

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86051 OF 2022

[Arising out of Order-in-Original No: CC-PVNSB/16/2021-22/Adj.(I) ACC dated 30th December 2021 passed by Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Sanofi Synthelabo India Pvt Ltd

Sanofi House CTS No 117B, L & T Business Park
Saki Vihar Road, Powai, Mumbai-400072.

... Appellant

versus

Commissioner of Customs- (Import)

Air Cargo Complex

Sahar Village, Andheri East, Mumbai - 400099

...Respondent

WITH

CUSTOMS APPEAL NO: 86128 OF 2022

WITH

CROSS-OBJECTION NO. 85767 OF 2022

[Arising out of Order-in-Original No: CC-PVNSB/16/2021-22/Adj.(I) ACC dated 30th December 2021 passed by Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Commissioner of Customs- (Import)

Air Cargo Complex

Sahar Village, Andheri East, Mumbai - 400099

... Appellant

versus

Sanofi Synthelabo India Pvt Ltd

Sanofi House CTS No 117B L & T Business Park
Saki Vihar Road, Powai, Mumbai-400072.

...Respondent

APPEARANCE:

Shri Prakash Shah, Shri Mihir Deshmukh, Shri Rajan Mishra and Shri Yash Prakash, Advocates for the assessee-appellant

Shri S K Hatangadi, Assistant Commissioner (AR) for Revenue

CORAM:

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

FINAL ORDER NO: 85521-85522/2024

DATE OF HEARING: 21/11/2023
DATE OF DECISION: 17/05/2024

PER: C J MATHEW

The limited issue in this appeal of M/s Sanofi Synthelabo India Pvt Ltd is the legality and propriety of the classification adopted by Commissioner of Customs (Import), Air Cargo Complex (ACC), Chatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai in order¹ to substitute the one declared in 46 bills of entry, filed between 3rd May 2016 and 9th March 2019, on import of goods. The jurisdictional Commissioner of Customs is also in appeal at the instance of the competent Committee of Chief Commissioners who are aggrieved by the decision in the impugned order to forgo fine in lieu of confiscation of goods unavailable in the form in which they had been imported.

2. The facts in brief are that the appellant imported 'enterogermina

¹ [Order-in-Original No: CC-PVNSB/16/2021-22/Adj.(I) ACC dated 30th December 2021]

(bacillus clausal spores)', of different quantities and capacities, claiming conformity with description corresponding to tariff item 3002 9030 of First Schedule to Customs Tariff Act, 1975 and entitled, thereby, to benefit of notification no. 12/2012-Cus dated 17th March 2012 (sr no. 195). In the impugned order, the adjudicating authority, opining that the goods conformed more appropriately to the description corresponding to tariff item 3004 9099 of First Schedule to Customs Tariff Act, 1975, denied eligibility for the notification and, thereby rejecting their claim for availment of benefit, confirmed recovery of ₹ 80,86,864/- as differential duty under section 28 of Customs Act, 1962, along with applicable interest under section 28AA of Customs Act, 1962, besides confiscating goods valued at ₹ 11,60,41,182/- under section 111 of Customs Act, 1962 but, while forbearing from imposing any fine in lieu thereof, imposed penalty of like amount under section 114A of Customs Act, 1962.

3. Insofar as the appeal of the jurisdictional Commissioner of Customs is concerned, the decision of Hon'ble High Court of Bombay, in *Commissioner of Customs (Import), Mumbai v. Finesse Creation Inc [2009 (248) ELT 122 (Bom)]*, that fine in lieu of confiscation under section 125 of Customs Act, 1962 is contingent only upon goods being physically amenable for vesting with the Central Government, will prevail. Accordingly, the appeal of Revenue has no legal ground for being sustained.

4. The only issue that remains for consideration is the correctness of the claim of the appellant that classification under declared heading, with attendant benefits in the impugned notification available to them, has been improperly set aside without first establishing the availability of a heading most appropriate to the impugned goods. On a perusal of the relevant headings in the First Schedule to the Customs Tariff Act, 1975 and the impugned order, we find that the declared classification has been discarded thus

‘22. I find the noticee has mis-declared the goods as culture of microorganisms, though they are not. The impugned goods are medicaments for the detailed findings made above and are classifiable under the HSN/CTH 30049099. I find that the goods are classifiable under the HSN 30049099, and attract higher duty as per Annexure of subject SCN without notification benefit..... Therefore, I find the impugned goods did not correspond in nature, classification & notification benefit with the declaration made in the impugned Bills of Entry....’

by relying on nothing other than acceptance of certain facts by the appellant herein and proceeding straight thereafter to ‘tariff item level’ by ignoring the General Rules for Interpretation of the Import Tariff which sets out the exercise as one of hierarchical elimination from heading onwards.

5. Furthermore, the rejection of the declared classification has relied upon

‘16. I find that the subject goods are multi-antibiotic resistant bacillus clausil and each capsule contains ingredient

2 thousand million spores of multi-antibiotic resistant bacillus clausii. Enterogermina 2 thousand million/5 ml oral suspensions can also be used in breast feeding infant to cure acute and chronic gastrointestinal disorders caused by intoxication or bacterial flora disorders with anomalous production and assimilation of vitamins. I find that the subject goods can be in the form of vials or in the form of powder or in the form of capsules, I find that the goods are "spores" and are not living microorganisms of CTH 0029030 and not Probiotics since not living organisms.

17. *I find that the Noticee has classified the impugned goods as "Enterogermina" (Bacillus Clausil Spores/ Probiotic)" under the HSN/CTH 30029030 as "cultures of microorganisms (excluding yeasts)" with respective claim for Notification Benefit. Therefore, it is appropriate to discuss 'Culture' and 'micro-organism', Culture: In microbiology, the propagation of microorganisms in a growth medium. As per Wikipedia, "microbiological culture, or microbial culture, is a method of multiplying microbial organisms by letting them reproduce in predetermined culture medium under controlled laboratory conditions. Microbial cultures are foundational and basic diagnostic methods used as a research tool in molecular biology. The term culture can also refer to the microorganisms being grown. Microbial cultures are used to determine the type of organism, its abundance in the sample being tested, or both. It is one of the primary diagnostic methods of microbiology and used as a tool to determine the cause of infectious disease by letting the agent multiply in a predetermined medium. For example, a throat culture is taken by scraping the lining of tissue in the back of the throat and blotting the sample into a medium to be able to screen for harmful microorganisms, such as Streptococcus pyogenes, the causative agent of strep throat".'*

6. The General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975 is the foundation of both classification and re-classification with the latter devolving onus on the 'proper officer', without comparability as an option until after the appropriateness of the proposed tariff item has passed muster in accordance with rule 1 therein, with the terms of engagement in any dispute on classification settled by the Hon'ble Supreme Court, in *Hindustan Ferodo Ltd v. Collector of Central Excise [1997 (89) ELT 16 (SC)]*, thus

'It is not in dispute before us as it cannot be, that onus of establishing that the said rings fell within Item No. 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.'

and, in *HPL Chemicals Ltd v. Commissioner of Central Excise, Chandigarh [2006 (197) ELT 324 (SC)]*, thus

'28. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub- heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue.....'

7. It would, therefore, appear that the impugned order has revised the classification without proper application of law as enacted and judicially determined. Accordingly, it would be appropriate for revision of classification be set side and the matter remanded to the original authority for a fresh decision after consideration of the relevant facts and in strict compliance with the General Rules for Interpretation of Import Tariff.

8. Appeal of the assessee is allowed by way of remand. Appeal of the jurisdictional Commissioner of Customs is dismissed.

(Order pronounced in the open court on 17/05/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)