

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 41809 of 2013

(Arising out of Order-in-Appeal C.Cus. No. 854/2013 dated 25.06.2013 passed by the Commissioner of Customs (Appeals), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. Symrise Private Limited

: Appellant

Semmanchery,
140, Old Mahabalipuram Road,
Chennai – 600 119

VERSUS

The Commissioner of Customs

: Respondent

Seaport-Import,
Custom House, No. 60, Rajaji Salai,
Chennai – 600 001

APPEARANCE:

Shri Hari Radhakrishnan, Advocate for the Appellant

Shri S. Balakumar, Assistant Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40499 / 2023

DATE OF HEARING: 02.06.2023

DATE OF DECISION: 28.06.2023

Order : [Per Bench]

This appeal is filed by the assessee against the order in Order-in-Appeal C.Cus. No. 854/2013 dated 25.06.2013 passed by the Commissioner of Customs (Appeals), Chennai, whereby the Commissioner (Appeals) has rejected the appeal filed by the assessee.

2.1 Brief facts of the case, as could be gathered from the impugned order, which are undisputed, are that the appellant had imported 'tomato dry flavour' under the cover of Bills-of-Entry by classifying the same under CTH 3302 1010 and thereby sought to avail the benefit of exemption of concessional rate of Basic Customs Duty (BCD) of 10% under Customs Notification No. 21/2002, Sl.No.119.

2.2 It appears that the IAD-CRA raised an objection with regard to the classification, but however, it appears that the appellant protested the same by filing its objections.

2.3 The adjudicating authority however, vide Order in Original No. 17711/2011 dated 17.11.2011 appears to have finalized the adjudication by classifying the imported 'tomato dry flavour' under Tariff Item 2106 9060 and thereby confirmed the demand issued to the importer under Section 28 of the Customs Act, 1962. Consequential differential duty with interest, as applicable under Section 28AA, was also demanded by the adjudicating authority.

3.1 It appears from the impugned Order-in-Appeal C.Cus. No. 854/2013 dated 25.06.2013 that the appellant had seriously agitated the re-classification and for reducing the demand of differential duty and, *inter alia*, pleaded that the classification proposed by the Revenue and confirmed thereafter covered only the food preparations which are not elsewhere specified or included and it is also a residuary heading with no specific heading as such. It was also pleaded by them that the HSN note under heading 2106 clearly specified the 'preparations for use directly or after processing, such as cooking, dissolving, or boiling in water, milk, etc., for human consumption'. They had further pleaded that the impugned goods in question were not wholly or partly preparation of food stuff and contained only synthetic and various chemicals which are specifically mentioned as such in CTH 3302. They appear to have relied upon an order of Mumbai Bench of the Tribunal in the case

of *M/s. Britco Foods Company Ltd. v. Commissioner of Central Excise, Pune [2001 (127) E.L.T. 73 (Tri. - Mumbai)]* and have also contended that the impugned goods were preparation of odoriferous substances like paprika extract, xanthan, carob powder, citric acid, tomato flavour (mixture of aroma chemicals), garlic oil, tocopherol, caprylic acid, galibamim oil, Ald C6, maltol, methyl heptonine, methyl salicylate, triacetin, vanadin salt, etc.

3.2 After hearing the appellant, the Commissioner (Appeals) also having dismissed their appeal, the present appeal has been filed before this forum.

4. Shri Hari Radhakrishnan, learned Advocate, appeared for the appellant and Shri S. Balakumar, learned Assistant Commissioner, argued for the Revenue.

5.1 Shri Hari Radhakrishnan, Ld. Advocate, submitted at the outset that the heading 2106 deals with food preparation not elsewhere specified or included, whereas the subject goods are neither food nor a food preparation, and is specifically covered under the heading 3302 being a mixture of odoriferous substances used as raw material in the food industry.

5.2 It is his case that the tomato dry powder is not a food stuff, does not belong to the genre of the food stuff mentioned and the same cannot be consumed as such or after processing since the tomato dry powder is the result of a chemical process.

5.2 Even though the said product contains natural substance, according to the learned Advocate, the same is classifiable only under CTH 3302; CTH 3301 covers the substances obtained from natural substances like citrus fruit, non-citrus fruit, spices, garlic, etc., and hence, CTH 3301 covered both natural and synthetic aromatics; therefore, the heading 3302 covers odoriferous mixture of natural and/or synthetic aromatics.

5.3.1 He would also plead that the product in question is not food flavouring material, but a food flavouring essence; that food flavouring materials could be directly used in households as against food flavouring essences which are used only for industrial purposes and it is because of this distinction that the goods/substances in question are classifiable only under CTH 3302.

5.3.2 It is in this connection, according to the learned Advocate, the order of the Mumbai Bench of the Tribunal in the case of *M/s. Britco Foods Company Ltd. (supra)* is relevant.

5.4 It was further submitted that it was not necessary that it should be made of essential oil, resinoid or oleoresin alone to merit classification under CTH 3302 and that the product in question contains garlic oil, which is an oleoresin; the synthesized tomato aroma forms the basis of the mixture, 'tomato dry flavour' and therefore, the product, namely, tomato dry flavour conforms to the requirements of odoriferous substance mentioned in HSN Note 2 in Chapter 33 and accordingly, merits classification only under CTH 3302.

6. *Per contra*, Shri S. Balakumar, learned Authorized Representative/Assistant Commissioner, relied upon the findings of the Commissioner (Appeals). He invited our attention to the findings of the adjudicating authority and also drew our attention to the reply filed by the appellant wherein they have specifically admitted that the products in question are flavour blends supplied to them for various applications like flavours for savoury, biscuits, etc., and those compounds formed one of the raw materials in the final flavour supplied by them to a customer.

7. After hearing both sides, we find that the only issue we have been called upon to decide is: whether the 'tomato dry flavour' is rightly classifiable under CTH 3302 as claimed by the appellant or classifiable under CTH 2106 as confirmed in the impugned order?

8.1 We find that the description of the item imported is "Tomato Flavour (For Industrial Use only - Not For Direct Consumption)", as seen from the invoice issued by the foreign supplier. The appellant has contended that the product is meant to be used in savoury and bakery flavour blending in order to provide tomato profile to the final flavour.

8.2 During the hearing, upon enquiry, the Ld. Advocate representing the appellant had submitted that the product is a formulation comprising various odoriferous ingredients so as to impart tomato taste and also stated that the imported product is said to be in concentrated form and suitable for use only in flavour blending (industrial use) i.e., wherever tomato profile is required in the product. The key ingredients used in the formulation were given, as detailed below: -

"Product: 854932 TOMATO DRY FLAVOR

...

Tomato Powder
Formic Acid
Salt
Citric Acid
Carob Seed Gum
Xanthan Gum
1,2 - Propylene Glycol
Silicon Dioxide
Paprika Extract
Beetroot Powder

Other trace aroma chemicals for taste enhancement:

Garlic Oil
Tocopherol
Caprylic Acid
Galbanum Oil
Paprika
Ald C6
Maltol
Linalool
Methyl Heptenone
Methyl Salicylate
Triacetin
Vanillin

..."

8.3 It is also submitted that the product is not an alternative to natural tomato powder which is normally a spray dried form of tomato pulp.

9. The imported product is said to be a mixture of odoriferous substances. The product imported, as submitted by the appellant, is not a naturally extracted product from tomato, but an in-house blend made by M/s. Symrise, Singapore using various aroma chemicals, essential oils/extracts, etc., to be used in flavours which need tomato taste in them. According to the Ld. Advocate, its description is an industrial use product, but not a food preparation, thus justifying its classification under Chapter Sub-Heading 3302 10.

10. Relying on the Explanatory Notes to HSN, it is the contention of the appellant that Chapter Heading 3302 covers mixtures of one or more odoriferous substances and mixtures of synthetic aromatics among others; the subject imported goods are a mixture of one or more odoriferous substances containing essential oils as well as synthetic aromatics and are meant to be used as raw materials in the perfumery, food or drink industries.

11. Now, let us examine the Chapter Headings 2106 and 3302, which are extracted below: -

2106	FOOD PREPARATIONS ELSEWHERE INCLUDED	PREPARATIONS SPECIFIED	NOT OR			
2106 10 00	-	Protein concentrates and textures	kg.	30%	-	
		protein substances				
2106 90	-	<i>Other :</i>				
	---	<i>Soft drink concentrates :</i>				
2106 90 11	----	Sharbat	kg.	150%	-	
2106 90 19	----	Other	kg.	150%	-	
2106 90 20	---	Pan masala	kg.	150%	-	
2106 90 30	---	Betel nut product known as "Supari"	kg.	150%	-	
2106 90 40	---	Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup	kg.	150%	-	
2106 90 50	---	Compound preparations for making non-alcoholic beverages	kg.	150%	-	

2106 90 60	---	Food flavouring material	kg.	150%	-
2106 90 70	---	Churna for pan	kg.	150%	-
2106 90 80	---	Custard powder	kg.	150%	-
	---	<i>Other :</i>			
2106 90 91	----	Diabetic foods	kg.	150%	-
2106 90 92	----	Sterilized or pasteurized millstone	kg.	150%	-
2106 90 99	----	Other	kg.	150%	-
...				

3302		MIXTURES OF ODORIFEROUS SUBSTANCES AND MIXTURES (INCLUDING ALCOHOLIC SOLUTIONS) WITH A BASIS OF ONE OR MORE OF THESE SUBSTANCES, OF A KIND USED AS RAW MATERIALS IN INDUSTRY; OTHER PREPARATIONS BASED ON ODORIFEROUS SUBSTANCES, OF A KIND USED FOR THE MANUFACTURE OF BEVERAGES			
3302 10	-	<i>Of a kind used in the food or drink industries:</i>			
3302 10 10	---	Synthetic flavouring essences	kg.	100%	-
3302 10 90	---	Other	kg.	100%	-
3302 90	-	<i>Other :</i>			
	---	<i>Mixtures of aromatic chemicals and essential oils as perfume base :</i>			
3302 90 11	----	Synthetic perfumery compounds	kg.	10%	-
3302 90 12	----	Synthetic essential oil	kg.	10%	-
3302 90 19	----	Other	kg.	10%	-
3302 90 20	---	Aleuritic acid	kg.	10%	-
3302 90 90	---	Other	kg.	10%	-

12.1 The Supplementary Chapter Note 5 to Chapter 21, Heading 2106 (except tariff items 2106 90 20 and 2106 90 30), *inter alia*, includes:

(a) protein concentrates and textures protein substances;

(b) preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids), for human consumption;

- (c) preparations consisting wholly or partially of foodstuffs, used in the making of beverages or food preparations for human consumption;
- (d) powders for table creams, jellies, ice-creams and similar preparations, whether or not sweetened; flavouring powders for making beverages, whether or not sweetened;
- (e) preparations consisting of tea or coffee or milk powder, sugar and any other added ingredients;
- (f) preparations (for example, tablets) consisting of saccharin and foodstuff, such as lactose, used for sweetening purposes;
- (g) pre-cooked rice, cooked either fully or partially or their dehydrates; and
- (h) preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrups, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juices and concentrated fruit juice with added ingredients.

12.2 As per the HSN Explanatory Note to Chapter Heading 2106: –

“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.

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This heading excludes preparations of a kind used for the manufacture of beverages, based on one or more odoriferous substances (heading 33.02)."

(Emphasis supplied)

13.1 Similarly, The Chapter Note 2 to Chapter 33 states that: -

"The expression "odoriferous substances" in heading 3302 refers only to the substances of heading 3301, to odoriferous constituents isolated from those substances or **to synthetic aromatics.**"

(Emphasis supplied)

13.2 The HSN Explanatory Note to Chapter Heading 3302 reads as follows: -

"33.02 - MIXTURES OF ODORIFEROUS SUBSTANCES AND MIXTURES (INCLUDING ALCOHOLIC SOLUTIONS) WITH A BASIS OF ONE OR MORE OF THESE SUBSTANCES, OF A KIND USED AS RAW MATERIALS IN INDUSTRY; OTHER PREPARATIONS BASED ON ODORIFEROUS SUBSTANCES, OF A KIND USED FOR THE MANUFACTURE OF BEVERAGES.

3302.10 – Of a Kind used in the food or drink industries

3302.90 – Other

This heading covers the following mixtures provided they are of a kind used as raw materials in the perfumery, food or drink industries (e.g., in confectionery, food or drink flavourings) or in other industries (e.g., soap-making) :

- (1) Mixtures of essential oils.
- (2) Mixture of resinoids.
- (3) Mixtures of extracted oleoresins.
- (4) Mixtures of synthetic aromatics.
- (5) Mixtures consisting of two or more odoriferous substances (essential oils, resinoids, extracted oleoresins or synthetic aromatics).
- (6) Mixtures of one or more odoriferous substances (essential oils, resinoids, extracted oleoresins or synthetic aromatics) combined with added diluents or carries such as vegetable oil, dextrose or starch.
- (7) Mixtures, whether or not combined with a diluent or carrier or containing alcohol, of products of other Chapters (e.g., spices) with one or more odoriferous substances (essential oils, resinoids, extracted oleoresins or synthetic aromatics), provided these substances form the basis of the mixture.

...”

14.1 A scrutiny of the above Tariff Items and HSN Notes thereon clearly indicates that the imported product is not meant to be directly used for human consumption. It is said to be for industrial use, for making food flavours and to impart a tomato profile. The products that are classifiable under Chapter Heading 2106 mostly consist of food and edible preparations which are meant to be used either directly or after processing such as cooking, dissolving or boiling in milk or water or other liquids, for human consumption. As per the HSN Notes, the said heading excludes mixture of odoriferous substances, which can be either natural or synthetic or mixed or both, which are used as raw materials in the perfumery, food or drink industries.

14.2 The appellant's submission is that the subject goods consists of various odoriferous substances and what is imported i.e., the tomato flavour, is of synthetic origin, which makes it classifiable under CTH 3302 1010. The Ld. adjudicating authority has relied on Chapter Note 2 to Chapter 33 of the Customs Tariff Act, 1975, which states that "odoriferous substances" in Chapter Heading 3302 refers only to substances of Chapter Heading 3301 to odoriferous constituents isolated from those substances or to synthetic aromatics, and also referred to the HSN, which states that the goods which qualify for classification under Chapter Heading 3302 should be mixtures, whether or not combined with a diluent or carrier or containing alcohol, of products of other Chapters (e.g., spices) with one or more odoriferous substances (essential oils, resinoids, extracted oleoresins or synthetic aromatics), provided these substances form the basis of the mixture. Thus, the Ld. adjudicating authority has ruled out the classification of tomato dry flavour basing on the above HSN to CTH 3302, stating that none of the ingredients listed under the HSN form the basis for the imported tomato dry flavour other than natural tomato powder, which does not fall under the list of principle essential oils, resinoids and extracted oleoresins of CTH 3301.

14.3 However, we find that the odoriferous substances can be of synthetic origin, which fact is omitted to be noted by the Ld. adjudicating authority. The appellant has been arguing that the tomato flavour is of synthetic origin though it may contain some natural odoriferous substances and it cannot be directly or indirectly used in food preparations. In this regard, the appellant has also put forth that it is not necessary that it should be made of essential oil, resinoid or oleoresin alone to merit classification under Chapter Heading 3302 and that in any case, the product contains garlic oil, which is an oleoresin.

15.1 A closer study indicates that the item which is imported is of synthetic origin and consists of odoriferous substances, which is an industrial raw material for making food flavours and the same cannot be directly used in any food preparations for human consumption.

15.2 It is also noticed that the Tribunal, Mumbai in the case of *M/s. Britco Foods Company Ltd. v. Commissioner of Central Excise, Pune [2001 (127) E.L.T. 73 (Tri. - Mumbai)]*, relied upon by the appellant, has categorically held that the Chapter Heading 2106 excludes preparations of food or drink industry based on odoriferous substances from that heading and put them under Chapter Heading 3302, and the above judgement has been maintained by the Hon'ble Supreme Court as reported in *2007 (213) E.L.T. 490 (S.C.)*.

15.3 Thus, Chapter Heading 3302 covers both natural and/or synthetic mixtures of odoriferous substances.

16. In view of the above, we hold that the item imported is correctly classifiable under CTH 3302 1010 of the Customs Tariff Act, 1975. So, the impugned order is set aside.

17. The appeal is allowed with consequential relief, as per the law.

(Order pronounced in the open court on **28.06.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd