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

A. File No.	:	GEN/ADJ/COMM/499/2022-Adjn
B. Order-in-Original No.	:	**MUN-CUSTM-000-COM-16-23-24**
C. Passed by	:	**Shri K. Engineer** **Commissioner of Customs,** **Customs House, AP & SEZ, Mundra.**
D. Date of order and Date of issue	:	03.11.2023 03.11.2023
E. SCN No. & Date	:	SCN F.No. GEN/ADJ/COMM/499/2022-Adjn, dated 25.01.2023
F. Noticee(s) / Party / Importer	:	M/s. Bright Performance Nutrition, 317, CTS No. 240 240/ 1 -8, Neelkanth Corporate IT Park, Kirol Vidya Vihar West, Maharashtra -400086
G. DIN	**:**	20231171MO000000BEC1

1. यहअपीलआदेश 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 (1)6 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा129 A (1)के अंतर्गत प्रपत्र सीए-3 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 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

   "केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवाकर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ, 2nd फ्लोर ,बहुमाली भवन ,मंजुश्री मील कंपाउंड ,गिर्धनगर ब्रिज के पास ,गिर्धनगर पोस्ट ऑफिस ,अहमदाबाद-380 004"

   "Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench,2nd floor, Bahumali Bhavan, Manjushri Mill Compound, Near Girdharnagar Bridge, Girdharnagar PO, Ahmedabad 380 004."

3. उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।

   Appeal shall be filed within three months from the date of communication of this order.

4. उक्त अपील के साथ1000 /- रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क ,व्याज, दंड या शास्ति रूपये पाँच लाख या कम माँगा हो -/5000 रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क ,व्याज ,शास्ति या दंड पाँच लाख रूपये से अधिक किंतु पचास लाख रूपये से कम माँगा हो 10,000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क ,दंड व्याज या शास्ति पचास लाख रूपये से अधिक माँगा हो। शुल्क का भुगतान खण्ड पीठ बेंचआहरितट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीयकृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा।

   Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs.10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.

5. उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत -/5 रूपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची- 1, न्यायालय शुल्क अधिनियम, 1870 के मदसं॰ 6-के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए।

   The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.

6. अपील ज्ञापन के साथ ड्यूटि /दण्ड /जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये। Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.अपील प्रस्तुत करते समय, सीमाशुल्क) अपील (नियम, 1982और CESTAT (प्रक्रिया (नियम, 1982 सभी मामलों में पालन किया जाना चाहिए।

   While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 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, न्यायाधिकरण के समक्ष मांग शुल्क का %7.5 भुगतान करना होगा।

   An appeal against this order shall lie before the Tribunal 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.

1. BRIEF FACTS OF THE CASE

1.1. An Intelligence developed by the officers of the Directorate of Revenue Intelligence, Zonal Unit, Lucknow *(hereinafter referred to as the "DRI")* indicated that M/s. Bright Performance Nutrition, 317, CTS No. 240 240/ 1 -8, Neelkanth Corporate IT Park, Kirol Vidya Vihar West, Maharashtra -400086 having IEC- 3713002223, *(hereinafter referred to as 'the Importer" or "M/s. BPN" for the sake of brevity)* had imported "Mass Weight Gainer" classifying them under CTH 21061000 by declaring "Mass Weight Gainer-Nutrition Supplement" from Mundra Port (INMUN 1) and paid Basic Customs Duty at the rate of 30% and 40% ad valorem from the year 2018 till conclusion of investigation in the matter.

1.2. The intelligence further indicated that the Importer is importing following mass gainers with nutritional composition, mentioned as-

(i) ON India Serious Mass Gainer — Nutrition Supplements (carbohydrates:77%, Protein:15%, Fat:0.6% and other vitamins and essential minerals} per l00 gm;

(ii) Mutant Mass Gainer- (carbohydrates: 80.70%, Protein:10.52%, Fat:0.0 l% and other vitamins and essential minerals);

1.3. The intelligence suggested that Mass Gainer as imported by the Importer are high calories supplement that contains various level of protein, fat, carbohydrate, minerals, vitamins, amino acids and various other supplements. It has low level of protein in comparison to the carbohydrates and fats because mass gainer is typically taken to increase the calorie level in body to further instigate muscle gain. Mass gainer is basically used to gain the muscle mass in the body and a good mass gainer provides between 300 to 1200 calories in one serving of the shake.

1.4. Whereas, the study of similar products, through open web platform of a specific protein supplement and trade famous with the name as *"Protein"* reveals the percentage of protein in it as 34% and carbohydrate as 54.4%. The same also gets confirmed from the official website of said product i.e. Protinex.com.

1.5. From the above compositions, it emerged that Mass/Weight gainer is high calorific value food supplements enriched with Carbohydrates, hence is not classifiable under CTH 21061000 which covers "Protein concentrates and textured protein substances", enriched with protein. However, CTH 21069099 covers all those "Protein enriched food supplements which are not elsewhere specified like "Whey Protein, Protein food supplements". From the above, it appeared that the imported goods have been misclassified under CTH 21061000 instead of its correct CTH 21069099.

1.6. In Jan, 2018 & before 2018, duty in the CTH 21061000, CTH 21069060 and CTH 21069099 were same viz. @30% in terms of Notification No.12/2012-Cus dated 17.03.2012 (Serial No. 92). Further, vide Notification No. 06/2018-Cus dated 02.02.2018 (Serial No.8), effective rate of BCD in respect of sub-heading 2106 90 was increased to @50%, however, duty in the CTH 21061000 was @30% till 22.05.2018. Further, vide Notification No. 45/2018-Cus dated 23.05.2018, effective rate of BCD in respect of CTH 21061000 was increased to @40%, however, duty in the sub-heading 210690 was @50% at that time.

1.7. Acting on the aforesaid intelligence, an investigation was initiated by the DRI, Lucknow. In response to DRI letter dated 30.06.2020, the Importer vide their letter dated 20.08.2020 submitted copies of Bills of Entry, Invoices, Remittance Advices, Product Literature and Product Images.

1.8. In this connection, statement of **Shri Parag Bhatia, Partner of the Importer i.e., M/s. Bright Performance Nutrition** was recorded on 19.10.2020 under Section 108 of the Customs Act, 1962 wherein he *interalia* stated:

(i) That M/s Bright Performance Nutrition, Mumbai is an importer and distributor of Nutrition health supplements; which import a wide range of nutrition products like whey protein, mass gainers, amino energy, Creatine, Glutamine, BCAA, Casein, Agri products, etc., from their overseas suppliers namely Glanbia Performance Nutritions, Ultimate Nutrition, Scitec Nutrition, Mutant' (Fit foods) etc. They further supply in domestic market direct to stores through their pan India sales network and warehouses across India;

(ii) That they import and sell whey proteins (pre-packed, finished product) about 80% of their total import volume; that whey protein consists protein @75%, Carbohydrate @12.5%, flat @,4.6% and other nutrients and the same is imported under CTH -21061000 — "Protein Concentrates & textured Protein substances". Their imported Amino based protein supplements consist of Amino based products (Essential Amino Acids & flavoring agents) and is classifiable under CTH -21069099: that Amino acids cannot be classified as protein Concentrates & textured protein substances; hence they have classified the same under CTH 21069099. Mass gainers comprises of Carbohydrates @80%, Protein @ 15%, Fat @3% and other nutrients, the same have been imported under CTH 21061000; that one of the reasons for classification of Mass gainers under CTH 21061000, it contains whey proteins concentrates and it is a dietary supplement. The Mass gainers are recommended and are consumed for weight gain and building muscle mass.

(iii) Mass Gainer consist of proteins in a very small amount, it is a mixture of carbohydrates (dominating material), protein, fat, amino acids, vitamins and performs a function of gaining of weight which is its characteristic usually not shown by protein, they submitted that they agree on the facts as answered by them; that Mass gainer are dietary supplements with 20% protein and 75% carbohydrates; that the function of mass gainer is weight gain and muscle gain, hence protein blend is mixed in the mass gainer; that according to their knowledge carbohydrates are not specifically classified in HSN code 2106; that since mass gainers have protein @20% and the entire industry importing Mass gainers use classification 21061000 as correct place to classify.

(iv) that carbohydrate (80%) will be the dominating substance in that mixture of mass gainer; that if carbohydrate were mentioned in the chapter 2106, undoubtedly mass gainers will be classifiable under the head of carbohydrate concentrated food preparations; that since carbohydrate is not present under CTH 2106 the Importer classified mass gainers under CTH 21061000 i.e., "Protein Concentrates & textured protein substances" as per their understanding.

(v) that there is no specific CTH for carbohydrate concentrated substances, hence they have classified it under 21061000. As per CTH 21069099 is concerned, it is a CTH for others. **They will also get clarity on classification**

of CTH from their consultant and the same may be recorded under their next statement.

(vi) On being asked did they classify the Mass Gainer under any other CTH at any instance, they answered that they have imported Mass Gainer under CTH 21069099 and 21069060. They will check the data and confirm the period & reasons for the classification.

1.9. Further statement of Shri Parag Bhatia, Partner of the Importer was recorded on 14.12.2020 under Section 108 of the Customs Act, 1962 wherein he *interalia* stated as under:

(i) On being asked about imported mass gainer from various supplier along with details like packing condition, Ingredients, use in health industry and nutritional value, He tendered that they import mass gainer from M/s. Glanbia Performance Nutrition (On Serious Mass), M/s. Scitec (Jumbo Nutrition), M/ s. Ultimate Nutrition, M/ s. Mutant (Mutant Mass weight Gainers) with following ingredients:

- On Serious Mass — whey protein concentrate blend-15%, Carbohydrate-76.64%, fat-06% and other nutritional elements.
- Mutant Mass — Protein-20%, Carbohydrate -70%, fat-3.5% and other nutritional elements.
- Scitec Jumbo- Protein-22.7%, Carbohydrate — 66%, Fat-3.1% and other mineral elements.

(ii) That all the above said Mass Gainer are imported in powder form and packed in air tight containers/pouches. These products are ready to mix powder which is used by health conscious person to quickly gain mass. These products are sold in domestic market via offline mode.

(iii) On being asked about his answer given in previous statement in instant case that there he has mentioned that imported mass gainer contains a very low quantity of protein compared to carbohydrates, which show that the product mass gainer is not protein concentrates rather protein is only a supportive nutritional element to each mass gainers, on which he answered that **Mass Gainers are dietary supplements containing protein in the range of 15-20%**. They contain blends of whey protein, the mass gainers are marketed as high protein mass gainer, hence they have classified Mass Gainer in HSN of 'Protein concentrates and texturized protein substances".

(iv) On being asked about types/ratio of Mass gainer on the basis of protein: carbohydrates prevalent in health industry, he answered that mainly 3 types of Mass Gainer are prevalent in health industry, which are as under:

1) 5: 1 (5 portions of Carbohydrates: 1 portion of protein)
2) 3: 1 (3 portions of Carbohydrates: 1 portion of protein)
3) 2:1 (2 portions of Carbohydrates: 1 portion of protein)

Among the above mentioned types of mass gainers based on carbohydrate: protein, product at S.No. 3 is a high protein content mass gainer.

(v) On being asked about his previous submission where he has mentioned that imported mass gainers are high protein mass gainer but consisting only 15%-20% protein of total supplement content, which is as per answer given by you is 5:1 mass gainer, to which he answered that since every scoop of above mentioned 5:1 mass gainer contains 50 grams of protein (as mentioned on the

label) it is called high protein mass gainer- the scoop size is 334 gms.

(vi) On being asked about the label of "**On** Serious Mass" where 50 grams of protein, 254 gms carbs are mentioned in 1 scoop and on packet 'High protein weight gainer powder" is mentioned despite the product contains only 15% of protein and carbohydrates: protein is 5:1 and as per his answer in previous question that said product does not contain higher quantity of protein, explain why on packing high protein weight gain powder is mentioned, to which he answered that 50 gms. protein in one serving is considered to be high protein as per industry standards. He also apprised that label claims on the package are done by the manufacturers. In this case, it is M/s. Glanbia Performance Nutrition, and he could not say much about it.

(vii) That at some instances they imported mass gainers under CTH 21069099 & 21069060 on payment of appropriate customs duty till the basic customs duty was changed (Increased vide notification No. 06/2018 — Customs date 02/02/2018); and that w.e.f Feb-2018 why M/s. Bright Performance Nutrition switched the classification of mass gainer from 210690 to 210610, to which he answered that they has declared mass gainers in CTH 210610 since 2015 (when they started importing health supplements). All their bills of entry were assessed by Customs officers in each instance for value and classification. As far as changing the CTH after the notification where duty was increased in 210690, they don't have the data currently; hence they would submit the date along with explanation for the change in CTH, within l5 days.

(viii) On being asked to peruse the commercial invoice No. 197840779 dated 12.06.2019 issued by M/s. Glanbia Performance Nutrition cleared by M/s. Bright Shiptrans Pvt. Ltd., where the supplier classified the product 'On India Serious Mass" under CTH 21069099. M/s. Bright Performance Nutrition also imported the same product "On Serious Mass" from the same supplier M/s. Glanbia Performance Nutrition, USA, however filed B/E under different CTH 210610 and asked to justify why M/s.Bright Performance Nutrition changed the CTH while filing B/E, on which he replied that they have imported 'On Serious Mass" from the supplier M/s. Glanbia Performance Nutrition from 2015 to 2018. The invoices never mentioned CTH when they imported the goods. The invoice mentioned in the question above is of the year 2019. They have not imported the said goods after M/s.Glanbia Performance Nutrition started importing these goods. They correctly classify mass gainers in CTH 210610 as per their understanding.

(ix) With regards the commercial invoice No. 9200456269 dated 23.04.19 & 9200468555 dated 27.06.2019 issued by M/s.Scitec Nutrition to M/s. Bright Performance Nutrition, wherein mass gainer 'Jumbo" has been classified under CTH 210690, however in B/E, the Importer classified the same under CTH 210610; he answered that they have correctly classified under 210610. These invoices were submitted to the Customs Officer for each and every consignment.

(x) That according to their interpretation mass gainer is rightly classifiable under CTH 210610. At the time of domestic sale, they maintain the same CTH 210610.

1.10. SCRUTINY OF DOCUMENTS OF THE IMPORTER

Whereas, scrutiny of the import documents submitted by importer as well as available in this office, revealed that the importer had filed following Bills of Entry in 2017 and 2018 classifying "Mass Weight Gainer/Mass Weight Gainer-Nutrition Supplement" under CTH 21069099, CTH 21069060 as well as under

CTH 21061000, as detailed below:

Table -1
2017 & 2018

S.N.	Port	BE No.	BE Date	Item Description	CTH
1	INM UN1	2874754	17-08-2017	BSN TRUEMASS 1200 CHOCOLATE 10.38 LB (NUTRITION SUPPLEMENTS)	21069099
2		4279425	2-05-2017	ON INDIA SEERIOUS MASS VANILLA 5.44 KG (NUTRITION SUPPLEMENTS)	
3		3214402	13-09-2017	ON SERIOUS MASS CHOCOLATE 12LB (NUTRITION SUPPLIMENTS)	
4		8624120	20-02-2017	ON SERIOUS MASS CHOCOLATE 12LB (NUTRITION SUPPLIMENTS)	21069060
5		3024330	29-08-2017	BSN TRUEMASS 1200 CHOCOLATE 10.38 LB (NUTRITION SUPPLEMENTS)	21061000
6		2238998	26-06-2017	ON SERIOUS MASS CHOCOLATE 12 LB (NUTRITION SUPPLEMENTS)	
1	INM UN1	4666318	03-01-18	ON INDIA SERIOUS MASS CHOC 2.72 KG (NUTRITION SUPPLEMENTS)	21069060
2		5008901	30-01-18	BSN TRUEMASS 1200 VANILLA 10.25 LB (NUTRITION SUPPLEMENTS)	
3		7343420	24-07-18	ON INDIA SERIOUS MASS CHOC 2.72 KG (NUTRITION SUPPLEMENTS)	21061000
4		5785725	29-03-18	BSN TRUEMASS 1200 VANILLA 10.25 LB (NUTRITION SUPPLEMENTS)	
5		8809028	12-11-18	MUTANT MASS WEIGHT GAINER/15LB EA-2/CS (ASSORTED FLAVOURS) (NUTRITION SUPPLEMENTS)	

1.11. EXAMINATION OF THE ISSUE

On scrutiny of documents/ data related to the present case, it was observed that in Jan, 2018 & before 2018, when duty in the CTH 21061000, CTH 21069060 and CTH 21069099 were same, the above products were imported under the correct CTH 21069099 and sometimes under CTH 21069060 and paid duty @30% in terms of Notification No.12/2012-Cus dated 17.03.2012 (Serial No.92).

However, the Importer switched such imports of Weight/ Mass Gainer' to CTH 21061000 only after the new Notification No. 50/2017-Cus dated 30.06.2017 was amended vide Notification No.6/2018-Cus dated 02.02.2018 (Serial No.8), wherein, the duty structure on CTH 21069099 was raised from 30% to 50%.

Such act of the Importer was indicative of willful intention to evade applicable customs duty by misclassifying the said Weight/ Mass Gainer under CTH 21061000 (Protein concentrates and textured protein substances). The details of such imports wherein the impugned goods were mis-classified under CTH 21061000 are provided in Annexure-A & Annexure-B in respect of BCD from 09.02.2018 to 15.05.2018 i.e. @30% and from 29.05.2018 to 0303.2021

i.e. @40% respectively.

1.12. Further, on scrutiny of Commercial Invoice no. 9200468555 dated 27.06.2019 and invoice no. 9200456269 dated 23.04.2019 issued by M/s. Scitec Nutrition and commercial invoice number 197840779 dated 12.06.2019 issued by M/s. Glanbia, sellers have mentioned CTH 210690 in their commercial invoice for mass gainer but M/s. Bright Performance Nutrition filed B/E under CTH 210610 against the same commercial invoice. This act of the Importer again comes across as willful intention to evade applicable customs duty by misclassifying the said Weight/ Mass Gainer under CTH 21061000 (Protein concentrates and textured protein substances).

1.13. On scrutiny of tax invoices issued by the Importer for domestic sales i.e., invoice no. DLESI171810027 dated 02.08.2017, invoice no. DLESI171810092 dated 02.09.2017, invoice no. DLESI 171810007 dated 04.10.2017, invoice no. DLESI 171810153 dated 07.12.2017, invoice no. DLESI 171810037 dated 28.02.2018, invoice no. and DLESI 171810186 dated 31.01.2018, they have mentioned CTH 21069099, in their tax invoice but Importer filed B/E under CTH 21061000 during the same period. This act of the Importer again shows wi11fu1 intention just to evade applicable customs duty by misclassifying the said Weight/Mass Gainer under CTH 21061000 (Protein concentrates and textured protein substances).

1.14. General Rules for the Interpretation provides that when by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

> 3(a} "The heading which *provides* the *most specific description shall be preferred to* headings *providing a more general* description. *Hower,* when two *or more* headings each *refer to* part only *of the materials or* substances *contained* in *mixed or composite goods or to part* only *of the items* in a *set* put *up for retail sale,* those *headings are to be regarded as equally specific* in relation to those *goods,* even *if one of* them *given a more complete or precise* description of the *goods".*
>
> *(b) "Mixtures, composite goods* consisting *of different materials or made up of different* components, and *goods put up* in s*ets for* retail sale, which cannot *be classified by reference to (a), shall be classified as if* they *consisted of* the *material or* component which *given them their* essential *character,* in so *far a*s this criterion is *applicable".*

2. Classification of Weight/Mass Gainer:

2.1. The Importer is importing Weight/ Mass Gainer which is for gaining mass and not for building muscles. Therefore, the essential character of the goods is not protein. Hence, the imported products are correctly classifiable under CTH 21069099.

2106

└ 210690; others

└ 21069099; others of others' of 2106

(i) Chapter Heading 2106 covers "**Food preparations not elsewhere**

specified or included". As per explanatory Note 16 of Chapter Heading 2106, *'Preparations* open *referred to as food supplements based on extracts from plants… ".* Therefore, the imported products being food supplements and sold in market as 'Mass Gainer" with the same description; are classifiable under Chapter Heading 2106.

Further CTH 21061000 covers "protein concentrates and *textured* protein *substances". Since* the imported products are food supplements and not protein concentrates, hence, are appropriately classifiable under CTH 21069099, which covers *'others"* of Chapter Heading 2106.

2.2. On the basis of above descriptions, it therefore appeared that imported products are Mass Gainer and not the Protein supplement based food supplements and are therefore rightly classifiable under CTH 21069099. The Importer appears to have knowingly resorted to mis-classification with the sole purpose of evading Customs duty.

3. Determination of Duty liability

Differential Customs Duties - short-paid on the impugned good imported by M/s. Bright Performance Nutrition are given in the **Annexure-A & Annexure-B**. The gist of the said details is produced as under-

Table-2

BE No. & Date	**Assessable Value (in Rs.)**	**Duty paid by misclassifying the goods under CTH 21061000 (in Rs.)**			**Duty payable on correct classification of such goods under CTH 21069099 (in Rs.)**		**Differential Duty payable (in Rs.)**	
A	B	C			D		E	
		BCD@30%	SWS@10%	IGST@18%	BCD@50%	IGST@18%	BCD	IGST
As per Annexure –A	16,76,64,055	5,02,99,217	50,29,922	4,01,38,775	83,832,028	4,52,69,295	3,35,32,811	51,30,520

Table-3

BE No. & Date	**Assessable Value (in Rs.)**	**Duty paid by misclassifying the goods under CTH 21061000 (in Rs.)**			**Duty payable on correct classification of such goods under CTH 21069099 (in Rs.)**		**Differential Duty payable (in Rs.)**	
A	B	C			D		E	
		BCD@40%	SWS@10%	IGST@18%	BCD@50%	IGST@18%	BCD	IGST
As per Annexure –B	42,94,41,939	17,17,76,776	1,71,77,678	11,13,11,351	21,47,20,970	11,59,49,324	4,29,44,194	46,37,973
Total (Table 2+3)	59,71,05,994	22,20,75,993	2,22,07,600	15,14,50,126	29,85,52,998	16,12,18,619	**7,64,77,005**	**97,68,493**

4. LEGAL PROVISIONS

As per **Section 28(4)** of the Customs Act, 1962, "*where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason*

of,-

(a) Collusion; or

(b) ***Any willful mis-statement****; or*

(c) Suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

(i) As per **Section 28AA** of the Customs Act, 1962*: Interest on delayed payment of duty. -"Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section."*

(ii) As per **Section 46(4)** of the Customs Act; 1962. - *"The importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods."*

(iii) As per **Section 46(4A)** of the Customs Act; 1962.-*" The importer who presents a bill of entry shall ensure the following, namely:-*

(a) the accuracy and completeness of the information given therein;
(b) the authenticity and validity of any document supporting it; and
(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force."

(iv) As per **Section 111(m)** of the Customs Act, 1962,"*the following goods brought from a place outside India shall be liable to confiscation-*

any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof. or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;"

(v) As per **Section 114A** of the Customs Act, 1962, "*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 determined under [sub-section (8) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined*:"

(viii) As per **Section 3(7)** of the Customs Tariff Act, 1975, "*Any article which is imported into India shall, in addition, be* ***liable to integrated tax at such rate****, not exceeding forty per cent as is* ***leviable under section 5 of the Integrated Goods and Services Tax Act, 2017*** *on a like article on its*

supply in India, on the value of the imported article as determined under sub-section (8) or sub-section (8A), as the case may be."

(ix) As per **Section 3(8)** of the Customs Tariff Act, 1975, "*For the purposes of calculating the integrated tax under sub-section (7) on any imported article where such tax is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, be the aggregate of- (a) the value of the imported article determined under subsection (1) of section 14 of the Customs Act, 1962 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and (b) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include the tax referred to in sub-section (7) or the cess referred to in sub-section.*"

5. CONTRAVENTIONS - CHARGES FRAMED:

5.1. From the analysis of data for the imports of 'Weight/Mass Gainer' made by the Party in previous years, it has been noticed that in Jan, 2018 & before 2018, when duty in the CTH 21061000, CTH 21069060 and CTH 21069099 were same, the Party imported above products under the correct CTH 21069099 and sometimes under CTH 21069060 and paid duty @30% in terms of Notification No.12/2012-Cus dated 17.03.2012 (Serial No.92). However, the Party switched such imports of 'Weight/Mass Gainer' to CTH 21061000 only after the new Notification No. 50/2017-Cus dated 30.06.2017 was amended *vide* Notification No.6/2018-Cus dated 02.02.2018 (Serial No.8), wherein, the duty structure on CTH 21069099 was raised from 30% to 50%. This act of the Party clearly shows their willful intention just to evade applicable customs duty by misclassifying the said Weight/Mass Gainer under CTH 21061000 (Protein concentrates and textured protein substances).

5.2. From the facts and foregoing discussion, it appeared that the Party appears to have contravened the following provisions:

(i) **Section 46(4)** of the Customs Act, 1962, *inasmuch as* the Party willfully mis-declared and did not file the correct particulars in their declaration before the Customs in respect of impugned goods. They did not classify such goods under correct CTH of 21069099 (attracting BCD@50%) but under CTH 21061000 (attracting BCD @30% till 22.05.2018 and @40% from 23.05.2018) with the intent to evade applicable customs duty (BCD) on such goods imported from their overseas supplier;

(ii) **Section 46(4A)** of the Customs Act, 1962, *inasmuch as* the Party failed to ensure the accuracy and completeness of the information given in the Bills of Entry filed before the Customs in respect of impugned goods as required under the provisions of said Section;

(iii) **Section 17** of the Customs Act, 1962, *inasmuch as* the Party failed to file the correct self-assessment of the duty liability on the imported impugned goods before the Customs consequent upon willful mis-declaration by them by way of misclassification of impugned goods as discussed supra;

(iv) **Section 2** of the Customs Tariff Act, 1975 read with First Schedule to the said Act *inasmuch as* the impugned goods imported by the Party, during the period from feb, 2018 onwards having a total assessable value of Rs. 59,71,05,994/-, have been mis-classified under CTH 21061000 and the same

should have been correctly classified under CTH 21069099, as explicated supra. The importer has wrongly availed the exemption Rs. 8,62,45,498/- from payment of BCD and IGST by way of such willful mis-declaration;

(v) **Section 3(7)** read with **Section 3(8)** of the Customs Tariff Act, 1975 *inasmuch as* the impugned goods imported by the Party, ***vide*** **322 Bills of Entry (as mentioned in Annexure-A & B)** also attracts Integrated Goods & Services Tax (IGST) U/s 3(7) read with Section 3(8) the Customs Tariff Act, 1975 whereas the importer by way of such willful mis-declaration wrongly availed the exemption from payment of customs duty and thereby reducing assessable value required for calculating such IGST.

5.3. It is seen that the Party have not paid applicable BCD on the said goods. On scrutiny of all the Bills of Entry filed by the Party during the period from Feb, 2018 to March, 2021 for determining duty liability, the actual duty liability has been worked out as provided in **Table – 2 & 3.** From the above, it appears that the Party is liable to pay the total differential duty of **Rs. 8,62,45,498/- (Rs. 7,64,77,005/- BCD + Rs. 97,68,493 IGST thereon)** on the impugned goods imported by them during the period Feb, 2018 to March, 2021.

5.4. Interest amount, at applicable rates, is also leviable on the duty(s) demanded above in terms of provisions of **Section 28AA** of the said Act, against all the aforesaid Bills of Entry.

5.5. For their act of willful mis-statement, as discussed supra, the impugned goods imported *vide* all the aforesaid **322 Bills of Entry** are also liable for confiscation in terms of **Section 111(m)** of the Customs Act, 1962 and penalty is also invokable in terms of **Section 114A** of the said Act.

6. SHOW CAUSE

Therefore, Show Cause Notice GEN/ADJ/COMM /499/2022-Adjn dated 25.01.2023 was issued to **M/s. Bright Performance Nutrition** (IEC-3713002223)**,** 317, CTS No. 240 240/1-8, Neelkanth Corporate IT Park, Kirol Vidya Vihar West, Maharashtra -400086 wherein they were called upon to show cause to the Commissioner of Customs, Custom House Mundra, having his office at Office of the Principal Commissioner of Customs, Custom House, 5B, Port User Building, Mundra Port, Mundra, Gujarat - 370421 as to why: -

a) The classification of the impugned goods *viz.* "**Mass Gainer**" under CTH 21061000 imported vide the above said Bills of entry as in Annexure- A & Annexure- B to this Show Cause Notice should not be rejected and the same should not be re-classified under CTH 21069099 and the above said Bills of entry as in Annexure- A & Annexure- B to the Show Cause Notice should not be re-assessed in terms of **Section 17** of the Customs Act, 1962, as discussed *supra;*

b) The differential customs duty (BCD and IGST) totally amounting to Rs. **8,62,45,498/-** (*Rupees Eight Crore Sixty Two Lakh Forty Five Thousand Four Hundred Ninety Eight only*), as illustrated in **Table-2 & 3** above, in respect of all the Bills of Entry filed during the period from Feb, 2018 to March, 2021 by the Party, should not be demanded from them in terms of **Section 28(4)** of the said Act, as discussed *supra;*

c) The interest amount as applicable on the aforesaid demand of duty mentioned at (b) above, should not be demanded from them in terms of **Section 28AA** of the said Act, as discussed *supra;*

d) the impugned goods imported by them under wrong CTH of 21061000 during the period from Feb, 2018 to March, 2021 should not be held liable to confiscation under the provisions of **Section 111(m)** of the said Act, as discussed *supra;*

e) Penalty should not be imposed upon them in terms of **Section 114A** of the said Act, as discussed *supra.*

7. Personal Hearing:

Opportunity of personal hearing in the case was given to the Noticee on 26.07.2023 & 23.08.2023. Shri Pramod Kedia, Authorized representative attended the Personal Hearing on behalf of the Importer on 23.08.2023. During personal hearing, Shri Pramod Kedia, Authorized representative submitted written submission dated 21.08.2023.

8. WRITTEN SUBMISSION:

The importer vides aforesaid letter dated 21.08.2023 have contended the Show Cause Notice *interalia* as under: -

8.1. The Importer have submitted that the **Demand is Time Barred**:

(i) In the present case demand of Customs duty for the period from February, 2018 to March, 2021. It is submitted that the importer did, in fact declare the correct description of the goods on the Bills of Entry which is not at all under challenge. Also, the show cause notice does not bring about any piece of specific evidence to suggest that the goods which were imported did not confirm to the description of the goods as declared in the Bills of Entry. Thus, there was no suppression of any fact on the part of the importer and as such extended period of limitation as provided under sub-section (4) of Section 28 of the Customs Act, 1962 is not invokable in the present, case. Since the show cause notice in this case has been issued beyond "one year" from the "relevant date", which was the normal period of limitation under Section 28(1) of the Customs Act, 1962 at the time of import of goods, the entire demand gets time barred.

(ii) The show cause notice in this case has not brought out any evidence or any circumstances based upon which the allegation of suppression of any material fact and "intention to evade the Customs duty" could be substantiated. It is also submitted that mere inaction or omission cannot be held to be a ground for invocation of extended period of limitation under the Customs Act, 1962. The extended period of limitation for demand of Customs duty can be invoked only when deliberate attempt to mis-declare or suppress is present and not otherwise. From the plain reading of Section 28 (4) of the Customs Act, 1962 it can be seen that the extended period of limitation for demand of Customs duty can be invoked only if the ingredients prescribed for invocation of same is present. It is also settled principle that the "burden of proof" for proving the presence of ingredients for invoking extended period of limitation for demand of Customs duty lies on the department and it has to be proved based on material evidences and not on presumptions and assumptions. In the instant case, the show cause notice has failed to bring out anything on records in material form which could prove that the ingredients prescribed under Section 28(4) of the Customs Act, 1962 were present in this case and the importer in any way had the intention to evade such duty.

Hence, without prejudice to anything said on merits subsequently in this reply, the demand of Rs 8,62,45,498/- of Customs duty (BCD and IGST) is required to be dropped on the aspect of time bar only. In this regard, the ratio laid down by Hon'ble Supreme Court in the case of Collector of Central Excise Vs Chemphar Drug and Liniments [1989 (40) E.L.T. 276 (S.C.)], which is pari materia to this case may kindly be appreciated

8.2. The Importer have submitted following points on **Merits**:

(i) The show cause notice dated 25.01.2023 proceeds on ground that "Mass Gainer, are not covered under the CTH 21061000 which covers Protein Concentrates and Textured Protein Substances, hence the importer has wrongly classified them under that CTH. As per the said Show Cause Notice, the correct classification should have been 21069099, which is meant for "others" of "others" of CTH 2106. Accordingly, the show cause notice proceeds to allege that the importer has short-paid the Customs duty to the tune of Rs. 8,62,45,498/-.

(ii) The said Show cause notice under Para 2 states that the intelligence suggested that Mass Gainer are high calories supplement that contains various level of protein, fat, carbohydrate, minerals, vitamins, amino acids and various other supplements. It has low level of protein in comparison to the carbohydrates and fats because mass gainer is typically taken to increase the calorie level in body to further instigate muscle gain.

(iii) In Para 3, the said show cause notice states that the goods under import with reference to the subject show cause notice have 15% (ON India Serious Mass Gainer) and 10.52% (Mutant Mass Gainer) of protein in them resp.

(iv) Para 4 of the said show cause notice states that the study of similar product through open web platform reveals the %age of protein in it as 34% as confirmed from the official website of Protinex.com.

(v) Further in Para 6.2 of the show cause notice, it is mentioned that M/s Scitec Nutrition and M/s Glambia (foreign Sellers/ Suppliers) have mentioned the CTH as 210690 in their commercial invoices for mass gainers but the importer has filed the bill of entry under CTH 210610 against the same invoices. This shows the willful intention of the importer to evade applicable customs duty. In this regard it was submitted that the classification mentioned in the invoice of overseas supplier is not sacrosanct and is subject to interpretation by the importer and the assessing officer at the port of import. They cannot be treated as gospel truth as held by the CESTAT, Hyderabad in Customs Appeal No. 27557 of 2013 in case of The Commissioner of Central Excise and Customs Vishakhapatnam II Commissionerate, Vishakhapatnam versus M/s Reliance Infrastructure Ltd. It was held in Para 43(k) of the CESTAT order that, "Classification of imported goods is a part of assessment which power and responsibility is with importer, the proper officer or the adjudicating authority and not with the overseas supplier."

(vi) The said show cause notice thus inferred that mass/weight gainer is high calorific value food supplement enriched of carbohydrates, hence not classifiable under CTH 21061000. It further stated that "Moreover, CTH 21069099 covers all those "Protein enriched food supplements which are not elsewhere specified like "whey protein, Protein food supplements".

(vii) In this regard, it is submitted that the said show cause notice fails to appreciate that the item under import i.e., Mass Gainer is nothing but a type of protein concentrate only and is used for weight gain and building muscle mass.

It contains whey proteins concentrates and it is a dietary supplement. As mentioned in the said show cause notice itself, the % age of protein varies in different brands and it is not fixed for all products. The level is kept different keeping in mind the customers' requirements. Moreover, protein concentrates do not mean that it will have 100% protein in it, in order to be eligible for being classifiable under CTH 21061000. Study shows that a protein concentrate powder may include other ingredients such as added sugars, artificial flavoring, thickeners, vitamins, and minerals. The amount of protein per scoop can vary from 10 to 50 grams. Supplements used for building muscle contain relatively more protein, and supplements used for weight loss contain relatively less. It is the scoop size or serving size that determines the protein intake and not the % age of protein in the product. It will not be out of context to mention here that more intake of protein is harmful to heart and to kidneys of humans.

(viii) In this background it was submitted that the commercial term used for the product used in the market although is Mass/ Weight gainer, but in fact it is nothing but Protein Concentrate only and therefore rightly classified under CTH 21061000 during import.

(ix) While drawing the conclusion as mentioned above in Para (v), Department has not shown any evidence to arrive at such conclusion that item under import is indeed classifiable under CTH 21069099 only.

(x) In this regard, it was further submitted that the component which gives essential characteristics to the aforesaid goods are Protein Concentrates which are vital for making body mass and as such these goods are bought and sold in the market as "High Protein Weight Gain Powder" and understood in the commercial parlance as such. This can be appreciated from the Labels used on these products.

(xi) In this regard, they enclosed labels of the products/goods which have been imported by them since 2018. It was submitted that the said powders do essentially contain "whey protein concentrate" and other nutrients and flavoring materials these powders are marketed in retail as "weight gainers/mass gainers" which is essentially a function of "protein". Though the said powders contain other substances viz. nutrients or flavoring materials, but it them the essential is the protein concentrate which gives characteristics and marketability. In these circumstances, it is submitted that applying the principles enunciated under Rule 2(b) and also 3(b) of General Rule of Interpretation of the Customs Tariff, the goods confirm to the specific description "Protein Concentrate and Textured Protein Substances" at Tariff Heading 21061000 and accordingly the appropriate duty of Customs has been paid on such goods.

(xii) It was further submitted that as per Rule 1 of the General Rules of Interpretation of the Customs Tariff, for legal purposes, the classification of goods has to be determined in accordance with terms of heading and any relative Section Note or Chapter Note. It is also submitted that in terms of Rule 2 (b) of the said Rules, a reference in a heading to a material or substance shall be taken to include a reference to mixtures or combination of that material or combination of that material or substance with other material or substance. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The said Rule also provides that classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3. Further, as per Rule 3 (a), the heading which provides the most specific description shall be preferred to headings providing a more general description and as per Rule 3 (b), mixtures,

composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3(a), shall be classified as if they consisted of material or component which gives them their essential character, insofar as this criterion is applicable. In the instant case by application of Rule 3 (a) and Rule 3 (b), the most specific description for the product in question is Protein concentrates and also it is this component which gives the said product it's essential character and marketability. Thus, the said product has been rightly classified by us at Tariff Heading 21061000 while importing.

9. The Importer have submitted that **Interest not leviable.**

In the instant case, it can be seen that the demand of Customs duty is not sustainable on merits and also because of time bar aspect, hence the demand of interest under Section 28AA of the Customs Act, 1962 becomes non-est in law because this provision is applicable only when there is a liability to pay the duty and it cannot be invoked, when the importer is not at all liable to pay any Customs duty.

10. The Importer have submitted that **Confiscation under Section 111(m) not legal:**

Hon'ble CESTAT, New Delhi in case of M/s Midas Fertchem Impex Pvt Ltd. v. Principal Commissioner of Customs, (Import, ACC, New Delhi) in Customs Appeal No. 52239 OF 2021 has held in Para 59 that, "...As far as 11 l(m) is concerned, we do not find any mis-declaration of the goods, although they deserved to be classified under CTH 3808 as "plant growth regulators" but all the documents including literature was made available to the officer during assessment. We, therefore, also find section 111(m) does not apply."

11. The Importer have submitted that **No Intention to Evade, No Penalty Imposable:**

(i) It is submitted that the description of goods was well written on the Bills of Entry filed with the Department which is not at all in dispute. The show cause notice dated 25.01.2023 does not point towards any instance or any or other documents, thus there was no instance of suppression of any fact on the part of the importer.

(ii) The acts of the importer were purely based upon bona-fide belief and the issue in this case is purely related to interpretation of the statute and declaration of CTH in the import Bills of Entry, hence there was no intention to evade the Customs duty on the part of the importer. It is well settled that the burden of proof for establishing the intention to evade the duty lies on the revenue and unless and until this burden is discharged, penalty under Section 114A of the Customs Act, 1962 cannot be imposed.

(iii) Also since the demand of Customs duty is not sustainable in the present case either on merits or on consideration of limitation, penalty under Section 114A of the Customs Act, 1962 would also not be imposable.

(iv) In this regard, the ratio laid down by Hon'ble Supreme Court in the cases of Cosmic Dye Chemical Vs Collector of Central excise, Bombay [1995 (75) ELT 721 (SC)] and UOI Vs Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3(SC)], which is pari materia to the Customs Act, 1962 may also be seen.

8. That the Importer would like to be heard in the case before any decision prejudicial to his interest is taken, either in person or through his authorized representative, hence it was requested to kindly grant Personal Hearing for the

sake of Natural Justice before proceeding for Adjudication of the case.

9. The importer also sought to demonstrate the various case laws and ratios decided whether quoted in this reply or otherwise in support of his defense and contentions, at the time of personal hearing.

12. PRAYER

In view of the above submissions, the importer made prayer that the proceedings initiated by the present Show Cause may be dropped.

13. DISCUSSION AND FINDINGS:

13.1. After having carefully gone through the subject Show Cause Notice, relied upon documents, submissions made by the Noticee and the records available before me, I proceed to decide the case. The main issues involved in the case which are required to be decided in the present adjudication are as below:

(i) Whether the classification of the impugned goods *viz.* "**Mass Gainer**" imported vide the 322 Bills of entry as in Annexure- A & Annexure- B to SCN is liable to be rejected and re-determined and goods are liable to re-assessed in terms of **Section 17** of the Customs Act, 1962

(ii) Whether, importer is correctly classifying the "Mass Weight Gainer" under CTH 21061000 by declaring "Mass Weight Gainer-Nutrition Supplement", instead of classifying the subject imported goods under CTH 21069099.

(iii) Whether the importer is liable to pay Basic Customs Duty @50% by declaring subject imported goods under CTH 21069099 instead of declaring the imported goods under CTH 21061000 and paying Basic Customs Duty @30 and Ad valorem duty @ 40% from the year Feb, 2018 to March, 2021. Therefore, whether the differential duty amounting to **Rs. 8,62,45,498/-** in terms of Section 28(4) is liable to be recovered from them along with interest under Section 28AA of the Act.

(iv) Whether the impugned goods are liable for confiscation under Section 111(m) of the Customs Act,1962.

(v) Whether the said Importer is liable to penalty under Section 114A of the Customs Act, 1962

13.2. M/s. BPN imported mass gainer from M/s. Glanbia Performance Nutrition (On Serious Mass), M/s. Scitec (Jumbo Nutrition), M/ s. Ultimate Nutrition, M/ s. Mutant (Mutant Mass weight Gainers) with following ingredients:

- On Serious Mass — whey protein concentrate blend -15%, Carbohydrate -76.64%, fat -06% and other nutritional elements.
- Mutant Mass — Protein-20%, Carbohydrate -70%, fat -3.5% and other nutritional elements.
- Scitec Jumbo - Protein -22.7%, Carbohydrate — 66%, Fat -3.1% and other mineral elements.

From above it is seen that the protein content varies between15% to 20% whereas, Carbohydrate substance vary from 66% to 77%. This clearly suggest that the imported Mass Gainer are high calories supplement that contains various level of protein, fat, carbohydrate, minerals, vitamins, amino acids and various other supplements. **It has low level of protein in**

comparison to the other nutritional supplements like carbohydrates and fats and Mass gainer is typically taken to increase the calorie level in body to further instigate muscle gain.

13.3. I observe that Shri Parag Bhatia, Partner of the Importer in his statement recorded on 19.10.2020 under Section 108 of the Customs Act, 1962, stated that mass gainers comprise of Carbohydrates @80%, Protein @ 15%, Fat @3% and other nutrients, the same have been imported under CTH 21061000; that one of the reasons for classification of Mass gainers under CTH 21061000, it contains whey proteins concentrates and it is a dietary supplement. The Mass gainers are recommended and are consumed for weight gain and building muscle mass. According to their knowledge carbohydrates are not specifically classified in HSN code 2106. He also stated that mass gainers have protein @ 20% and the entire industry is importing Mass gainers under CTH 21061000.

13.3.1 With regards to the wrong classification of Mass Gainer under CTH 2106100 instead of classifying the same under CTH 21069099; Shri Parag Bhatia stated that there is no specific CTH for carbohydrate concentrated substances, hence they have classified it under CTH 21061000.

13.4. I find that principles for the classification of goods are governed by the Harmonized Commodity Description and Coding System (Harmonized System or HSN) and the General Rules for Interpretation specified there under. The General Rules for the Interpretation (GIR) specified in the Import Tariff are in accordance with the GIR specified in the HSN. In terms of GIR I of the HSN and the import Tariff-

> *The titles of Sections. Chapters and sub-chapters are provided or ease of reference only: for legal purposes,* ***classification shall be determined according to the terms of the headings*** *and any relative Section or Chapter Notes...*

13.5. General Rules for the Interpretation provides that when by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

> *3(a} "The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them given a more complete or precise description of the goods".*
>
> *(b) "Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which given them their essential character, in so far as this criterion is applicable".*

13.6. Classification of impugned imported Goods "Mass Gainer":

There is no dispute of Tariff Heading/Chapter Heading of Mass Gainer, importer is also classifying the same in CTH 2106. The contention of importer is the impugned goods is classifiable under Tariff item 21061000. At this

juncture it would be useful to refer to the Tariff Heading 2106 of Customs Tariff Act,1975 which reads as under:-

2106 FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED

2106 10 00 - Protein concentrates and textured protein substances

2106 90 - Other:

---Soft drink concentrates:

21069011--- Sharbat

2106 90 19 ---- Other

2106 90 20 --- Pan masala

2106 90 30 --- Betel nut product known as “Supari”

2106 90 40 --- Sugar-syrups containing added flavoring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup

2106 90 50 --- Compound preparations for making non-alcoholic beverages

2106 90 60 --- Food flavouring material

2106 90 70 --- Churna for pan

2106 90 80 --- Custard powder

--- Other:

2106 90 91 ---- Diabetic foods

2106 90 92 ---- Sterilized or pasteurized millstone

2106 90 99 ---- Other

The subject imported Weight/ Mass Gainer is for gaining mass and not for building muscles. Therefore, the essential character of the goods is not that of being protein supplement. Hence, the imported products are correctly classifiable under CTH 21069099.

2106

210690; others

21069099; others of others’ of 2106

(ii) Chapter Heading 2106 covers "**Food preparations not elsewhere specified or included".** As per explanatory Note 16 of Chapter Heading 2106, *‘Preparations* open *referred to as food supplements based on extracts from plants… ”.* Therefore, the imported products being food supplements

and sold in market as 'Mass Gainer" with the same description; are classifiable under Chapter Heading 2106.

Further CTH 21061000 covers "protein concentrates and *textured* protein *substances". Since* the imported products are food supplements and not protein concentrates, hence, are appropriately classifiable under CTH 21069099, which covers *'others"* of Chapter Heading 2106.

13.6.1 On the basis of above discussion, I find that the imported products have a categorization as Mass Gainer as it has very less content of Protein as compared to other substances. By constitution they do not merit categorization as Protein supplement based food supplements and are therefore rightly classifiable under CTH 21069099.

13.7. I further find relevance in case of **Raptakos Brett & Co. Ltd. Versus Commissioner of C. Ex., RAIGAD {2014 (307) E.L.T. 565 (Tri. - Mumbai)}** the Hon'ble CESTAT, West Zonal Bench, Mumbai vide Final Order Nos. A/256-262/2014-WZB/C-II(EB), dated 19-3-2014 in Appeal Nos. E/1176-1177/2008-Mum, 1321- 1322/2010-Mum and 88684-88686/2013-Mum; wherein the Hon'ble Tribunal while deciding the appeal has held that to constitute protein concentrate, at least 70% of protein was required - Hence, it was not classifiable under Tariff Item 21061000 of Central Excise Tariff as protein concentrates and textured protein substances - As product was consumed by people recuperating from illness, hence it was ready to eat packaged product classifiable under Tariff Item 2106 90 99 ibid and assessee was entitled to benefit of Notification 3/2006-C.E. The relevant portions of the said Order are produced hereunder:

> ***2****. The appellant, M/s. Raptakos Brett & Co. Ltd., Raigad are manufacturers of 'Threptin' and 'Prorich' diskettes. 'Threptin' diskettes are described as high calorie protein supplement fortified with B vitamins. 'Prorich" diskettes are described as whey protein enriched. The department sought to classify these products under CETH 21061000 as "protein concentrates and textured protein substances". The appellant sought to classify the same as falling under 21069099 as 'food preparations not elsewhere specified or included' and claimed the benefit of concessional excise duty under Notification No. 3/2006-C.E., dated 1-3-2006 as ready to eat packaged food. Accordingly, show cause notices were issued to the appellant demanding differential duty ... These notices were adjudicated vide the impugned orders and the product was classified under CETH 21061000 as "protein concentrates and textured protein substances" and the duty demands were confirmed along with interest thereon and also by imposing penalties. Aggrieved of the same, the appellant is before the Hon'ble Tribunal.*
>
> ***3*** *.... The 'Threptin' diskettes so manufactured contains 1.50 gms. of protein, 2.4 gms. Carbohydrate, 0.7 gms. of fat and the balance, other substances, in a diskette weighing 5 gms. approximately. Thus, the protein content is only 30%. In the case of 'Prorich' diskettes, which weighs 5 gms. Protein content is 1.5 gms, carbohydrates account for 2.9 gms, fat account for 0.2 gms. and other ingredients, the balance. Thus, in the case of 'Prorich' diskettes also the protein content is only 30%. Therefore, it cannot be said that the product manufactured by them is a protein concentrate as protein accounts for only of 30% of the weight of the product and carbohydrates is predominant.*
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> .

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5.2 *Secondly, as per the expert opinion obtained and produced by the appellant, discussed in Para 3.1 above, and also from the technical literature available on the subject matter, it is seen that, to constitute protein concentrate, at least 70% of protein is required, both, in respect of soya protein products as also milk protein products. In the present case, the protein content is only 30% and nowhere near to 70% as mentioned in the technical literature. The expert opinion and the technical literature relied upon by the appellant has not been rebutted in a meaningful way by the Revenue nor any contrary opinion has been produced by the Revenue in support of their contention. As per the technical literature available, even skimmed milk powder contains 33% to 37% of protein and full cream milk powder contains 23% to 27% of proteins, but we do not classify milk powder as a protein concentrate.*

5.4 *… Consequently, the product merit classification under CETH 2106 90 99 and the appellant is rightly entitled to the benefit of Notification 3/2006, dated 1-3-2006. In Wockhardt Life Sciences Ltd. [2012 (277) E.L.T. 299 (S.C.)], the Hon'ble Apex Court held that in classification of goods functional utility and predominant usage of the commodity must be taken into account apart from understanding in common parlance. If we apply this ratio to the facts of the present case, the classification under CETH 2106 90 99 is more appropriate.*

6*. In view of the above factual analysis, the appeals succeed. Accordingly, we allow the appeals with consequential relief, if any, in accordance with law.*

In light of the ratio laid down in the above Order of Hon'ble Tribunal, it is evident that in the instant case, the impugned goods are rightly classifiable under Custom Tariff Item 21069099 instead of Custom Tariff Item 21061000.

13.8. Assessment of Duty:

Section 17. Assessment of duty.—
(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify [the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1)] and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

[Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.]

(3) For [the purposes of verification] under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.]

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self- assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

Explanation.—For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.]

13.8.1 Determination of Duty liability on correct classification of such goods under CTH 21069099

In the above foregoing paras, I find that the imported goods i.e., "Mass Weight Gainer/Mass Weight Gainer-Nutrition Supplement "are correctly classifiable under CTH 21069099. Thus, M/s. Bright Performance Nutrition has short paid the Customs Duties and they are liable to pay the differential Customs Duties - short-paid on the impugned good procured under Bills of Entries mentioned in **Annexure-A & Annexure-B** attached to Show Cause Notice. The gist of the differential duties payable by the importer is produced as under-

BE No. & Date	**Assessable Value (in Rs.)**	**Differential Duty payable (in Rs.)**	
A	B	E	
		BCD	IGST
As per Annexure – A	16,76,64,055	3,35,32,811	51,30,520
As per Annexure – B	42,94,41,939	4,29,44,194	46,37,973
Total	**59,71,05,994**	**7,64,77,005**	**97,68,493**

13.9. Applicability of extended period under section 28(4) of the Customs Act, 1962:

The relevant legal provisions of Section 28(4) of the Customs Act, 1962 are reproduced below: -

> *"28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.—*
>
> *(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,—*
>
> *(a) collusion; or*
>
> *(b) any willful mis-statement; or*
>
> *(c) suppression of facts."*

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been [so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

The term "relevant date" For the purpose of Section 28 ibid, has been defined in Explanation 1, as under:

Explanation 1 *. - For the purposes of this section, "relevant date" means,-*

(a) in a case where duty is 21[not levied or not paid or short-levied or short-paid], or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest.

13.9.1. Scrutiny of the import documents submitted by importer as well as available on record, revealed following points:

- that the importer had classified "Mass Weight Gainer/Mass Weight Gainer-Nutrition Supplement" under CTH 21069099, CTH 21069060 as well as under CTH 21061000, during the period **2017 and 2018**.
- Scrutiny of Commercial Invoice no. 9200468555 dated 27.06.2019 and invoice no. 9200456269 dated 23.04.2019 issued by M/s. Scitec Nutrition and commercial invoice number 197840779 dated 12.06.2019 issued by M/s. Glanbia, sellers have mentioned CTH 210690 in their commercial invoice for mass gainer but the importer filed B/E under CTH 210610 against the same commercial invoice.
- Scrutiny of tax invoices issued by the Importer for **domestic sales** i.e. invoice no. DLESI171810027 dated 02.08.2017, invoice no. DLESI171810092 dated 02.09.2017, invoice no. DLESI 171810007 dated 04.10.2017, invoice no. DLESI 171810153 dated 07.12.2017, invoice no. DLESI 171810037 dated 28.02.2018 and invoice no DLESI 171810186 dated 31.01.2018, they have mentioned CTH 21069099, in their tax invoice but at the instant of importing the subject goods they filed B/E under CTH 21061000 during the same period.

This act of the Importer clearly shows their willful intention just to evade applicable customs duty by misclassifying the said Weight/Mass Gainer under CTH 21061000 (Protein concentrates and textured protein substances). Importer mislead the department at the time of filing of Bills of Entry of imported goods by mentioning wrong CTH 21061000 instead of correct CTH 21069099, thereby evading the Customs duty. Had the investigating agency i.e. DRI not initiated investigation against the Importer, the evasion of Customs Duty would not have come to the knowledge of the department. Further, during the period 2017-18 the importer at the time of filing Bills of Entry were classifying "Mass Weight Gainer/Mass Weight Gainer-Nutrition Supplement" under CTH

21069099, CTH 21069060 as well as under CTH 21061000 as detailed vide **TABLE-1** hereinabove. Moreover, scrutiny of Commercial Invoice issued by their sellers i.e. M/s. Scitec Nutrition and M/s. Glanbia, it is observed that the sellers have mentioned CTH 210690 in their respective commercial invoices, however, the importer filed B/E under CTH 210610 against the same commercial invoice. Similarly, the Importer while issuing tax invoices for domestic sales have mentioned CTH 21069099, but in case of filing Bills of Entry for imported goods they resorted to CTH 21061000 during the same period.

13.9.2. It is expedient to examine the scheme of the self-assessment in order to appreciate the issue in greater detail. In earlier days, based on the "assessment" regime a tax officer would pass an order of assessment determining the rights and liabilities of the taxpayers concerned. Subsequently this assessment scheme was replaced by "self-assessment" scheme. Under this scheme, the obligation to comply with the law concerned rests upon the taxpayers who must ensure compliance with the provisions of customs law, along with the attendant consequences. This scheme where the taxpayer is obliged to assess and determine the correct tax liability is commonly understood as the self-assessment scheme. In such scenario the role of the tax officer is limited to verifying the self-assessment of the taxpayer and initiate recovery proceeding, if required, in order to recovery short paid tax, besides ensuring that the other provisions of the tax law are complied with by the taxpayer. There is therefore greater responsibility on the Importer to make correct declaration and not hold back anything pertinent from the Department. Whereas, the conduct of the importer as discussed in Para above only seems to strongly indicate deliberateness in choosing a wrong classification. In view of the above, I find that the importer, in the instant case, made self-assessment to mislead the Department by preferring to resort to wrong CTH 21061000 instead of correct CTH 21069099 with sole intension to evade the duty. Therefore, I hold that the extended period is rightly invokable and accordingly differential Customs duty is recoverable under section 28(4) of the Customs Act, 1962.

13.10. Confiscation of the goods under section 111(m) of the customs act, 1962:

13.10.1. It is alleged in the SCN that the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962. In this regard, I find that as far as confiscation of goods are concerned, Section 111 of the Customs Act, 1962, defines the Confiscation of improperly imported goods. The relevant legal provisions of Section 111(m) of the Customs Act, 1962 are reproduced below: -

> *(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;"*

13.10.2. As the impugned goods are found to be liable for confiscation under Section 111(m) of the Customs Act, 1962, I find that it necessary to consider as to whether redemption fine under Section 125 of Customs Act, 1962, is liable to be imposed in lieu of confiscation in respect of the goods imported under the Bills of Entry, as detailed in Annexure-B1 & B2 to SCN. The Section 125 ibid reads as under:-

*"**Section 125**. Option to pay fine in lieu of confiscation.—(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods 1[or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit."*

13.10.3. A plain reading of the above provision shows that imposition of redemption fine is an option in lieu of confiscation. It provides for an opportunity to owner of confiscated goods for release of confiscated goods, by paying redemption fine. I find that redemption fine can be imposed in those cases where goods are either physically available or the goods have been released provisionally under Section 110A of Customs Act, 1962 against appropriate bond binding concerned party in respect of recovery of amount of redemption fine as may be determined in the adjudication proceedings.

13.11. As regards applicability of Section 111(m) of the Customs Act, I find that any goods could be held liable for confiscation only when the goods were physically available for being confiscated. If the imported goods were seized and then released provisionally, then also such goods may be held liable for confiscation because they were released on provisional basis. But in this case, the goods imported by them have never been seized; on the contrary, the goods imported by them have been legally allowed to be cleared for home consumption. These goods are not available for confiscation at this stage. In case of **Manjula Showa Ltd. 2008 (227) ELT 330**, the Appellate Tribunal has held that goods cannot be confiscated nor could any condition of redemption fine be imposed when there was no seizure of any goods. The Larger Bench of the Tribunal in case of **Shiv Kripalspat Pvt. Ltd. 2009(235) ELT 623** has also upheld this principle. When no goods imported by them have been actually seized nor are they available for confiscation, the proposal to redemption of such non-existent goods does not have any legs to stand.

13.12. In this regard, I find that the goods imported under total 322 Nos. of Bills of Entry were neither seized, nor released provisionally. Hence, neither the goods are physically available nor bond for provisional release under Section 110A of the Customs Act covering recovery of redemption fine is available. I, therefore, hold that redemption fine cannot be imposed in respect of subject imported goods.

14. Role and culpability of Importer:

I find that the Importer mislead the department at the time of filing of Bills of Entry of imported goods by mentioning wrong CTH 21061000 instead of correct CTH 21069099, thereby evading the Customs duty. Had the investigating agency i.e. DRI not initiated investigation against the Importer, the evasion of Customs Duty would not have come to the knowledge of the department. Further, during the period 2017-18 the importer at the time of filing Bills of Entry were classifying "Mass Weight Gainer/Mass Weight Gainer-Nutrition Supplement" under CTH 21069099, CTH 21069060 as well as under CTH 21061000 as detailed vide **TABLE-1** hereinabove. Moreover, on scrutiny of Commercial Invoice issued by M/s. Scitec Nutrition and M/s. Glanbia, sellers, it is observed that the sellers have mentioned CTH 210690 in their commercial

invoice, however, the importer filed B/E under CTH 210610 against the same commercial invoice. Similarly, the Importer while issuing tax invoices for domestic sales have mentioned CTH 21069099, but at the instant of importing the subject goods they filed B/E under CTH 21061000 during the same period. Therefore, it is evident that the Importer are well aware of the correct classification of the Importer goods, however, they intentionally resorted to mis-classification while filing Bills of Entry of Imported goods, with intent to evade payment of Customs Duty. Therefore, such acts of omission and commission have rendered the importer are liable for penalty under section 114A of Customs Act, 1962.

15. Liability of Penalty under Section 114A on importer under the Customs Act, 1962.

15.1. As discussed in foregoing paras the importer has wilfully misclassify the goods and has evaded customs duty. Therefore, they are liable to pay duty under section 28 of the customs act, 1962.

15.2. The importer has placed reliance on judgement of Hon'ble Supreme Court in the cases of Cosmic Dye Chemical Vs Collector of Central excise, Bombay [1995 (75) ELT 721 (SC)] and UOI Vs Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3(SC)]. They have submitted that the ratio laid down by above judgment is pari materia to Customs Act, 1962.

15.2.1. I find that the aforesaid two case laws cited by the importer are not squarely applicable in this case. In case of **Cosmic Dye Chemical Vs Collector of Central Excise Bombay [1995 (75) ELT 721 (SC)]** the issue involved was whether the value of exempted goods was includable in total turnover of previous year for availing SSI exemption. Two High Courts were of the view the value of exempted goods may be includible however two High Court were of the view that value was not includible and hence the issue was arbitrary. Further, **in case of UOI Vs Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3(SC)],** Hon'ble Apex Could has held that Mandatory penalty under Section 11AC of Central Excise Act, 1944 not applicable to every case of non-payment or short-payment of duty - Conditions mentioned in Section 11AC ibid should exist for penalty thereunder. In this case, the importer has paid short amount of duty by way of suppression of facts and have been held liable to pay the differential Customs duty as determined under Section 28(8) of the Customs Act, 1962 which suffice the condition of Section 114A of Customs Act, 1962.

15.3. I find that section 114A stipulates that the person who is liable to pay duty by reason of collusion or any willful mis-statement or suppression of facts as determined under section 28, is also be liable to pay penalty under section 114A. I find that for these acts and omissions, the Importer is liable for penal action under Section 114A of the Customs Act, 1962.

15.4 I hold that for these acts and omissions, the importer is liable for penal action under Section 114A of the Customs Act, 1962.

16. In view of my discussion and findings in the paras supra, I pass the following order:

ORDER:

(i). I reject the classification of imported goods covered under Bills of Entry as attached in **Annexure-A and Annexure-B** to the Show Cause Notice; and order to re-classify the same under Custom Tariff Item No.

21069099 of the first schedule of the Customs Tariff Act, 1975 to re-assess the duty.

(ii). I confirm the demand of differential Custom Duty of **Rs.8,62,45,498/-***(Rupees Eight Crore Sixty-Two Lakh Forty-Five Thousand Four Hundred Ninety-Eight only)* on goods imported under Bills of Entry filed during the period from Feb, 2018 to March,2021 (as attached in **Annexure-A and Annexure-B** with the Show Cause Notice) and order to recover the same under Section 28(4) of Customs Act, 1962 along with applicable interest under section 28AA ibid from the Importer.

(iii). I order to confiscate the Goods imported vide total 322 Nos. of Bills of entry for the period from Feb, 2018 to March, 2021under Section 111(m) of the Customs Act 1962. Since, the subject goods are not physically available for confiscation, therefore, I refrain from imposing any redemption fine under Section 125 of the Customs Act, 1962;

(iv). I impose Penalty of **Rs.8,62,45,498/-** *(Rupees Eight Crore Sixty Two Lakh Forty Five Thousand Four Hundred Ninety Eight only)* upon importer, M/s. Bright Performance Nutrition under Section 114A of the Customs Act, 1962 for his act of omission and commission.

17. This OIO is issued without prejudice to any other action that may be taken against the claimant under the provisions of the Customs Act, 1962 or rules made there under or under any other law for the time being in force.

(K. Engineer)
Commissioner of Customs
Custom House Mundra

F.No. GEN/ADJ/COMM/499/2022-Adjn **Date: 03.11.2023**

BY SPEED POST/BY EMAIL/BY HAND/ NOTICE BOARD OR BY OTHER LEGALLY PERMISSIBLE MEANS:

To (The Noticee):
M/s. Bright Performance Nutrition,
317, CTS No. 240 240/ 1 -8, Neelkanth Corporate IT Park, Kirol Vidya Vihar West, Maharashtra -400086. (email id: info@bpnpl.com)

Copy for information and further necessary action / information/ record to:

a. The Chief Commissioner of Customs, CCO, Ahmedabad.
b. The Deputy/Assistant Commissioner (Legal/Prosecution), Customs House, Mundra

c. The Deputy/Assistant Commissioner (Recovery/TRC), Customs House, Mundra.

d. The Deputy/Assistant Commissioner (EDI), Customs House, Mundra.

e. Notice Board

f. Guard File