REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.378-381 OF 2008

Commissioner of Central Excise, Bangalore … Appellant (s)

versus

M/s. Karnataka Agro Chemicals .... Respondent (s)

WITH

Civil Appeal Nos. 348-349 of 2008

J U D G M E N T

S.H. KAPADIA, J.

These civil appeals concern classification of "micronutrient" compounds for the purpose of excise duty. According to the Department, micronutrient is a 'Plant Growth Regulator' ("PGR" for short), therefore, it falls under CSH 3808.20 of the Central Excise Tariff as a chemical product whereas according to the assessee it falls under CSH 3105.00

(other fertilizers). By the impugned judgment dated 26.2.07, CESTAT has accepted the contention of the assessee that their product(s) "multi micronutrient" (the impugned product) would fall under CSH 3105.00 as contended by the respondent-assessee, hence these civil appeals are filed by the Department.

2. For the sake of convenience we reproduce hereinbelow the facts as reproduced in the case of **Commissioner of Central Excise, Bangalore v. M/s. Karnataka Agro Chemicals [Civil Appeal Nos. 378-381 OF 2008]**.

3. Respondent-assessee manufactures "multi micronutrients" for soil application and for foliar application. The Ministry of Agriculture has granted registration to the assessee's product(s) as "fertilizer" in terms of Section 2(h) of the Fertiliser (Control) Order.

4. By show cause notices dated 26.8.02, 25.2.03, 1.10.03 and 24.5.04, the Department alleged that the assessee had

misdeclared that the impugned product(s) contained nitrogen and had cleared the same without payment of duty. According to the Department, the label on each of the products of the assessee indicated the composition of each of the several products. The label indicated the percentage of zinc, ferrous, manganese and boron (micronutrient elements). In the label there was no mention of N (nitrogen), P (phosphorus) or K (potassium). According to the show cause notices, the chemical analysis of the samples confirmed the fact that fertilizing elements N, P or K were not there in "micronutrient compounds" of the assessee. According to the show cause notices, the mixtures manufactured by the assessee did not contain N, P or K as essential constituents. That, in any event, N, P or K are not the essential constituents of the micronutrients. That, in the impugned product(s) there was no N, P or K as fertilizing element. That, addition of N, P or K was only a pretence to misdeclare their product(s). Therefore, the impugned product(s) were classifiable under CSH 3808.20 of the Central Excise Tariff.

5. In reply to the above show cause notices, assessee submitted that its product(s) were got tested on three occasions by the Department which indicated presence of nitrogen in all the products. That, on perusal of Explanatory Note 6 to Chapter 31, it was sufficient if nitrogen is present in the product(s) of the assessee to merit classification under CSH 3105.00 According to the assessee, nitrogen was an essential constituent of the assessee's product(s) and, therefore, the product(s) came within CH 31.05 For that purpose reliance was placed by the assessee on Explanatory Note 6 to Chapter 31. According to the assessee, even in the trade parlance, the product(s) manufactured by the assessee are known and used as fertilizers and since nitrogen is a fertilizing agent it was an essential constituent in its product (s) used as fertilizers.

6. We quote hereinbelow Explanatory Note 6 to Chapter 31 of the Central Excise Tariff which reads as below:

"CHAPTER 31
FERTILISERS

Notes :

6. For the purposes of heading No.31.05, the term "other fertilizers" applies only to products of a kind used as fertilizers and containing, as an essential constituent, at least one of the fertilizing elements nitrogen, phosphorus or potassium."

7. We also quote hereinbelow CSH 3105.00 of the Central Excise Tariff which reads as below:

"CHAPTER 31
FERTILISERS

Heading No.	Sub-heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
31.05	3105.00	Mineral or chemical fertilizers, containing two or three of the fertilizing elements, nitrogen, phosphorous and potassium; other fertilizers	16%

8. We also quote hereinbelow Explanatory Note 1 to Chapter 38 of the Central Excise Tariff which reads as below:

"CHAPTER 38

MISCELLANEOUS CHEMICAL PRODUCTS

Notes:

1. This Chapter does not cover:

(a) Separate chemically defined elements or compounds with the exception of the following:

(1) Artificial graphite (heading No.38.01);

(2) Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products, put up as described in Heading No.38.08."

9. We also quote hereinbelow CH 3808 of the Central Excise Tariff which reads as below:

"CHAPTER 38
MISCELLANEOUS CHEMICAL PRODUCTS

Heading No.	Sub-heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
38.08		Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulphur-treated bands, wicks and candles, and fly-papers)	

	3808.20	Plant growth regulators	16%
	3808.90	Other	16%

10. We also quote hereinbelow Circular No.392/25/98-CX., dated 19.5.1998 issued by CBEC which reads as follows:

"Micronutrients — Classification of [Chapter 28/31]

Circular No. 392/25/98-CX., dated 19-5-1998

[From F.No. 106/1/98-CX.3]

Government of India

Ministry of Finance (Department of Revenue),

New Delhi

Subject : Central Excise - Classification of Micronutrients - Clarification Regarding.

Attention is invited to the instructions contained in Board's Circular No. 79/79/94-CX., dated 21-11-1994 [See 1994 (74) E.L.T. T46] wherein Board had clarified that Micronutrients listed under the Fertiliser (Control) Order, 1985 and their mixtures (with or without N.P.K.), as notified by the Central Government or a State Government would be classifiable under CET Chapter 31.05.

2. A doubt has been raised regarding classification of certain Micronutrients such as compounds of Zinc, Boron, Manganese, Molybdenum, Iron etc., which are required in minor quantities to regulate

plant growth - whether classifiable as fertilisers (31.05), plant growth regulators (38.08) or as separate chemically defined compound (Ch. 28).

3. The matter has been re-examined in the light of Supreme Court judgment in the case of Ranadey Micronutrients v. Collector of Central Excise - Civil Appeal No. 5404 of 1993, decided on 10-9-1996 - 1996 (87) E.L.T. 19 (S.C.). Micronutrients are basically salts of elements such as Zinc, Boron, Manganese, Molybdenum, Iron etc., known as trace elements. These are essential for plant growth in small amounts only and their absence leads to stunted growth. These elements are supplied in minor quantities to regulate the formation of hormones etc., which in turn alter life processes of the plant so as to accelerate growth, enhance yield and improve quality, thus indirectly contributing to regulate plant growth.

4. According to HSN Explanatory Notes, plant growth regulators are applied to alter the life process of the plant so as to accelerate or retard growth, enhance yield, improve quality of facilitate harvesting, etc. Plant hormones are one type of plant growth regulators. Synthetic organic chemicals are also used as plant growth regulators.

5. Fertilizers are materials added to soil and, sometimes to foliage to supply nutrients to sustain plants and promote their abundant and fruitful growth. The elements that constitute these plant foods are divided into three classes - (1) Primary-Nitrogen (N), Phosphorous (P) and Potassium (K), (2) Secondary - Calcium (Ca), Magnesium (Mg) and Sulphur (S) and (3) Minor or so called micronutrients - Iron (Fe), Manganese (Mn), Copper (Cu), Zinc (Zn), Boron (B) and Molybdenum (Mo). However, for the purpose of classification of micronutrients as `Other Fertilizers' in Heading 31.05 CET, the scope of the term 'Other Fertilizers' has to be determined in the light of Note 6 of Chapter 31. Further, the specific exclusion of separate chemically defined compounds as laid down in the HSN Explanatory Notes to Heading 3105.90, must also be borne in mind. If, the micronutrient is a separate chemically defined compound, it will be classifiable under Chapter 28/29. If not so, and if in accordance with Note 8 to Chapter 31, it contains N, P or K, it will be classifiable under Chapter Heading 31.

6. Further it is also stated that notification under F.C.O. is irrelevant for deciding classification under the Central Excise Tariff and regardless of such notification, the appropriate consideration should be :-

(i) whether or not the micronutrient in question is a separate chemically defined compound. If it is, then classification under 31.05 is ruled out; and

(ii) if it is not, whether it contains N, P or K as laid down in the Explanatory Notes.

7. Therefore, it is clarified that classification of micronutrients may be done in accordance with the above guidelines.

8. The above clarification may be brought to the notice of the lower field formations and the trade interests may also be suitably advised.

9. Board's earlier Circular No. 79/79/94-CX, dated 21-11-1994 stands modified accordingly.

10. All pending assessments may be finalized on the above basis."

11. At this stage we need to consider the order passed by the Adjudicating Authority. The main issue which arose for determination was: whether the impugned product(s) manufactured by the assessee was classifiable as Plant Growth Regulator ("PGR") under CSH 3808.20 or whether it was "other fertilizer" under CSH 3105.00. The main submission made by the Department in the show cause notices was that to classify the impugned product(s) under CSH 3105.00, nitrogen is not the essential element of micronutrients. That, though in the impugned product(s) nitrogen did exist, it did not exist as a fertilizing element but as a chelating agent and consequently the impugned product (s) was not classifiable under CSH 3105.00. In this connection, the Adjudicating Authority placed reliance on the Report of the Chemical Examiner dated 12.7.01. According to

the Adjudicating Authority, in any event, mere trace of nitrogen in the impugned product(s) was not sufficient to classify the same under CHS 3105.00. Reliance was also placed on the labels, affixed on the impugned product(s), by the Adjudicating Authority to show that "Multi Micronutrients" manufactured by the assessee for soyabean, coffee, citrus, tea nursery etc. only indicated that they could be used to increase or improve the yield in terms of quality and quantity and since PGRs are organic chemicals synthesized in the plant to regulate its growth and development the impugned product(s) fell under CSH 3808.20 of the Central Excise Tariff. According to the Adjudicating Authority, the content of nitrogen, present in the impugned product(s), was only 0.31%, which was not sufficient to be called as "fertilizing element" and that the said nitrogen was used only as a chelating agent and, therefore, it was not sufficient enough to act as a fertilizing element, consequently the impugned product(s) fell under CSH 3808.20. According to the Department, PGR is an item in CH 38.08. The said item is a specific item which would override the item "other fertilizers" in CSH 3105.00. According to the

Adjudicating Authority “fertilizer” is a general entry whereas PGR is a specific entry and, therefore, the specific entry will override the general entry in the matter of classification.

12. The order of the Adjudicating Authority was overruled by the Tribunal which came to the conclusion by the impugned judgment that PGRs are chemical compounds; that in the show cause notices there was no allegation made by the Department that the impugned product(s) was a chemically defined compound; that in fact the impugned product(s) was a mixture of various inorganic substances and, therefore, it cannot be classified under CSH 3808.20. According to the Tribunal, classification of “micronutrients” has been the subject-matter of three circulars issued by CBEC, the first was dated 24.5.90 in which micronutrients were classified under CH 38.08 on the ground that it did not contain nitrogen, phosphorus or potassium; the second was issued on 21.11.94 in which it was stated that micronutrients with or without N, P, K stood recognized as a fertilizer and on 19.5.98 third Circular was issued clarifying that in order to classify

micronutrients two tests are required to be followed, namely, whether or not the micronutrients is a separate chemically defined compound and if it is so then classification under CH 31.05 shall stand ruled out and if the said micronutrients is not a separate chemically defined compound then one has to find out whether it contains N, P or K in terms of Note 6 to chapter 31. In this case the Tribunal observed that even in the Circular dated 19.5.98 issued by CBEC there is no prescribed percentage of any of the above elements in the impugned product(s). According to the Tribunal, there is also no specific mention of micronutrients in the said Explanatory Note which has led to confusion. Therefore, according to the Tribunal even a trace of nitrogen in the impugned product(s) was sufficient to classify micronutrient as "other fertilizer" in CSH 3105.00, hence these civil appeals by the Department.

13. At the outset, it may be stated that in a generic sense "micronutrients" may be a kind of fertilizer in the functional sense but for the purposes of Central Excise Tariff they are excluded from the scope of CH 31.05 (fertilizers) by virtue of

Chapter Note 6 which requires the term "other fertilizers" to include only those products used as fertilizers and containing N, P or K as an essential constituent which is not the case in respect of micronutrients.

14. Therefore, one needs to ascertain the composition of micronutrients. In this connection, we wish to quote from certain encyclopedias/chemical dictionaries as follows:

(i) According to the **"Scientific Encyclopedia"** by Van Nostrand, "fertilizer" is a substance which is often a combination of substances of organic composition, natural or manufactured, in solid or liquid form. The "micronutrient" consists of Boron (B), Copper (Cu), Iron (Fe), Manganese (Mn), Zinc (Zn) and Molybdenum (Mo).

15. The important thing to be noted is that N, P or K is not mentioned as an element of "micronutrient".

(ii) According to the **"Gardener's Guide to Fertilizing Trees and Shrubs"** plants require 17 elements for normal growth. Carbon,

hydrogen and Oxygen are found in air and water. Nitrogen, potassium, magnesium, calcium, phosphorous and sulfur are absorbed from the soil. The last 6 elements are used in large amounts by the plant and are called **macronutrients**. There are 8 other elements which are used in smaller amounts. These are called **micronutrients** or trace elements which include iron, zinc, molybdenum, manganese, boron, copper, cobalt and chlorine. The nutrients that are most likely to limit plant growth are nitrogen, phosphorus and potassium.

(iii) According to the **"Scientific Encyclopedia"** by Van Nostrand, a 'plant growth regulator' is essentially a chemical substance which is concerned with plant growth and which provides tonic to the plant growth. It is a plant hormone. It is an organic compound which controls growth.

(iv) According to the **www.en.wikipedia.org** "micronutrients" are vitamins and minerals. Vitamin is an organic compound. Vitamins are classified by their biological activities and

not by their structure. Vitamins have diverse bio-chemical functions including functions as hormones, therefore, plant hormones are also known as plant growth regulators. Plant hormones are made of chemicals that can vary in structure from one plant to another.

(v) According to the **"McGraw-Hill Encyclopedia of Science & Technology"** materials added to the soil or applied directly to crop, to supply elements needed for nutrition of the plant is called as "fertilizers". The chemical elements – nitrogen, phosphorus and potassium are **macronutrients** or primary fertilizer elements which are required in greatest quantity. Sulphur, calcium and magnesium are secondary elements necessary for the health of vegetation. They are required in lesser amounts as compared to macronutrients. The other elements include boron, cobalt, copper, iron, manganese, molybdenum and zinc. These are required in traces. These minor elements are called **micronutrients**. Many commercial fertilizers, therefore, contain more than one of the primary fertilizer elements. It is important to note that none of N, P or K can constitute 100% plant nutrient.

(vi) According to the **"Encyclopedia Americana"**, the nutrients required in the largest amounts are calcium, magnesium, nitrogen, phosphorous, potassium and sulfur. These elements are generally required in quantities ranging from 10 to 400 pounds per acre (11.2 to 440 kg per hectare). At the same time, plants also need small amount of boron, chlorine, cobalt, copper, iron, manganese, molybdenum and zinc (micronutrients or trace elements). They are required in quantities of about one-fifth ounce per acre (6 grams per hectare) of molybdenum to 10 ounces per acre (280 kg per hectare) of iron and manganese.

16. Therefore, it is clear that "micronutrients" do not include N or P or K. "Micronutrient" is required in very small quantity, almost a trace in the plant nutrients.

17. The issue involved in this civil appeal is: whether the impugned product(s) is a PGR or a fertilizer?

18. The contention of the Department in its show cause notice is that the micronutrient compounds manufactured by the respondent-assessee were liable to be classified under CSH 3808.20 and not under CSH 3105.00 on account of absence of N, P or K in the impugned product(s). According to the Department, there is 0.31% of nitrogen in the impugned product as a chelating agent and not as a fertilizing element and that even if it is a fertilizing agent, its quantity of 0.31%, would not amount to "essential constituent" in terms of explanatory note 6 to Chapter 31.

19. We have examined several reference books, some of which are quoted hereinabove, which shows that micronutrients *per se*, as against macronutrients, do not contain N, P or K.

20. Micronutrient(s) functionally may be a Fertilizer but not in terms of composition. In fact, N, P or K is the constituent element of macronutrient and not of micronutrient.

21. Coming to PGRs, it needs to be emphasized that they are organic compounds, other than nutrients, which in small quantity inhibits, promotes, alters or modifies physiological processes in plants.

22. In the present case, the impugned product(s) is "multi micronutrient". It is contended on behalf of the assessee that the impugned product(s) contains nitrogen, hence it is classifiable as "other fertilizer" under CSH 3105.00. It is contended that nitrogen is an essential constituent of the impugned product(s) and, therefore, the same is classifiable as "other fertilizers".

23. Therefore, the relevant question to be asked is- what is the method of manufacture of "multi micronutrient"? This question becomes relevant as the impugned product(s) is a mixture of various inorganic substances. It is the "method of manufacture" which has a strong bearing on the question whether the product(s) needs to be classified under CSH

3808.20 or under CSH 3105.00. This aspect has not been examined by the Adjudicating Authority.

24. It is alleged by the Department that N, P or K are not the essential constituents of micronutrient(s). We agree. However, in this case, the impugned product(s) is “multi micronutrient” which the assessee claims to be a mixture of various inorganic substances. In this connection it is important to note that two tests have been formulated in the circular of CBEC dated 19.5.1998, namely, whether the subject-product(s) is a chemically defined compound, if so, it goes out of CSH 3105.00. If not, whether the said product(s) contains N, P or K as constituent element in terms of explanatory note 6.

25. In the show cause notice, no allegation was made by the Department that the impugned product(s) is a distinct chemical compound. Therefore, the only question is whether the impugned product(s) contains nitrogen as an “essential constituent”. According to the assessee, the impugned product (s) is a mixture of various inorganic substances whose

essential constituent is nitrogen which makes it a fertilizer. It is this point which arises for consideration, viz, whether 0.31% of nitrogen found to exist in the impugned product(s) would make it a fertilizer. In this connection, the aforestated scientific study indicates that PGRs are organic compounds, other than nutrients. As compared to nutrients which play a major role in the plant growth as a whole, PGRs. play a restrictive role. PGR do not contain N, P or K. In the impugned product(s) manufactured by the assessee, PGR exists. Therefore, the question to be asked is whether presence of mere 0.31% of nitrogen would make the PGR in the impugned product classifiable as "other fertilizers" in CSH 3105.00. In our view, essentially the impugned product is PGR. However, assessee contends that the impugned product(s) is a mixture of various inorganic substances and, therefore, it is for the Adjudicating Authority to go into composition and find out whether 0.31% of nitrogen would convert PGR into nutrient falling under CH 31.05. Whether with addition of 0.31% of nitrogen, the PGR becomes "other fertilizers" in CSH 3105.00 is the question which needs to be examined by the

Adjudicating Authority as it is the case of the Department that the assessee has added nitrogen only as a pretence so that the impugned product(s) could be classified as “other fertilizer” under CSH 3105.00.

26. For the aforestated reasons, on the point of classification and not on the point of invocation of larger period (which is separately dealt with hereinafter) we set aside the impugned judgment dated 26.2.07 of CESTAT and remit the matter to the Adjudicating Authority for *de novo* determination of the said case in accordance with law.

27. On the question of invocation of extended period of limitation, we are in agreement with the view expressed by the Tribunal that the larger period of limitation was not invokable by the Department. As stated above, three Circulars have been issued by the Department. Till today, the controversy regarding the classification of “micronutrient fertilizers” was not settled. There is even a conflict of views between Ministry of Finance and Ministry of Agriculture. In the circumstances,

question of invoking extended period of limitation does not arise. It is well-settled that mere non-declaration is not sufficient to invoke the larger period but some positive act of suppression is required for invoking larger period of limitation under Section 11A of the Central Excise Act, 1944 [**See: Padmini Products v. Collector of Central Excise – 1989 (43) ELT 195 (SC)].** Therefore, in the present case, there is no warrant to invoke larger period of limitation or to impose penalty and to that extent we uphold the order of the Tribunal.

28. Accordingly the civil appeals are partly allowed to the extent indicated above with no order as to costs.

.....J.
(S.H. Kapadia)

.....J.
(B. Sudershan Reddy)

New Delhi;
May 15, 2008.