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

REGIONAL BENCH-COURT NO. 2

Excise Appeal No. 10003 of 2021 – DB
(Arising out of OIO-AHM-EXCUS-003-COM-030-20-21 dated 05/10/2020 passed by Commissioner, CGST & Central Excise- Ahmedabad)

BGP INTERNATIONAL **........Appellant**
Survey No, 90, Near Malosan Village,
Taluka-Vijapur, Mehsana, Gujarat

VERSUS

Commissioner, CGST & Central Excise, Gandhinagar **......Respondent**
2nd Floor, Custom House, Near All India Radio,
Navrangpura-380009, Ahmedabad, Gujarat

APPEARANCE:
Shri Anand Nainawati, Advocate appeared for the appellant
Shri Rajesh R Kurup, Superintendent (AR) appeared for the department

CORAM:
HON'BLE MEMBER (JUDICIAL), DR. AJAYA KRISHNA VISHVESHA
HON'BLE MEMBER (TECHNICAL), MR. SATENDRA VIKRAM SINGH

Final Order No. 10469/2026

DATE OF HEARING: 22.06.2026
DATE OF DECISION: 29.07.2026

SATENDRA VIKRAM SINGH

1. M/s. BGP International, Mehsana (Appellant) are manufacturing Organic Manure and Nicotine Sulphate. They are clearing their products in DTA as well as exporting to other countries. The Central Excise officers investigated a case of mis classification of Nicotine Sulphate which as per them was classifiable under CTH 24039990 instead of 29399900 declared by them in their returns. The officers took various samples of the product and got it tested from CRCL and also recorded the statements of Shri Harshad B. Patel, Authorised Signatory of appellant. Shri Patel stated that a part of their production is also sold to M/s. BGP Healthcare P. Limited which is an independent entity; that he does not agree with the report of chemical examiner in respect of sample drawn from the premises of M/s. BGP Healthcare P. Ltd. (in short BHPL). The revenue issued a show cause notice dated 17.06.2020 proposing classification of Nicotine Sulphate manufactured by the appellant under CTH 24039990 and demanding differential duty of Rs.4,60,00,920/- under proviso to section 11A

by invoking extended period. They also demanded differential duty of Rs.3,56,475/- in respect of sales to M/s. BGP Healthcare alleging under valuation of such goods, under the said proviso. The revenue also proposed recovery of interest under Section 11AA and mandatory penalty under Section 11AC of the Central Excise Act, 1944.

1.1 The show cause notice was decided by the Commissioner vide impugned order dated 05.10.2020, wherein, he upheld classification of the product under CTH 24039990, confirmed the differential duty of Rs.4,60,00,920/- on account of mis-classification of goods and duty of Rs.3,56,475/- on account of undervaluation of goods sold to related party alongwith interest and equal penalty under Section 11AC of the Central Excise Act, 1944.

2. Aggrieved with the above order, appellant filed appeal before this Tribunal by taking the following grounds:-

- The impugned order is non-speaking as the same has been passed by ignoring various submissions made by them. Their letter dated 07.04.2006 addressed to the Deputy Commissioner of Central Excise intimating the department about manufacture and classification of "Nicotine Sulphate" under CTH 29399900 has completely been ignored. In support of this contention, he relied on following decisions-
    a) Cyril Lasardo (Dead) Vs. Juliana Maria Lasarado-2004 (7) SCC 431
    b) Asst. Commissioner, Commercial Tax Department Vs. Shukla & Brothers- 2010 (254) ELT 6 (SC)
- Learned Adjudicating Authority has travelled beyond the scope of show cause notice, which cites the report of chemical examiner as the sole basis for change in classification. The report mentions that "the sample is aqueous dispersion (liquid) having concentration of Nicotine of 35.7% by weight which is an extract and essence of tobacco and such type of manufactured product of tobacco is defined under CTH 24039990 and not under CTH 29399900." The learned Commissioner in Para 19.7 has

however held that the product is not classifiable under CTH 29399900 as sample has contents of two different chemically defined compounds viz. Nicotine Sulphate and Nicotine, which are excluded from Chapter 29 by virtue of Note 1(a) of this Chapter. They rely on following decisions, where it has been held that Adjudicating Authority cannot travel beyond the scope of show cause notice-

a) CCE, Nagpur Vs. Ballarpur Industries Ltd.-2007 (215) ELT 489 (SC)
b) CC, Customs Vs. Toyo Engineering India Limited-2006 (201) ELT 513 (SC)
c) Commissioner Vs. Reliance Ports and Terminals Ltd.- 2016 (334) ELT 630 (Guj.)
d) Commissioner of Customs, New Delhi Vs. Tag Overseas-2018 (9) GSTL 282 (Tri. Del.)

- The show cause notice makes vague and arbitrary allegations as it ignores subsequent test report dated 02.04.2018 issued by CRCL, Vadodara and test report dated 20.05.2019 issued by CRCL, New Delhi in respect of samples drawn from their factory and relies only upon first test report dated 20.06.2017 in respect of sample drawn from a third party premises more than a year ago on 08.03.2016. In this test report Chemical Examiner has answered a question of classification and so, gone beyond his role. Their contentions on this ground have been completely ignored as the Adjudicating Authority who did not consider two test reports in respect of samples drawn from their factory and proceeded to decide case based on the first test report of sample drawn from third party premises.
- It has been held in following cases that where show cause notice or impugned order uses a language which pre-judges the issue at hand, this results in violation of principles of natural justice-

    a) Oryx Fisheries Pvt Ltd. Vs. Union of India - 2011 (266) ELT 422
    b) Rajam Industries (P) Ltd. Vs. Addl. DGCEI-2010 (255) ELT 161 (Mad.)

- The chemical examiner is not a competent authority to decide/ opine on classification of a product which is entirely within the jurisdiction of the Adjudicating Authority. They refer following decisions-
  a) CCE, Ahmedabad-I Vs. Dhariyal Chemicals- 2014 (309) ELT 727 (T)
  b) Puma Ayurvedic Herbal (P) Ltd. Vs. CCE, Nagpur- 2006 (196) ELT 3(SC)
- Test report of a sample drawn from a third party premises cannot be relied upon. The procedure adopted by the officer for drawing samples from premises of M/s. BHPL is in violation of Central Excise Manual of Supplementary Instructions, 2005. Further, samples were drawn on 08.03.2016 and the test report was received on 20.06.2017 that is after more than one year. The samples were drawn in the presence of the Manager/ Representative of M/s. BHPL and not the appellant. It is important to submit that Nicotine Sulphate is being manufactured by the appellant and not by BHPL.
- Sampling of Nicotine Sulphate is required to be carried out as per Indian Standards IS: 1055-1984 as detailed below:-

  > *"When freshly manufactured material in bulk quantity is offered for inspection, representative samples of the material shall be drawn and tested as prescribed in IS: 10627: 1983 within 90 days of its manufacture. When the material is offered for inspection after 90 days of its manufacture, sampling shall be done as prescribed in IS: 10627: 1983. However, the criteria for conformity of the material when tested, shall be the limits of tolerances, as applicable over the declared nominal value and given under clause 2.2 of the standard."*

- Apparently, in this case, sample drawn from the premises of BHPL has not been tested within 90 days.
- All the three test reports are mere assertion without any evidence for classification of the product and do not indicate how Nicotine Sulphate becomes fit for classification under CTH 24039990 instead of declared CTH 29399900. The outcome of report dated 20.05.2019 read with clarification dated 13.02.2020 of CRCL, New Delhi, it is clear that Nicotine Sulphate is an organic chemical and since, it is a sulphate salt,

it is fit to be classified under CTH 2939 which covers vegetable alkaloids whether natural or synthetic and their salts and their other derivatives.

- Nicotine Sulphate is not meant for human consumption being highly toxic. If more than 7 drops consumed by human, it may be lethal and may even cause death by paralysis, if inhaled. On its own, it is used as insecticide and not as a substitute for tobacco.
- Chapter 24 of the Central Excise Tariff Act covers, "Tobacco and Manufactured Tobacco Substitutes." CTH 2403 covers, Other manufactured Tobacco and Manufactured Tobacco Substitutes; Homogenised or Reconstituted Tobacco; Tobacco Extracts and Essences." Nicotine Sulphate being highly toxic in nature, is neither manufactured tobacco nor a tobacco substitute. It is also not homogenised or reconstituted tobacco and therefore, it cannot be covered under CTH 2403.
- The Nicotine Sulphate obtained by adding dilute sulphuric acid to Nicotine is entirely different than Nicotine and therefore, cannot be covered as tobacco extracts and essence.
- Historically and Commercially, Nicotine Sulphate has always been classified under CTH 2939. One of the manufacturers of Nicotine Sulphate, M/s. Nisol Manufacturing Co. Pvt. Ltd. are exporting this product under CTH 2939. (Copy of LOP dated 19.09.2019 issued to this unit, by the Development Commissioner, Kandla, SEZ for manufacture and export of Nicotine alkaloid 95% under CTH 29397900 enclosed)
- As per Note 1(a) of Chapter 29, separate chemically defined whether or not containing impurities, are only covered under Chapter 29. As per CRCL test report sample contains Nicotine 36.4% and Nicotine Sulphate 47.4% which means that sample contains 47.4% Nicotine Sulphate and the rest is water and out of 47.4% Nicotine Sulphate, Nicotine percentage is 36.4% and the rest is Sulphuric Acid. The finding of

learned Commissioner in respect of Note 1(a) of Chapter 29 is not applicable to the product in question.

- M/s. BGP International and M/s. BHPL are not related party as per the provisions of Section 4(3)(b) of the Central Excise Act, 1944 as none of the conditions specified therein, are satisfied in their case. Consequently, differential duty demand of Rs.3,56,475/- is not legally sustainable.
- To plead that mutuality of business interest is necessary for establishing related party, they rely on the decision of Hon'ble Supreme Court in the case of UOI Vs. Atic Industries- 1984 (17) ELT 323 where it is held that, even though, buyer company is holding 50% share in manufacturing company, such buyer company and manufacturing company cannot be treated as having mutuality of business interest. In their case, BGP and BHPL have only common Partner/ Director which does not establish mutuality of interest between the appellant and BHPL. They rely on various other decisions to plead the above point including the decision of Hon'ble Supreme Court in the case of UOI Vs. Hind Lamps- 1989 (43) ELT 161 (SC).
- Thus, there is no suppression, mis-statement etc. as classification of Nicotine Sulphate manufactured by the appellant under CTH 2939 was in the Knowledge of the department since long time. Thus, extended period is not invokable.
- ER-1 return for April-2015, shows that appellant has manufactured Nicotine Sulphate and shown it's clearance under CTH 29399900 indicating that nothing was suppressed from department. They also rely on a letter dated 07.04.2006 of M/s. Alchem International (now known as BGP International) submitted to the Jurisdictional Deputy Commissioner of Central Excise intimating about manufacture of Nicotine Sulphate in their factory and its classification under CTH 2939. The show cause notice issued on 16.06.2020 for demanding differential

duty for the period June-2015 to June-2017 is hit by limitation. They rely on the decision of Hon'ble Supreme Court in following cases:-

a) Pushpam Pharmaceuticals Company Vs. CCE- 1995 (78) ELT 401 (SC),

b) Anand Nishikawa Co. Ltd. Vs. CCE-2005 (188) ELT 149 (SC),

c) Continental Foundation Jt. Venture Vs. CCE-2007 (216) ELT 177 (SC).

- As the demand of duty is not sustainable in this case, they are neither liable to any interest nor to any penalty as confirmed by the learned Commissioner. They requested to allow their appeal and set aside the impugned order.

3. During arguments, learned Advocate Shri Anand Nainawati highlighted relevant Chapter Notes, HSN Explanatory Notes, various provisions and circulars to plead that appellant has correctly classified Nicotine Sulphate under CTH 2939 and revenue's attempt to classify it under CTH 2403 is not legally sustainable. He argued that as per HSN Explanatory Notes under the heading 2403, Nicotine (the alkaloid extract from tobacco) is excluded from Chapter 24 and classifiable under CTH 2939. CTH 2403 covers tobacco extracts and essences which are liquids extracted from moist leaves by pressure, or prepared by boiling waste tobacco in water. They are mainly used for manufacture of insecticides and parasiticides.

3.1 Learned Counsel further argued that there are certain exceptions to the Rule that Chapter 29 is limited to separate chemically defined compounds. These exceptions include the following products:-

Heading 29.09-Ketone peroxides.

Heading 29.12 -Cyclic polymers of aldehydes; paraformaldehyde.

Heading 29.19 -Lactophosphates.

Heading 29.23 -Lecithins and other phosphoaminolipids.

Heading 29.34- Nucleic acids and their salts.

Heading 29.36-Provitamins and vitamins (including concentrates and intermixtures), whether or not in a solvent.

Heading 29.37 -Hormones.

Heading 29.38 -Glycosides and their derivatives.

Heading 29.39 -Alkaloids and their derivatives.

Heading 29.40 -Sugar ethers, sugar acetals and sugar esters, and their salts.

Heading 29.41 -Antibiotics.

3.2 Learned Advocate explained that as per Hawley's Condensed Chemical Dictionary, (Sixteenth Edition) Nicotine ($C_5H_4NC_4H_7NCH_3$) is an alkaloid from tobacco; thick, water-white, levoratatory oil turning brown on exposure to air, also in form of dust or powder. Hygroscopic. Boiling point 247C, density-1.00924. Soluble in alcohol, chloroform, ether, kerosene, water, and oils, combustible.

Use: Insecticide, fumigant. Available as the dihydrochloride, salicy-late, sulfate and bitartrate.

Nicotine Sulfate $(C_{10}H_{14}N_2)_2.\ H_2SO_4$

Hazard- Poisonous, causes tremers, incordination, nausea, disturbed respiration, dark bloody haemorrhages in the heart and in lungs, congregation of the brain.

Use: Insecticide

3.3 Learned Advocate further mentioned that the impugned order which has travelled beyond the scope of the show cause notice, is not legally sustainable. Extended period in this case has been upheld ignoring ample decisions of Hon'ble Supreme Court and various Hon'ble High Courts which have held that when information is declared in statutory returns, suppression cannot be alleged for non-furnishing of any other information which is not required to be supplied in statutory return. He also relied on the decision of Hon'ble Supreme Court in the case of Densons Pultretaknik Vs. CCE- 2003 (155) ELT 211 (SC) to plead that mere claiming wrong classification is no suppression. He argues that when facts are known to both sides, omission to do what ought to have been done, cannot be considered as suppression. Further, when demand of duty in this case is not sustainable, interest and penalty cannot be recovered from them. On related party sales, learned Advocate argues that the appellant and M/s. BHPL are not related in terms of Section 4 of the Central Excise Act, 1944 and therefore, differential duty demand on this ground is also not sustainable.

4. Opposing the prayer, Shri Nem Singh, learned Commissioner (AR) pleaded that the test reports read with clarification given by the CRCL justifies misclassification of Nicotine Sulphate. He draws attention towards test report dated 20.06.2017 wherein, the Chemical Examiner has put a remark- *"the sample is an "aqueous dispersion" having concentration of Nicotine (extract an essence of tobacco). Such type of manufactured product of tobacco defined under Chapter 2403 subheading 99.90."* He pleads that there is huge difference in rate of excise duty leviable on products of heading 2939 and 2403 which shows appellant's intent to evade payment of duty. He reiterates the finding of learned Commissioner to justify invocation of extended period. On related party sales, Shri Singh submits that Shri Jayesh B Patel was Partner in BGP International and also a Director in BHPL which establishes that both the entities were interconnected related persons. He further submits that valuation of such goods sold to related party should be @110% of cost of production as provided under Rule 9 of Central Excise Valuation Rules, 2000. He argues that during 2016-17, appellant sold goods (Nicotine Sulphate) to M/s. BHPL @ Rs. 920/- per unit which is less than 110% of the cost of production and thus, there was undervaluation of goods. Learned AR further submitted that letter dated 07.04.2006 of M/s. Alchem International was not produced before the Adjudicating Authority and hence, it cannot be relied upon. He places reliance on the following decisions to support his contentions:-

a) Usha Rectifier Corpn. (I) Ltd. v. CCE- 2011 (263) E.L.T. 655 (S.C.)
b) Mahavir Plastics v. CCE- 2010 (255) E.L.T. 241 (Tri. Mumbai)

c) Neminath Fabrics Pvt. Ltd. v. CCE- 2010 (256) E.L.T. 369 (Guj.)

4.1 On revenue neutrality, he relied upon the following decisions:-

a) Star Industries v. Commissioner of Customs (Imports)- 2015 (324) E.L.T. 656 (S.C.)

b) Vogue Textiles Ltd. v. CCE- 2017 (351) E.L.T. 310 (Tri. - Chan.)

c) Forbes Marshall Pvt. Ltd. v. CCE- 2015 (38) S.T.R. 843 (Tri. - Mumbai)

5. We have heard both sides. Following three issues are involved for decision-

(a) Whether proceedings for recovery of central excise duty in this case are barred by limitation?

(b) Classification of "Nicotine Sulphate", whether under CTH 24039990 as claimed by department or under CTH 29399900 as declared by appellant?

(c) Whether M/s. BGP International and BGP Healthcare Pvt. Ltd. are related parties?

5.1 Regarding first issue, we find that revenue has confirmed demand of central excise duty raised vide show cause notice dated 16.06.2020 for the period from June-2015 to June-2017, by invoking extended period of limitation. During arguments, learned Advocate produced a copy of the letter dated 07.04.2006 sent by M/s. Alchem International (now known as BGP International) addressed to the Deputy Commissioner, Central Excise, Gandhinagar intimating manufacture of Nicotine Salts viz. Nicotine Sulphate (H S Code 29397002), Nicotine Alkaloid (H S Code 29397001) and Nicotine Polacrilex (H S Code 29397009). Copy of the said letter is reproduced as under:-

ANNEXURE- 322 24

NOW KNOWN AS BGP INT

ALCHEM INTERNATIONAL

AT. MALOSAN , TAL. VIJAPUR, DIST. MEHSANA. (N.G)
PHONE NO. 02763 -236215 FAX NO. 236288

To.
The Deputy Commissioner
Central Excise,
Gandhinagar.

O/C

Dt. 07/04/2006.

SUB. INTIMATION REGARDING NEW PRODUCT.

Dear Sir,

We Alchem international at Servey .no. 90, Post. Malosan, Tal Vijapur, Dist. Mehsana Holder of c.excise reg no. AACFA 6786 FXM 001 hereby intimate to you that we intend to Manufacture Nicotine salts in our premises as below.

The H.S no of the products are as below.

NICOTINE SULPHATE	H.S. CODE NO.	29397002	29397002
NICOTINE ALKOLOID	H.S. CODE.NO.	29397001	29397002
NICOTINE POLACRILEX	H.S CODE NO.	29397009	29397003
By Product generated Organic manure			

Kindly include the said products in our exisisting liecence and allow clearances. We hereby also submit the list of raw material and manufacturing process for the above products.

Thanking You

Yours Faithfully,

(H.B.Patel)

On above basis, learned Advocate Shri Anand Nainawati contended that the department was already informed of manufacture of Nicotine Sulphate in the unit falling under CTH 29397002. We also find that the appellant has filed monthly Excise Returns (ER 1) for the disputed period clearly disclosing manufacture and clearance of Nicotine Sulphate under CTH 29399900. From above evidence, it is clear that classification of Nicotine Sulphate by appellant under Chapter Heading 2939 was already intimated to the department and therefore, there is no ground to allege suppression, misstatement etc. in the case to invoke extended period. We accordingly hold that the action of the department to demand central excise duty on Nicotine Sulphate for the period

June-2015 to June-2017 by issuing show cause notice on 12.06.2020 is hit by limitation. The entire demand is therefore, liable to be dropped on this ground alone. To support above view, we rely on following decisions, wherein it was held that information not required to be supplied under law, if not supplied, does not amount to suppression-

a) Apex Electricals Pvt. Ltd. Vs. UOI- 1992 (61) ELT 413 (Guj.)

b) Cadila Pharmaceutical Ltd. Vs. CCE- 2017 (349) ELT 694 (Guj.)

5.2 Regarding second issue, we find that revenue has determined classification of Nicotine Sulphate under CTH 24039990 which covers, *"Other manufactured Tobacco and Manufactured Tobacco Substitutes"; "Homogenised or Reconstituted Tobacco"; "Tobacco Extracts and Essences"* by rejecting classification of the product adopted by appellant under CTH 29399900, which covers vegetable alkaloids, whether natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives. The above decision of learned Commissioner is based on Note 1(a) of Chapter 29 which restricts the scope of headings of Chapter 29 to cover only "separate chemically defined organic compounds, whether or not containing impurities." Since, Section Notes/ Chapter Notes do not throw further light on classification of disputed product, recourse is taken to harmonised system of nomenclature (HSN) explanatory notes. We refer the decision of Hon'ble Supreme Court in the case of Collector of Central Excise, Hyderabad Vs. Bakelite Hylam Limited reported at 1997 (91) ELT 13 (SC) wherein, it was held that explanatory notes to Harmonized System of Nomenclature is a safe guide for ascertaining the true meaning of any expression used in the Act in case of any doubt. Under general notes to this Chapter, it is mentioned that-

> *"A separate chemically defined compound is a substance which consists of one molecular species (e.g., covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a definitive structural diagram. In a crystal lattice, the molecular species corresponds to the repeating unit cell.*

Separate chemically defined compounds containing other substances deliberately added during or after their manufacture (including purification) are excluded from this Chapter. Accordingly, a product consisting of saccharin mixed with lactose, for example, to render the product suitable for use as a sweetening agent is excluded (see Explanatory Note to heading 29.25).

The separate chemically defined compounds of this Chapter may contain impurities. An exception to this rule is created by the wording of heading 29.40 which, with regard to sugars, restricts the scope of the heading to chemically pure sugars."

5.3 Sub heading (C) under General notes covers some products which remain classified in Chapter 29, even when, they are not separate chemically defined compounds. These exceptions include the following products-

Heading 29.09-Ketone peroxides.

Heading 29.12 -Cyclic polymers of aldehydes; paraformaldehyde.

Heading 29.19 -Lactophosphates.

Heading 29.23 -Lecithins and other phosphoaminolipids.

Heading 29.34- Nucleic acids and their salts.

Heading 29.36-Provitamins and vitamins (including concentrates and intermixtures), whether or not in a solvent.

Heading 29.37 -Hormones.

Heading 29.38 -Glycosides and their derivatives.

Heading 29.39 -Alkaloids and their derivatives.

Heading 29.40 –Sugar ethers, sugar acetals and sugar esters, and their salts.

Heading 29.41 -Antibiotics.

From above, it is clear that heading 29.39 covers, "Alkaloids and their derivatives".

5.4 Para-6.2 of the show cause notice elaborates the process of manufacture of "Nicotine Sulphate" as intimated by the appellant to the Jurisdictional Range Superintendent. The manufacturing process is as under-

"Tobacco powder and tobacco leaves/wastes are mixed with waste lime and some water is added for wetting till strong smell is observed. The material is then transferred to percolators for percolation. After filling percolators, water and depleted broth are charged into percolators for extraction. Here, mostly

> *depleted broth is used for extraction. From the bottom of percolators, fresh broth is collected which is transferred to another fresh Broth Buffer Tank. After keeping this process continued for 20 hrs Nicotine contained in the tobacco is extracted in water and the rest remains is discarded. This Nicotine is taken for liquid extraction in two stages. It is transferred from water layer to kerosene oil layer. Then settling is done for 30 minutes to separate layers of depleted broth and Nicotinized kerosene. The depleted broth is sent to storage for recycling. Top layer of Nicotinized kerosene only without broth is transferred. After the Kerosene sample is drawn and tested for Nicotine content, dilute sulfuric acid is added as per analysis result for fixation of Nicotine from kerosene as Nicotine Sulphate to meet the concentration between 35% to 45% as Nicotine Sulphate."*

The above manufacturing process clearly indicates that Nicotine Sulphate obtained by the appellant is vegetable alkaloid and therefore, it is appropriately classifiable under CTH 2939. Regarding restrictions imposed by note 1(a) of Chapter 29, we find that sub heading (C) under General Notes to Chapter 29 details certain exceptions to this rule as per which some goods though not separate chemically defined, still remain classified under this Chapter. We therefore agree with the arguments of learned Advocate that restrictions put by note 1(a) of Chapter 29 will not debar classification of "Nicotine Sulphate" under Chapter 29.

5.5 We further find that the entire case of revenue is based on CRCL test report dated 20.06.2017 in respect of sample of the product drawn on 08.03.2016 from the premises of M/s. BGP Healthcare Pvt. Ltd. In this test report, apart from indicating percentage of Nicotine content in Nicotine Sulphate, the chemical examiner has also opined that *such type of manufactured product of tobacco are defined under Chapter 2403, sub heading 99.90.* The appellant challenged this test report on three grounds –

(i) The sample has been drawn from third party premises and not from their factory, and also, in their absence, which procedure of sampling is not approved by the CBIC Supplementary Manual.

(ii) The CRCL lab has tested the sample after more than one year from the date of drawl of sample which is not in accordance with Bureau of Indian Standards.

(iii) The Chemical examiner is not authorised to give opinion on classification of the product.

Regarding the first point, we find that the officers have drawn samples from a third party premises on 08.03.2016 in the absence of the appellant or their representative. The CBIC Supplementary Manual in para 8.1 clearly specifies that, *"except where there are special instructions for particular kind of samples, the representative samples from such or any lot must be drawn in quadruplicate* ***in the presence of the owner/ manager of the factory or his representative."*** Therefore, by drawing samples in absence of the manufacturer or his representative, the officers have violated the guidelines issued by CBIC on drawl of samples.

On second issue, we find that sample drawn on 08.03.2016 was tested by CRCL which communicated test report on 20.06.2017 and thus, it is clear violation of IS: 10627: 1983 which prescribes that the sample should be tested within 90 days of it's manufacture. We also refer the decision of CESTAT Kolkata in the case of Moorgate Industries (I) Pvt. Ltd. Vs. Commissioner of Customs (Port) reported at 2023 (12) TMI 963, wherein, at para-9, it was observed that, *"the sample was tested nearly two months after its drawl and had not been stored in accordance with the prescribed conditions, the reliability of the test result, therefore is not only doubtful but also unreliable. We also note that the Board's Circular- 12/2014-Cus clearly states that the sample is to be drawn in accordance with the BIS standards."* In present case, also we find that the samples drawn on 8th March-2016 were tested in June-2017 i.e. after lapse of more than one year which as per BIS, should have been tested within 90 days of the manufacture. Accordingly, the test report dated 20.06.2017 in this case is not reliable.

Regarding third point, we find that Hon'ble Supreme Court in the case of Camlin Limited reported at 2008 (230) ELT 193 (SC) held that, *"opinion of Chief Chemist is not relevant for determining classification of products. The role of the Chief Chemist is only to supply analytical data."* Similar finding was given by this Tribunal in the case of Mclloyds & Company Vs. Commissioner of Customs, Ahmedabad reported at 2014 (310) ELT 929 (T) and Commissioner of Central Excise, Ahmedabad-I Vs. Dhariyal Chemicals reported at 2014 (309) ELT 727 (T), wherein, it was held that, *"Deputy Chief Chemist is only required to do any chemical testing and submit the findings to the authorities and is not empowered to classify the product."* In view of this, we hold that opinion given by the chemical examiner on classification of Nicotine Sulphate under CTH 24039990 is of no relevance.

5.6 We further find that the department has also drawn samples from the appellant's factory on 16th February, 2018 and after testing samples, CRCL vide report dated 02.04.2018, reported as under:-

> *"The sample is in the form of brown coloured liquid and is composed of a aqueous solution of Nicotine Sulphate, an organic chemical.*
>
> *% of nicotine Sulphate = 46.6%"*

Since, there was contradiction in this report and the report dated 20.06.2017, the officers sent second sample (out of the samples drawn on 16.02.2018) to CRCL, New Delhi on 21.01.2019 for re-testing which vide report dated 20.05.2019 intimated as under-

> *"The sample is in the form of brown coloured liquid. It is composed of aqueous solution of Nicotine Sulphate.*
>
> *Nicotine Content (% by mass) -36.4%*
>
> *Nicotine Sulphate Content (% by mass) - 47.4%"*

The samples drawn on 16.02.2018 were tested twice, once in April-2018 and second time in May-2019 and on both the occasions, test reports indicate almost similar composition of the material and recognise the product as organic chemical. Therefore, we have no hesitation in rejecting the sample test report dated 20.06.2017, on above grounds.

5.7 During arguments, learned Advocate submitted copy of export data of one company by name M/s. Nisol Manufacturing Company Pvt. Ltd, Anand who have exported Nicotine Sulphate by classifying the same under CTH 29397910. Learned Advocate further argued that said exporter was also audited by the officers who have not raised any objection on classification of this product under CTH 29397910. After perusing the export data, we are of the view that in one Commissionerate, officers have accepted classification of Nicotine Sulphate under CTH 2939 whereas, in other Commissionerate, it has been objected to, and classification under tobacco products of CTH 2403 is being sought. This is clearly impermissible. We accordingly hold that the appellant has correctly classified Nicotine Sulphate under CTH 29399900 and revenue’s attempt to classify it under CTH 24039990 and recover differential duty for the larger period, cannot be legally sustained. Accordingly, demand of duty, interest and penalty on this count is set aside.

5.8 Regarding related party transaction between the appellant and BGP Healthcare Pvt. Ltd., we find that the show cause notice in para 12.1 reproduces provisions of the Section 4(3) dealing with definition of “Related Party” and then, relying on the statement on Shri Harshad Patel, Authorised Signatory of BGP International, alleging that both the entities are related parties as Shri Jayesh B Patel, Partner of appellant firm is also Managing Director of BGP Healthcare Pvt. Ltd. during 2016-17. Revenue has demanded differential duty of Rs. 3,56,475/- by adopting valuation of goods cleared to BGP Healthcare Pvt. Ltd. as per Rule 9 of the Central Excise Valuation Rules i.e. 110% of the cost of production. As mentioned in para 12.4 of the show cause notice, transaction value of goods sold to BGP Health Care in 2015-16 & 2017-18 of the cost of production (upto June-2017) was more than 110% of the cost of production and therefore, no differential duty was demanded.

However, in 2016-17, transaction value was only 107.95% of the cost of production and therefore, differential duty liability of Rs.3,56,475/- for this year has been demanded and also confirmed by the learned Commissioner without elaborating how these two entities are related. We accordingly, have no hesitation to hold that the allegation of related party sale between the appellant and BGP Healthcare Pvt. Ltd. are without any supportive evidence and therefore, duty of Rs.3,56,475/- confirmed by the learned Commissioner on this count, cannot be sustained. Therefore, this duty demand along with interest and penalty as confirmed vide impugned order is also set aside.

6. Appeal is allowed.

(Pronounced in the open court on 29.07.2026)

(DR. AJAYA KRISHNA VISHVESHA)
MEMBER (JUDICIAL)

(SATENDRA VIKRAM SINGH)
MEMBER (TECHNICAL)

Bharvi