

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI.**

PRINCIPAL BENCH,  
COURT NO. III

**EXCISE APPEAL NO. 51847 OF 2021**

[Arising out of the Order-in-Appeal No. DDN/EXCUS/000/APP/33-34/2020-21 dated 28/05/2020 passed by Commissioner (Appeals), CGST, Central Excise & Service Tax, Dehradun (M.P.).]

**M/s Orchid Bio-Tech Pvt. Ltd.**

**.....Appellant**

65, Peerpura – Delhi Highway, Roorkee,  
District Haridwar, Uttarakhand.

**Versus**

**Commissioner, CGST, Dehradun,**

**....Respondent**

E-Block, Nehru Colony, Haridwar Road,  
Dehradun, Uttarakhand.

**APPEARANCE:**

None for the appellant.

Shri Bhagwat Dayal, Authorized Representative for the  
Department

**CORAM:**

**HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)**

**HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 51887/2025**

**DATE OF HEARING : 08.09.2025**

**DATE OF DECISION: 18.12.2025**

**P.V. SUBBA RAO**

**M/s. Orchid Biotech Ltd.<sup>1</sup>** filed this appeal to assail the order-in-appeal dated 28.5.2020<sup>2</sup> passed by the Commissioner (Appeals) upholding the order-in-original dated 06.11.2017 passed by the Joint Commissioner. This appeal was listed on several dates before (23.03.2023, 22.05.2023, 08.08.2023, 13.09.2023, 29.11.2023, 13.02.2024, 06.05.2024, 30.07.2024, 23.10.2024, 23.10.2024, 23.12.2024, 19.02.2025, 22.04.2025,

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**1. appellant**

**2. impugned order**

08.07.2025) but the appellant has either not appeared or sought an adjournment. When the matter was listed on 08.07.2025, it was made clear that the appeal may be decided on merits even if the appellant does not appear and the matter was directed to be listed on 02.09.2025. The appellant did not appear on 02.09.2025. Learned authorised representative for the Revenue submitted his synopsis and compilation. The matter has been adjourned to today, 08.09.2025. The appellant has not appeared today also.

2. The question which arises is how to deal with cases where the appellant does not appear before this Tribunal. The Larger Bench of the Hon'ble Supreme Court has, in the case of **BALAJI STEEL RE-ROLLING MILLS Versus COMMISSIONER OF C. EX. & CUSTOMS<sup>3</sup>**, held that if the appellant is not present on the day the matter is taken up for hearing, this Tribunal should decide the matter on merits. The relevant portion of the judgment is reproduced below:

"2. The sole question of law which arises for consideration in the present appeal is as to whether the Customs, Excise and Service Tax Appellate Tribunal (in short 'the Tribunal') has the power to dismiss the appeal for want of prosecution or not.

.....

13. Applying the principles laid down in the aforesaid case to the facts of the present case, as the two provisions are similar, **we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by**

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3. 2014 (310) E.L.T. 209 (S.C.)

**the appellant for want of prosecution and it ought to have decided the appeal on merits even if the appellant or its counsel was not present when the appeal was taken up for hearing.** The High Court also erred in law in upholding the order of the Tribunal.

14. We, therefore, set aside the order, dated 18-1-2014 passed by the High Court of Judicature of Bombay, Bench at Aurangabad and also the order, dated 22-8-2012 passed by the Tribunal and direct the Tribunal to decide the appeal on merits.”

**(emphasis supplied)**

3. Respectfully following the judgment of the Supreme Court in **Balaji Steel Re-rolling mills**, we have carefully gone through the records of the case, the appeal and heard learned authorized representative for the Revenue and proceed to decide this appeal on merits.

4. The appellant manufactured dietary supplements during July, 2011 to March, 2015 (relevant period) and cleared them without paying excise duty. The appellant's factory was in Khasra No. 65 of Village Makhiyali Dundi, Pargana Manglore of Tehsil Roorkee in Haridwar District or Uttaranchal.

5. During the relevant period, two area-based exemption notifications were available to units located in Himachal Pradesh and Uttaranchal.

(i) **Notification No. 49/2003-CE dated 10.06.2003** exempted **specified goods** cleared from units located in Uttaranchal and Himachal Pradesh from the whole of excise duty;

(ii) **Notification No. 50/2003-CE dated 10.06.2003** exempted **specified goods** cleared from **units located in the specified Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park** or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area of Uttaranchal and Himachal Pradesh.

6. The appellant's factory was in Khasra No. 65 of Village Makhiyalidundi, Pargana Manglore of Tehsil Roorkee in Haridwar District which was not an area specified in Annexure II and Annexure III of Notification No. 50/2003-CE dated 10.06.2003 and therefore, the appellant was not entitled to the benefit of exemption Notification No. 50/2003-CE.

7. The appellant claimed the benefit of exemption Notification No. 49/2003-CE dated 10.06.2003 as amended and filed a declaration to the effect stating that it would be manufacturing Pharmaceutical Products falling under Central Excise Tariff Heading No. 3004. Pharmaceutical products were one of the specified goods under this notification.

8. Officers of the department received intelligence, that in addition to pharmaceuticals, the appellant was also manufacturing Dietary Foods Supplements, classifiable under chapter heading no. 21069099 of Central Excise Tariff Act, 1985, which are not specified goods under exemption under Notification No. 49/2003-CE but the appellant had not paid excise duty. Officers visited the factory premises of the

appellant on 17.03.2015 and found that the appellant was manufacturing Dietary Food Supplements/Dietary Supplement under PFA License No. NS-321/2011-12 dated 12.07.2011 & 12612006000220 dated 27.07.2012 respectively but cleared them classifying them under Central Excise Tariff heading<sup>4</sup> 30031000/30032000 without paying central excise duty.

9. Finding that Dietary Food Supplements/Dietary supplements were clearly excluded from Chapter 30 of the Central Excise Tariff and that they deserved to be classified under **CETH 21069099** and that the goods under this CETH were not specified in Notification No. 49/2003, a show cause notice dated 15.07.2016<sup>5</sup> was issued to the appellant proposing to:

- a) Classify Dietary Supplements/Dietary Food Supplements manufactured by the appellant under CETH 21069099;
- b) Deny the benefit of exemption under Notification No. 49/2003-CE dated 10.06.2003 as they are not covered under its Schedule;
- c) Recover duty amounting to Rs. 1,63,92,750/- which was not paid on the clearances made during July, 2011 to March, 2015 along with interest;
- d) Impose penalty on the appellant ; and
- e) Impose personal penalty on Shri Anil Kumar Singh, Plant Head of the appellant

10. The Joint Commissioner adjudicated the matter and passed the order-in-original confirming the proposals in the SCN. He

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4. CETH  
5. SCN

imposed penalty equal to the amount of duty on the appellant and imposed a penalty of Rs. 5,00,000/- on Shri Anil Kumar Singh.

11. On appeals filed by the appellant and Shri Anil Kumar Singh, the Commissioner (Appeals) passed the impugned order dismissing the appellant's appeal and reducing the penalty imposed on Shri Anil Kumar Singh from Rs. 5,00,000/- to Rs. 2,00,000/-.

12. Aggrieved, the appellant filed this appeal before us.

### **Submissions in the appeal**

13. In this appeal, the impugned order is assailed on the following grounds:

- (i) The impugned order is erroneous and has been passed by rejecting the ground violation of principles of natural justice by the Joint Commissioner taken by the appellant before the Commissioner (Appeals).
- (ii) The calculation of duty is not correct and the demand has to be based on the MRP on each wrapper.
- (iii) Chapter note 1(a) to Chapter 30 states  
Note 1  
*This Chapter does not cover:*
  - (a) *Food or beverages (such as diabetic, diabetic or fortified food, **food supplements**, tonic beverages and mineral waters), other than nutritional preparation*
- (iv) Since the appellant's products were nutritional preparations, they were not excluded by Chapter note 1(a) to Chapter 30.
- (v) The products cannot be classified under CETH 2106

- (vi) The appellant is therefore, entitled to the benefit of exemption Notification No. 49/2003.
- (vii) The appellant had no mens rea and therefore, extended period of limitation could not have been invoked to raise a demand.
- (viii) The penalty under section 11AC, likewise, needs to be set aside.
- (ix) The appellant may be given an opportunity of being heard.

### **Submissions of the Revenue**

14. Learned authorised representative for the Revenue made the following submissions:

- (i) The appellant was not entitled to the benefit of exemption Notification No. 50/2003-CE because its factory was not in the specified area.
- (ii) The appellant was entitled to the benefit of exemption Notification No. 49/2003-CE but only for pharmaceutical products and not for dietary supplements.
- (iii) There is no dispute that the goods in question were dietary supplements and that the appellant had obtained a licence under the Prevention of Food Adulteration (PFA) to manufacture them.
- (iv) The appellant had mis-classified them as pharmaceutical products under CETH 3003 and claimed the benefit of exemption Notification No. 49/2003-CE.
- (v) CETH 3003 reads as under and food supplements do not fall under it by any stretch of imagination:  
*"3003 : Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packing for retail sale"*

(vi) Chapter Note 1(a) of Chapter 30 of the Central Excise Tariff specifically excludes food supplements from the entire chapter. It reads as follows:

1. *This Chapter does not cover:*

(a) *Food or beverages (such as diabetic, diabetic or fortified food, **food supplements**, tonic beverages and mineral waters), other than nutritional preparation for intravenous administration (Section IV)*

(vii) Shri Anil Kumar Singh, Plant Head of the appellant company, in his statement dated 17.03 2015 tendered under Section 14 of the Central Excise Act, 1944, had *inter alia*, stated that, license of Drug Licensing cum Controlling Authority permits manufacture of medicaments only, whereas, the Dietary Supplements are manufactured under license from Food Safety Department; that, these products are manufactured by using ingredients rich in Vitamin A, C, E, B, B2, B6, B12, Calcium, Iron, Folic Acid, Zinc, Copper and other minerals like Manganese, Molybdenum, Sodium, Carbohydrates etc. In addition, these products are containing Ginseng, amino acids, proteins, Omega – 3 fatty acid, Green Tea extract. Various active agents in form of antibiotics & bulk drugs are main ingredients used in the medicines, where as in case of dietary food supplements, various Vitamins, Minerals, Food Extracts, Fruit Extracts etc. were used.

(viii) Therefore, there is no dispute in this case that the goods that were cleared were not pharmaceuticals but were dietary supplements as clearly explained by Shri Anil Kumar Singh himself.

(ix) In short, the goods in dispute were dietary supplements and as per the Chapter note to Chapter 30 of the Central Excise Tariff, they cannot be classified under Chapter 30 of the tariff and they were not covered by the exemption Notification No. 49/2003-CE.

- (x) The appellant was liable to pay excise duty but it had not paid it. The declaration for claiming the benefit of exemption notification was only made for pharmaceutical products whereas admittedly and undisputedly dietary supplements were also cleared without paying duty.
- (xi) In view of the above, the demand has been confirmed invoking extended period of limitation and penalty of an amount equal to the duty evaded was also imposed on the appellant by the Joint Commissioner which have been upheld in the impugned order
- (xii) The impugned order is correct and calls for no interference. The appeal may be dismissed.

### **Findings**

15. We have considered the submissions in the appeal and the submissions advanced by the learned authorised representative on behalf of Revenue and perused the records.

16. The first question to be decided is about the classification of the dietary supplements manufactured by the appellant. The appellant classified them as pharmaceutical products under CETH 3003. However, Chapter note 1(a) to Chapter 30 of the Central excise Tariff, reads as follows:

This Chapter does not cover:

- (a) *Food or beverages (such as diabetic, diabetic or fortified food, **food supplements**, tonic beverages and mineral waters), other than nutritional preparation for intravenous administration (Section IV)*

17. In its appeal, the appellant reproduced part of the above Chapter note 1(a) minus the words 'for intravenous administration' and made out a case that all food supplements which are nutritional preparations were excluded from the purview of Chapter note 1(a). If the complete sentence is read, it would leave no manner of doubt that food supplements other than nutritional preparations for intravenous administration will not fall under Chapter 30 at all. This note clearly excludes dietary supplements from its purview. They deserve to be classified as dietary supplements under CETH **21069099**.

18. The appellant also contested that the Commissioner (Appeals) erred in not dealing with their plea of violation of principles of natural justice. We find that in paragraph 6.4 of the impugned order, the Commissioner (Appeals) examined this contention and gave a specific finding that the demand was based on the documents provided by the appellant and they were in possession of all the documents and for this reason, rejected the contention of violation of principles of natural justice. We find no error on this finding in the impugned order.

19. The appellant also submitted in the appeal that the method of calculation of duty was erroneous. However, the appellant has not provided any details of how the duty should have been calculated instead. There is absolutely no alternative calculation from the appellant for us to examine. We, therefore, cannot accept this contention.

20. The next question to be answered is if the appellant was entitled to the benefit of exemption Notification No. 49/2003-CE for the dietary supplements. In view of our finding that the goods were correctly classified in the impugned order under CETH 21069099 they were not covered by the exemption Notification No. 49/2003-CE.

21. The appellant also contested the invocation of extended period of limitation on the ground that it had no mens rea to evade. We find that the appellant was not paying duty and was not filing returns as it was claiming the benefit of exemption Notification No. 49/2003. It had to give a declaration to claim the benefit of this exemption. In the declaration, it declared 'Pharmaceutical products falling under C.E. Tariff Heading No. 30.04". On receiving intelligence, the matter was investigated and it was found that the appellant was not only manufacturing pharmaceutical products with a licence from the Drugs Controller but it was also manufacturing Dietary Food Supplements/Dietary Supplements in the form of tablets, syrups, drops and capsules under a licence under the Prevention of Food Adulteration (PFA) licence from the Food Safety and Standards Authority of India (FSSAI).

22. From the facts of the case, it is clear that the appellant knew that the dietary supplements or dietary food supplements which it had manufactured were not drugs but were food and hence it had obtained a licence for their manufacture from the

FSSAI. It could not have entertained a belief that they were pharmaceutical products. Even in the appeal before us, the appellant claimed that they were not excluded by Chapter note 1(a) of Chapter 30 (Pharmaceutical products) by quoting part of the note and reproducing the complete note. Nothing in the conduct of the appellant from filing the declaration before the department that they were manufacturing 'Pharmaceutical products falling under CETH 30.04' to citing part of the Chapter note 1(a) in the appeal before us, shows any bonafide belief of the appellant. The mens rea or intention to evade can only be inferred from the conduct of the assessee. We find from the facts of the case, that the appellant had the intention to evade and therefore, declared 'Pharmaceutical products falling under CETH 30.04' and did not declare the dietary supplements in the form of tablets, capsules, syrups and drops manufactured by it. Therefore, we find in favour of the Revenue and against the appellant on the question of invoking extended period of limitation.

23. The appellant also contended that the calculation of the duty in the SCN confirmed by the Joint Commissioner and upheld in the impugned order is not correct. We find, however, the appellant does not say as to what was the correct amount of duty that should have been. We, therefore, find that this submission also deserves to be rejected.

24. The appellant contested the imposition of fine under section 11AC of the Central Excise Act. We find that penalty under section 11AC can be imposed if duty is not paid or short paid by reason of fraud, collusion, wilful mis-statement or suppression of facts or violation of the provisions of the Act or Rules with an intent to evade. In other words, penalty under this section can be imposed for the same reasons as for invoking extended period of limitation. We have already found in favour of the Revenue and against the appellant on this count because the appellant had mis-declared the nature of goods by not declaring the dietary supplements which it was manufacturing. We, therefore, find in favour of the Revenue and against the appellant on the question of imposing penalty under section 11AC.

25. In view of the above, the confirmation of demand of duty with interest and the imposition of penalty in the impugned order need to be upheld are upheld.

26. The impugned order is upheld and the appeal is dismissed.

(Order pronounced in open court on 18/12/2025.)

**(BINU TAMTA)**  
**MEMBER (JUDICIAL)**

**(P.V. SUBBA RAO)**  
**MEMBER (TECHNICAL)**