CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 907 of 2009

(Arising out of Order-in-Original No. 106/2009 dated 22.05.2009 passed by the Commissioner of Customs (Import), JNCH, Nhava Sheva, Mumbai-II)

Neulife Nutrition Systems .... **Appellants**
Amar House, Naigaum Cross Road
Dadar (East), Mumbai – 400 014.

Versus

Commissioner of Customs (Import) .... **Respondent**
Jawaharlal Nehru Custom House (JNCH), Nhava Sheva
Uran Taluka, Raigad District, Maharashtra– 400707.

Appearance:

Shri V. Sridharan a/w Shri J.C. Patel, Advocates for the Appellants

Shri D.S. Mann, 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/85392/2024

Date of Hearing: 08.12.2023
Date of Decision: 08.04.2024

PER: M.M. PARTHIBAN

This appeal has been filed by M/s Neulife Nutrition Systems (hereinafter, referred to as 'the appellants'), assailing Order-in-Original No. 106/2009 dated 22.05.2009 (hereinafter, referred to as 'the impugned order') passed by the Commissioner of Customs (Import), JNCH, Nhava Sheva, Mumbai-II.

2.1 Briefly stated, the facts of the case are that the appellants herein is a partnership firm engaged in importation and sale of whey protein concentrate powders, glutamine powder and other nutritional supplements which are primarily used by body builders, athletes and similar individuals. The products imported by the appellants were classified by them under chapter heading 21.06 of the Central Excise Tariff and are levied to Additional Duty of Customs (CVD) on the basis of the retail sale price, in terms of Section 3 (2) of the Customs Tariff Act, 1975 read with relevant notification issued from time to time and Section 4A of the Central Excise Act, 1944. The appellants had imported the above goods through JNCH Seaport and in case of emergency have also imported through Sahar airport. During the period of import in 2008, on the basis of an intelligence that the appellants are declaring incorrect description so as to mis-classify the imported goods under lower rate of duty and mis-declaring the Maximum Retail Price (MRP)/Retail Sale Price (RSP), the Central Intelligence Unit (CIU), JNCH have conducted an enquiry into the imports by the appellants vide Bill of Entry (B/E) No.703275 dated 08.02.2008 along with their earlier imports. On completion of investigation, against mis-declaration of Retail Sale Price (RSP) and mis-classification of the imported goods, the department had initiated show cause proceedings by issue of Show Cause Notice (SCN) dated 06.06.2008 proposing for re-classification of impugned goods and consequent demand for payment of differential duty short paid by the appellants under Section 28of the Customs Act, 1962, confiscation of imported goods under Section 111(m) ibid and proposal for imposition of penalty under Section 112(a) ibid.

2.2 In the adjudication of the above SCN dated 08.02.2008, the Commissioner of Customs had considered the following issues viz., (i) mis-declaration with respect to Maximum Retail Price of the goods attracting RSP based duty; (ii) classification of the goods i.e., Dietary supplements and (iii) invoking extended period to recover duty under Section 28 of the Customs Act, 1962, along with relied upon documents to the SCN, defense reply of the appellants and the additional submissions made by the appellants after the personal hearing opportunity given to them. The following order was passed by the learned

Commissioner of Customs vide impugned Order-in-Original dated 22.05.2009:

"*ORDER*

(i) I order for re-classification of the product '100% soy protein' of various flavours, imported vide Bills of Entry detailed in annexure to this order, under CTH 21061010.

(ii) The proposal to re-classify various flavours of whey protein concentrate and 100% casein under CTH 21061010, and glutamine powder and creatine under CTH 21069099 is hereby dropped.

(iii) The declared Retail Selling Price (RSP) of goods imported in the 51 Bills of Entry listed in the annexures to this order are rejected and re-determined as provided in the annexure.

(iv) I hold as liable to confiscation under Section 111(m) of the Customs Act, 1962 the goods listed in the annexures to this order, totally valued at Rs.2,88,17,290 (Rupees two crores, eighty eight lakhs seventeen thousand two hundred and ninety only). However, since the goods are not physically available for confiscation, I give the importer the option under Section 125 of the Act to redeem the same on payment of a redemption fine of Rs.28,00,000/- (rupees twenty eight lakhs only).

(v) Consequent to re-determination of RSP, I confirm differential duty amounting to Rs.55,96,627/- (rupees fifty five lakhs ninety six thousand six hundred and twenty seven only) as detailed in the annexures to this order, under Section 28 of the Customs Act, 1962 along with the interest applicable under Section 28AA of the Act from M/s Neulife Nutrition Systems.

(vi) I impose penalty of Rs.10,00,000/- (Rupees Ten Lakhs only) on M/s Neulife Nutrition Systems u/s 112(a) of the Customs Act, 1962."

2.3 The applicant had preferred an appeal before this Tribunal and in the first round of litigation, the Tribunal had passed the Order No. A/85430-85431/2018-WZB dated 27.02.2008 wherein the Tribunal had decided the case by allowing the appellants' appeal and in dismissing the appeal filed by the Revenue. The relevant paragraph of the said order of the Tribunal, in the first round of litigation, is extracted and given below, as under:

"***4.*** *We have heard both sides at considerable length and we find that the issues in dispute can be disposed of by a common order and on the basis of precedent and law. There is, therefore, no requirement to delve into the many submissions made by Learned Counsel and by Learned Authorized Representative.*

5. *We take up the issue of classification of the 'flavours of whey protein concentrate', 'casein' and 'glutamine powder' and 'creatine' that Revenue desire to bring under heading nos. 2106 10 10 and 2106 90 99. As pointed out by Learned Counsel, the Tribunal, in Amrit Foods v. Commissioner of Central Excise, Meerut-I [2006 (202) E.L.T. 545 (Tri. - Del.)], has elaborated upon the scope of additions to 'milk products' thus -*

> *'11. We have considered the arguments of both the sides. We find that the dispute of classification of milk shake mix (MSM) and soft serve mix (SSM) has to be decided on the basis of Chapter Note 4 of Chapter 4. According to Chapter Note 4 of Chapter 4, the product consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa includes fats and oil derived from milk. The case of the appellant is that the product manufactured by them contains only natural milk constituents except stabilizers added by them within prescribed quantity as permitted under the Prevention of Food Adulteration Rules in accordance with HSN Explanatory Notes to Chapter 4. It is stated by them that for the product to be classified under sub-heading 1901.19, HSN Explanatory Notes had given examples on page 147 of Harmonized Commodity Description and Coding System Second Edition Volume 1 Section III "Food preparations of goods of headings 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included. The preparation of this heading may be distinguished from the products of Headings 04.01 to 04.04 in that they contain, in addition to natural milk constituents other ingredients not permitted in the products of those earlier headings. These products will go to the sub-heading 1901.19 only if it contains in addition to natural milk constituents other ingredients which are not the products of Chapter 4. In the present case except the stabilizers which are added in the milk is sugar which is stabilizing agent and dextrose which is also sugar. There are only addition of stabilizers. The dispute of the department is that stabilizers are emulsifiers and these are changing the characteristics of the products and its body and texture and gives smoothness to the products. This finding of the Commissioner is based on reply to question No. 9 of the statement dated 26-7-2000 of Shri Mr. P. Sree. The Revenue has strongly relied upon this statement in support of their contention. In addition to that, the Revenue has argued that ageing process is also being done which is for packed ice cream mix. We find that the appellants claim is that the stabilizers are added for keeping the products stabilize during its storage and transport and its shelf life. The product stabilizers are emulsifier and maintains consistency of the products. They are not adding additional quality to the products. We find that this is squarely decided in case of Nestle India Limited v. CCE, New Delhi (supra) by this Tribunal. In the said decision, it is made clear that the milk product will go to the Heading 19.01 only if it contains other ingredients not permitted by Headings 04.01 to 04.04. We find that in the present case no other ingredients except permissible stabilizers have been added. Addition of stabilizers is essential to maintain the consistency and shelf life of the products. HSN Explanatory Note also qualifies the addition of stabilizers without changing its classification from Chapters 4 to 19. The ratio of the decisions relied upon by the Revenue has no relevance to the present dispute. We, therefore, classify the products SSM and MSM under sub-heading 0404.90 of the Central Excise Tariff. The other two products i.e. coffee creamer and cream packed are also classified under sub-heading 0404.90. There is no reason given in the impugned order for classifying the product under Chapter 19. This is not disputed by the Revenue. We, therefore, set aside the order of the Commissioner and classify the products under sub-heading 0404.90.'*

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

7. *The impugned order has accepted the proposal in the show cause notice to discard the declared 'retail selling price' and redetermine these on the basis of certain documents purported to refer to the price at which goods of the importer-appellant were distributed and some statements. The provisions of Section 14 of Customs Act, 1962 and the rules for valuation, notified from time to time, always did envisage the application of only one assessable value for levy of basic duties of customs and additional duties of customs if levied advalorem. Following the alteration of the law for collection of duties of Central Excise to subject specified goods to levy on 'retail selling price', a parallel provision for levy of additional duties was inserted in Customs Tariff Act, 1975. Notwithstanding this insertion, the machinery provision for ascertainment of transaction value, and its substitute values, did not expand beyond the scope of value as described in Section 14 of Customs Act, 1962. Accordingly, the mechanics of ascertainment of assessable value under Section 14 of Customs Act, 1962 may not be extended to confer authority for, or to provide the means to, redetermine the 'retail selling price' referred to in Customs Tariff Act, 1975. It would appear that the Legislature did not intend interference with the 'retail selling price' except where the price at the retailer end varied with the declaration made for assessment, the enforcement thereto, empowered by Central Excise Act, 1944. The Customs Act, 1962 does not provide the wherewithal to do so.*

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

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

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

2.4 We further find that against aforesaid Tribunal's Order dated 27.02.2008, the department had filed a Civil Appeal No. 866 of 2019 before the Hon'ble Supreme Court and vide its Order dated 28.07.2021, the Hon'ble Apex Court had set aside the finding and conclusion of the Tribunal on the issue of valuation and remanded back the case for fresh consideration on merits and in accordance with the law on this limited issue. Further, the Hon'ble Supreme Court had upheld the views of the Commissioner in respect of classification of the product specified as 'whey protein' as discussed in paragraphs Nos. 106 to 109 of impugned order and upheld the same. The copy of the said order of the Apex Court is extracted below:

1

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 866/2019

COMMISSIONER OF COMMISSIONER OF CUSTOMS (IMPORT) NHAVASHEVA ...APPELLANT(S)

VERSUS

NEULIFE NUTRITION SYSTEMS ...RESPONDENT(S)

O R D E R

1. We have heard learned counsel for the parties at length.

2. We have perused the relevant documents including the judgment(s) and order(s) dated 22.05.2009 and 27.02.2018 passed by the Commissioner of Customs (Import) (for short, 'the Commissioner') and the Customs, Excise & Service Tax Appellate Tribunal (for short, 'the Tribunal') respectively.

3. In our opinion, the view taken by the Commissioner in respect of classification of product specified as *'whey protein'*, as discussed in paragraphs Nos.106 to 109 of the judgment dated 22.05.2009 is the correct view, which does not require interference. The Tribunal has rightly endorsed that position. It is a different matter

that the Tribunal in the impugned judgment ought to have elaborated on the aspects dealt with by the Commissioner, to take that view. That does not take the matter any further for the Appellant-Department.

4. We uphold the finding of fact and thus, the conclusion reached by the Commissioner as well as the Appellate Tribunal in that regard.

5. However, the only indulgence that needs to be shown in this appeal is in regard to the issue of valuation. For, the Tribunal has not adverted to the efficacy of Section 3 of the Customs Tariff Act, 1975 and Section 4A of the Central Excise Act, 1944 at all. Whereas, it decided the issue under consideration only in reference to Section 14 of the Customs Act, 1962. We refrain from dilating on this issue any further, as we are disposed to remit the matter to the Tribunal for reconsideration of that issue afresh. We leave all contentions available to both sides open for being examined by the Tribunal on its own merits and in accordance with law.

6. Accordingly, we set aside the finding and conclusion of the Tribunal on the issue of valuation and relegate the parties before the Tribunal by remanding the appeal for considering the limited

issue of valuation, afresh on its own merits and in accordance with law. Ordered accordingly.

7. All contentions available to the parties in that regard are left open.

8. The appeal is partly allowed in the above terms. No order as to costs.

....................,J.
(A.M. KHANWILKAR)

....................,J.
(SANJIV KHANNA)

NEW DELHI
JULY 28, 2021.

2.5 On the basis of the remand directions of the Hon'ble Supreme Court vide above judgement dated 28.07.2021, this case has been come up for fresh consideration before the Tribunal. Thus, this appeal is now coming before the Tribunal in the second round of litigation on the limited issue of dispute with respect to valuation of the imported goods.

3. Learned Advocate for the appellant submitted that the department had demanded the differential duty in respect of imports under B/E No.703275 dated 08.02.2008 and all past imports during the period 2005 to 2008 in which it was alleged that the RSP/MRP affixed on the goods was higher than the one declared in the various B/Es on the basis of market enquiry conducted at the premises of various dealers/retailers and pricelist alleged to have been found in the dealers' premises. However, learned Advocate stated that no report of market enquiry has been provided to the appellants by the Department; no pricelist alleged to have been recovered from the dealer was produced in the form of evidence. Thus there is no justification for adoption of higher RSP/MRP for determination of additional duties of customs. Further, learned advocate pleaded that there is no machinery provision under the Customs Tariff Act, 1975, for re-determination of RSP on the imported article and for adopting a RSP, other than that declared on the imported article. Further, learned Advocate submitted that Section 3(2) of the Customs Tariff Act, 1975, has not borrowed and incorporated any provision of the Central Excise Act, 1944 and the Rules made thereunder for redetermination of the sale price/RSP. Learned Advocate also reiterated that impugned order on enhancement of value on the basis of statements recorded from the partner of the appellants stating that the MRP was declared on the basis of two and half times the CIF value of imports and the discount given to dealers varied from 15% to 28% of the MRP; payment of differential duty in 8 B/Es for an amount of Rs.10,22,953/- have not been taken into consideration. Further, he stated that on classification of whey protein, since it is dependent on its composition either in heading 04.04 or 35.02, which are not

covered for valuation on RSP/MRP basis, such goods are not liable to be assessed to additional duty of customs on the basis of retail sale price. Thus he claimed that the impugned order of the Commissioner on this ground is not sustainable and the same is liable to be set aside.

4. Learned Authorised Representative (AR) reiterated the findings recorded in the impugned order and stated that the appeal filed by the appellants is on the limited issue of valuation of goods and correct RSP/MRP re-determined on the basis of the records of the case is legally sustainable, as the impugned order have properly considered the legal position and the facts of the case and evidences available.

5. We have carefully gone through the records of the case alongwith the written submissions in the form of paper book submitted in this case by both the sides.

6. The issue involved in the present case lies in the narrow compass of valuation of the imported goods for the purpose of determination of Additional duty of Customs (CVD) in accordance with the legal provisions and on the basis of the facts of the case, as per the directions of the Hon'ble Supreme Court vide its judgement dated 26.07.2021 in remitting this case for reconsideration by this Tribunal, and with specific reference to the paragraph 5 of the above judgement. Thus we would like to examine the legal provisions governing the Additional duty of Customs with particular reference to Section 3 of the Customs Tariff Act, 1975; Section 4A of the Central Excise Act, 1944 and Section 14 of the Customs Act, 1962 and other relevant legal provisions as detailed below. The period of dispute in the present case is between 2005 to 2008. The relevant legal provisions of the Act, Rules and notification concerning levy of Additional duty of Customs are extracted and provided as follows:

"The Customs Tariff Act, 1975

Levy of additional duty equal to excise duty, sales tax, local taxes and other charges.

3. *(1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article :*

Provided *that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.*

Explanation. *— In this sub-section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.*

(2) For the purpose of calculating under sub-sections (1) and (3), the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of—

- *(i) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and*
- *(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include—*
  - [1]*[(a) the duty referred to in sub-sections (1), (3), (5), (7) and (9);]*
  - *(b) the safeguard duty referred to in sections 8B and 8C;*
  - *(c) the countervailing duty referred to in section 9; and*
  - *(d) the anti-dumping duty referred to in section 9A :*

Provided *that in case of an article imported into India,—*

- *(a) in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 [later substituted as Legal Metrology Act, 2009 (1 of 2010) w.e.f.08.04.2011] or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such article; and*

1 Substituted by Finance Act, 2007 dated 11.05.2007 w.e.f.10.10.2007 *(b) where the like article produced or manufactured in India, or in case where such like article is not so produced or manufactured, then, the class or description of articles to which the imported article belongs, is the goods specified by notification in the Official Gazette under sub-section (1) of section 4A of the Central Excise Act, 1944 (1 of 1944).*

Explanation. *— Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section.*

(3) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or not] such additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

(4) In making any rules for the purposes of sub-section (3), the Central Government shall have regard to the average quantum of the excise duty payable on the raw materials, components or ingredients used in the production or manufacture of such like article.

(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such im-ported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.

Explanation *. — In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, the highest such tax or, as the case may be, such charge.*

(6) For the purpose of calculating under sub-section (5), the additional duty on any imported article, the value of the imported article shall, notwithstanding anything contained in sub-section (2), or section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of —

(i) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that

section, as the case may be; and

(ii) *any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include —*

[1][(a) *the duty referred to in sub-sections (5), (7) and (9);]*

(b) *the safeguard duty referred to in sections 8B and 8C;*

(c) *the countervailing duty referred to in section 9; and*

(d) *the anti-dumping duty referred to in section 9A."*

"The Customs Act, 1962

Valuation of goods.

[1]***14.*** *(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:*

Provided *that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:*

Provided further *that the rules made in this behalf may provide for,—*

(i) *the circumstances in which the buyer and the seller shall be deemed to be related;*

(ii) *the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;*

(iii) *the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section;*

Provided also *that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.*

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation.—For the purposes of this section—

1 Substituted by Finance Act, 2007 dated 11.05.2007 w.e.f.10.10.2007

(a) "rate of exchange" means the rate of exchange—

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct,

for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

"Central Excise Act, 1944

Valuation of excisable goods with reference to retail sale price.
4A. *(1) The Central Government may, by notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 [later substituted as Legal Metrology Act, 2009 (1 of 2010) w.e.f. 08.04.2011] or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods, to which the provisions of sub-section (2) shall apply.*

(2) Where the goods specified under sub-section (1) are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette.

(3) The Central Government may, for the purpose of allowing any abatement under sub-section (2), take into account the amount of duty of excise, sales tax and other taxes, if any, payable on such goods.

(4) Where any goods specified under sub-section (1) are excisable goods and the manufacturer—

(a) removes such goods from the place of manufacture, without declaring the retail sale price of such goods on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law as referred to in sub-section (1); or

(b) tampers with, obliterates or alters the retail sale price declared on the package of such goods after their removal from the place of manufacture,

then, such goods shall be liable to confiscation and the retail sale price of such goods shall be ascertained in the prescribed manner and such price shall be deemed to be the retail sale price for the purposes of this section.

Explanation 1.—For the purposes of this section, "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, *forwarding and the like and the price is the sole consideration for such sale:*

***Provided** that in case the provisions of the Act, rules or other law as referred to in sub-section (1) require to declare on the package, the retail sale price excluding any taxes, local or otherwise, the retail sale price shall be construed accordingly.*

Explanation 2.—For the purposes of this section,—

(a) where on the package of any excisable goods more than one retail sale price is declared, the maximum of such retail sale prices shall be deemed to be the retail sale price;

(b) where the retail sale price, declared on the package of any excisable goods at the time of its clearance from the place of manufacture, is altered to increase the retail sale price, such altered retail sale price shall be deemed to be the retail sale price;

(c) where different retail sale prices are declared on different packages for the sale of any excisable goods in packaged form in different areas, each such retail sale price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates."

"Notification
No.13/2008-Central Excise (N.T)

New Delhi, the 1st March, 2008
11 Phalguna, 1929 (Saka)

GSR......(E)-In exercise of the powers conferred by section 37 read with sub-section (4) of section 4A of the Central Excise Act,1944 (1 of 1944), the Central Government hereby makes the following rules, namely:-

***1**.(1) These rules may be called the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008.*

(2) They shall come into force on the date of their publication in the Official Gazette.

***2**. In these rules, unless the context otherwise requires,-*
(a) 'Act' means the Central Excise Act, 1944 (1 of 1944);
(b) 'retail sale price' means the retail sale price as defined in section 4A of the Act; and
(c) words and expressions used in these rules and not defined but defined in the Act or any other
rules made under the Act shall have the meaning as assigned therein.

***3.** The retail sale price of any excisable goods under sub-section (4) of section 4A of the Act, shall be determined in accordance with these rules.*

***4.** Where a manufacturer removes the excisable goods specified under sub-section (1) of section 4A of the Act,-*
(a) without declaring the retail sale price on the packages of such goods; or

(b) by declaring the retail sale price, which is not the retail sale price as required to be declared under the provisions of the Standards of Weights and Measures Act, 1976(60 of 1976) or rules made thereunder or any other law for the time being in force ; or
(c) by declaring the retail sale price but obliterates the same after their removal from the place of manufacture, then, the retail sale price of such goods shall be ascertained in the following manner, namely:-
(i) if the manufacturer has manufactured and removed identical goods, within a period of one month, before or after removal of such goods, by declaring the retail sale price, then, the said declared retail sale price shall be taken as the retail sale price of such goods:
(ii) if the retail sale price cannot be ascertained in terms of clause (i), the retail sale price of such goods shall be ascertained by conducting the enquiries in the retail market where such goods have normally been sold at or about the same time of the removal of such goods from the place of manufacture:

Provided that if more than one retail sale price is ascertained under clause (i) or clause (ii), then, the highest of the retail sale price, so ascertained, shall be taken as the retail sale price of all such goods.

Explanation.- For the purposes of this rule, when retail sale price is required to be ascertained based on market inquiries, the said inquiries shall be carried out on sample basis.

***5.** Where a manufacturer alters or tampers the retail sale price declared on the package of goods after their removal from the place of manufacture, resulting into increase in the retail sale price, then such increased retail sale price shall be taken as the retail sale price of all goods removed during a period of one month before and after the date of removal of such goods:*

Provided that where the manufacturer alters or tampers the declared retail sale price resulting into more than one retail sale price available on such goods, then, the highest of such retail sale price shall be taken as the retail sale price of all such goods.

***6.** If the retail sale price of any excisable goods cannot be ascertained under these rules, the retail sale price shall be ascertained in accordance with the principles and the provisions of section 4A of the Act and the rules aforesaid.”*

“Notification No. 2/2006-C.E. (N.T.), dated 1-3-2006

In exercise of the powers conferred by sub-section (1) and sub-section (2) of section 4A of the Central Excise Act, 1944 (1 of 1944) and in supercession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 13/2002-Central Excise (N.T.), dated the 1st March, 2002, published in the Gazette of India Extraordinary, vide number G.S.R 152(E), dated the 1st March, 2002, except as respects things done or omitted to be done before such supercession, the Central Government hereby specifies the goods mentioned in Column (3) of the Table below and falling under Chapter or heading or sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) mentioned in the corresponding entry in column (2) of the said Table, as the goods to which the provisions of the said sub-section (2) shall apply, and allows *as abatement the percentage of retail sale price mentioned in the corresponding entry in column (4) of the said Table.*

TABLE

S. No.	***Chapter or heading or sub-heading of the First Schedule***	***Description of goods***	***Abatement as a percentage of retail sale price***
(1)	***(2)***	***(3)***	***(4)***
1.	*0402 91 10 or 0402 99 20*	*Concentrated (condensed) milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale*	*-*
22.	*2106*	*Ready to eat packaged food, texturised vegetable proteins (Soya bari), and instant food mixes such as Pongal mix, Vadai mix, Pacoda mix, Payasam mix, Gulabjamun mix, RavaDosa mix, Idli mix, dosai mix, Murruku mix, and Kesari mix.*	*37%*
23.	*2106 90 11*	*Sharbat*	*35%*
24.	*2106 10 00, 2106 90 50, 2106 90 70, 2106 90 80, 2106 90 91 or 2106 90 99*	*All goods (other than S. No. 22 above)*	*40%*
95.	*9612*	*All goods*	*35%*
96.	*9617 00 11, 9607 00 12*	*Vacuum flasks*	*40%*

Explanation. - For the purposes of this notification "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be, and the price is the sole consideration for such sale."

7. On careful examination of the above legal provisions of the Customs Act, 1962; Customs Tariff Act, 1975, Central Excise Act, 1944 and the Rules made thereunder read with NotificationsNo.13/2008-C.E. (N.T) dated 01.03.2008, No.2/2006-C.E. (N.T) dated 01.03.2006, issued in exercise the said Section 4A of the Central Excise Act, it transpires that the levy of additional duty of Customs is provided under Section 3 of the Customs Tariff Act, 1975; and that the said levy of additional duty of customs under Section 3 is in addition to the duty of customs i.e., customs duty leviable under Section 12 of the Customs Act, 1962. It is also provided under Section 3 ibid, that the additional duty of customs shall be equal to the excise duty for the time being leviable on like article produced or manufactured in India.

8.1 In order to determine the amount of such additional duty of customs which is leviable as above being equal to the excise duty, reference has to be made to the First Schedule to the Central Excise Tariff for identification of appropriate ad-valorem rate and the respective notifications, if any, to determine the effective rate of duty. Further, in case where the levy of additional duty of customs is to be determined with respect to the retail sale price that is required to be declared as per the extant law viz., Standards of Weights and Measures Act, 1976 (presently it is Legal Metrology Act, 2009) or the rules made thereunder, then RSP based levy as per Section 4A of the Central Excise Act would apply for determination of the amount of additional duty of customs. These legal provisions are specific to the calculation of additional duty of customs under sub-section (2) to Section 3 of the Customs Tariff Act and have been given as '*Non obstante clause'* by specific wordings in the said sub-section which reads as follows:

> *"(2) For the purpose of calculating under sub-section (1) and (3), the additional duty on imported article, where such duty is leviableat any percentage of its value, the value of imported article shall,* ***notwithstanding anything contained in section 14 of the Customs Act, 1962****, be the aggregate of……".*
>
> (Emphasis supplied)

Any legal provision contained in any section of an Act which state that "notwithstanding anything contained in some other particular Act…" has a purpose, which is to provide the enacting part of that section in case of any conflict, an overriding effect of the provision or Act mentioned in the *non obstante* clause. Thus, it is very clearly demonstrated that by specific mention of such *non obstante* clause in Section 3(2) of the Customs Tariff Act, 1975, it will have an overriding effect on the general provision of valuation of imported goods under Section 14 of the Customs Act, 1962. Further, we also note that wherever it is considered necessary, the said Customs Tariff Act have provided for applying certain provisions of the Customs Act and the Rules and Regulations made thereunder to be applicable for determination of such duty, as noticed in the case of safeguard duty levied under Section 8B of the Customs Tariff Act, in terms of Section 8(9) ibid; anti-dumping duty levied under Section 9A of the Customs Tariff Act, in terms of Section 9(8) ibid. Furthermore, under Section 4A of the Central Excise Act, 1944 detailed legal provisions exist for determination of assessable value on the basis of retail sale price declared on goods and specific rules have been notified viz., Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 for laying down the method and manner of determination of retail sale price under various situations. Hence, in our considered view there exist no lack of clarity or deficiency in wherewithal of the legal provisions under the Customs Tariff Act, 1975 for re-determination of retail sale price to the extent that the provisions of Section 4A Central Excise Act, 1944 and the Rules made thereunder in determination of the measure of such levy of additional duty of customs as equivalent to the excise duty, are sufficient for carrying out the purpose of the Customs Tariff Act for implementation of RSP based levy of the additional duty of customs.

8.2 From the detailed examination of the above legal provisions relevant to the levy of additional duty of customs on retail sale price, it also transpires that the following are the legal position in valuation of the imported goods for the purpose of calculation of additional duty of Customs under the extant legal provisions:

(i) in respect of the imported goods there shall be legal requirement in terms of the Standards of Weights and Measures Act, 1976/Legal Metrology Act, 2009 or the rules made thereunder, to declare on the package thereof the retail sale price of such goods

(ii) in such a case having the legal requirement as above at (i), then notwithstanding the legal provision under Section 4 of the Central Excise Act, 1944 for determination of excise duty on the basis of transaction value, the value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, as the Central Government may allow by notification in the Official Gazette.

(iii) In terms of Section 3 of the Customs Tariff Act, 1975, in article imported in India shall be liable additional duty of customs which is equal to the excise duty for the time being leviable on alike article if produced or manufactured in India.

(a) For the purpose of calculating additional duty of customs, where it is leviable at any percentage of its value, then the value of imported article shall notwithstanding anything contained in section 14 of the Customs Act, 1962 shall be the aggregate of value of imported article determined under section 14(1) ibid and any duty of customs chargeable on that article under section 12 ibid but not including certain specified duties such as Safeguard dutyunder Section 8B and 8C of the Customs Tariff Act, 1975, Countervailing duty under Section 9 ibid, Anti-Dumping duty under Section 9A ibid;

(b) In case of imported article for which there is a legal requirement to declare the retail sale price (RSP), then the value of imported article shall be deemed to be retail sale price declared on the imported article less such amount of abatement as prescribed in the notification issued by the government;

(c) Where there exists more than one retail sale price or more than one retail sale price is declared, the maximum of such illegal sale price shall be deemed to be the retail sale price for determination of additional duty of customs.

(iv) All goods covered under the chapter heading 2106 are notified for declaration of RSP/MRP and additional duty of customs shall be determined in terms of the retail sale price less permissible abatement, and not on the basis of assessable value as determined under Section 14 of the Customs Act, i.e., CIF value plus duties of customs;

(v) Retail Sale Price is required to be declared by the importer on actual basis and the price is required to be indicated on the packages there of before clearance from customs; in case of any change in RSP or in the absence of correct declaration of RSP, it shall be determined in terms of Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008.

The above legal position clearly provides that in determination of additional duty of customs, as a measure of levy, it is equal to the excise duty leviable on like goods manufactured in India. In respect of excise duty leviable on the basis of Retail Sale Price for the excisable of the goods manufactured in the country, then for similar products imported into India, the additional duty of customs shall also be determined on the basis of Retail Sale Price and not on the basis of assessable value plus applicable duties of customs.

8.3 In respect of the RSP to be declared by the importer, the plea given by the appellants that it varies with each shipment on account of various factors, such as the price charged by the supplier not being constant, fluctuations in foreign exchange rate and variations in the local market prices cannot be taken as a ground for declaring an assumed RSP of two and half times the CIF value of imported goods. The legal requirements under Rule 6 of the Legal Metrology

(Packaged Commodities) Rules, 2011, is that every package of imported goods for which these Rules apply shall bear thereon or on the label securely affixed thereto, a definite, plain and conspicuous declaration made, *inter-alia*, indicating (a) the name and address of the manufacturer, or where the manufacturer is not the packer, the name and address of the manufacturer and packer and for any imported package the name and address of the importer (b) the retail sale price of the package. Further, "retail sale price" in terms of the above Rules shall mean the maximum price at which the commodity in packaged form may be sold to the consumer and the price shall be printed on the package in the manner as indicated below:

> 'Maximum or Max. retail price Rs/ ....inclusive of all taxes
> or in the form MRP Rs/ ....incl., of all taxes'

8.4 In present case, the learned Commissioner in paragraph 104 of the impugned order, in proceeding with the issue of mis-declaration of MRP has stated as follows. The relevant portion of the order in paragraph 104 is extracted and given below:

> *"104. First I proceed with the issue of mis-declaration of the Maximum retail price of the goods imported and attracting RSP based CVD. The importer filed B.E. No. 703275 dated 08.02.2008 for home consumption clearance of various dietary supplements and the said consignment was taken up by the C.I.U. of this Custom House for investigation on account of suspected mis-declaration in respect of description and MRP of the goods. Out of the total 46 items of the B.E., the importer had claimed that the items under CTH 21061000 which attract RSP based CVD and thus the importer had declared RSP in respect of all these13 items in the E.D.I. Bill of entry. All other items were claimed for classification under various Chapters like 04, 29 and 35. But since all the goods were in pre-packed condition ready for retail sale, the compliance of DGFT notification No.RE-44 was warranted for such goods. However, during 100% examination of the goods, compliance of notification RE-44 was not found, meaning that no stickers regarding the details like name and address of importer, name of the manufacturer, month of the import, maximum retail price etc. were found on the packing. The representative samples were taken in original packing to ascertain the MRP of the goods and to further investigate the matter with respect to classification. It was ascertained by the officers that these goods were available on various shops in the market which are mainly selling goods relating to sport or fitness. The names of such shops are given in the show-cause notice. It was further ascertained that the maximum retail price found on the goods imported in past by the importer were much higher than the declared once in the Bs.E vide which the said goods were imported. This fact was not disclosed by the importer during his voluntary statement recorded on 22.02.2008 though he admitted that they have not pasted the RSP details on their goods pending for clearance as they*

have not worked out the same…………………The market inquiry conducted in this case is as per the practice of the department and nothing new like drawal of panchanama or recording of statements of the shopkeepers need be expected by the importer. At the most, the importer could have requested for the copy of the said report as they have done for number of various documents, though the details of the same were made available to the importer during recording of statements based on which he confessed the said change in RSP………..
As far as the consignments beyond 6 months period are concerned, it is placed on record that the goods pertaining to such consignments were not available in market for verification of the MRP………………….
In view of the above, I am of the firm opinion that the importer has mis-declared RSP in the Bs.E (sometimes even equal to the CIF value) deliberately with an intention to evade the customs duty and on suppression of facts from the department which could be brought on record only after investigation by the CIU. Therefore, the differential duty on account of this mis-declaration is required to be recovered from the importer under the proviso to Section 28 of the Customs Act and the goods in respect of which the RSP has been found mis-declared, are liable to confiscation under Section 111(m) of the Customs Act, 1962 and for this deliberate attempt on part of the importer, they are liable to penalty under Section 112(a) of the said Act."

The above findings of the learned Commissioner in the impugned order brings out apparent contradiction in relying on the examination of the imported goods in one B/E dated 08.02.2008 and drawal of representative samples from such consignment and conduct of market inquiry for determination of the retail sale price of all the goods covered in the past imports during 2005-2008 covered by various B/Es. Further, the learned Commissioner has recorded in his findings that there is no RSP available in the market for verification of RSP, in respect of consignments beyond six months' period. Thus, we are of the considered view that on the factual matrix of the case, there is no legal basis for re-determination of RSP based additional duty of customs in the impugned order and for imposition of fine and penalty.

9. In this regard we find that Rule 3 and 4 of the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008, prescribe the method in which the retail sale price shall be determined under sub-section (4) of Section 4A of the Central Excise Act, 1944, which in a similar manner apply to the determination of retail sale price of imported goods under Section 3 of the Customs Tariff Act, 1975. The said method has certain essential ingredients that inquiry

in the retail market shall be conducted for determining the retail sale price of such imported goods, in comparison with similar goods which have normally been sold at or about the same time of the removal of such goods from the place of manufacture. We find that in the impugned order there is no such finding that the above the market survey conducted by the Department is fulfilling this essential condition. Further, there is no specific report or any evidential record to indicate that the revised retail sale price proposed for re-determination of additional duty of customs in terms of the table annexed to the impugned order, is arising from the inquiry conducted in the manner specified under Rule 4 ibid. It is also obvious that the adjudged demand in the impugned order for the differential additional duty of customs in respect of past imports, has no specific basis, as it is on record that entire proposal for differential duties is on the basis of examination of the goods in respect of single B/E No. 703275 dated 08.02.2008 containing 46 items, out of which only 13 items are covered under the scope of RSP based levy.

10. In the impugned order the classification of various goods imported by the appellants have been determined as follows:

> *"109. Since CTH 2106 is residuary heading for protein concentrates, in terms of Rule 3 of the rules for interpretation of the tariff, the imported goods, i.e., whey protein concentrates, are rightly classifiable under CTH 0404, or CTH 3502/3504, depending on the % of whey protein content"*
>
> *"111. …. Glutamine is an amino acid and is formed by replacing the side chain hydroxyl of Glutamic Acid. Salts of Glutamic Acid are classified under CTH 2922, and specifically under CTH 29224290. Since there are absolutely no additives in the item imported, there can be no reason to classify the goods in the residual heading of CTH 2106, in the existence of a specific heading."*
>
> *"112. Creatine, in pure form is another product where the Department had claimed classification under CTH 2106. …..Since the product is a salt of acetic acid, the appropriate classification of the product would be under CTH 29152990. However, since the show cause notice does not propose re-classification under this heading, it do not propose to interfere with the classification and has been adopted the time of import."*
>
> *"113. The last item that under dispute is different flavours of item declared as 100% soy, which the importer claims is a soy protein isolate containing soy–protein protein of approximately 80%….. The item under import, since it as a protein of % of 80% or less, is in fact a protein concentrate. This being the case, the specific heading for the*

product under import is CTH 21061010, which is the classification proposed to be adopted by the Department."

Since, the Hon'ble Supreme Court has given their opinion that the view taken by the learned Commissioner in respect of classification of the product 'whey protein' is the correct view, which does not require any interference, and the Hon'ble Apex Court have also upheld the findings of the conclusion arrived at the earlier order of the Tribunal, we do not find it necessary to go into the issue of classification. The above conclusions on the classification of the imported goods in the impugned order are referred in the context of examining the valuation issue which is remitted to the Tribunal, for examining the limited question of applicability of RSP based on valuation is in accordance with the law.

11. It transpires from the plain reading of notification No.2/2006-C.E. (N.T.) dated 01.03.2006, as amended, issued under Section4A of the Central Excise Act, 1944, that only specific goods which are described so and covered by the chapter or heading or sub-heading of the First Schedule to the Central Excise Tariff alone are imposed with additional duty of customs on the basis of RSP. In careful reading of the above notification, we find that the coverage of the goods under RSP based levy is of the following types. (i) One, by coverage of the entire goods covered under a particular CTH or sub-heading or heading providing the description "all goods". For eg., Chapter heading 19.02, 19.04 and CTH 21069030 provided under Sl. No.11, 12 and 21, respectively, are of this type; (ii) the other, where specific description of the goods covered under a particular CTH or sub-heading or heading mentioned. For eg., 'Biscuits' under Sl. No.13 and 'Sharbat' under Sl. No.23 are of this type. It is clear that goods covered under heading 04.04 and 35.02 are not one of the items specified in the notification, as the same do not find mention in the said notification. Similarly, CTH 21061010 does not find any specific mention even though the entire CTH 2106 is covered by two entries at Serial No.22 and 24 of the above notification.

12. The above analysis indicates that basis on which the differential additional duty of customs has been calculated do not proceed on legal basis as provided under Section 4A of the Central Excise Act,

1944 and Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008. Further, the claim of the appellants that the duty already paid in respect of eight B/Es have not been taken into account, either in accepting the same or in denial of the same in the impugned order.

13. In view of the foregoing discussions and analysis, we do not find any merits in the impugned order dated 22.05.2009, insofar as the adjudged demands were confirmed on the appellants on the basis of valuation of imported goods on redetermination of RSP without duly following the legal provisions as laid down under Section 3 of the Customs Tariff Act, 1975 read with Section 4A of the Central Excise Act, 1944, and Rule 3 and 4 of the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008. Consequently, the demands of additional duty of customs and imposition of redemption fine and penalty confirmed in the impugned order dated 22.05.2009 is not legally sustainable.

14. In view of the above, we are of the considered view that the adjudged demands confirmed on the appellants in the impugned order dated 22.05.2009 on the issue of valuation is liable to be set aside. Therefore, by setting aside the impugned order to this extent, the appeals are partly allowed in favour of the appellants.

(Order pronounced in open court on 08.04.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha