

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10049 of 2022 - DB

(Arising out of OIO-MUN-CUSTOM-000-COM-08-21-22 dated 02/07/2021 passed by Commissioner of CUSTOMS-MUNDRA)

BRIGHT PERFORMANCE NUTRITION

.....Appellant

Office No 1 2nd Floor Arjas Mall
Plot No 118/118 Sector 8
Gandhidham, Gujarat

VERSUS

COMMISSIONER OF CUSTOMS-MUNDRA

.....Respondent

Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat- 370421

APPEARANCE:

Shri Pramod Kedia, Chartered Accountant for the Appellant
Shri Rajesh Nathan, Assistant Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. 10588/2024

DATE OF HEARING: 15.11.2023
DATE OF DECISION: 15.03.2024

RAMESH NAIR

This appeal is directed against Order-In-Original No. MUN-CUSTOM-000-COM-08-21-22 dated 02/07/2021 passed by Learned Commissioner Customs House, Mundra, Kutch whereby the Learned Commissioner passed the following order:-

(i) I deny listing of the subject goods under Sl. No. 23 and 453 of Schedule- III of the IGST Notification No. 1/2017-Integrated Tax (Rate) dated 28.06.2017.

(ii) I order to list the subject goods under Sl. No. 9 of Schedule-IV of the IGST Notification No. 1/2017-Integrated Tax (Rate) dated 28.06.2017.

(iii) I confirm and order to recover the differential amount of IGST totally amounting to Rs. 1,18,71,347/- (One Crore Eighteen Lakh Seventy One Thousand Three Hundred Forty Seven only) in respect of goods detailed in Annexure-A to the impugned Show Cause Notice, under Section 28(4) of the Customs Act, 1962.

(iv) I order to charge and recover interest from M/s. Bright Commodities, 203, Om Corner, Plot No.- 336, 337 342, Ward 12B, Gandhidham, Gujarat 370201, on the confirmed IGST amount at Sl. No. (iii) above, under Section 28AA of the Customs Act, 1962

(v) I impose penalty of Rs. 1,18,71,347/- (One Crore Eighteen Lakh Seventy One Thousand Three Hundred Forty Seven only) plus amount of applicable interest upon the M/s. Bright Commodities, 203, Om Corner, Plot No. 336, 337 342, Ward 12B, Gandhidham, Gujarat 370201 under Section 114A of the Customs Act, 1962. However, I give an option to them to pay 25% of the amount of total penalty imposed at (v) above, subject to payment of total amount of duty and interest confirmed at (iii) and (iv) above, and the amount of 25% of penalty imposed, within 30 days of receipt of this order, as provided under first proviso to Section 114A of the Customs Act, 1962."

From the above order, the issue for consideration by us arises that whether the appellant's goods i.e. Nutrition/Dietary Supplements classified under Tariff item 21069099 attracts IGST at the rate of 18 % under serial No. 453 and/or 23 of Schedule III of Notification No. 1/2017- Integrated Tax (Rate) dated 28-06-2017 as claimed by the appellant or the said goods is covered under serial No. 9 of Schedule IV of the said notification which provided for IGST at the rate of 28% as claimed by the Revenue.

2. Shri Pramoad Kediya, Learned Chartered Accountant appearing on behalf of the appellant at the outset submits that the entire case of the department is that the goods imported by the appellant, for the purpose of IGST is falling under Schedule IV Serial No. 9. It is his submission that the goods of the same chapter heading are partly covered under serial No. 453 and/or 23 of Schedule III which attracts 18% IGST and partly under serial No. 9 of schedule IV of Notification No. 1/2017- Integrated Tax (Rate) dated 28-06-2007.

2.1 He submits that the goods mentioned in serial No. 9 are not general but some specific items for the reason that the entry appeared therein reads as food preparation not elsewhere specified or included i.e. Protein concentrates and Textured Protein Substances, etc. He submits that only the

goods described in entry No. 9 are covered under Schedule IV of notification and the goods other than those specified therein will not fall under serial No. 9 but the same are appropriately covered under serial No. 453 and/or 23 of Schedule 3 of the notification which attracts 18% IGST. Therefore, the appellant's declaration under serial No. 453 and/or serial No. 23 is correct. Hence the entire case of the department fails on this ground alone. He also reiterated the grounds of the appeal.

3. On the other hand, Shri Rajesh Nathan, Learned Assistant Commissioner (AR) appearing on the behalf of the Revenue reiterates the finding of the impugned order. He submits that the goods of Tariff Item No. 2169099 which are not elsewhere specified or included, are covered under serial No. 9 of schedule IV. Therefore, the correct IGST rate is 28%. Hence, the impugned order is proper which does not required any interference.

4. We have carefully considered the submission made by both the sides and perused the record. We find that the appellant have declared their goods namely Nutrition/ Dietary supplements under Tariff Item No. 21069099 and paid IGST @ 18% under Serial No. 453 or 23 of scheduled III of Notification No. 1/2017- Integrated Tax (Rate) dated 28.06.2017. The case of the department is that the said goods are covered under Serial No. 9 of Schedule IV of the said notification which provided for IGST at the rate of 28%. For ease of reference both the entries are reproduced below:-

1.3 The Sl. No. 453 and 23 of Schedule III of the subject Notification No. 01/2017- Integrated Tax (Rate) dated 28.06.2017 are reproduced:

<i>S.No.</i>	<i>Chepter/Heading/ Subheading/ Tariff Item</i>	<i>Description of Goods</i>
<i>453</i>	<i>Any Chapter</i>	<i>Goods which are not specified in schedule I, II , IV,V or VI</i>
<i>23</i>	<i>21069099</i>	<i>All Kind of food mixes including instant food mixes, soft drink concentrates, Sharbat, Betelnut product known as "Supari", Sterilized or pasteurized millstone, ready to eat packaged food and milk containing edible nuts with</i>

		<i>sugar or other ingredients, Diabetic foods: (other than Namkeens, bhjia, mixture, chabena and similar edible preparations in ready for consumption from)</i>
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1.4 At the relevant time, the goods classifiable under Tariff Item 21069099 were liable to four type of IGST rates i.e. 5%, 12%, 18% and 28% under Notification No. 1/2017-Integrated Tax (Rate) dated 28.06.2017, details of which are as under :

<i>Schedule</i>	<i>Sl. No.</i>	<i>Chepter/Heading/ Subheading/ Tariff Item</i>	<i>Description of Goods</i>	<i>Rate of IGST</i>
<i>I</i>	<i>101</i>	<i>21069099</i>	<i>Sweetmeats</i>	<i>5%</i>
<i>II</i>	<i>46</i>	<i>21069099</i>	<i>Namkeens, bhujia, mixture, chabena and similar edible preparations in ready for consumption form.</i>	<i>12%</i>
<i>III</i>	<i>23</i>	<i>21069099</i>	<i>Food preparations not elsewhere specified or included i.e. Protein concentrates and textured protein substances, Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup, Compound preparations for making non-alcoholic beverages, Food flavouring material, Churna for pan, Custard powder</i>	<i>18%</i>
<i>IV</i>	<i>09</i>	<i>21069099</i>	<i>Food preparations not elsewhere specified or included i.e. Protein concentrates and textured protein substances, Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup, Compound preparations for making non-alcoholic beverages, Food flavouring material, Churna for pan, Custard powder</i>	<i>28%</i>

4.1 The Adjudicating Authority is of the opinion that the goods in question is not instant food mixes, hence not falling under Serial No. 23 of Schedule III and also not falling under serial No. 453 of Schedule III. Therefore, it falls under serial No. 9 of Schedule IV as food preparation not elsewhere specified

or included. From the close reading of the above entries, we find that as per the description given at serial No. 9 of Schedule IV only certain specific items are covered, for the reason the word "i.e." is suffixed with "food preparations not elsewhere specified or included". It means only the food preparations not elsewhere specified or include are covered under Serial No. 9 of Schedule IV which specific items described after the word "i.e." under Serial No. 9. The case of the department is that since goods are covered under Serial No. 9 the same will not fall under either Serial No. 453 or 23 of Schedule III, which is absolutely incorrect. Other than the specified goods covered under Serial No. 9 all other goods fall under Serial No. 453 and/or 23 of any chapter falls under the description given therein. We find that the Adjudicating Authority has not given any heed to a vital fact that description mentioned in serial No. 9 is only for some specific items which does not cover the goods of the present case. Therefore, the appellant's goods does not fall under Serial No. 9. Accordingly, the Serial No. 453 and/or 23 of Schedule III is the correct entry where the appellant's goods fall. Hence, the correct rate of IGST applied by the appellant i.e. 18% is correct and legal.

4.2 The identical issue has been considered by this Tribunal in the case of *Neuvera Wellness Pvt. Ltd* vide final order No. 12343/2023 dated 20.10.2023 wherein the following similar issue was involved:

"The following issues arise for consideration in the present appeal:

a) Whether Nutritional Supplements imported by the Appellant, which are preparations of substances such as Creatine, Nitrates, Glutamine and Amino Acids and which are admittedly classifiable under CTS2106 9099, are liable to IGST at 28% under Sr.No.9 of Schedule IV of Notification No.1/2017-IGST-Rate or at 18% under Sr. No.453 of Schedule III of the said Notification,

b) Whether the demand for alleged differential IGST is without jurisdiction and barred by limitation."

On the above issues, involving the similar entries the Tribunal has passed the following order:-

4. We have carefully considered the submission made by both the sides and perused the records. We find that the lower authorities have denied the exemption under entry No. 453 of Schedule IV of Notification No. 1/2017-IGST-Rate. Accordingly the IGST will attract @ 28% instead of 18%. For better understanding of the exact entry of both the Notification as claimed by the appellant as well as contended by the Revenue are reproduced below:

1) In exercise of the powers conferred by sub-section (1) of section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), the Central Government, on the recommendations of the Council, hereby notifies the rate of the integrated tax of-

- (i) 5 per cent. in respect of goods specified in Schedule I,
- (ii) 12 per cent. in respect of goods specified in Schedule II,
- (iii) 18 per cent. in respect of goods specified in Schedule III,
- (iv) 28 per cent. in respect of goods specified in Schedule IV,
- (v) 3 per cent. in respect of goods specified in Schedule V, and
- (vi) 0.25 per cent. in respect of goods specified in Schedule VI

appended to this notification (hereinafter referred to as the said Schedules), that shall be levied on inter-State supplies of goods, the description of which is specified in the corresponding entry in column (3) of the said Schedules, falling under the tariff item, subheading, heading or Chapter, as the case may be, as specified in the corresponding entry in column (2) of the said Schedules.

Schedule III- 18%

S. NO.	Chapter / Heading / Sub heading / Tariff Item	Description of Goods
(1)	(2)	(3)

23.	2106	All kinds of food mixes including instant food mixes, soft drink concentrates, Sharbat, Betel nut product known as "Supari", Sterilized or pasteurized millstone, ready to eat packaged food and milk containing edible nuts with sugar or other ingredients, 75[Diabetic foods, Custard powder; [other than batters including idli/dosa batter, Namkeens], bhujia, mixture, chabena and similar edible preparations in ready for consumption form
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453	Any Chapter	Goods which are not specified in Schedule I, II, IV, V or VI
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Schedule IV – 28%

S. NO.	Chapter / Heading/Sub heading/Tariff Item	Description of Goods
(1)	(2)	(3)

9.	2106	<i>Food preparations not elsewhere specified or included i.e. Protein concentrates and textured protein substances, Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and maltodextrine syrup, Compound preparations for making non-alcoholic beverages, Food flavouring material, Churna for pan, Custard Powder</i>
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5. The department seeks to apply serial No. 9 of the aforesaid Notification. From the entry of Serial No. 9 there are certain specific items which are covered in the description of goods under Serial No. 9 wherein the impugned goods of the appellant are not appearing, therefore, in our view, the appellant's imported goods do not fall under Serial no. 9. We find that the lower authorities have contended that the food preparation not elsewhere specified and included suffixed with 'i.e.' means all the products of the heading 2106 shall fall under this description 'food preparation not elsewhere specified and included' is suffixed with i.e. and with specified items which means that only the items which are described after the words 'i.e.' are only covered under this entry and no any other product. Admittedly, the appellant's product are not covered under any of the goods described in serial No. 9, therefore serial No. 9 is not applicable in the appellant's case. We find that serial No. 453 is applicable to goods of any Chapter which are not specified in Schedule I, II, IV, V and VI. Thus the appellant's goods is not specified under Serial No. 9 of Schedule IV, whereas it will be covered by Serial No. 453 of Schedule III of Notification 1/2017-IGST-Rate. For a better understanding, it is necessary to read the entire tariff entry of 2106 which is given below:

2106	FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED		
21061000	- Protein concentrates and textured protein substances	kg.	40% -
210690	- Other :		
	- Soft drink concentrates :		
21069011	- Sharbat	kg.	150% -
21069019	- Other	kg.	150% -
21069020	- Pan masala	kg.	150% -
21069030	- Betel nut product known as "Supari"	kg.	150% -
21069040	- Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup	kg.	150% -
21069050	- Compound preparations for making non-alcoholic beverages	kg.	150% -
21069060	- Food flavouring material	kg.	150% -
21069070	- Churna for pan	kg.	150% -
21069080	- Custard powder	kg.	150% -
	- Other :		
21069091	- Diabetic foods	kg.	150% -
21069092	- Sterilized or pasteurized millstone	kg.	150% -
21069099	- Other	kg.	150% -

From the above tariff entry, it can be seen that the entry covers various food preparation not elsewhere specified or included. However, out of the many items provided under tariff item 2106, the serial No. 9 described only some of those goods. This also establish that Serial No. 9 is not a general entry which covers entire entry of 2106 but only some of the goods which are specified in the description of goods are provided under serial no. 9 of Schedule IV,. This fact also strengthens the claim of the appellant that their goods are not covered under serial no. 9 of the schedule IV of Notification 1/2017-IGST-Rate and correctly falls under Serial No. 453 according to which the rate of IGST is 18%. As regard, the misinterpretation made by both the lower authorities on the word 'i.e.', the appellant have relied upon the judgment in the case of Castrol India Limited (supra) wherein the Hon'ble Supreme Court dealing with the meaning of "that is to say" held as under:

"16. In Stroud's Judicial Dictionary, 4th Edition, Vol. 5, at page 2753, we find : "That is to say" is the commencement of an ancillary clause, which explains the meaning of the principal clause. It has the following properties : (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the physical clause is general in terms it may restrict it; see this explained with many examples, Stukeley v. Butler Hob, 1971". The quotation, given above, from Stroud's Judicial Dictionary shows that, ordinarily, the expression "that is to say" is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed. In unusual cases, depending upon the context of the words "that is to say", this expression may be followed by illustrative

instances. (See State of T.N. v. PyareLal Malhotra [1976 (1) SCC 834], Mahindra Engineering and Chemical Products Ltd. v. Union of India [1992 (1) SCC 727]; SaitRikhajiFurtarnal v. State of A.P. [1991 Supp (1) SCC 202]; and R. Dalmia v. C.I.T. [1977 (2) SCC 467].

17.*The expression “that is to say” is descriptive, enumerative and exhaustive and circumscribes to a great extent the scope of the entry. (See Commissioner of Sales Tax, M.P. v. Popular Trading Company, Ujjain [2000 (5) SCC 511].”*

18.*The expression “that is to say” in sub-heading 2710.60 has to be interpreted to be words of limitation. The fact that sub-heading 2710.60 contains an exclusion clause goes to show that there may be other lubricating oils which may fall in the residuary heading “others”.*

19.*The sub-heading 2710.60 significantly uses two expressions. They are (i) “that is to say” and (ii) “excluding”. The first expression is used in description, enumerative and exhaustive sense and to a great extent circumscribes the scope of the entry. But the second expression dilutes the pervasiveness by carving out an exception for the purpose of the particular sub-heading a particular type of lubricating oil. All other types of lubricating oil are covered by the residuary entry i.e. 2710.99.*

20.*Under the Notification 120/84-C.E., lubricating oil was exempted without reference to any tariff heading/sub-heading. Consequently, the criteria specified in the Notification were satisfied. That being so, majority view contained in the order of the CEGAT is not sustainable and is set aside. The minority view as expressed is confirmed.*

The appeals are allowed with no order as to costs.”

From the above decision, we are of the view that as explained in the above decision the word “that is to say” is “mutatis mutandis” applies in respect of the expression “i.e.” in the present case. Accordingly, the word used ‘i.e.’ at serial number 9 of schedule IV of Notification (supra) it is fixed, specific and clear that only the description given in such entry shall be covered by serial no. 9. Consequently the goods of the appellant will fall under Serial No. 453 of Schedule III of the Notification 1/2017-IGST, therefore, the demand of differential custom duty shall not sustain.

6. *As regard the submission of the learned Counsel on the demand being time barred, we find that there is no dispute that the physical assessment of bill of entry was made by the proper custom officer and the appellant have declared the goods correctly as per the documents and claimed the exemption of IGST rate in terms of Serial No. 23 and 453 of Schedule III of Notification 1/2017. Had the officer of the different view as raised in the present case, the show cause notice could have been issued immediately on assessment or objection should be raised at that time itself. However in the present case for the clearance for the period July 2017 to November 2017, the show cause notice was issued on 09.07.2022. As per the facts narrated above, since there was no suppression*

of fact on the part of the appellant, the demand is also hit by limitation. We find force in the submission of the learned counsel that whatever IGST needs to be paid by the appellant, it was available as an input tax credit to them, therefore, the present case is involved revenue neutrality. Accordingly, the malafide intention cannot be attributed to the act of the appellant. For this reason, the demand for the extended period is not sustainable also on time bar.

7. *As per our above discussion and findings, the impugned order is not sustainable. Hence, the same is set aside. The appeal is allowed."*

From the above decision, it can be seen that the issue and fact are absolutely identical in the present as well the case cited above. Therefore, the ratio of the above judgment is directly applicable.

4.3 As per our above discussion and finding supported by the above decision, we are of the clear view that the appellants have correctly declared their goods under Serial No. 453 and/or 23 of Schedule III of Notification No. 1/2017- Integrated Tax (Rate) which attracts 18% of IGST. Therefore, the impugned order is not sustainable.

5. Accordingly, the impugned order is set aside. Appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 15.03.2024)

**RAMESH NAIR
MEMBER (JUDICIAL)**

**RAJU
MEMBER (TECHNICAL)**