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| | **OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS,<br>CUSTOM HOUSE: MUNDRA, KUTCH<br>MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421<br>Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62** |

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| A. File No. | : | GEN/ADJ/ADC/572/2022-Adjn-O/o Pr Commr-Cus-Mundra |
| B. Order-in- Original No. | : | MCH/ADC/MK/74/2023-24 |
| C. Passed by | : | Smt. Mukesh Kumari<br>Additional Commissioner of Customs,<br>Custom House, AP & SEZ, Mundra. |
| D. Date of order passed | : | 06.06.2023 |
| E. Date of order issued | | 07.06.2023 |
| F. Show Cause Notice No. & Date | : | S/01-18/PCA/SCN/NESTLE/2021-22 dated 17.06.2022 |
| G. Noticee(s)/Party/ Importer | : | M/s. Nestle India Pvt Ltd, Nestle House, Jacaranda Marg, 'M' Block, DLF City, Phase-II, Gurugram-1222002. |

## DIN-20230671MO000000C663

**1.** यह अपील आदेश संबन्धित को नि:शुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए- 1- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

**" सीमा शुल्क आयुक्त (अपील), मुंद्रा**
**चौथी मंजिल, हुडको बिल्डिंग, ईश्वर भुवन रोड,**
**नवरंगपुरा, अहमदाबाद 380 009"**
**"THE COMMISSIONER OF CUSTOMS (APPEALS), MUNDRA**
**Having his office at 4th Floor, HUDCO Building, Ishwar Bhuvan Road,**
**Navrangpura, Ahmedabad-380 009."**

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए ।
Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –

(i) उक्त अपील की एक प्रति और A copy of the appeal, and
(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं°-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए ।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपील ज्ञापन के साथ ड्यूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये ।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम,1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए ।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (A) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

**Sub.:- SCN No. S/01-18/PCA/SCN/NESTLE/2021-22 dated 17.06.2022 issued to M/s. Nestle India Pvt Ltd, Nestle House, Jacaranda Marg, 'M' Block, DLF City, Phase-II, Gurugram-1222002..**

**BRIEF FACTS OF THE CASE**

M/s Nestle India Pvt. Ltd., Nestle House, Jacaranda Marg, 'M' Block, DLF City Phase-II, Gurugram, Haryana - 1222002 (hereinafter referred to as **'the Importer/Noticee'**) had imported many consignments of "RICE FLAKES" of various flavours (like Cherry, Tomato, Carrot, Beet Root, Spinach) by classifying those under chapter 20 of Customs Tariff Act, 1975 and paid Integrated Goods and Services Tax (hereinafter referred to as **"IGST"**) at rate of 12%, as follows:-

**Table-A**

| Sr. No | Description | Customs Heading | IGST Paid | Sr. No. of IGST Notification 01/2017 |
|---|---|---|---|---|
| 1 | Tomato Rice Flakes | 20081990 | 12 % | 40 |
| 2 | Carrot Rice Flakes | 20059900 | 12 % | 37 |
| 3 | Beet Root Rice Flakes | 20081990 | 12 % | 40 |
| 4 | Spinach Rice Flakes | 20081990 | 12 % | 40 |
| 5. | Cherry Rice Flakes | 20086000 | 12 % | 40 |

2. On scrutiny of the bills of entry, it appeared that the correct classification of the imported goods will be under heading 1904 which attracts IGST @ 18% under Sr. No. 15 of Schedule III of Notification No.01/2017- Integrated Tax (Rate) dated 28.06.2017, as against IGST at the rate of 12% under Sr. Nos. 37 and 40 of Schedule-II of IGST levy Notification No.01/2017- Integrated Tax (Rate) dated 28.06.2017, when classified under chapter headings 2005 and 2008, respectively

3. Thus, it appeared that the subject goods were misclassified under heading 2005 and 2008, attracting a lower IGST @ 12%. Accordingly, a Show Cause Notice F.No. S/01-18/PCA/SCN/NESTLE/2021-22 dated 17.06.2022 was issued calling upon the importer to show cause to the Additional Commissioner of Customs (Import), Custom House, Mundra having his office at PUB Building 5B, Adani Port, Mundra, as to why:

(a) the goods imported under Bill of Entries mentioned in Annexure "A" enclosed herewith should not be re-assessed by re-classifying them under appropriate CTH 1904 of the Customs Tariff Act, 1975.

(b) differential duty amounting to Rs. 33,20,768/- not-paid/ short-

paid by them on the aforesaid imported goods not be demanded, confirmed and recovered from them under Section 28 (4) of the Customs Act, 1962.

(c) applicable interest on the amount as at sr. no. (b) above should not be demanded and recovered under Section 28AA of the Customs Act, 1962.

(d) penalty should not be imposed under Section 114A of the Customs Act, 1962.

3.1 The Custom Brokers M/s. Arihant Shipping Agencies and M/s. Bright Shiptrans Pvt. Ltd., having their office at Arjan's Mall, Office No. 02, 2nd floor, Plot No. 118-119, Sector- 8, Gandhidham, were also called upon to show cause in writing through the said SCN as to why:

(a) penalty should not be imposed on Custom Broker/CHA M/s. Arihant Shipping Agencies and M/s. Bright Shiptrans Pvt. Ltd under Section 117 of the Customs Act, 1962.

**RECORDS OF PERSONAL HEARING**

4. Following the principal of natural justice, an opportunity of being heard was given through virtual mode and the same was attended by Ms Jyoti Pal, advocate, representative of the importer. During the hearing, written and verbal submissions were made by the representative of the importer.

4.1. During the said personal hearing, Ms. Jyoti Pal (Advocate) appearing on behalf of the importer also stated that the goods in question are not to be classified under Chapter 19, as the same are correctly classified under chapter 20. She explained that the major ingredients used in the impugned goods are fruit or vegetable puree with a percentage ranging from 30 % to 40 %. She also explained that the rice flour contributes merely about 2% to 6% and instead of rice puree, the rice flour is used in the preparation of said foods.

**DEFENCE SUBMISSION MADE BY M/s NESTE INDIA PVT.LTD**

5. The Noticee (Importer) manufactures CERELAC, i.e. cereal for babies from the age of 6 months till 2 years and sale the same in India. In furtherance to the same, the Noticee imported Tomato Rice Flake/ Cherry Rice Flake/ Carrot Rice Flake/ Spinach Rice Flakes/ Beetroot Rice Flakes (hereinafter referred to as “impugned goods” or “tomato/vegetable/fruit

rice flakes" or "imported goods"). The same can be broadly classified into 3 categories i.e. (a) Tomato Rice Flakes, (b) Fruit Rice Flakes i.e. Cherry Rice Flakes, (c) Vegetable Rice Flakes (which include carrot rice flakes, spinach rice flakes and beetroot rice flakes). The impugned goods are used as ingredient in the manufacture of CERELAC and are not meant to be consumed as such.

6. Ingredients and manufacturing process:- For manufacturing the impugned goods, the suppliers of the Noticee makes use of (a) the puree of the particular goods is prepared from the fruit/vegetable based on the type of goods, (b) Maltodextrin, (c) Maize Starch, (d) Rice Flour, (e) Sucrose and (f) Glucose syrup as ingredients.

6.1. The manufacturing process of the impugned goods involves mixing of dry ingredients with the fruit/vegetable pulp< Heating of the slurry obtained in the first process at 70°C< Passing the mixed slurry through a sieve< Spreading the sieved mixture through applicator rollers to obtain a thin film< Cooling the film through a dehumidifier at a temperature of 25°C to make the film brittle such that it breaks into flakes< Sieving the flakes to obtain a uniform size of the flakes< Packaging of the flakes.

7. That the impugned goods are preparations of tomato/vegetables/fruits and fall under CTH 2002/2005/2008 respectively; that the Noticee inadvertently classified the Tomato and Beetroot/spinach rice flakes under CTH 2008 instead of CTH 2002 and 2005 respectively; that the impugned goods would merit its classification under Chapter 20 which covers "Preparations of vegetables, fruit, nuts or other parts of plants. Chapter Note 1(a) to Chapter 20 provides that this Chapter does not cover vegetables, fruit or nuts prepared or preserved by the processes specified in Chapters 7, 8 or 11. Chapter 7 refers to "Edible vegetables and certain roots and tubers". HSN EN to Chapter 7 provides that the Chapter covers vegetables including the products listed in Note 2 to the Chapter, whether fresh, chilled, frozen (uncooked or cooked by steaming or boiling in water) provisionally preserved or dried (including dehydrated, evaporated or freeze-dried). It further provides that some of these products when dried and powdered are sometimes used as flavouring materials but nevertheless remain classified in heading 07.12.

7.1 Chapter 8 refers to "Edible fruit and nuts; peel of citrus fruit or melons". HSN EN to Chapter 8 provides that this Chapter covers fruit, nuts

and peel of citrus fruit or melons (including watermelons) generally intended for human consumption (whether as presented or after processing). They may be fresh (including chilled) frozen (whether or not previously cooked by steaming or boiling in water or containing added sweetening matter) or dried (including dehydrated, evaporated or freeze-dried); provided they are unsuitable for immediate consumption in that state, they may be provisionally preserved (e.g by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions)

7.2 Further CTH 1105 covers "flour, meal, powder, flakes, granules and pellets of potatoes" and CTH 1106 covers "flour, meal and powder of the dried leguminous vegetables of heading 0713, of sago or of roots or tubers of heading 0714 or of the products of chapter 8".

7.3 Accordingly, on a combined reading of the above, it is evident that fruits and vegetables, subjected to processes in addition to those specified in Chapter 7 and 8 would not fall under Chapter 7 or 8. Moreover CTH 1105 and CTH 1106 does not include flakes of those fruits and vegetables which are imported by the Noticee. Additionally, HSN EN to Chapter 20 further provides that this Chapter inter-alia includes 'vegetables, fruit, nuts and other edible parts of plants prepared or preserved by other processes not provided for in Chapter 7, 8 or 11 or elsewhere in the Nomenclature'. Thus, where any fruits and vegetables are being prepared by any process other than those covered under Chapters 7, 8 or 11, the resultant product would merit classification under Chapter 20 and nowhere else.

7.4 In the present case, the fruit or vegetable puree forms the base of the impugned goods. Thus, at the start of the manufacturing process itself, the fruits or vegetables have been subjected to processes (i.e. preparation of puree) which move the goods out of the purview of Chapter 7 or 8 of the Tariff Act. However, it is pertinent to note that even post the manufacturing activity, the fruits or vegetables remain the core ingredient to the impugned goods.

7.5 Accordingly, the impugned goods are prepared fruits and vegetables having been subjected to processes other than those mentioned in Chapter 7 or 8 and thus would merit classification under Chapter 20 only. At the outset, it is to be noted that to be covered under Chapter 20, the fruits and vegetables need to be prepared. In other words, the resultant product needs to be a preparation of fruits or vegetables. In the present case, fruit

or vegetable puree is subjected to the process of mixing with dry ingredients heating, spreading to form a film and cooling the same to obtain the fruit or vegetables rice flakes.

7.6 Thus, the fruit or vegetable puree undergoes a series of processes which are not covered under Chapter 7 or 8 to be converted into fruit or vegetable rice flakes and would accordingly, be a fruit or vegetable preparation and be covered under Chapter 20.

7.7 In the present case, approximately 25-50% of the total ingredient composition of impugned goods is made up of the respective fruit or vegetable puree. The other ingredients such as maltodextrin, maize starch, rice flour, sucrose and glucose are only added to enable the production of the impugned goods in the form of flakes but do not impart any essence to the impugned product in terms of flavor or colour Thus, the fruit or vegetable puree is the main ingredient to the impugned goods.

8. On application of Rule 3(b) of GRI Rules, the impugned goods would be classified considering the fact that the fruit or vegetable puree is the main character giving ingredient to the same. On application of the ratio laid down by the judgement, in the case of Reckitt and Colman of India Ltd., Calcutta vs CCE, 1985 (22) E.L.T. 216 (Tribunal) the Tribunal explained what is meant by the word 'preparations'. It is clear that where fruits or vegetable are subjected to certain processes and other ingredients are added in such processes, the resultant product would be called a 'preparation of fruit or vegetable. In the present case, the fruit or vegetable puree is also subjected to multiple processes and addition of various ingredients is made to produce the impugned goods, as mentioned above and explained in the manufacturing process enclosed as Annexure- 6 Thus it is submitted that the impugned goods are preparations of fruits or vegetable and merit classification under Chapter 20

**9. TOMATO RICE FLAKES MERIT CLASSIFICATION UNDER CTH 2002**

9.1 Firstly, the importer is concerned with the classification of tomato rice flakes comprise of 30% tomato puree. At the outset, it is inferable that the tomato rice flakes are preparations of tomato. Accordingly, by application of Rule 1 of GRI, it is submitted that the tomato rice flakes would be classified under Heading 2002 of the Tariff Act which includes 'Tomatoes prepared or preserved otherwise than by vinegar or acetic acid.

9.2 Specific reference is made to HSN EN to CTH 2002 which states that 'the heading also includes homogenised prepared or preserved tomatoes (e.g., tomato puree, paste or concentrate) and tomato juice of which the dry weight content is 7 % or more. Further, in the instant case, tomatoes are not prepared using vinegar or acetic acid, but are prepared using other ingredients like glucose syrup, sucrose, maize starch, rice flour etc. and are subjected to processes as explained in detail in the manufacturing process already discussed above.

9.3 Thus, the tomato rice flakes being preparation of tomato would be classified under CTH 2002. CTH 2002 includes two tariff items, i.e. CTI 20021000 which covers 'Tomatoes, whole or in pieces and CTI 20029000 which covers 'Other'. In the instant case, since the tomato rice flakes are not in the form of whole tomatoes or tomatoes in pieces, the same would be classified under CTI 20029000. Here it is to be noted that the Noticee has inadvertently classified the tomato rice flakes under CTH 2006 and CTH 2008, however the same are correctly classifiable under CTH 2002 as explained above.

**10. VEGETABLE RICE FLAKES MERIT CLASSIFICATION UNDER CTH 2005**

10.1 The next variety of flakes imported by the Noticee is made from vegetable purees beetroot, spinach or carrot. Here it is to be noted that the vegetable rice flakes when imported are not in a frozen state although the manufacturing process involves the process of dehumidification of the flakes with the purpose of making the film brittle. Further the manufacturing process of the vegetable rice flakes does not involve processes involving the use of vinegar or acetic acid for the purpose of preservation but makes use of glucose or sucrose for the preservation of the goods.

10.2 CTH 2006 includes 'vegetables, fruits, nuts, fruit-peel and other parts of plants, preserved by sugar (drained, glace or crystallised)'. HSN EN to CTH 2006 provides as under-

> *'The products of this heading are prepared first by treating the vegetables, fruit, nuts, fruit-peel or other parts of plants with boiling water (which softens the material and facilitates penetration of the sugar) and then by repeated heating to boiling point and storage in syrups of progressively increasing sugar concentration until they are sufficiently impregnated with sugar to ensure their preservation."*

10.3 On a comparison of the process as specified under CTH 2006 and the actual process performed for manufacturing the impugned goods, it is evident that the process followed by the Noticee is not the same as the process specified under CTH 2006. Accordingly, the impugned goods would not merit classification under CTH 2006.

10.4 On application of Rule 1 of GRI, the vegetable rice flakes would merit classification under CTH 2005 which covers 'Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006'. HSN EN to Heading 2005 further provides that the term "vegetables" in this heading is limited to the products referred to in Note 3 to this Chapter. These products (other than vegetables prepared or preserved by vinegar or acetic acid of heading 20.01, frozen vegetables of heading 20.04 and vegetables preserved by sugar of heading 20.06) are classified in the heading when they have been prepared or preserved by processes not provided for in Chapter 7 or 11.

10.5 Chapter Note 3 to Chapter 20 provides that Headings 20.01, 20.04 and 20.05 cover, as the case may be, only those products of Chapter 7 or of heading 11.05 or 11.06 (other than flour, meal and powder of the products of Chapter 8) which have been prepared or preserved by processes other than those referred to in Note 1 (a). B.46. Here it is to be noted that spinach, carrot and beetroot are inter-alia included under Chapter 7 as 'vegetables'. Accordingly, preparations of the same would be included under CTH 2005. Further, as already submitted in the foregoing paragraphs, since the vegetables in the present case have been subjected to processes other than those covered under Chapter 7 and Chapter 11 the vegetable flakes would merit consideration under CTH 2005.

10.6 Also, it has been explained above that the vegetable rice flakes are not prepared or preserved by vinegar or acetic acid and is neither covered under the scope of CTH 2006. Therefore, vegetable rice flakes are not excluded from the scope of CTH 2005. CTH 2005 has been reproduced below for reference:

| CTI | | Description of Goods |
|---|---|---|
| 2005 | - | Other vegetables prepared or preserved otherwise than by vinegar or acetic acid not frozen, other than products of heading 2006 |
| 20051000 | - | Homogenized vegetable |
| | | |

| | | |
|---|---|---|
| 20052000 | - | Potatoes |
| 20054000 | - | Peas (pisum, sativum) |
| | - | Beans (Vigna spp, Phaseolus spp): |
| 20055100 | -- | Beans, shelled |
| 20055900 | -- | Other |
| 20056000 | - | Asparagus |
| 20057000 | - | Olives……Kg. 30 % |
| 20058000 | - | Sweet corn (Zea mays |
| | - | Other vegetables and mixtures of vegetables |
| 20059100 | -- | Bamboo shoots |
| 20059900 | -- | Other |

10.7 On a perusal of the above scheme of the Tariff Act, it is evident that since the vegetable flakes imported by the Noticee being made from vegetables specifically covered by description under CTH 2005At the eight-digit level, since there is no entry specifically covering preparations of spinach, beetroot and carrot, the same would be classified under CTI 20059900.

**11. FRUIT RICE FLAKES MERIT CLASSIFICATION UNDER CTH 2008**

11.1 Lastly, the Noticee also imports flakes made of the following fruit purees and in the present case, it has imported only Cherry Rice Flakes. The manufacturing process for the fruit rice flakes is similar to that for the tomato rice flakes and the vegetable rice flakes. It is pertinent to note that HSN EN to Heading 2008 provides as under:

> *'The products of this heading may be sweetened with synthetic sweetening agents (e.g., sorbitol) instead of sugar. Other substances (e.g. starch) may be added to the products of this heading, provided that they do not alter the essential character of fruit, nuts or other edible parts of plants.'*

11.2 In the present case undoubtedly substances such as maize starch, rice flour and sugar in the form of glucose or sucrose are added to the fruit pulp. However, the addition of such substances does not alter the essential character of the impugned product being that of a fruit preparation. The Noticee has already made submissions in the preceding portion of the appeal as to how the essential character in the impugned goods is imparted by the respective fruit or vegetable puree.

11.3 Accordingly, on application of Rule 1 of GRI, the fruit rice flakes would merit classification under CTH 2008 which covers 'Fruit, nuts and

other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or not elsewhere specified or included.

11.4 Relevant extract of CTH 2008 has been reproduced below for reference:

| CTI | | Description of Goods |
|---|---|---|
| 2008 | - | Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included |
| | - | Nuts, ground-nuts and other seeds, whether or not mixed together. |
| 200830 | - | Citrus Fruit |
| 20083010 | - | Orange |
| 20083090 | - | Other |
| 20084000 | -- | Pears |
| 20085000 | -- | Apricots |
| 20086000 | - | Cherries |
| 20087000 | - | Peaches, including nectarines |
| 20088000 | - | Strawberries |

11.5 On a perusal of the above scheme of CTH 2008, it is evident that the cherry fruit rice flakes imported by the Noticee will be classified under CTI 20086000.

## 12. IMPUGNED GOODS DO NOT MERIT CLASSIFICATION UNDER CTI 19049000

12.1 CTH 1904 applies to 'Prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, corn flakes); cereals (other than maize (corn)) in grain form or in the form of flakes or other worked grains (except flour, groats and meal) pre-cooked, or otherwise prepared, not elsewhere specified or included.' Thus, heading 1904 is divided into two parts, i.e.

a) Prepared foods obtained by the swelling or roasting of cereals or

cereal products (for example, corn flakes); and

b) cereals (other than maize (corn)) in grain form or in the form of flakes or other worked grains (except flour, groats and meal) pre-cooked, or otherwise prepared, not elsewhere specified or included.

12.2 On application of Rule 1 of GRI, it is necessary that for the purpose of classification, a product has to necessarily conform to the description of the CTH under which such product is purported to be included.

12.3 At the outset, it is to be noted that the HSN EN to sub-heading 1904 10 (first part of CTH 1904) inter-alia states as under:

*"This group covers a range of food preparations made from cereal grains (maize, wheat, rice, barley, etc.) which have been made crisp by swelling or roasting. They are mainly used, with or without milk, as breakfast foods."*

12.4 In the instant case, the impugned goods are not prepared by swelling or roasting of cereals nor are the impugned goods of the nature of cereal products, i.e. ready to consume breakfast foods. Accordingly, the impugned goods are not covered under the first part of CTH 1904.

12.5 Proceeding to the second portion of CTH 1904, it is seen that the same covers cereals which can be in grain form, flake form or otherwise worked (except flour, groats and meal), which has either been or otherwise prepared.

12.6 In the instant case, the impugned goods do not contain cereal (rice) in grain form. The impugned goods are in the form of flakes, but the same are not flakes of any cereal, i.e. rice, barley, etc. As explained above, the impugned goods are fruit or vegetable flakes made of fruits or vegetable puree which also have 1-6% of rice flour as one of the many ingredients. It is submitted that presence of minute percentage of rice flour in the impugned goods does not make the latter cereal flakes. Mere fact that the impugned goods are in the form of flakes shall not for any reason merit their classification under CTH 1904.

12.7 It is submitted that the use of the word rice in the description of the goods in the impugned BoEs is attributed to the presence of 1-6% rice flour in the product composition and not because the impugned goods are 'flakes of rice'. Accordingly, it is submitted that the impugned goods do not satisfy the specific description of CTH 1904 and would not be classified under residuary entry i.e. CTI 19049000.

13. that the impugned goods are classifiable under Chapter 20 and not

under Chapter 19 by application of Rule 3(a) of GIR. Rule 3 of GIR provides for the rules of classification to be followed in cases where goods are prima facie, classifiable under two or more headings, Relevant portion of Rule 3 of GIR Rules is extracted below for a ready reference-

> "When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more heading, classification shall be effected as follows: a
>
> a. The heading which provides the most specific description shall be preferred to headings providing a more general description."

From the perusal of the above extracted rule, the Noticee understand that in terms of Rule 3(a), the heading which provides for most specific description should be preferred over the heading which provides for general one.

13.1 In the present case also tariff entries of CTH 2002, 2005 and 2008 cover the impugned goods more specifically than CTI 19049000 for the detailed submission made above. Thus, the impugned goods are correctly classified under Chapter 20.

14. The present classification of tomato/fruit/vegetable rice flakes imported by the Noticee and in the impugned BoE, the Noticee has inadvertently classified the Tomato and Beetroot rice flask incorrectly and the correct classification for same should have been CTI 20029000 and 20059900 respectively.

14.2 In this respect, it is submitted that it has been held in catena of judgments that finalization of classification of any goods or clearance of any imported goods under a particular classification does not debar an assessee to dispute the earlier classification, when the assessments are re-opened by the departments for any reason. Reliance is made upon the judgement of:

> Lili Foam Industries (P) Ltd. vs. Collector of Central Excise [1990 (46) ELT 462 (Tribunal)].
>
> Bakeman's Home Products Pvt. Ltdvs. Collector of Customs, Bombay, 1997 (95) ELT 278 (Tribunal).
>
> Decora Ceramics Pvt. Ltd. v. Collector of Central Excise, Rajkot [1998 (100) ELT 297 (Tribunal)].

15. In the present case, the SCN has been issued by invoking extended period of five years under section 28 (4) by alleging that the Notice wilfully mis-classified the impugned goods with an intent to evade the payment of

IGST; that the Noticee has not suppressed any information from the Department and all the relevant information was provided by the Noticee at the time of import through the BOEs; that the description is also in consonance to the description given for the category of the impugned goods in point 2.3.20 of Food Safety and Standards (Food Products Standards and Food Additives Regulations 2011.

15.1 Moreover, for issuance of SCN under Section 28(4) of the Customs Act, it is necessary that the act of suppression or mis-declaration should be wilful. In this regard the Noticee relies on the case of Cosmic Dye Chemical vs. Collector of Central Excise, Bombay, (1995) 6 SCC 117, wherein the Hon'ble Supreme Court held that suppression and mis-representation of fact should be wilful in order to constitute a permissible ground for invoking extended period of limitation. The Noticee also places reliance on the case of Commissioner of Central Excise, Aurangabad vs Bajaj Auto Limited, 2010 (260) ELT 17 (SC) and the Hon'ble Supreme Court in Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur 2013 (288) E.L.T. 161 (S.C.). The Noticee places reliance of the case of CC, Bangalore vs. A. Mahesh Raj reported in 2006 (195) ELT 261

15.2 Further, the Noticee also places reliance on the following case laws in support of their contention that Section 28(4) cannot be invoked in cases of interpretation of the law:

> Steelcast Ltdvs. Commissioner of Central Excise, Bhavnagar, 2009 (14) STR 129 (Tri.-Del.);
> P.T. Education & Training Services Ltd. vs. Commissioner of Central Excise, Jaipur, 2009 (14) STR 34 (Tri.-Del.)

16. It is most humbly submitted that the proposal of interest under Section 28AA of the Customs Act is not sustainable in the present case because the duty demand itself is not payable as demonstrated in the foregoing paragraphs. It is a cardinal principle of law that when the principal demand is not justified there is no liability to pay ancillary demands. In this regard, the notice placed reliance on the case of Hon'ble Supreme Court of India in the case of Prathibha Processors vs Union of India, 1996 (88) E.L.T. 12 (S.C.) and judgement of Hon’ble Supreme Court in the case of Commissioner of Customs, Chennai vs Jayathi Krishna and Co., 2000 119 ELT 4 SC. Therefore, from the judgement cited above, the

Noticee humbly submits that once the duty itself cannot be demanded, the corresponding interest is also not payable.

17. The SCN has also sought to impose penalties on the Noticee under Sections 114A of the Customs Act. In this regard, the Noticee contends that no further IGST is payable as the Noticee had correctly classified the impugned goods and discharged IGST at the correct rate. The reliance is placed on the following case laws:-

Collector of Central Excise vs. H.M.M. Limited, 1995 (76) ELT 497 (SC)
Commissioner of Central Excise, Aurangabad vs. Balakrishna Industries, 2006 (201) ELT 325 (SC)
CC vs Videomax Electronics, 2011 (264) ELT 0466 (Tri.-Bom.)
Union of India Vs Rajasthan Spinning & Weaving Mills 2009 (238) E.L.T. 3 (S.C.):
Digital Systems vs. Commissioner of Customs, 2003 (154) ELT 71.
Goodyear (India) vs. CCE, 2003 (157) ELT 560.
Anand Metal Industries vs. CCE, 2005 (187) ELT 119.

## 18. SUBMISSION OF CUSTOM BROKERS

18.1 M/s Arihant Shipping Agencies

M/s Arihant Shipping Agencies vide their letter dated 06.05.2023 stated that the subject matter is related to the classification of the goods under import and the classification is decided by the importer/client. Further the classification of the goods under import decides on the basis of ingredients and the manufacturing process of the goods i.e. CERELAC and the same was not provided to them by their client. Further M/s Arihant Shipping Agencies also stated that they don't want any personal hearing in the subject matter and requested to drop the Show Cause Notice proceedings against their firm.

18.2 M/s Bright Shiptrans Private Limited

M/s Bright Shiptrans Private Limited vide their letter dated 06.05.2023 stated that the subject matter is related to the classification of the goods under import and the classification is decided by the importer/client. Further the classification of the goods under import decides on the basis of ingredients and the manufacturing process of the goods i.e. CERELAC and the same was not provided to them by their client. Further M/s Bright Shiptrans Private Limited also stated that they don't want any personal hearing in the subject matter and requested to

drop the Show Cause Notice proceedings against their firm.

**:DISCUSSION & FINDINGS:**

19. I have gone through the case records, Show Cause Notice, RUDS, as well as the written and verbal submissions made by the importer and the other Noticee. I find that the importer along with Customs Broker (CB), M/s Arihant Shipping Agencies and M/s Bright Shiptrans Pvt. Ltd, has been issued a Show Cause Notice. Taking note on the submissions given by the Noticee, I now proceed to decide the case for the subject SCN.

20. I find that the aforesaid SCN has been issued to the importer and CB on the ground of mis-declaration of the Customs Tariff Item (CTI) and description of the goods the bills of entry covered under the SCN has been declared as Tomato/Cherry/Carrot/Spinach/Beet Root Rice Flakes (hereinafter referred as *** wherever warranted), where Tomato/Cherry/Carrot/Spinach/Bret Root stood for the particular vegetable/fruit which was purported to be present in the impugned goods covered in the respective BE.

21. Department, on the basis of the declaration in the description of the respective BE as above has proposed classification under CTI 19049000. In the instant case, the imported goods were “flavoured Rice Flakes of different flavors”. It was observed in the SCN that the Rice Flake is commonly known as Flattened Rice, which is flattened into flat, light, dry flakes by Rice is parboiled before flattening so that it can be consumed with very little to no cooking. These flakes of rice swell when added to liquid, whether hot or cold, as they absorb water, milk or any other liquids. It is also called "beaten rice". Further, the item Rice falls under category of Cereals Hence, the imported goods viz “Flavoured Rice Flakes” are Flakes of Cereals and not Vegetables.

22. Pursuant to the issuance of the aforesaid SCN, the importer has made submission stating that the said SCN has been issued on the wrong premises. They submitted that they manufacture CERELAC, i.e, cereal for babies from the age of 6 months till 2 years and sale of the same in India as well as for exports. In furtherance to the same, they have imported fruit / vegetable rice flakes. The impugned goods are used as an ingredient in the manufacture of "CERELAC” and are not meant to be consumed as such. Further, they have made detailed submission as discussed in the foregoing paras. Relevant portion of their submission as and when warranted for analysis and discussion will be referred to here-in-after.

23. Firstly, I proceed to examine the correct classification of "Tomato Rice Flakes". In this regard, I find that "Tomato Rice Flakes" have been imported under classification CTH 2008. As mentioned in Para 7 above, the Noticee has submitted they inadvertently classified the "Tomato Rice Flakes" under CTH 2008 instead of 2002; that tomato rice flakes merit classification under CTH 2002 as it comprise of 30% tomato puree. It is also submitted that the tomato rice flakes are preparations of tomato and accordingly, by application of Rule 1 of GRI, tomato rice flakes would be classified under Heading 2002 of the Tariff Act which includes 'Tomatoes prepared or preserved otherwise than by vinegar or acetic acid. For the ease of reference, the CTH 2002 is referred as below:-

| Tariff Item | Description of goods | Unit | Rate of duty | |
|---|---|---|---|---|
| | | | Standard | Pref enti Are |
| (1) | (2) | (3) | (4) | |
| --- | | | | |
| 2002 | TOMATOES PREPARED OR PRESERVED OTHERWISE THAN BY VINEGAR OR ACETIC ACID | | | |
| 2002 10 00 | - Tomatoes, whole or in pieces | kg. | 30% | |
| 2002 90 00 | - Other | kg. | 30% | |

I find that the Chapter 20 covers preparations of vegetables, fruit, nuts or other parts of plants and CTH 2002 reads as "Tomato prepared or preserved otherwise than by vinegar or acetic acid". I find that the CTH 2002 covers tomatoes prepared or preserved stuffs where main characteristic is tomato. But, as per the Noticee's own submission that "Tomato Rice Flakes" contains only 30% of tomato. As more than 70% contents of the said imported goods is other than tomato which implies that tomato is not the dominating characteristic. Hence, the said imported goods falls beyond the scope of CTH 2002. Therefore, I reject the Noticee's claim that the imported "Tomato Rice Flakes" are to be classified under CTH 2002.

24. Now, I proceed to examine the correct classification of "Beetroot/Carrot/Spinach Rice Flakes". For the sake of brevity, Beetroot Rice Flakes, Carrot Rice Flakes and Spinach Rice Flakes are to be read as "Vegetable Rice Flakes". I find that during the import of vegetable rice flakes, the Noticee has declared classification as CTH 2005 for carrot rice

flakes, CTH 2008 for beetroot rice flakes and CTH 2008 for spinach rice flakes. However, the Noticee has submitted due to inadvertence they classified the Spinach and Beetroot rice flakes under CTH 2008 instead of 2005. Therefore, I proceed to examine the classification of "Vegetable Rice Flakes" under CTH 2005. The Noticee has submitted that vegetable rice flakes merit classification under CTH 2005; that the vegetable rice flakes are made from vegetable purees beetroot, spinach or carrot; that it is to be noted that the vegetable rice flakes when imported are not in a frozen state although the manufacturing process involves the process of dehumidification of the flakes with the purpose of making the film brittle. Further the manufacturing process of the vegetable rice flakes does not involve processes involving the use of vinegar or acetic acid for the purpose of preservation but makes use of glucose or sucrose for the preservation of the goods.

24.1 The Noticee has submitted the vegetable rice flakes are not prepared or preserved by vinegar or acetic acid and are neither covered under the scope of CTH 2006 as the process undertaken for preparing the vegetable rice flakes is different from the process specified under CTH 2006. It is also submitted that the vegetables in the present case have been subjected to processes other than those covered under Chapter 7 and Chapter 11, therefore, the vegetable rice flakes would merit consideration under CTH 2005.

24.2 For better understanding of the CTH 2005, the same is referred as under:-

| Tariff Item | Description of goods | Unit | Rate of duty | |
|---|---|---|---|---|
| | | | Standard | Preferential Area |
| (1) | (2) | (3) | (4) | |
| **2005** | **OTHER VEGETABLES PREPARED OR PRESERVED OTHERWISE THAN BY VINEGAR OR ACETIC ACID, NOT FROZEN, OTHER THAN PRODUCTS OF HEADING 2006** | | | |
| 2005 10 00 | - Homogenised vegetables | kg. | 30% | |
| 2005 20 00 | - Potatoes | kg. | 30% | |
| 2005 40 00 | - Peas *(pisum, sativum)* | kg. | 30% | |
| | - *Beans (Vigna spp. Phaseolus spp.):* | | | |
| 2005 51 00 | -- Beans, shelled | kg. | 30% | |
| 2005 59 00 | -- Other | kg. | 30% | |

| | | | |
|---|---|---|---|
| 2005 60 00 | - Asparagus | kg. | 30% |
| 2005 70 00 | - Olives | kg. | 30% |
| 2005 80 00 | - Sweet corn *(Zea mays var. saccharata)* | kg. | 30% |
| | - Other vegetables and mixtures of vegetables: | | |
| 2005 91 00 | -- Bamboo shoots | kg. | 30% |
| 2005 99 00 | -- Other | kg. | 30% |

I find that the CTH 2005 covers "other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006. The CTH 2006 covers the goods as under:-

| | | | |
|---|---|---|---|
| **2006 00 00** | **VEGETABLES, FRUITS, NUTS, FRUIT-PEEL AND OTHER PARTS OF PLANTS, PRESERVED BY SUGAR (DRAINED, GLACE OR CRYSTALLISED)** | kg. | 30% |

24.3 As per the submissions of the Noticee, the vegetable rice flakes are not mere vegetable prepared or preparation. The content of vegetables in vegetable rice flakes constitute mere 30% major chunk of 70% comprises of cereals, glucose, sucros etc. On plain reading of CTH 2005, it is inferred that products covered are primarily vegetables with application of some processes. Whereas goods under disputs are goods with some contents of vegetables in them, therefore, the vegetebale rice flakes loose their identy as vegetable prepared. So, it can not be accepted that the vegetebale rice flakes are vegetable prepared or preparation as mentioned under CTH 2005. Hence, I reject the Noticee's claim that the vegetebale rice flakes are to be classified under CTH 2005.

25. Now, I proceed to examine the classification of "Cherry Rice Flakes". I find that the Noticee has delcared and claimed the classification of cherry rice flakes under CTH 2008. The CTH 2008 reads as follows:-

I/1228697/2023

| Tariff Item | Description of goods | Unit | Rate of duty | |
|---|---|---|---|---|
| | | | Standard | Preferential Area |
| (1) | (2) | (3) | (4) | |
| **2008** | **FRUIT, NUTS AND OTHER EDIBLE PARTS OF PLANTS, OTHERWISE PREPARED OR PRESERVED, WHETHER OR NOT CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER OR SPIRIT, NOT ELSEWHERE SPECIFIED OR INCLUDED** | | | |
| | - *Nuts, ground-nuts and other seeds, whether or not mixed together :* | | | |
| 2008 11 00 | -- Ground-nuts | kg. | 30% | |
| 2008 19 | -- *Other, including mixtures:* | | | |
| 2008 19 10 | --- Cashew nut, roasted, salted or roasted and salted | kg. | 45% | |
| 2008 19 20 | --- Other roasted nuts and seeds | kg. | 30% | |
| 2008 19 30 | --- Other nuts, otherwise prepared or preserved | kg. | 30% | |
| 2008 19 40 | --- Other roasted and fried vegetable products | kg. | 30% | |
| 2008 19 90 | --- Other | kg. | 30% | |
| 2008 20 00 | - Pineapples | kg. | 30% | |
| 2008 30 | - *Citrus fruit :* | | | |
| 2008 30 10 | --- Orange | kg. | 30% | |
| 2008 30 90 | --- Other | kg. | 30% | |
| 2008 40 00 | - Pears | kg. | 30% | |
| 2008 50 00 | - Apricots | kg. | 30% | |
| 2008 60 00 | - Cherries | kg. | 30% | |
| 2008 70 00 | - Peaches, including nectarines | kg. | 30% | |
| 2008 80 00 | - Strawberries | kg. | 30% | |
| | - *Other, including mixtures other than those of sub-heading 2008 19 :* | | | |
| 2008 91 00 | -- Palm hearts | kg. | 30% | |
| 2008 93 00 | -- Cranberries (*Vaccinium macrocarpon, Vaccinium oxycoccos*); lingonberries (*Vaccinium vitis-idaea*) | kg. | 30% | |
| 2008 97 00 | -- Mixtures | kg. | 30% | |
| 2008 99 | -- *Other:* | | | |
| | --- *Squash :* | | | |
| 2008 99 11 | ---- Mango | kg. | 30% | |
| 2008 99 12 | ---- Lemon | kg. | 30% | |
| 2008 99 13 | ---- Orange | kg. | 30% | |
| 2008 99 14 | ---- Pineapple | kg. | 30% | |
| 2008 99 19 | ---- Other | kg. | 30% | |
| | --- *Other :* | | | |
| 2008 99 91 | ---- Fruit cocktail | kg. | 30% | |
| 2008 99 92 | ---- Grapes | kg. | 30% | |
| 2008 99 93 | ---- Apples | kg. | 30% | |
| 2008 99 94 | ---- Guava | kg. | 30% | |
| 2008 99 99 | ---- Other | kg. | 30% | |

25.1 I find that CTH 2008 covers those items where the fruit is main and primary content and the fruit goes under some process. Yet the main and dominating characteristic is fruit again. But, I find that in cherry rice flakes, fruit content is limited only to 30% as claimed by the Noticee. Therefore, it is natural that in cherry rice flakes fruit content is not predominant; it ceases to have its identity and no longer remain fruit prepared or preserved. Hence, I reject the Noticee's claim that the cherry rice flakes are to be classified under CTH 2008.

26. Now, I move on examining the classification of the impugned goods as proposed by the Department. I find that the Department has issued the impugned Show Cause Notice to the Noticee proposing the classification of impugned goods under CTH 1904. I refer the CTH 1904 for ease of reference as follows:-

| Tariff Item | Description of goods | Unit | Rate of duty | |
|---|---|---|---|---|
| | | | Standard | Pref enti Are |
| (1) | (2) | (3) | (4) | |
| **1904** | **PREPARED FOODS OBTAINED BY THE SWELLING OR ROASTING OF CEREALS OR CEREAL PRODUCTS (FOR EXAMPLE, CORN FLAKES); CEREALS [OTHER THAN MAIZE (CORN)] IN GRAIN FORM OR IN THE FORM OF FLAKES OR OTHER WORKED GRAINS (EXCEPT FLOUR, GROATS AND MEAL), PRE-COOKED OR OTHERWISE PREPARED, NOT ELSEWHERE SPECIFIED OR INCLUDED** | | | |
| 1904 10 | - *Prepared foods obtained by the swelling or roasting of cereals or cereal products:* | | | |
| 1904 10 10 | --- Corn flakes | kg. | 30% | |
| 1904 10 20 | --- Paws, Mudi and the like | kg. | 30% | |
| 1904 10 30 | --- Bulgur wheat | kg. | 30% | |
| 1904 10 90 | --- Other | kg. | 30% | |
| 1904 20 | - *Prepared foods obtained from unroasted cereal flakes or from mixtures of unroasted cereal flakes and roasted cereal flakes or swelled cereals :* | | | |
| 1904 20 10 | --- With millet content 15% or more by weight | kg. | 30% | |
| 1904 20 90 | --- Other | kg. | 30% | |
| 1904 30 00 | - Bulgur wheat | kg. | 30% | |
| 1904 90 00 | - Other | kg. | 30% | |

On going through the CTH 1904, I find that CTH 1904 covers the food items prepared by the swelling or roating of cereals or cereals products; cereals (other than maize) in grain form or in the form of flakes or other worked grains (except flour, groats and meal), pre-cooked or otherwise prepared, not elsewhere specified or included. I find that the impugned goods have rice and corn starch as main ingredient which provides to main characteristics of cereal flakes. These cereal flakes are pre-cooked and used in their final product "Ceralac" which is a baby/infant food product. I find that the Noticee had hide true identy of the said goods under the premise of tomato/vegetable/fruit rice flakes, whereas the the same are flavoured flakes of cereals. Tomato, vegetable or furits are just added to give the tinge of various flavours to flakes of cereals. As discussed above, the impugned goods don't fall under the CTH 2002, 2005 and 2008, because the main characteristics of impugned goods is not fruit/vegetable or tomato rather the same carries the identy of cereal flakes.

26.1 Accordingly, as discussed above, I hold that the impugned goods of the ingredients as submitted by the importer in their submissions and declared as tomato/vegetable/fruit rice flake are rightly classifiable under CTI 19049000.

27. Now, moving on to the issue of correct levy of IGST as duty of customs under Section 3 of the Customs Act,1962, I find that once the identity of imported goods is ascertained, the rate of IGST is to be asscertained through the Notification No.01/2017- Integrated Tax (Rate) dated 28.06.2017. I find that the rate of IGST for goods imported falling under CTH 1904 has been prescribed ate the rate of 18% vide Sr. No. 15 of Schedule III of Notification No.01/2017- Integrated Tax (Rate) dated 28.06.2017. The same is extracted as below:-

**Schedule III – 18%**

| S. No. | Chapter / Heading / Sub-heading / Tariff item | Description of Goods |
|---|---|---|
| (1) | (2) | (3) |
| 1. | 0402 91 10, 0402 99 20 | Condensed milk |
| 2. | 1107 | Malt, whether or not roasted |
| ------- | | |
| ------- | | |
| 15. | 1904 [other than 1904 10 20] | All goods i.e. Corn flakes, bulgar wheat, prepared foods obtained f cereal flakes [other than Puffed rice, commonly known as M flattened or beaten rice, commonly known as Chira, parched commonly known as khoi, parched paddy or rice coated with sug gur, commonly known as Murki] |

27.1 I find that corresponding entry for goods of CTH 1904 is mentioned in Schedule-III at sr.no.15 of the Notification No.01/2017- Integrated Tax (Rate) dated 28.06.2017 and all entries under Schedule-III carries tax rate of 18%. There is no fration of doubt that the Noticee is required to pay IGST @18% on the said imported goods. Apparently, the Noticee discharged IGST @12%, therefore, the differential duty is required to be recovered from the Noticee. Hence, I confirm the demand of differential duty of Rs.33,20,768/-.

**Table - B**

| Sr. No. | BE No. and Date | Description | Declared CTH | Assessable Value | Total Duty as per declared CTI (BCD @30 %, SWS @ 10% and IGST @12% | Correct CTH | Total Duty as per new CTI (BCD @30 %, SWS @ 10% and IGST @18% | Differential Duty |
|---|---|---|---|---|---|---|---|---|
| 1 | 8017863/ 27.06.20 | Cherry Rice Flakes | 20086000 | 6005943.38 | 2940509.88 | 19049000 | 3419784.16 | 479274.28 |
| 2 | 8029839/ 29.06.20 | Cherry Rice Flakes | 20086000 | 2727336.43 | 1335303.92 | 19049000 | 1552945.36 | 217641.44 |
| 3 | | Tomato Rice Flakes | 20081990 | 771603.67 | 377777.16 | 19049000 | 439351.13 | 61573.97 |
| 4 | 8084946/ 06.06.20 | Carrot Rice Flakes | 20059900 | 2707973.63 | 1325823.89 | 19049000 | 1541920.18 | 216096.29 |
| 5 | | Tomato Rice Flakes | 20081990 | 765856.10 | 374963.15 | 19049000 | 436078.46 | 61115.31 |
| 6 | | Cheery Rice Flakes | 20086000 | 2332645.68 | 1142063.32 | 19049000 | 1328208.45 | 186145.13 |
| | | | | | | | | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 7 | 8085439/ 06.06.20 | Beet Root Rice Flakes | 20081990 | 1707098.97 | 835795.66 | 19049000 | 972022.15 | 136226.49 |
| 8 | | Cheery Rice Flakes | 20086000 | 1166322.75 | 571031.62 | 19049000 | 664104.17 | 93072.55 |
| 9 | | Beet Root Rice Flakes | 20081990 | 897980.83 | 439651.41 | 19049000 | 511310.28 | 71658.87 |
| 10 | | Spinach Rice Flakes | 20081990 | 3378652.86 | 1654188.44 | 19049000 | 1923804.94 | 269616.50 |
| 11 | 8139018/ 11.06.20 | Cherry Rice Flakes | 20086000 | 2462236.95 | 1205511.21 | 19049000 | 1401997.72 | 196486.51 |
| 12 | | Spinach Rice Flakes | 20081990 | 3217764.67 | 1575417.58 | 19049000 | 1832195.20 | 256777.62 |
| 13 | 8583540/ 25.08.20 | Tomato Rice Flakes | 20081990 | 1333903.13 | 653078.97 | 19049000 | 759524.44 | 106445.47 |
| 14 | | Carrot Rice Flakes | 20059900 | 2829911.12 | 1385524.48 | 19049000 | 1611351.39 | 225826.91 |
| 15 | | Cheery Rice Flakes | 20086000 | 2166828.89 | 1060879.42 | 19049000 | 1233792.37 | 172912.95 |
| 16 | 8583523/ 25.08.20 | Cherry Rice Flakes | 20086000 | 2166828.81 | 1060879.39 | 19049000 | 1233792.32 | 172912.93 |
| 17 | | Spinach Rice Flakes | 20081990 | 3362657.64 | 1646357.18 | 19049000 | 1914697.26 | 268340.08 |
| 18 | | Beet Root Rice Flakes | 20081990 | 1070380.85 | 524058.46 | 19049000 | 609474.86 | 85416.40 |
| 19 | | Cherry Rice Flakes | 20086000 | 541707.20 | 265219.85 | 19049000 | 308448.08 | 43228.23 |

28. Now, coming to the discussion on other contentions raised by the importer. I find that the Noticee has contended that extended period of limitation is not invokable and the demand is time barred. In this connection, I find that the SCN has been issued under section 28 (4) of the Customs Act, 1962. Section 28 (4) of the Customs Act, 1962 provides for an extended period of five years for issuance of show cause notice, where the duty has not been levied or has been short levied etc. by reason of collusion or any wilful mis-statement or suppression of facts by the importer. I find that in this case the description of the impugned goods was grossly mis-declared by stating it to be a tomato/vegetable/fruit rice flake with an intention to hide its true identity of cereal flakes. The Noticee should have declared the true nature and identity of the imported goods as “flavoured cereal flakes”. Hiding the identity of the impugned goods with an intention to evade payment of duty of customs is an wilful mis-declaration on the part of the Noticee. Thus, I find that the extended period is rightly invokable in this case.

28.1 As discussed *para supra*, the Importer has mis-declared the description of the goods which led to issuance of the said SCN while proposing to correct classification of the impugned goods under Chapter 1904 considering the same to be cereal flake. Hence, the contention of the importer does not hold merit and the said SCN has been rightly issued under Section 28(4) of the Customs Act, 1962, invoking the extended

period along with consequential interest and penalty under Section 114 of the Customs Act, 1962.

28.2 I find that the Noticee has relied upon the decision of the Apex Court in the case of Cosmic Dye Chemical v. Collector of Central Excise reported in 1995 (75) E.L.T. 721 (S.C.) and submitted that to constitute suppression there must be wilful intention to evade duty. In this regard, I find that as already discussed the true identity of the imported goods is "flavoured cereal flakes" which was concealed under the guise of tomato/vegetable/fruit rice flakes through the misdeclaration of true identity of the imported goods. This mis-declaration was led by mis-classification of the impugned goods by the importer and hence short payment of duty. Therefore, it is established the Importer deliberately and intentionally misdeclared the true identity and nature of the impugned goods. As much as the case law of Cosmic Dye Chemical v. Collector of Central Excise reported in 1995 (75) E.L.T. 721 (S.C.) is concerned, I find that the decision of the Apex Court in the case of Cosmic Dye Chemicals (supra) relied upon by the petitioners is distinguishable on facts. In that case, on the date of filing declaration, the assessee bone fide believed that he need not include the value of the goods on the ground that the product was fully exempt whereas, in the present case the Noticee deliberately mis-declared the true identity of impugned goods. The Noticee has also placed reliance on the case of Commissioner of Central Excise, Aurangabad vs Bajaj Auto Limited, 2010 (260) ELT 17 (SC). I find that in the case of Commissioner of C.Ex., Aurangabad vs Bajaj Auto Ltd., reported in 2010 (260) E.L.T. 17 (S.C.), the Supreme Court had disapproved the finding of the Tribunal that since both the assessees were situated in the jurisdiction of the same division, the Revenue must be aware about the transaction and, therefore, penalty could not be imposed. Such are not the facts in the present case, therefore, the decision of apex court is also distinguishable on facts and not similar to facts and circumstances of the present case. The Noticee also placed reliance of the case of CC, Bangalore vs. A. Mahesh Raj reported in 2006 (195) ELT 261. In this regard, I find that in the judgment of the Division Bench of the Karnataka High Court reported i n 2006 (195) E.L.T. 261(Kar) is in the context of a smuggler and is distinguishable. I also observe, that the single Bench Order of the Hon'ble Karnataka High Court placed reliance on the decision of the single Judge of the Madras High Court in the case of Commissioner of Customs (Air), Chennai v. Customs and Central Excise Settlement Commission - 2002

(139) E.L.T. 512 (Mad.). This order of Madras High Court was subsequently overruled by a Division Bench of the High Court of judicature at Madras - 2008 (222) E.L.T. 344 (Mad.) on 23-10-2007. Therefore, the decision of Hon'ble High Court in case of CC, Bangalore vs. A. Mahesh Raj reported in 2006 (195) ELT 261 is not similar to the facts and circumstances of the present case and hence not applicable here.

28.3 Further, in this regard, I find that the Noticee has not only indulged in mis-classification but also mis-declaration of the imported goods. The Noticee have declared only the partial description of the goods in the Bills of Entry in as much as they declared the goods as tomato/vegetable/fruit rice flakes', therein instead of mentioning the same as "flavoured cereal flakes". Declaration of partial description of the goods is akin to suppression of the correct description of goods. The principles of linguistic construction imply that a partial truth always hints at a partial untruth which is withheld. By no figment of imagination, it can be said that the Noticee was not aware about the entire technical specifications of the goods/products that he has purchased. However, the Noticee has opted to present only a part of the information in their declaration. The Department has assessed the Bills of Entry on the basis of such partial declaration on the part of the Noticee. However, later on during scrutiny, it came to light that the imported goods were actually flavoured cereal flakes. Thus, I find that the wrong classification is attributable to wilful mis-statement, mis-declaration, misclassification and suppression of material facts regarding the correct description of the goods/products imported by the Noticee. Therefore, the ratio of the case laws cited by them is not applicable to the facts of the case in hand.

28.4 I find that in the case of Steel Cast Ltd. (supra), the invocation of longer period of limitation was rejected on the ground that a lot of confusion prevailed on the relevant issue during the relevant time. The facts in the present case are at variance with the facts involved in the case of Steelcast Ltd vs. Commissioner of Central Excise, Bhavnagar, 2009 (14) STR 129 (Tri.-Del.). I also find that issue involved in the P.T. Education & Training Services Ltd. vs. Commissioner of Central Excise, Jaipur, 2009 (14) STR 34 (Tri.-Del.) is altogether different as the same concerned with the levy service tax on the value of taxable services received in advance, which is not the case here. Therefore, the ration laid down in these cases cannot be applied to the present case.

29. I find that the Noticee has contended that the entire exercise is revenue neutral. Had the notice paid the IGST on impugned goods, it would have been eligible for input tax credit of the same. Hence, there is no loss of revenue to the government exchequer. In this regard, I find that this is a case of complete mis-declaration leading to miss-classification of goods and resulting into short payment of duty of customs. As already discussed above, the impugned goods merit classification under a different CTI and increased duty of IGST @18% instead of IGST @12%. Thus, it is not a revenue neutral matter

30. I find that the Noticee has pleaded that the present demand is Invalid in absence of an appeal against the out of charge order/Bills of entry. In this regard, I find that the present demand is under Section 28(4) of the Customs Act, 1962 by virtue of which the assessment can be re-opened. Hence, I do not find merit in the contention raised by the importer. I find that in the case of Priya Blue Industries Ltd. versus Commissioner of Customs (Preventive) as reported in 2004 (172) ELT. 145 (SC). Hon'ble Supreme Court of India has held in perk 6 as below -

> *"We are unable to accept this submission. Just such a contention has been negative by this Court in Flock (India)'s case (Supra). Once an Order of Assessment is pass the duty would be payable as per that under Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment of stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent officer. The officer considering a refund claim cannot also review an assessment order."*

31. In as much as demand of interest is concerned, Section 28AA of the Customs Act, 1962, is unambiguous and mandates that where there is a short payment of duty, the same along with interest shall be recovered from the person who is liable to pay duty. The interest under the Customs Act, 1962 is payable once demand of duty is upheld and such liability arises automatically by operation of law. In an umpteen number of judicial pronouncements, it has been held that payment of interest is a civil liability and interest liability is automatically attracted under Section 28AA of the Customs Act, 1962. Interest is always accessory to the demand of duty as held in case of Pratibha Processors Vs UOI – 1996 (88) ELT 12 (SC). The Noticee has taken plea that when demand itself is not sustainable, the demand of interest doesn't arises at all. As already

discussed at length above, the demand of differential duty of customs is very much legitimate and so is of interest. Hence, I hold that the amounts demanded under Section 28 in the SCN and confirmed in this order are recoverable from the Noticee together with interest at appropriate rate in terms of section 28AA of the Customs Act, 1962.

32. Now moving to the issue of imposition of penalty under Section 114A of the Customs Act, 1962. I find that The Section 114A of Customs Act,1962 provides for penalty for short levy or non-levy of duty in certain cases "Where the Duty has not been levied or has been short levied or the interest has not been charged or paid or has been part paid or the Duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the Duty or interest, as the case may be as amended under Sub-section 28 shall also be liable to pay a penalty equal to the duty or interest so determined". In this case, I find that in the present case, the duty of customs has been short levied by reason of wilful mis-statement mis-declaration of description/ misclassification of the imported goods and therefore, the Noticee is liable for penalty under Section 114A of the Customs Act, 1962. The Section 114A of the Customs Act, 1962 reads as under:

***Section 114A. Penalty for short-levy or non-levy of duty in certain cases.*** *-*
*Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28] shall also be liable to pay a penalty equal to the duty or interest so determined:*

*Provided that where such duty or interest, as the case may be, as determined under sub-section (8) of section 28, and the interest payable thereon under section 28AA, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined:*

*Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:*

*Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:*

*Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AA, and twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect :*

*Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.*

*Explanation . - For the removal of doubts, it is hereby declared that - (i) the provisions of this section shall also apply to cases in which the order determining the duty or interest sub-section (8) of section 28 relates to notices issued prior to the date* on which the Finance Act, 2000 receives the assent of the President;*
*(ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.*

32.1 The bare perusal of the above provision clearly envisages for imposition of penalty for short levy or non-levy of duty in certain cases. As discussed above the Importer has wilfully declared misclassification, which is case of wilful misdeclaration. Therefore, the imposition of penalty under Section 114A of the Customs Act, 1962 is legally warranted in the present case and I do so. The case laws cited by the importer for non-imposition of penalty under the Section 114A are not applicable to the present case as the demand under Section 24(4) of the Customs Act, 1962 is rightly invoked in the case in hand.

33. However, I find that the ingredients and manufacturing process of the impugned goods in question was not known to the Custom Broker M/s Arihant Shipping Agencies and M/s Bright Shiptrans Pvt. Ltd and they have filed the respective bills of entry on the basis of documents provided by the importer. Accordingly, I do not find them liable to penalty under Section 117 of the Customs Act, 1962.

Accordingly, I pass the following order,

34. **Order**

i. I reject the classification of the impugned goods as mentioned in column 4 of Table-B, at Para 27 above, shown against each bill of entry and order re-classification under CTI mentioned at column No.

7, against each bill of entry of the said Table B with consequent duty liability.

ii. I confirm the demand of differential duty of Rs. 33,20,768/- (Rupees Thirty-Three Lakhs Twenty Thousand Seven Hundred Sixty-Eight only), under section 28(4) of the Customs Act, 1962, which is to be recovered from the importer M/s Nestle India Private Limited.

iii. I confirm the applicable interest on the differential duty confirmed in sub-para (ii) above under section 28AA of the Customs Act, 1962, which is to be recovered from the importer M/s Nestle India Private Limited.

iv. I impose a penalty of Rs. 33,20,768/- (Rupees Thirty-Three Lakhs Twenty Thousand Seven Hundred Sixty-Eight only) under Section 114A of the Customs Act, 1962 on the importer M/s Nestle India. Further, in terms of 1st proviso to Section 114A of the Customs Act, 1962, where such duty or interest, as the case may be, as determined under sub- section (8) of section 28, and the interest payable thereon under section 28AA is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined.

v. I do not impose any penalty on the CB M/s Arihant Shipping Agencies and M/s Bright Shiptrans Pvt. Ltd under section 117 of Customs Act.

35. This order is issued without prejudice to any other action which may be contemplated against the importer or any other person under provisions of the Customs Act, 1962 and rules/regulations framed thereunder or any other law for the time being in force in the Republic of India.

Signed by
Mukesh Kumari
Date: 06-06-2023 19:19:51

Additional Commissioner of Customs
Customs House, Mundra

GEN/ADJ/ADC/572/2022-ADJN

I/1228697/2023

To
M/s Nestle India Pvt. Ltd., Nestle House,
Jacaranda Marg, 'M' Block, DLF City Phase-II,
Gurugram- 1222002

Copy to:

1. The Deputy/Assistant Commissioner (RRA), Custom House, Mundra.
2. The Deputy/Assistant Commissioner (TRC), Custom House, Mundra.
3. The Deputy/Assistant Commissioner (Group-I), Custom House, Mundra.
4. The Deputy/Assistant Commissioner (Audit), Custom House, Mundra.
5. M/s Arihant Shipping Agencies (CB).
6. M/s Bright Shiptrans Pvt. Ltd (CB).
7. Guard File.