CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 50961 of 2020

(Arising out of order-in-original No. 11/2020/MKS/Pr. Commr./ ICD-Import/ TKD dated 18/21.05.2020 passed by the Principal Commissioner of Customs (Import), ICD, Tughlakabad, New Delhi).

M/s Daxen Agritech India Pvt. Ltd., **Appellant**
120, DIC Industrial Area
Baddi, Solan
Himachal Pradesh-173205.

VERSUS

Principal Commissioner of Customs (Import) **Respondent**
Inland Container Depot
Tughlakabad, New Delhi.

APPEARANCE:

Shri T. Chakrapani, Consultant with Sh. Anil Kumar, Advocate for the appellant

Shri Rakesh Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 51678/2023

DATE OF HEARING: 14.09.2023
DATE OF DECISION: 20.12.2023

BINU TAMTA:

Challenge in the present appeal is to the order in original No. 11/2020/MKS/Pr. Commr./ ICD-Import/ TKD dated 18/21.5.2022 passed by the Principal Commissioner affirming the classification and

confiscation of the goods and the consequent demand of differential duty, interest and penalty, as proposed in the show cause notice.

2. The facts of the case are that the appellant is engaged in cultivation, manufacturing and marketing of the health food supplements, especially Ganoderma business and is importing items in question, namely, "Bulk Reishi Gano Powder-100% Ganoderma and Bulk Ganocelium Powder 100% Gano Mycelium" from their related foreign supplier M/s DXN Industries, Malaysia.

3. On verification of the import data of M/s Daxen Agritech (India) Pvt. Ltd., it was noticed that the importer had imported the subject goods vide Bills of Entry as mentioned in Table-A.

BE No.	BE date	Item name	Ass. Value (INR)	Duty paid (INR)	Duty payable (INR)	Differential duty (INR)
2608299	03.07.2013	Bulk Reishi Gano Powder	8152639.2	726359	4308425.238	3582066.2
		Bulk Ganocelium Powder	7246790	645652	3829711.111	3184059.1
3421252	01.10.2013	Bulk Reishi Gano Powder	10738593	956755	5675024.243	4718269.2
		Bulk Ganocelium Powder	5206590	463881	2751526.617	2287645.6
3708747	04.11.2013	Bulk Reishi Gano Powder	7138150	441138	3772298.131	3331160.1
		Bulk Ganocelium Powder	11103788	686214	5868018.844	5181804.8
5210850	16.04.2014	Bulk Reishi Gano Powder	6937318	428726	3666164.443	3237438.4
		Bulk Ganocelium Powder	9249757	571635	4888219.082	4316584.1
6718801	10.09.2014	Bulk Reishi Gano Powder	7000436	432627	3699520.413	3266893.4
		Bulk Ganocelium Powder	9333915	576836	4932694.06	4355858.1
9286242	19.05.2015	Bulk Reishi Gano Powder	17060794	1054357	9134860.931	8080503.9

8183633	13.01.2017	Bulk Reishi Gano Powder	18240600	1127269	9766564.458	8639295.5
4305997	07.12.2017	Bulk Reishi Gano Powder	17377500	2085300	9894748.5	7809448.5
4346737	11.12.2017	Bulk Reishi Gano Powder	18344700	2201364	10445472.18	8244108.2
5700445	23.03.2018	Bulk Reishi Gano Powder	18456900	2214828	16223615.1	14008787
		Total	171588470.2	14612941	98856863.35	84243922

The importer had filed these bills of entry under self-assessment scheme through their authorized representative, M/s Challenger Cargo and M/s SMS Clearing & forwarding Pvt. Ltd., Customs Broker. It appeared that they were mis-declaring these goods as Ayurvedic proprietary Medicine and consequently wrongly classifying the same under CTH 30039011 instead of correct CTH 21069099 of food supplements thereby evading payment of appropriate customs duty.

4. The issue of classification of subject goods viz. Bulk Reishi Gano Powder -100% Ganoderma and Bulk Ganocelium Powder-100% Gano Mycelium, had come up for consideration before the concerned appraising group earlier, and had been adjudicated by Assistant Commissioner (Group-I), ICD-TKD, Delhi vide Assessment Order No. 01/2012 dated 27.07.2012 whereby the goods had been held to be wrongly classified under CTH 30039011 by the importer.

5. On appeal by the appellant, the Commissioner (Appeals) vide order dated 26.08.2012 directed the assessing authority to pass a suitable order and accordingly remanded the matter back. The Assistant Commissioner passed a fresh order dated 24.05.2013,

confirming the classification of the goods in question under CTH 2106 9099 as food supplements. The appellant once again challenged the said order before the Commissioner (Appeals) who was pleased to restore the classification of the products under CTH 30039011 as Ayurvedic Medicaments vide order dated 17.02.2024. Being aggrieved, the revenue filed an appeal before this Tribunal which was finally decided on 10.01.2018, upholding the classification as claimed by the revenue, reported in **2018 (362) ELT 713**, which is now the subject matter of challenge before the Supreme Court.

6. The Department then issued the show cause notice dated 02.07.2018 covering the bills of entry for the period from 30.07.2013 to 23.03.2018 to which the appellant filed its reply. Thereafter a supplementary, show cause notice was issued to the appellant which was also duly replied. On adjudication, the Principal Commissioner rejected the classification claimed by the appellant of the products as Ayurvedic medicaments under CTH 30039011 and affirmed the classification as proposed in the show cause notice, invoking the extended period of limitation and the consequential interest and penalty along with confiscation of goods under section 111(m) and (o) of the Customs Act, 1962 (hereinafter referred to as the Act).

7. We have heard the learned Counsel for the appellant and also the Authorised Representative for the revenue and have perused the records of the case.

8. The moot question in the present appeal is whether the product Reishi Gano and Ganocelium are classifiable as Ayurvedic medicaments under chapter 3003.9011 of the First Schedule to the

Central Excise Tariff Act, 1985 (CETA) as contended by the appellant or as food supplements under CTH 2106999 of CETA. The relevant entries relied on by the appellant and the Department is as under:-

2106	Food preparations not elsewhere specified or included
2106 90 99	---- Other
3003	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not pout up in measured doses or in
3003 9011	---- Of Ayurvedic system

8.1 The said issue is no longer rest-integra and has been decided by the Chennai Bench in **DXN Manufacturing India Private Ltd. vs. Commissioner of Central Excise and Service Tax, Pondicherry - 2018 (11) GSTL 68**, where the Tribunal reconsidered the matter at length on being remanded by the Supreme Court - **2015 (325) ELT A41** and concluded that both the impugned goods fail both the twin test for being considered as Ayurvedic medicament and therefore the products in question are nothing but food supplements promoted mainly for general health or well-being and therefore merit classification under 2108 of the CETA and more specifically under 2108.99, as it stood at the relevant time and assessed accordingly under section 4A of the Act for discharge of duty liability. The issue of classification was thus decided in favour of the revenue and against the assessee. The said order was followed by the Principal Bench subsequently in an appeal filed by the revenue in respect of the present appellant relating to the earlier round of proceedings, reported in **2018 (362) ELT 713**, and finding no reason to differ from the ratio and findings arrived by the Chennai Bench of the Tribunal, the appeal was allowed holding that the products are classified as food supplement and not as Ayurvedic medicine. We have been told that

appeal against both the orders of the Chennai Bench and the Principal Bench as referred above have been filed by the party before the Supreme Court and the same are pending consideration, however, there is no stay of the impugned orders. Therefore, the orders of the Chennai Bench and the Principal Bench of the Tribunal deciding the issue of classification in favour of the revenue are binding. Consequently, we have no hesitation in concluding the issue of classification of the products in question under CTH 21069099 as food preparation. We may also like to refer from the synopsis filed by the appellant, where it is stated :

> "Since, the issue of classification, the dispute matter is in the Hon'ble Supreme Court, the appellant is not contesting the same before this Hon'ble Tribunal, being sub-judice in nature."

Thus the issue of classification on merits stands affirmed in favour of the revenue and against the appellant.

9. The next question which arises in the present appeal is the invocation of the extended period of limitation under section 28(4) of the Act. The submission of the learned Counsel is that the issue of classification of the products in question was within the knowledge of the department at the time of clearing of the subject goods at the relevant time of imports as the department itself had filed an appeal against the Order-in-Appeal dated 17.02.2014 before the Tribunal and therefore the allegations of suppression are not made out and so the extended period of limitation cannot be invoked. The learned Authorised Representative for the revenue have submitted that the

period of limitation has been rightly invoked and cited several judgements in support thereof.

10. We find that show cause notice was issued on 2.7.2018 for the period 03.07.2013 to 03.03.2018, covering several bills of entries as given in Table-A above which is per Annexure-A to show cause notice. In the appeal filed against the first assessment order dated 27.07.2012, the Commissioner (Appeals) vide order dated 16.08.2012 remanded the matter to the adjudicating authority to pass suitable order. On remand, the Adjudicating Authority vide order dated 24.05.2013 once again confirmed the classification under CTH 21069099, however, the appellant challenged the said order and the Commissioner (Appeals) vide order dated 17.02.2014, set aside the Order-in-Original and classified the products under CTH 30039011 and thereafter till the final order dated 10.01.2018 was passed by the Tribunal that the product in question is to be classified as food supplements, the appellant was under a bonafide belief and filed the bills of entry, accordingly in terms of the order of the Commissioner (Appeals) dated 16.08.2012 and thereafter the order dated 17.02.2014. In view of the proceedings which was pending since 2012 and the department itself had preferred an appeal, it cannot be said that the department was not aware of the classification of the products as declared in the instant bills of entry by the appellant and therefore no fault can be found on the part of the appellant as 9 out of the 10 bills of entries were filed before the final order was passed by the Tribunal on 10.01.2018 and the Order-in-Appeal by the Commissioner (Appeals) was holding the field. In this regard we would like to refer to

the observations made by this Tribunal in an appeal filed by the Customs Broker of the appellant against the present impugned order as under:

> "11. In the order, the Principal Commissioner obfuscated the fact that the final order of this Tribunal was passed on an appeal by the revenue as the Commissioner (Appeals) had decided the classification in favour of the importer. Until the final order was passed by this Tribunal on 10.1.2018, the order of the Commissioner was binding on both sides. Of the bills of entry listed in the impugned order, all except one were filed before the final order was passed by this Tribunal. The last one was filed soon after the final order was passed. There is nothing on record to show that appellant was made aware of this order by the revenue and told to classify the goods accordingly. It is not unlikely that it took some time for the appellant to come to know about the final order. It may be pointed out that the SCN dated 02.07.2018 was issued in the present proceedings six months after the final order. Therefore, in respect of nine bills of entry, the importer and the appellant were correct in classifying the goods as per order of the Commissioner (Appeals) and the officers were correct in clearing the goods for home consumption accordingly. The Principal Commissioner is in error in holding in the impugned order that the importer and the appellant (in importer's behalf) should have filed bills of entry contrary to the order of the Commissioner in good faith.
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> 12. There is a well established practice in the department to deal with cases with the order which holds the field is against the revenue and an appeal is pending with the superior court or Tribunal. SCN are issued periodically to protect revenues interest and they are transferred to the call book which are then decided after the order of the superior Court or Tribunal is received. In these bills of entry also, after the order of the Commissioner (Appeals), SCNs could have been issued and transferred to Call Book and decided after this Tribunal passed the final order. However, until the final Order of this Tribunal was issued, the order of Commissioner (Appeals) was binding both on the importer and the officers."

11. The aforesaid observations of the Tribunal (against the present impugned order), holds the field that the appellant was justified in adopting the classification while filing the bills of entry. This is sufficient to turn down the revenue's contention about the existence of wilful suppression of facts or deliberate mis-statement on behalf of the appellant. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten the liability on the appellant when the revenue is aware of the litigation with the appellant on the issue of classification of the very same products and taking

steps to challenge the same before the higher forum. Thus it cannot be said that the appellant has in any manner, suppressed or mis-stated the facts wilfully to evade the payment of duty.

12. The law on invocation of extended period of limitation is well settled. Mere omission or merely classifying the goods/services under incorrect head does not amount to fraud or collusion or wilful statement or suppression of facts and therefore the extended period of limitation is not invocable. Reliance is placed on the decision of the Tribunal in **Incredible Unique Buildcon Private Ltd. 2022 (65) GSTL 377.**

> **"17.** We are unable to find any proof of show cause notice or from the impugned order. intent to evade either from the Mere omission or merely classifying its services under an incorrect head does not amount to fraud or collusion or wilful misstatement or suppression of facts. The intention has to be proved to invoke extended period of limitation. Supreme Court has delivered the judgment in the case of *Larsen & Toubro* dated 20 August, 2015, prior to which there was no clear ruling that services which involved supply or deemed supply of goods could only be classified under WCS. The appellant had been classifying its services (which also involved supply/use of goods) under the CICS and Revenue never objected to it and, therefore, the appellant could have reasonably believed it to be the correct head and continued to file returns accordingly and paying duty. Once the returns are filed, if Revenue was of the opinion that the self-assessment of service tax and the classification was not correct, it could have scrutinized the returns and issued notices within time. The show cause notice was issued on 30 September, 2015 for the period covered October, 2010 to June, 2012, which is clearly beyond the normal period of limitation. Therefore, although Revenue is correct on merits, the demand is time barred and, therefore, cannot sustain. For the same reason, the penalties imposed upon the appellant under Sections 77 and 78 also cannot be upheld."

13. The Supreme Court in **Nizam Sugar Factory 1995 (78) ELT 401** has categorically laid down that where facts are known to both the parties, the omission by one to do what he might have done, and not that he must have done, does not render it suppression. Thus when all the facts are before the department as in the present case then there would be no wilful mis-declaration or wilful suppression of

facts with a view to evade payment of duty. The relevant para from the judgement in **Nizam Sugar Factory** (supra) is quoted below:-

> **"4.** Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

13.1 Without multiplying too many decisions on the principle justifying or rejecting the invocation of the extended period of limitation, we would just refer to the citations:

> 2004 (166) ELT 151 (SC) - Hyderabad Polymers (P) Ltd., vs. Commissioner of Central Excise, Hyderabad
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> 2006 (197) ELT 465 (SC) – Nizam Sugar Factory vs. Collector of Central Excise, Andhra Pradesh
>
> 2004 (164) ELT 236 (SC) – ECE Industries Ltd., vs. Commissioner of Central Excise, New Delhi.
>
> 2003 (153) ELT 14 (SC) P&B Pharmaceuticals (P) Ltd., vs. Collector of Central Excise
>
> 2015 (324) ELT 8 (SC) – Caprihans India Ltd., vs. Commissioner of Central Excise, Surat

14. We have also considered the decisions cited by the learned Authorised Representative for the revenue on the issue of extended period of limitation, however, we feel that in the facts of the present case the same would not be applicable for the simple reason that the earlier proceeding on the subject matter (Order in Original dated

27.7.2012 annexed as 'Annexure B' in the Appeal paper book) was decided without allegation of suppression and mis-statement of material facts, then in the subsequent show cause notice, it cannot be said that there was any suppression on the statement of facts by the appellant. We, therefore conclude that the revenue cannot invoke the extended period of limitation under section 28(4) of the Act, hence the show cause notice dated 2.07.2018 is barred by limitation for the period beyond the normal period.

15. We now come to the issue of imposing penalty under section 114A of the Customs Act on the appellant. As we have held that it is not a case of willful suppression, mis-statement or mis-declaration by the appellant, the ingredients required for invoking the penalty being the same, we hold that penal action under the provisions of section 114A as imposed by the impugned order is not justifiable and is hereby set aside. We are also supported by the decision of this Tribunal dated 1.12.2022 (arising out of the same impugned order) refuting the observations of the Principal Commissioner on self assessment by the appellant, inter-alia observing:

> "14…….Self assessment is subject to any reassessment by the proper officer. Self assessment can also be appealed against to the Commissioner (Appeals). They can assess duty as per their understanding and the officers are free to reassess it as per section 17(4). Mis-classification or incorrect assessment of duty does not amount to mis-declaration in the bill of entry, nor does it attract any penalty.
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> 15……..We understand that the bills of entry are cleared on the basis of self assessment, they are subjected to post clearance audit. If so, it gives sufficient time to the officers to find if any duty has escaped assessment and issue a demand under section 28. However, there can be no penalty for wrong self-assessment by the importer".

16. On similar grounds, we hold that the appellant cannot be held liable for penalty under section 114 AA of the Customs Act and

the reasoning given by the Principal Commissioner that at the time of presenting the bill of entry, the importer made and subscribed to false declaration against the contents of bills of entry, in contravention to section 46(4) of the Act is unsustainable in view of the discussion above.

17. Lastly, we would consider the issue of confiscation of goods under section 111 (m) and (o) as ordered by the Principal Commissioner. The learned counsel for the appellant submitted that the invocation of section 111(m) of the Act is not proper, for the reason that the present dispute relates to classification of goods and does not involve any valuation issue. Similarly, the confiscation under the provisions of section 111(o) is also not sustainable as the benefit of the exemption notification has been availed in accordance with law.

18. Referring to the provisions of section 111 (m), the Tribunal analysed the same in the order dated 1.12.2022 (arising out of the same impugned order) observing as:

> "20. Section 111(m) does not provide for confiscation of goods if the importer or on his behalf the Customs broker claims any wrong classification in the bill of entry. It only provides for confiscation if there is mis-declaration of goods. Even if the goods are mis-classified or duties, otherwise wrongly self-assessed by the importer, the goods do not become liable for confiscation. The remedy against wrong assessment is reassessment by the officer under section 17(4). The dispute between the revenue and the importer was with respect to the classification. At the time the bills of entry were filed, the Commissioner (Appeals) order held the field according to which the appellant filed the bills of entry. Therefore, the Principal Commissioner has erred in holding that the goods were liable for confiscation under section 111(m)".

19. In view of the aforesaid observations made, the findings in the impugned order that section 111(m) can be invoked for mis-declaration of any material particular, in respect of the goods and not necessarily only the value of the goods stands quashed and the issue

stands decided in favour of the appellant that there cannot be any confiscation of goods under section 111(m) in the case of wrong classification.

19.1 Also, as noticed by us, it is a simple case of mis-classification/incorrect classification and not mis-declaration of goods on the part of the appellant, the logical inference would be that the appellant has not wrongly claimed the exemption benefit and therefore there can be no confiscation under Section 111(o) of the Act.

20. We therefore partly allow this appeal and modify the impugned order to the following effect:

a) The goods in question are re-classified as food preparations under CTH 2106 9099

b) The revenue cannot invoke the extended period of limitation and therefore the show cause notice is barred by limitation except to the extent of the normal period.

c) The demand of differential duty is limited to the normal period, i.e. 03.07.2013 to 19.05.2015 and the same may be computed accordingly.

d) The interest under the provisions of section 28AA of the Act is also to be charged and recovered from the appellant for not paying the due customs duties in respect of the normal period of demand.

e) There cannot be any order of confiscation under section 111(m) or 111(o) of the Act.

f) No penalty can be imposed on the appellant under the provisions of section 114A or under 114AA of the Customs Act, 1962.

21. The impugned order is partly set aside as referred to above and the appeal is remanded to the Adjudicating Authority for the limited purpose of computing the differential duty to be demanded in respect of normal period only.

22. Accordingly, the appeal is partly allowed by way of remand.

(Pronounced on 20th Dec., 2023).

(Binu Tamta)
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)

Pant