CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. 1

Customs Appeal No.51113 Of 2022

[Arising out of Order-in-Original No. VII (HQ)10/Imp/Adj/Sundyota/96/2020/8089 dated 28.06.2021 passed by the Commissioner of Customs, New Delhi]

Sundyota Numandis Probioceutical Private Limited : Appellant
701-702, Indraprasth Corporate, 100 Feet Road,
Prahladnagar, Ahmedabad-380015

Versus

Principal Commissioner, Customs New Delhi: Respondent
Air Cargo Complex (import)
New Customs House, near IGI Airport
New Delhi-110037

APPEARANCE:
Mr. Tarun Gulati, Senior advocate, Mr. Ketan Tadsare, Ms. Shruti Kulkarni, and Mr. Rajat Chhabra, Advocates for the Appellant

Mr. M.K. Shukla, Authorised Representative for the Department

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 50167/2026

Date of Hearing:08.10.2025

Date of Decision:29.01.2026

HEMAMBIKA R. PRIYA

The present appeal has been filed by M/s Sundyota Numandis Probioceuticals Private Limited[1] to assail the Order-in-Original No. VII (HQ)10/Imp/Adj/Sundyota/96/2020/8089 dated 28.06.2021[2] wherein the Commissioner had confirmed the demand of Rs. 7,07,02,027/- along with interest and penalties.

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1 the appellant
2 the impugned order

2. The brief facts of the case are that the appellant was engaged in the manufacture and sale of nutraceutical and pro-biotic products in India. These products comprise variety of key ingredients which were proprietary of the overseas vendors. The appellant imported these ingredients on payment of customs duty. The Department issued show cause notice alleging that the appellant had mis-classified (a) Tendofit, (b) Mobilee, & (c) GG Orosoluble and was liable to pay differential duty along with interest thereon,and that the goods were liable to confiscation. The matter was adjudicated vide the impugned order dated 28.06.2021 wherein the demand of customs duty to the tune of Rs. 7.07.02.027/- along with interest was confirmed along with appropriate penalties. Aggrieved by the said order, the appellant has filed the present appeal.

3. Learned counsel for the appellant submitted that Tendofit was a key ingredient that goes into the manufacturing of nutraceutical products that support tendon health. Tendofit consists of 85% of Mucopolysaccharides (MPS) and Collagen of 15%. Further, MPS consists substantially Chondroitin Sulphate which provides the essential characteristic to MPS and, as a corollary, to Tendofit as well. Learned counsel submitted that as bovine extract and comprises Chondroitin Sulphate and as Tendofit derives its essential characteristics from Chondroitin Sulphate, the product can be said to be a "Natural Polymer. Learned counsel submitted that this understanding of the appellant was also corroborated by a certificate issued by Dr. Joseman Jacob, Professor and Head, Department of Materials Science and Engineering, Indian Institute of Technology Delhi. He further contended that Mobilee also comprised a key

ingredient derived from rooster comb that went into the manufacturing of nutraceutical products that support joint health. Learned counsel stated that Mobilee was an extract that consists of Sodium hyaluronate, Polysaccharides and collagen. The Sodium hyaluronate was a natural polymer by itself and constituted 60-75% of Mobilee, while Polysaccharide and Collagen constitutes 10% and 5% respectively. As such, Sodium hyaluronate provided the essential character to Mobilee, and can be considered to be a Natural Polymer. This understanding of the appellant is also supported by certificate issued by Dr. Joseman Jacob. As regards, GG Orosoluble, learned counsel submitted that it was an ingredient that was a pro-biotic known as Lactobacillus Rhamnosus GG, which was essentially cultures of bacteria i.e. live microorganisms, that helps promote healthy balance of gut bacteria and have been linked to a wide range of health benefits which include digestive health and immune functions. This had been certified by Dr. Biswaranjan Pradhan, Indian Institute of Technology, Bhubaneswar. Xylitol and sorbitol have been used as excipient carrier to provide better stability to GG Orosoluble, in order to withstand conditions during storage, transportation as well as during industrial processes.

3.1 Learned counsel further submitted that the impugned order had classified the imported goods under Chapter 21 as miscellaneous edible preparations, thereby regarding them as edible preparation in the form in which these are imported. However, he contended that the imported articles were not edible in the form in which these are imported for following reasons:-

(i) Tendofit and Mobilee are imported in bulk packaging [25kg and 5kg drums respectively) which necessarily needed to be formulated into prescribed dosage strength 260-520 mg/day and 50 mg/day respectively. The dosage strength is also a condition prescribed for FSSAI approval. Learned counsel reiterated that the imported goods are not edible, prior to such process of formulation.

(ii) GG Orosoluble has clinical efficacy and tolerability of dosage of up to 6 billion cells per day and exceeding these limits may pose a risk of un-desired, un-noticed adverse events. Learned counsel submitted that the time of import, it has a concentration of 16 billion cells per gram and cannot be consumed as such without being formulated into permissible dosage concentration.

(iii) Further, GG Orosoluble, being microorganism, was sensitive to temperature/moisture. To ensure stability as well as palatability (to mask the obnoxious smell and taste) it is accompanied by an excipient. During the transportation, exposure to temperature and moisture tends to affect composition of excipient in proportion to the strength microorganism and thus viability of the product. GG Orosoluble thus requires calibration of excipient before being consumed. Due to the possibility of affected composition of excipient, GG Orosoluble cannot be consumed as imported.

3.2 Learned counsel further submitted that the impugned order had failed to ascertain the inedible nature of the imported goods, and the findings to classify the import goods as 'Miscellaneous Edible Preparations' under Chapter 21 were misplaced. He submitted that the imported GG Orosoluble was subjected to the process of manufacturing after its importation. The manufactured finished goods

resultantly attained the character of an edible preparation. Accordingly, the retail packagings of the manufactured finished goods bore the remarks/declaration regarding its edible nature. The impugned Order had relied on the declaration in the retail packaging of the finished goods manufactured in India and has concluded that the imported GG Orosoluble itself was in edible condition. Learned counsel stated that the impugned order had erroneously relied on the declarations made in respect of the finished goods, to determine classification of the imported raw material required therefore.

3.3 Learned counsel further submitted that Tendofit and Mobilee weremeant for improving joint health while GG Orosoluble is meant for gut health. These were neither "known' or 'used' as 'food' or 'food preparation in common parlance. He concluded that Note 16 of HSN Explanatory Notes to Chapter 21 categorically exclude preparations intended for the prevention of treatment of diseases or ailment for chapter 21. In this regard, he relied on the decision of the Supreme Court in the case of **Indian Cable Company Limited Calcutta vs. Collector of Central Excise Calcutta**[3] wherein it was categorically emphasized the need to refer to common parlance or understanding of the relevant trade in matters of classification of products. Learned counsel also relied on the decision of the Supreme Court in the case of **Union of India vs. Garware Nylons Ltd.**[4]**,** where the Court held that revenue is under the burden to prove the classification alleged by it. Learned counsel contended that revenue authorities alleged classification of the subject goods under CTH 2106 as 'food preparation

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3 (1994 (74) ELT 22 (SC)
4 1996 (87) ELT 12 (SC)

not elsewhere classified without putting forth any evidence in support thereof.

3.4 Learned counsel further submitted that the appellant had relied upon certification by Dr. Joseman Jacob, Professor and Head, Department of Materials Science and Engineering, IIT Delhi that Tendofit and Mobilee are essentially natural polymers and on the conclusions drawn by the Dr. Biswaranjan Pradhan, Research Scientist, IIT Bhubaneswar that GG Orosoluble is essentially a probiotic and is consumed for the benefit of gut health. He contended that the illustrations provided under Note 6 are indicative of the items which are sought to be classified under tariff item 2106 9099, which includes, items such as "misthans", "mithal", "namkeens", "bhujia", etc. On the other hand, Tendofit, Mobilee and GG Orosoluble are known and used as nutraceutical supplement needed for support and improvement of health and not for the purpose of any food preparations or any food stuff.Rule 3(b) of the General Rules for Interpretation, is with reference to goods consisting of different materials or components, wherein the classification of such goods is to be based on the material or component which gives them its essential character. In the present case, "Tendofit" consists of MPS which constitutes about 85% of its overall composition, and MPS substantially consists of Chondroitin Sulphate which is a polymer by itself and provides the essential characteristics to Tendofit. Similarly, Mobilee was an extract consisting of Sodium hyaluronate, Polysaccharides and collagen. Sodium hyaluronate is a natural polymer by itself and constitutes 60-75% of the overall composition of Mobilee. As such, Sodium hyaluronate provided the essential character to Mobilee which is classified as

Natural Polymer. In this context, learned counsel stated that EU Customs also recognizes Chondroitin Sulphate (in Tendofit) and Sodium Hyaluronate (in Mobilee) to be covered under CTH 3913, more particularly under entry 3913 9000 95 and 3913 9000 BS respectively.

3.5 Learned counsel further submitted that the definition of food as provided under the FSSAI was wide enough to include 'substance' which may not be considered as food in the conventional sense of the expression. Therefore, issuance of an FSSAI license did not conclusively determine whether the subject item is a food preparation which would necessarily fall within CTH 2106 9099. He submitted that the impugned order did not even attempt to analyse the contents of the EU tariff structures, Certificate issued by Dr. Joseman Jacob so as to ascertain its applicability in the present dispute. In this context, he relied upon the Tribunal's decision in the case of **Commissioner of Customs (Import), Nhava Sheva vs. NDC Drug & Chemical Private Limited[5].**

3.6 Learned counsel further submitted that Probiotics are live microorganisms when consumed in adequate amount, improves or restores gut flora. GG Orosoluble was essentially culture of bacteria i.e. live microorganisms that help promote a healthy balance of gut bacteria and have been linked to a wide range of health benefits which include digestive health and immune function. The micro-organisms are highly sensitive in nature and are easily affected by high temperature/moisture and loss its viability. It is for these reasons that these cultures of micro-organisms are always accompanied by an excipient carrier. Cultures of microorganism are expressly covered

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5 2012 (284) ELT 366 (Tri.-Mumbai)

under CTH 30029030 and hence GG Orosoluble is nothing but a probiotic i.e. culture of microorganism, and is liable to be classified under CTH 3002 9030. In support of his submission, learned counsel relied upon the recent decision of Mumbai Tribunal in the case of **Danisco (India) Pvt. Ltd. vs. CC, Air Cargo complex Andheri[6].**

3.7 Learned counsel further submitted that the appellant had classified the subject goods i.e. Tendofit and Mobilee under Chapter Heading 3913 for being a natural polymer and GG Orosoluble under Chapter heading 3002 for being a probiotic, was based on the specific characteristics possessed by them, whereas the impugned order classified the subject goods under residual Chapter heading 2106 as 'food preparation not elsewhere specified merely because these are to be consumed orally. The appellant had a bona fide belief that it has correctly classified Mobilee and Tendofit under Chapter 39 and GG Orosoluble under Chapter 30 and such belief was also supported by various judicial decisions holding ground during the relevant period such **Commissioner of Customs (Import), Nhava Sheva vs. NDC Drug & Chemical P. Ltd.[7]** Further, there was no judicial precedent in contradiction with the appellant's belief in the present case. With respect to the imposition of interest, learned counsel submitted that it was a settled principle of law that, in cases where the original demand is not sustainable, interest cannot be imposed. In the present set of facts and circumstances, since the demand itself is unsustainable, the interest imposed on such demand is erroneous and is liable to be dropped. He prayed for setting aside the demand along with interest and penalties.

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6 (2023 (5) TMI 398-CESTAT Mumbai)
7 2012 (284) E.L.T. 366 (Tri. Mumbai)

4. Learned authorized representative for the department submitted that Tendofit is a mixture of two separate compounds, and is used to prepare nutraceutical products to support tendon health. Merely because of the presence of mucopolysaccharide, the entire product cannot be called natural polymer as along with mucopolysaccharide, Collagen to the extent of 15% was also present in impugned goods. Thus, when Collagen was added to the mucopolysaccharides, the resultant product namely Tendofit, no longer remained as 'Natural Polymer' and changed its nature to food preparation falling under CTH 2106. Learned authorized representative further submitted that for import of impugned goods, FSSAI clearance is required, thus making it a nutraceutical formulation. Learned authorized representative stated that the definition of 'Food' under Sec 3(j) of FSSAI Act, 2006 means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances. He submitted that as per section 3(zk) of FSSAI Act, 2006, "primary food" means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting,

collection or catching in the hands of a person other than a farmer or fisherman. The importer had taken FSSAI certificate/clearance at the time of import, which clearly indicates the edible nature of the imported goods.

4.1 Learned authorized representative further submitted that as per appellant's submission Tendofit is a bovine cartilage extract, whichwas used to prepare nutraceutical products to support tendon health. Nutraceuticals are substances or compounds derived from food that provide health benefits beyond basic nutrition. The term is a combination of the words "nutrition" and "pharmaceutical". Nutraceuticals can be consumed-as part of a diet or taken as supplements. Nutraceuticals help with improving health, delaying aging, preventing chronic diseases,increasing life expectancy, and supporting the body's structure or function. Learned authorized representative submitted that HSN explanatory Notes CTH 2106 says that "(16) preparations, often referred to as food supplements, based on extracts from plants, fruit concentrates, honey, fructose, etc. and containing added vitamins and sometimes minute quantities of iron compounds. These preparations are often put up in packaging with indications that they maintain general health or well-being." The impugned goods fall in CTH 2106. Both food supplements and nutraceuticals serve to improve the health and wellness of individuals. It is not prophylactic (done or used in order to prevent a disease), therapeutic (helping to cure an illness).

4.2 Learned authorized representative further contended that the drugs mainly used to treat diseases are referredto as "Pharmaceuticals" while the drugs which prevent diseases are called

"Nutraceuticals". Nutraceuticals are classified under CTH 21069099 as a general practice. In this context, learned Authorized Representative submitted thatin the context of the present GST tax regime, CESTAT Ahmedabad had ruled that Nutrition/Dietary Supplements are covered by Sl. No. 453 of Schedule III of Notification No. 1/2017-IGST-Rate with CTH 2106 attracting IGST at rate of 18 per cent. Learned Authorized Representative further submitted that the appellant had submitted that Mobileewas a natural extract derived from rooster comb, primarily comprising of sodium hyaluronate along with some amount of polysaccharide and collagen. It was used to prepare nutraceutical products to support joint health. The FSSAI product approval licensewasfor rooster comb extract. Learned authorized representative contended that Mobilee was of animal origin and the classification proposed by the appellant of 3913 as natural copolymers was not justified. He contended that similar toTendofit, Mobileewas also rightly classifiable under CTH. 2106. Merely because of the presence of Sodium Hyaluronate, the entire product could not be classified as 'natural polymer' as along with Sodium Hyaluronate, Polysaccharides and Collagen were also present in the impugned good viz., Mobilee. Thus,when other substances are added to the Sodium Hyaluronate, the resultant product namely Mobileeno longer remained as Natural Polymer and was converted as food preparation falling under CTH 2106. Learned Authorized Representative further contended that GG Orosoluble was a probiotic culture used for pediatricdiarrhoea as well as maintenance of gut flora.Itwas not culture of micro-organism liable to be classified under CTH. 3002. It was a final

product which has already undergone the process to be marketed as a dietary supplement.

5. We have heard the learned counsel for the appellant and the learned Authorized Representative for the Department. The issue before us for consideration relates to the classification of the impugned goods viz. Tendofit, Mobilee &GG Orosoluble. However, before we consider the submissions made by the learned counsel and the learned authorized representative, we proceed to take note of the provisions of the Customs Act, 1962.

6. Customs duty is levied as per section 12(1) of the Customs Act, which is reproduced below:-

> "12. Dutiable goods - (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the [Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from India"

What is apparent from the above is that under the Customs Act, 1962[8], the taxable event for customs duty occurs on import of the goods into India or export of goods. It is settled law that the fundamental principle while determining the classification under the Customs Tariff Act, 1975 is the condition of goods at the time of import, which is the taxable event. In this context, we draw support from the Supreme Court's decision in Commissioner **of Customs (Imports)** versus **M/s Welkins Foods**[9] wherein the Court held as follows:-

> "85.The twin factors mentioned should be regarded as fundamental principles while determining the classification of a product under the First Schedule of the Act, 1975. This is because, according to Section 12 of the Act, 1962, it is evident that the goods are taxable at the point of

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8 the Act
9 Civil Appeal No. 5531 of 2025 dated 06.01.2026

> import. Therefore, as recognised by this Court in Dunlop India (supra), what is crucial is the condition of the goods at the time of import, which is the taxable event under the Act, 1962. **By excluding consideration of actual use and subjective intentions regarding use, it is ensured that classification aligns with the taxable event.** Actual use can be considered only in those rare instances where there is overwhelming statutory evidence to that effect.
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> 86. Furthermore, relying on 'objective characteristics and properties' ensures legal certainty and ease of verification. The core of the principles outlined above is to prevent 'subjectivity' from influencing classification disputes. Reckless and unfounded consideration of subjective elements can lead to a cascade of issues in classification, as such elements may be used as a shield to import goods at a lower duty."
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> **(emphasis supplied)**

6.1 Classification under the Customs Tariff Act, 1975, relies on the Harmonized System of Nomenclature (HSN) to assign 8-digit codes for imported and exported goods, to determine the applicable duty rates. The Customs Tariff Act is organized into 21 sections, 98 chapters, headings, sub-headings, and 8-digit tariff items. This HSN-aligned system, maintained by the World Customs Organization, standardizes classification globally while allowing India-specific extensions.

6.2 The General Rules of Interpretation (GIR) to be followed for classification of goods follows six GIRs sequentially:

- GIR 1: Determined by heading terms and relevant section/chapter notes.
- GIR 2: Covers incomplete/unfinished articles or mixtures by essential character.
- GIR 3: For multiple headings, prefers (a) most specific description, (b) essential character for mixtures, or (c) last-in-number for equal specificity.

- GIR 4-5: Applies to unlisted goods akin to listed ones or by material/function.
- GIR 6: Sub-heading classification mirrors above rules at that level.

6.3 These rules ensure objective, hierarchical application without trade parlance overriding statutory terms unless specified.

7. With the above guiding principles, we proceed to take each of these products for consideration.

7.1 **Tendofit:-** It has been submitted before us that Tendofit is Bovine Cartilage extract and its composition is as follows:

Substance	ASSAY
Mucopolysaccharides	84.6%
Collagen	15.4%

Bovine Cartilage extract, contains collagen and chondroitin sulfate, or similar proteins. While classifying the said goods in CTH 2106, the impugned order has held as follows:-

> "8.4.3 ..... Tendoflt is a Bovine Cartilage Extract containing Mucopolysaccharides and Collagen to the extent of 84.6% and 15.4% respectively. The noticee has stated that Mucopolysaccharide is a natural polymer, in primary form und that it substantially consists of Chondroitin Sulphate which is a biological polymer that acts as the flexible connecting matrix between the protein filaments in cartilage. However, I observe that the submission made by the noticee is silent regarding the role of Collagen in the said impugned item. Collagen is a protein made up of various amino acids and is an important constituent of the impugned preparation. Since the said item 'Tendofit' is in a form of a preparation containing two ingredients Chondroitin Sulphate/Mucopolysaccharides and Collagen, therefore, it cannot be termed as "natural polymer" in primary form. I find that as the said item is in the form of a preparation, hence there is a need to look into for the appropriate classification as a whole and not splitting it into its constituents and classify them. The item in the manner it has been imported has to be classified and not its separate constituents as has been attempted by the

> noticee. Going by the composition of the impugned goods, I am of the view that it loses its character as a natural polymer and becomes a food preparation which is taken as a nutraceutical by the human beings for general health benefits. Here it is very relevant to state that the impugned goods are in fully manufactured state, ready for human consumption when packed for retail sale and the importer has obtained certificate from FSSAI for this purpose. FSSAI regulates the manufacture, storage, distribution, sale and import of food items to ensure availability of safe and wholesome food for human consumption. Does an import of polymers falling under Chapter 39 of the Tariff require a FSSAI certificate? The answer is no. The very reason that the importer obtained FSSAI certificate clearly implies that the impugned goods are nothing but food preparations under CTH 2106 and not some natural polymer/ plastic as covered under 3913 of the Tariff."
>
> xxxxxx xxxxxx xxxxxx xxxxxx
>
> 8.4.9 ..... I now proceed to examine the classification as proposed in the show cause notice of the impugned goods under CTH 2106 9099 of the Tariff Chapter 21 covers miscellaneous edible preparations. Further the entry 2106 covers 'Food preparations not elsewhere specified or included' such as Protein concentrates and textured protein substances and others.
>
> xxxxx xxxxx xxxxxxx xxxxxxx
>
> Such preparations for use either directly or after processing for human consumption are covered within the CTH 2106 of the tariff. Having examined the nature of the goods covered under CTH 2106 from the supplementary notes, I am of the view the item 'Tendofit' which is undisputedly an edible preparation of miscellaneous nature and thus going by the essential nature and character of the impugned goods, I hold a firm view that as per General Rules for Interpretation of the Customs Tariff, being a composition of Mucopolysaccharides and collagen, Tendofit, meant for human consumption duly certified by FSSAI as a food merits classification under CTH 21069090 of the Tariff."

7.2 A perusal of the submission indicates that Tendofit comprises MPS and Collagen of 85% & 15% respectively. In order to appreciate the findings of Commissioner, it would be imperative to reproduce the competing headings, which are reproduced below:

"Chapter Heading 21

> **FOOD PREPARATIONS, NOT ELSEWHERE SPECIFIED OR INCLUDED**

2106 10 00 - Protein concentrates and textured protein Substances 2106 90 – Other
--- Soft drink concentrates:
2106 90 11 --- Sharbat
2106 90 19 --- Other
2106 90 20 --- Pan masala
2106 90 30 --- Betel nut product known as "Supari"
2106 90 40--- Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and maltodextrine syrup
2106 90 50 --- Compound preparations for making nonalcoholic beverages
2106 90 60 ---- Food flavouring material
2106 90 70 --- Churna for pan
2106 90 80--- Custard powder
--- Other
2106 90 91 ---- Diabetic foods
2106 90 92---- Sterilized or pasteurized millstone
21069099 --- Other"

7.3 The relevant HSN Explanatory notes for the said CTH is as below:

"21.06 - Food preparations not elsewhere specified or included.

2106.10 - Protein concentrates and textured protein

substances 2106.90 - Other

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

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

(B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.) (see the General Explanatory Note to Chapter 38).

However, the heading does not cover enzymatic preparations containing foodstuffs (e.g., meat tenderisers consisting of a proteolytic enzyme with added dextrose or other foodstuffs). Such preparations fall in heading 35.07 provided that they are not covered by a more specific heading in the Nomenclature.

The heading includes, *inter alia :*

(1) Powders for table creams, jellies, ice creams or similar preparations, whether or not sweetened.

……. ……..… ……. …….

(2) Flavouring powders for making beverages, whether or not sweetened, with a basis of sodium bicarbonate and glycyrrhizin or liquorice extract (sold as " Cocoa-powder ").

(3) Preparations based on butter or other fats or oils derived from milk and used, e.g., in bakers' wares.

(4) Pastes based on sugar, containing added fat in a relatively large proportion and, sometimes, milk or nuts, not suitable for transformation directly into sugar confectionery but used as fillings, etc., for chocolates, fancy biscuits, pies, cakes, etc.

(5) Natural honey enriched with bees' royal jelly.

(6) Protein hydrolysates consisting mainly of a mixture of amino-acids and sodium chloride, used in food preparations (e.g., for flavouring); protein concentrates obtained by the elimination of certain constituents of defatted soya-bean flour, used for protein-enrichment of food preparations; soya-bean flour and other protein substances, textured. However, the heading **excludes** non-textured defatted soya-bean flour, whether, or not fit for human consumption **(heading 23.04)** and protein isolates **(heading 35.04).**

…… …… ……”

7.4 From a bare perusal of the CTH 2106 and the connected HSN notes, it is evident that the said CTH covers diverse range of products that do not fit into more specific categories of Chapter 1 to Chapter 20. The goods are liable to be classified under the said heading, if they meet one of the primary conditions as defined in the said HSN viz., (i) Preparations intended for direct human consumption or for consumption after simple processing such as cooking, dissolving of milk or water (ii) manufacturing inputs which are preparations consisting wholly or partly of foodstuffs used in making beverages or other food preparations. The impugned order has classified the said

product under CTH 2106.90 in the other category which basically covers the following products:-

- **2106 90:** The "Other" category, which includes:
    - **Soft Drink Concentrates/Sharbat:**Bases for non-alcoholic beverages.
    - **Pan Masala & Supari:** Betel nut products known as "Supari" (2106 90 30) and Pan Masala (2106 90 20).
    - **Traditional Snacks:** Items like Namkeens, Bhujia, and Mithai (sweetmeats).
    - **Dietary Supplements:** Food supplements and diabetic foods.
    - **Culinary Aids:** Food flavoring materials, sugar syrups with added flavors, and custard powder.

7.5 The said order has relied on the fact that the said products contained a percentage of collagen which makes it edible for human consumption and therefore is rightly classifiable under the said heading, albeit the final product viz., the Tendofit being a nutraceutical would be a food preparation and more liable to be classified under this heading. However, we observe that the Ld Counsel has submitted that Tendofit, at the time of import,is a raw ingredient and not edible as imported, as the same is imported in bulk i.e., 25 kgs drum. It has been contended that as per the FSSAI approval, Tendofit is required to be formulated into prescribed dosage strength of 260-520 mg/day before they can be considered as edible. The analysis of the raw material by Prof Bibhu Prasad Panda, Jamia Hamdard who has certified the imported ingredient as follows:-

"-it is hygroscopic in nature and, if handled in an uncontrolled environment, poses a risk pathogenic contamination and alterations in physiochemical characteristics.

-It is unpalatable due to its salty and chalky flavour and disagreeable odour."

7.6. From the above, it is very clear that the raw material, Tendofit, which at the time of import is not edible, would not be classifiable under the said residuary heading 21069099. This is further strengthened by the examples of 'Namkeen, Mithai, Misthans' etc given for the said heading. It is also important to note that there is no chemical examination report which supports the Department's contention that the imported goods are edible at the time of import.

8. We now move to the classification of the said product as per the GIR. In this context, we find that the said product comprises 86.4% of Mucopolysaccharides(MPS) derived from Bovine cartilage which substantially consists of Chondroitin Sulphate and 15.4% of Collagen. Thus we would need to sequentially move through the GIRs to establish the correct classification of the said item. GIR 1 and GIR 2 would not be applicable in the instant case. We find that the GIR 3 pertains to classification in case of multiple headings, which prefers (a) most specific description, (b) essential character for mixtures, or (c) last-in-number for equal specificity. Tendofit, being a composite product would then be classifiable as per 3(b) on the basis of the material which gives its essential character. In the instant case, it is the MPS/Chondroitin Sulphate which gives Tendofit its essential character. It is noted that the appellant has chosen to classify their product as 3913 as polysaccharide derivatives. In order to appreciate their contention, we reproduce the competing heading and the HSN notes hereinafter:

<u>Chapter Heading 39139092</u>

3913 Natural polymers (for example, alginic acid) and modified natural polymers (for example, hardened proteins, chemical derivatives of natural rubber), not elsewhere specified or included, in primary forms

3913 10 - Alginic acid, its salts and esters:
3913 10 10 --- Sodium alginate
3913 10 90 --- Other
3913 90 --- Other
--- Chemical derivatives of natural rubber
3913 9011 ---- Chlorinated rubber
3913 9019 --- Other
3913 90 20 --- Hardened proteins (such as hardened casein, gelatine)
3913 0 -- Dextran
3913 90 90 --- Other

The HSN explanatory notes is also reproduced hereinafter:-

39.13 - Natural polymers (for example, alginic acid) and modified natural polymers (for example, hardened proteins, chemical derivatives of natural rubber), not elsewhere specified or included, in primary forms.

3913.10 - Alginic acid, its salts and esters

3913.90 - Other

The following are some of the principal natural or modified natural polymers of this heading.

(1) **Alginic acid, its salts and esters**

Alginic acid, a poly(uronic acid), is extracted from brown algae *(Phaeophyta)* by maceration in an alkaline solution. It may be produced by precipitating the extract with a mineral acid or by treating the extract to obtain an impure calcium alginate which on treatment with a mineral acid is transformed into alginic acid of high purity……..

Among the esters is propylene glycol alginate which is used in foodstuffs, etc.

The heading excludes :

(a) Unmodified natural resins (heading 13.01).

(b) Etherified or esterified endosperm flour of locust beans or guar seeds (heading 13.02).

(c) Linoxyn (heading 15.18).

(d) Heparin (heading 30.01).

(e) Starch ethers and esters (heading 35.05).

(f) Rosin, resin acids and their derivatives (including ester gums and am gums) (heading 38.06).

9. The appellant has chosen to classify the product as natural polymer and has relied on the US Custom Ruling in this context. In order to appreciate the said contention, we may refer to the said US Customs Ruling in this regard, which is reproduced hereinafter:-

> "Re: Chondroitin Sulfate imported in bulk form:
>
> This is in reference to your letter of May 19, 1999, to the Director, Customs National Commodity Specialist Division, concerning the classification, under the Harmonized Tariff Schedule of the United State (HTSUS), of "chondroitin sulfate" (CS), imported in bulk form. In preparing our response, we have reviewed the decisions in NY A82011, issued by the Customs National Commodity Specialist Division on June 20, 1996, NY 815350, issued on October 19, 1996, and HQ 960053, which was issued by Customs Headquarters on October 21, 1997, and have determined that the classification set forth in those rulings for CS imported in bulk is in error.
>
> xxxxxxxx xxxxxxxxx xxxxxxxx xxxxxxxxxxx
>
> FACTS:
> The substance CS imported in bulk form is a white powder "glycosaminoglycan that predominates in the ground substance of cartilage, bone, and blood vessels but also occurs in other connective tissues. It consists of repeating disaccharide units in specific linkage, each composed of a glucoronic acid residue linked to a sulfated N-acetylgalactosamine residue." Dorland's Medical Dictionary, 321 (28th Edition,W. B. Saunders Company, 1994). Furthermore, the Merck Index, §2270, 371 (12th Edition, Merck & Co., Inc., 1996) adds that "[t]hese biological polymers act as the flexible connecting matrix between the tough protein filaments in cartilage to form a polymeric system similar to reinforced rubber." Id. The CAS registry number assigned to CS is 12678-07-8 and it is not listed in the Chemical or Pharmaceutical Appendixes to the HTSUS.
>
> We note that there are varying grades and types of CS. All are produced using three basic steps:

extraction from animal cartilage, drying, and milling into a fine powder.

ISSUE:

Whether CS imported in bulk form is classified in heading 3001, HTSUS, as animal substances for therapeutic or prophylactic use, or heading 3913, HTSUS, as a naturally occurring polysaccharide.

LAW AND ANALYSIS:

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

.....

The following headings are relevant to the classification of this product:

3001 Glands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included:

* * * * * * * * * * * *

3913 Natural polymers (for example, alginic acid) and modified natural polymers (for example, hardened proteins, chemical derivatives of natural rubber), not elsewhere specified or included, in primary forms:

Other

Polysaccharides and their derivatives

xxxxxxx xxxxxxx xxxxxx xxxxxx

..... We note that the FDA's use of a term does not control Customs classification

decisions. However, Customs is not classifying the product according to the definition of the terms "therapeutic" and "prophylactic" in FDA statutes. Rather, the FDA regulates the use of this product in the U.S. Where Customs must determine whether a "use" provision applies to a substance, the controlling regulatory scheme is indeed relevant. More importantly, the Courts have delineated some of the factors to consider in determining whether a product falls within the class or kind of a particular "use" provision. These are: (1) the general physical characteristics, (2) the expectation of the ultimate purchaser, (3) the channels of trade, (4) the environment of sale (accompanying accessories, manner of advertisement and display), (5) the use in the same manner as merchandise which defines the class, (6) the economic practicality of so using the import, and (7) the recognition in the trade of this use..... Applying these factors, we find that they weigh overwhelmingly in favor of finding that CS is not prepared principally for use in the U.S. for therapy or prophylaxis. Our analysis follows thus: The general physical characteristics of CS is that of a mucopolysaccharide, like rubber. The expectation of the ultimate purchaser is that CS increases the general health of their bones and joints and may treat joint ailments through the same mechanism that it improves joint function generally. The channels of trade and environment of sale is through health food stores and pharmacies shelved with the dietary supplements. One can also purchase the product electronically on the internet through web sites promoting natural products for maintaining general good health. The product is advertised as a substance which maintains healthy joints. The product is used as a dietary supplement. The substance is not prepared for a sole use. The basic preparatory steps in the manufacture of the CS, extraction from animal cartilage, drying, and milling into a fine powder, occur whether or not the CS is being used as a dietary supplement. The very same CS which is sold as a dietary supplement may currently be recommended for use to "treat" osteoarthritis. We note that some medical doctors have recommended CS for use in therapy and prophylaxis of joint maladies. Therapeutic is defined as "having healing or curative powers..... It may well be that CS has therapeutic or prophylactic use. However, to the extent health care professionals suggest using CS, these recommendations are no different from recommending a healthy diet to "treat" coronary

> artery disease, eating a hard candy to "treat" low blood sugar associated with the administration of insulin, or taking vitamin C to "prevent" a cold. Healthy foods, hard candy and vitamin C are not classified under subheading 3001, HTSUS, by virtue of these doctor recommendations. The fact remains that in this country, CS is marketed, used and regulated as a dietary supplement to maintain strong joints not unlike the purposes provided by any nutrient..... The economic practicality of using the import as therapy or prophylaxis is not feasible as regulations preclude its being marketed as such. Our research indicates that there is no consensus that CS has prophylactic or therapeutic use, regardless of the grade of the product, beyond its ability to maintain healthy joints. Indeed, the NIH states that "results of previous studies in the medical literature have yielded conflicting results on the effectiveness of glucosamine and CS as effective treatments for osteoarthritis."
>
> HOLDING:
>
> CS is classified in subheading 3913.90.20, HTSUS, the provision for "[N]atural polymers . . .: [O]ther: [P]olysaccharides and their derivatives....."

9.1 The US Customs Ruling is for the Chondroitin Sulfate which is the essential ingredient of Tendofit. The impugned order has not accepted the ruling stating that the same was for bulk import. In this context, we note that the Ld Counsel has submitted that Tendofit is imported in bulk form i.e., 25 kgs drums, a fact which has clearly been ignored by the Commissioner. The Commissioner has held that the "essential character of the impugned goods is of an edible preparation which shall be sole criteria to classify it under a specific entry under the Tariff…….", whereas it has clearly stated that at the time of import, the goods are not edible. The Department has led no evidence to establish that Tendofit, at the time of import, was in an

edible form. It is settled law that the goods have to be classified at the import stage and not as per the intended use. In order to determine the classification of the goods, we need to go by the settled principal of law that if the department intends to classify the goods under a particular heading, or subheading, different from the one claimed by the importer, the department is required to induce proper evidence and thereby discharge the burden of proof. We find that other than mere reiteration of their opinion, the Department has failed to discharge this burden. In this context, we rely on the decision of the Apex court in the case of **HPL Chemicals** versus **Commissioner of Customs, Excise, Chandigarh**[10] which relied on the earlier decision of the Apex court in **Union of India and Others** versus **Garware Nylon Limited and others.**[11]

10. The impugned order has rejected the appellant's submission that under the EU Customs Tariff, Chondroitin Sulphate is classified under Chapter 39139000, on the grounds that the import was not of Chondroitin Sulphate. We are unable to appreciate this finding of the Commissioner. It is an admitted fact that Tendofit is a Bovine Cartilage extract which contains 86% of Chondroitin Sulphate. Therefore, to merely reject the submission on the ground that the imported goods is not the same cannot be accepted. In this context, we find that the Tribunal in **S. R. Files and Tissues Limited** versus **Commissioner of Central Excise**[12] held that the decision of the Supreme Court of South Africa based upon the opinion of the committee on Harmonised system, can be made applicable to the Indian context. The said

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10 (2006(197)ELT 324),
11 (1996(10)SCC 413)
12 2013 (565) ELT 294

decision of the Tribunal in arriving at the classification has been affirmed by the Apex Court in **Commissioner of Central Excise** versus **Hindalco industries Limited.**[13] Hence, the US Customs Ruling and the EU Tariff have a persuasive value that cannot be ignored or wished away by the Department.

11. Further, we find that the Supreme Court in its decision in the case of **Welkins (supra)** has relied on its judgment in Dunlop India and held as follows:-

> "73. While the judgment of this Court in Dunlop India (supra) was delivered in the pre-HSN era, it laid down two principles governing classification under the customs law which remain relevant even in the HSN era. They are: (i) evaluation and classification of goods based on their condition at the time of import, generally referred to as the 'as imported' principle; and (ii) consideration of 'use' only when reference to use or adaptation is provided in the tariff heading……"

12. In the instant case, it is an admitted fact that the Tendofit imported is converted to capsules for use as nutraceutical, for which the appellant has the FSSAI license as well. However, what was imported is not the final product, ready to use as nutraceuticals but merely its raw material. Hence, the use of the imported goods cannot become the principle for its classification. In view of the above discussions, we hold that Tendofit is rightly classified under CTH 3913 by the appellant.

13. We now address the submissions with regard to **Mobilee:**-

It is on record that Mobilee is a natural extract derived from rooster comb comprising of sodium hyaluronate, polysaccharide and collagen. The Chemical composition of the said product is as follows:-

Substance	ASSAY

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Hyaluronic acid and other components, including and collagen	(60-75&)
Polysaccharides	10%
Collagen	5%

14. We find that the findings in respect of Mobilee in the impugned order is as follows:-

> "8.5.2 Mobilee is a natural extract derived from rooster comb and comprising of sodium hyluronate, polysaccharide and collagen.
>
> xxxxx xxxxxxx xxxxxx xxxxxxx
>
> 8.5.3 I find that the item 'Mobilee' is an extract consisting of Sodium Hyaluronate, Polysaccharides and collagen. The noticee has submitted that the impugned goods predominantly contain 'Sodium Hyaluronate' and as EU tariff structure which is upto 10 digit, it is classified under CTH 3913 9000 85 of the Tariff. I find that the notice is silent about the other two constituents of the composition i.e. Polysaccharides & Collagen, which are also important to decide the characteristics of the item. The issue before me is not about classification of 'Sodium Hyaluronate' but of a product comprising of 'Sodium Hyaluronate', polysaccharides and collagen. The EU classification was about 'Sodium Hyaluronate' only and thus not relevant to the case in hand. The item imported by the notice is an edible preparation duly supported as a food under FSSAI certificate and not a plastics as contended by the notice for classifying it under Chapter 39 of the Tariff.
>
> 8.5.4…….I am of the view that Mobilee is an edible preparation of miscellaneous nature and thus as per General Rules for Interpretation of the Customs Tariff, I hold the classification under CTH 21069090 of the Tariff as proposed in the notice and reject CTH 39139090 as adopted by the notice."

15. Learned counsel has submitted that Mobilee was imported in bulk packaging i.e., 5 kg drums which was required to be formulated into prescribed dosage strength 80 mg/day as per the FSSAI approval. He further submitted that the imported goods were not edible prior to such process of formulation. Learned authorized representative has submitted that the said goods were nutraceuticals to support joint health. Its classification as natural polymer is not justified as Collagen

was also present, in addition to Sodium Hyaluronate. The learned authorized representative has relied on the decision of this Tribunal in the case of **Bright Performance Nutrition** versus **Commissioner of Customs, Mundra**[14] wherein nutraceuticals/food supplement has been classified under CTH 2106. The dispute in the instant case relates to the raw material Mobilee imported in bulk for formulation of Mobilee the supplement. Therefore, this decision is not applicable in the instant case.

16. We note that Sodium hyaluronate's customs classification typically falls under **Harmonized Tariff Schedule (HTS) code 3913.90**, for natural polymers and their derivatives, specifically under subheadings like **3913.90.20** (polysaccharides and derivatives) or **3913.90.90** (other), depending on its form (bulk powder vs. finished product). The finished medicaments or cosmetic preparations can shift its classification. In the context of its classification, we once again take note of the US Ruling CLA-2 OT:RR:CTF:TCM **H017425** ARM regarding the classification of Sodium Hyaluronate derived from Rooster Comb in heading 3001, HTSUS, or as "natural polymers" of heading 3913, HTSUS. The relevant paras are extracted hereinafter:

> "CBP has classified bulk sodium hyaluronic acid in subheading 3913.90.20, HTSUS, the provision for "Natural polymers (for example, alginic acid) and modified natural polymers (for example, hardened proteins, chemical derivatives of natural rubber), not elsewhere specified or included, in primary forms: Other: Polysaccharides and their derivatives," in numerous rulings (see New York Ruling Letters (NY) 870775, dated February 19, 1992, NY 881465, dated January 20, 1993, NY 890398, dated October 6, 1993, NY A88459, dated October 28, 1996, NY

14 [(2024) 18 Centax 1 (Tri.Ahmd)]

> D87202, dated February 4, 1999, and NY K87872, dated July 22, 2004).
> HOLDING:
> By application of GRI 1, bulk sodium hyaluronate is classified in heading 3913, HTSUS, specifically in subheading 3913.90.20, HTSUS, which provides for: "Natural polymers (for example, alginic acid) and modified natural polymers (for example, hardened proteins, chemical derivatives of natural rubber), not elsewhere specified or included, in primary forms: Other: Polysaccharides and their derivatives……."

17. In addition, we find that the EU Customs Tariff classified Sodkum Hyaluronate under CTH 3913 as natural polymer. As noted above, HSN adopted by the WCO forms the basis on which commodities/goods are internationally classified by all Member countries upto the six digit level. Consequently, the persuasive value of such rullings cannot be ignored.

18. Further, we find that the classification adopted by the appellant is supported by the opinion of the Professor & head of Material Science &Engineering, IIT Delhi Dr. Joseman Jacob, wherein he has categorically opined as follows:-

> **"Product name: Tendofit (Mucopolysaccharide)**
>
> Mucopolysaccharide: not less than 86.4%
> Collagen content: not less than 15.4%
>
> **Product name: Mobilee**
>
> Sodium hyaluronate content: 60-75%
> Polysaccharide: not less than 10%
> Collagen content: not less than 5%
>
> xxxxxxx xxxxxxxx xxxxxxxxxx
>
> The TGA and ITG thermograms in Figure A2 and Figure A3 represent the thermal degradation behaviour of mucopolysaccharide (Tendofit) and Mobilee, respectively. The mucopolysaccharide (Tendofit) TGA thermogram depicts a three-stage degradation of the polymer at 106, 257 and 476 °C which is in close agreement with literature reported data of collagen. For Mobilee, the degradation stages appear at 106, 279 and 650 °C. The DSC thermogram of mucopolysaccharide (Tendofit) and Mobilee is represented in Figure A4 and Figure AS respectively.

> From DSC analysis, a melting peak at 241 °C (we could not find the literature value for this for comparison, although collagen value is known, its content is low to be distinctly seen) was observed for mucopolysaccharide (Tendofit) and at 237 °C (265 °C for pure hyaluronic acid, this sample has only 65% content, so probably the value is fine) for Mobilee.
>
> xxxxxxx xxxxxxxx xxxxxxx
>
> Based on the data it can be concluded that both products - Mucoploysaccharide (Tendofit) and Mobilee are essentially a 'polysaccharide' and if both the products derived or extracted from natural source then both can be considered as 'natural polysaccharide'."

19. In this context, it is settled law that expert opinion such as above are assistive, but not binding, requiring scrutiny for bias, completeness and scientific criteria. In classification matters, the revenue department bears the burden of proof via robust evidence. The expert opinion in the instant case is none other than the Head of the Department in IIT, Delhi which is a pre eminent public institute of technology and has been created to be a Centre of Excellence for training, research and development in Science, Engineering and Technology. Per contra, we do not find any evidence led by the Revenue department to disprove the said opinion. No chemical test report or expert opinion has been placed before us in support of their contention.

20. We find that the product Mobilee being a mixture, the classification would have to be as per GIR 3 (b). Such a commodity/mixture would have to be classified by the component which gives it its essential character. In the instant case, the essential character of Mobilee is given by Sodium Hyaluronate which is liable to be classified under CTH 3913. The learned authorized representative has submitted that as collagen is also present along with sodium hyaluronate, hence the resultant product viz., Mobilee does not remain

a natural polymer, and changes its nature to a food preparation. We are unable to appreciate this contention. It has been submitted before us that Mobilee, when imported is not in edible form and is in bulk packaging of 5 kgs. It needs to be formulated to the prescribed dosage strength of 80mg/day before the same becomes edible. Consequently, applying the principle of customs classification which is at the time of import, the same cannot be termed as preparation of food falling under CTH 2106. Consequently, we uphold the appellant's contention in classifying Mobilee in CTH 3913.

21. We now proceed to deal with the classification of the product – GG Orosoluble.

21.1 **GG Orosoluble –** The appellant has claimed the classification of the said product under CTH 3002 whereas the Department has classified the same under CTH 2106. In order to appreciate the submissions, we reproduce the findings in respect of this commodity in the said impugned order, which are reproduced hereinafter:-

> "8.6.2 'GG Orosoluble' has been submitted by the notice as per which it contains a specific grade of bacteria based Probiotic culture, viz., Lactobacillus Rhamnosus GG and certain other ingredients such as Xylitol, Sorbitol, Natural Vanilla Flavour & Maltodextrin.
>
> xxxxx xxxxxx xxxxxxx xxxxxx
>
> said item is in not a 'probiotic' but a form of a preparation/ products which contains other important ingredients making it fit for human consumption along with the specific grade of bacteria based Probiotic culture, hence the appropriate classification as a whole and not splitting it into its constituents is required to be look into. It is a settled law that the item has to be classified in the manner it has been imported and not its separate constituents. From the ingredients of the impugned goods, I am of the view that itlosses its character as a probiotic and becomes a food supplement, ready to use for human consumption for general health benefits. Here it is very relevant to state that the impugned goods are in fully manufactured state, ready for human consumption when packed for retail sale.

> Chapter 30 covers pharmaceutical products whereas on the impugned product, it has clearly been mentioned that it is 'Not for medicinal use'. The importer is not in possession of any Drug License which is a mandatory requirement for import, manufacturer and sale of pharmaceutical preparations. Further from the above composition that GG Orosoluble contains bacteria based Pro-biotic Micro-organism, but also Sorbitol, Xylitol & Maltodextrin for stabilizing and diluting the said item and vanilla flavour, it is in the nature of a preparation for human intake and is akin as Health & Dietary Supplement. It is evident that is in the nature of an edible preparation of miscellaneous kind for human consumption."

21.2 In this context, learned counsel has submitted that that GG Orosoluble, was an ingredient that was a pro-biotic known as Lactobacillus Rhamnosus GG, which was essentially cultures of bacteria i.e. live microorganisms, that helps promote healthy balance of gut bacteria. This has been certified by Dr. Biswaranjan Pradhan, Indian Institute of Technology, Bhubaneswar. Xylitol and sorbitol have been used as excipient carrier to provide better stability to GG Orosoluble, so that it can withstand conditions during storage, transportation as well as during industrial processes. Learned counsel further submitted that their contract manufacturer in India have obtained relevant licences under the State FDA under the appropriate product category of probiotics. He drew attention to the entries appearing under Sr. No. 22 of such license which specifically mentions the subject goods i.e. Lactobacillus rhammosus as probiotics. It has been contended that the said product was subjected to manufacturing process after its importation, which results in the edible preparation GG Orosoluble. Consequently, the retail packaging of the product of the final product bear the declaration of its edible nature. Learned authorized representative has submitted that the imported product

was a final product which has already undergone the process to be marketed as a dietary supplement.

21.3 As stated supra, goods have to be classified based on their state at the time of the import. In the instant case, we note that Dr. Biswaranjan Pradhan, Indian Institute of Technology, Bhubaneswar, has clearly opined that the imported powder represents a probiotic powder which is used for suitable formulation production as per required dosage. The addition of Xylitol and sorbitol is for better stability during storage, transportation as well during the industrial processes. It has been categorically stated that the goods are raw material grade, which has to undergo processes for making it edible. The use of the excipient carriers is not used as a flavouring agent or sweetener for food preparation. We find that the Department has not led any evidence to controvert these submissions.

24. It is settled law that the Department has to discharge the burden of proving the classification alleged by them. In the instant case, the appellant has submitted the expert opinion of the Professor of a reputed institute to substantiate their claim. We observe that the Supreme Court in its judgment in **Hindustan Ferodo Ltd** versus **Collector of Central Excise, Bombay** [15] held that it was for the Revenue to lead and evidence in and demonstrate that the classification is incorrect. The relevant para is reproduced hereinafter:

> *"4.* It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.*"*

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15 [1997 (89) ELT 16(SC)]

25. Further, we draw from CESTAT's decision in **Denisco (India) Private Limited** versus **Commissioner of Customs, Air Cargo Complex Andheri**[16]**.** The relevant paras are reproduced hereinafter:-

> "9. Learned Counsel has placed before us rulings of foreign customs administrations as has Learned Authorized Representative. We take notice that the impugned orders are about the nature of the impugned goods in the context of exclusions in chapter 30 of First Schedule to Customs Tariff Act, 1975 and inclusions in chapter 21 of First Schedule to Customs Tariff Act, 1975 The rulings relied upon by both sides had arisen from examination of the relevant product in the framework of the enumerations at the domestic level in the respective tariffs and that of the European Union (EU) pertains to application of non-tariff barriers imposed by a constituent State. At this stage, we may also take notice that, notwithstanding the several submissions of Learned Authorized Representative on the proper classification of 'probiotics' -whether as food supplement or ingredient for manufacture of food supplement, the intent of law insofar as classification of probiotic within heading 3002 of First Schedule to Customs Tariff Act, 1975 is beyond question as the notification cited by the appellant unambiguously deem it to be so. No amount of argument or depth of research can move probiotics or for that matter, 'cultures of micro-organisms (excluding yeasty to chapter 21 as proposed by the show cause notices.
>
> 10. It, therefore, only remains to be seen if any finding of the adjudicating authority permits such re classification within the restraining framework supra and in conformity with the rules of engagement for alteration of classification as decided by the Hon'ble Supreme Court in re HPL Chemicals Ltd. The impugned orders have held, and ignoring the lack of any allegation on the description of imported goods as detailed in the bills of entry, that the goods are ingredients intended for use in manufacture of food supplements and such goods find acceptability within chapter 30 only to the extent that these are intravenously administered. Indeed, on the admission on behalf of the appellant that the cultures are to be processed further before use by consumers, intravenous administration is not a claim at all. The adjudicating authority, and Learned Authorized Representative, rely upon note 1(a) in chapter 30 of First Schedule to Customs Tariff Act, 1975 based upon a statement of a technically qualified representative of the importer before the investigators and, having excluded the "food additive' thereby, proceeds to rely upon the General Rules for the Interpretation of the Schedule in Customs Tariff Act, 1975 for fitment in the proposed classification
>
> 11. All of this commences with the supposition that the impugned goods are 'food preparations for which reliance has been placed on the elements elaborated in the

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> description corresponding to subheading 3002 06 in Explanatory Notes to Harmonized System of Nomenclature (HSN) and the common ground of administration other than intravenously. Thereafter, conformity with that pertaining to heading 2106 in Explanatory Notes to Harmonized System of Nomenclature (HSN) was rendered. However, this approach may be validated only upon exclusion of the impugned goods from chapter 30 of First Schedule to Customs Tanff Act, 1975 and is tantamount to comparison of two rival headings for the more appropriate fitment which is permissible only after fulfilment of fitment of the description within the heading sought to be imposed by customs authorities, viz, heading 2106 of First Schedule to Customs Tariff Act, 1975 sans reference to notes in the chapter containing the declared classification. This is evident from
>
> *1. The titles of Sections Chapters and sub-Chapters are provided for ease of reference only, for legal purposes, classification shall be determined according to terms of the headings and any relative Section or Chapter Notes.....*
>
> in the General Rules for the Interpretation of this schedule in Customs Tariff Act, 1975 and absence thereof is insufficient discharge of obligation laid down in re HPL, Chemicals Ltd."
>
> **(emphasis supplied)**

26. In the instant case, apart from the expert opinion of Dr Pradhan, there is no contrary chemical examination report which would establish the Department's contentions. In view of the same, we are of the opinion that the classification adopted by the appellant for GG Orosoluble is correct.

27. In the light of the above discussions, we set-aside the impugned order. Consequently, the appeal is allowed.

(Order pronounced in the open Court on 29.01.2026)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.