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

REGIONAL BENCH- COURT NO.1

Excise Appeal No. 10657 of 2018

[Arising out of OIO-VAD-EXCUS-001-COM-28-17-18 Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

M/s Narmada Bio Chem Pvt. Ltd. **........Appellant**
Block No. 74, 88, 89 & 90, National Highway,
No. 88, Ahmedabad, Kheda Road, Malpura, Gujarat.

VERSUS

C.C.E. & S.T.-Vadodara-i **.......Respondent**
1st Floor, Central Excise Building,
Race Course Circle, Vadodara
Gujarat-390007

WITH

Excise Appeal No. 11593 of 2018

[Arising out of OIO-VAD-EXCUS-001-COM-28-17-18 Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Rameshbhai Patel Director **........Appellant**
M/s Narmada Bio Chem Ltd. (Unit III)
Block No. 74, 88, 89 & 90, National Highway,
No. 88, Ahmedabad, Kheda Road, Malpura, Gujarat.

VERSUS

C.C.E. & S.T.-Vadodara-i **.......Respondent**
1st Floor, Central Excise Building,
Race Course Circle, Vadodara
Gujarat-390007

APPEARANCE:

Sh. J. C. Patel, Advocate for the Appellant
Sh. S. K. Shukla, Authorised Representative for the respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Final Order No. A/ 11074-11075 /2019

DATE OF HEARING: 10.04.2019
DATE OF DECISION: 09.07.2019

RAMESH NAIR

The present appeals have been filed by M/s Narmada Bio-chem Pvt. Ltd. against OIO No. VAD-EXCUS-001-C0M-28-17-18 dated 13.2.2017 passed by the Commissioner, Central Excise, Vadodara – I. The brief facts of the case are that the Appellants are engaged in manufacture of NPK Fertilizer, Organic Manure and Soil Conditioner. Soil Conditioner is being sold under the brand name "Power Gold" and Organic Manure is being cleared by them under the Brand name 'Bio Gold'. The Product Power Gold consists of Single Super Phosphate (SSP), gypsum and other inorganic substances viz. Calcium, Magnesium, Sulphur, Mud, Dolomite and Bentonite. Bio-gold is an organic manure consisting poultry manure (i.e. poultry faeces -excreta and urine.), Carbon, Bentonite and Dolomite. The products claiming to be having presence of Nitrogen, Phosphorus and Potassium and were in turn claimed to be Fertilizers. The product Power Gold under CETSH 3103 9000 and Bio-Gold under CETSH 310290 90. The Appellants were availing exemption of duty in excess of 1 % under Sl. No. 40 of Notification No. 1/2011 - CE dated 1.3.2011 till 16.3.2012. Afterwards exemption from duty in excess of 1% under S.No. 128 of Notification No. 12/2012 dated 17.3.2012 was availed from 17.3.2012 on above products. The Appellant factory was visited by Central Excise Officers on 19.2.2014 and statements of Manager Shri Ramesshbhai Bhoi, Director Shri Rameshbhai Jinabhai Patel and GM Accounts Shri Jitendrabhai Yashvantbhai Patel were recorded. Samples of the aforesaid products were drawn for testing at Chemical Examiner, Central Excise Laboratory, Vadodara. The test report gave the following composition:

(i) NPK Fertilizer :Nitrogen - 29.70%, Phosphorous (as P2O5) – 11.60%, Potassium (as K2O) – 10.37%
(ii) Power Gold :Calcium (Ca)-21.1%, Magnesium (Mg)-5.9%, Sulphur (S)20.9%
(iii) Bio-Gold :Total Carbon-13.92%, Moisture-12%, Ash-76%

2. The test report also stated that the sample is composed of carbon bearing material and small amount of phosphorous, potassium and nitrogen bearing inorganic compounds along with clay matter.

The test report, however, did not give the percentage of phosphorous, potassium and nitrogen. The Appellant thereafter were issued show cause notice dated 28.10.2016 for the period October 2012 to March 2016, wherein it was contended that the products Power Gold and Bio Gold do not contain Nitrogen (N), Potassium (K) or Phosphorus (K) and are therefore not phosphatic Fertilizer. The goods therefore were proposed to be classified as "Chemical products not elsewhere specified or included" under CETSH 38249090 and were also proposed to be liable for excise duty @ 10% (with cess) till 16.3.2012 and thereafter @ 12% with cess till 28.2.2015 and thereafter @ 12.5%. The basis of classification of the two products was alleged to be as under:

(i) Soil Conditioner (Power Gold etc.): Soil conditioner is a product which is added to soil to improve the soil's physical qualities especially its ability to provide nutrition for plants as per Wikipedia. From the test results of these products following is observed that these products are not having any of nitrogen, phosphorous and/or potassium as essential constitutes. The trace amount of P in the said product cannot be treated as essential / major constituent. As per the extract of the Fertilizer Control Order, 1985, the fertilizers classified as straight phosphatic fertilizer have a minimum of 16% phosphorous. In the instant case, the content of P205 is not enough for the products to be considered as phosphatic fertilizers. As per the statements dated 19.02.2014 of Shri Rameshbhai Jinabhai Patel, Director, Soil Conditioner (Power Gold CMS etc.) is not having essential constituent of any of fertilizing elements viz. nitrogen (N), phosphorous (P) or Potassium (K), the same was not fertilizer by the products fell under Chapter 38 of the Central Excise Tariff Act, 1985 attracting full rate of central excise duty. As per the statements dated 19.2.2014 of Shri Maheshbhai Bhoi, Manager (Commercial), this product is manufactured by mixing of raw material viz. bentomite, gypsum, magnesium waste, mud, dolomite with the help of Hopper. This product is used for soil conditioning. The product broachers of the products confirm their use as soil conditioner and not as fertilizer. Therefore, this cannot be classified under CETSH 31039090 as phosphatic fertilizer but can be classified as Chemical Products not elsewhere specified or included under CSTSH 38249090.

(ii) Organic Manure (Bio Gold etc.)- From the test results of these products following is observed that these products are not having any of Nitrogen, Phosphorus and/or Potassium as essential constitutes. As per the statement dated 22..8.2016 of Shri Jitendra Yashvantbhai Patel, General Manager (Account) and authorized signatory of M/s NBCPL, Organic Manure is Bio gold etc. and as per statements dated 19.2.2014 of Shri Rameshbhai Jinabhai Patel, Director, this is hot having essential constituent of any of fertilizing elements viz. nitrogen (N), phosphorous (P) or Potassium (K), the same was not fertilizer but the products fell under Chapter 38 of the Central Excise Tariff Act, 1985 attracting full rate of central excise duty. As per the statements dated 19.2.2014 of Shri Maheshbhai Bhoi, Manager (Commercial), this product is manufactured by mixing of raw materials, viz. bentomite, gypsum, magnesium waste, mud, sulphar, dolomite and carbon with the help of Hopper. This product is used for soil conditioning. The product broachers of the products confirm their use as soil conditioner and not as fertilizers. Therefore, this is soil conditioner which is added to soil to improve the soil's physical qualities especially its ability to provide nutrition for plants as per Wikipedia. Therefore, this cannot be classified under CETSH 31029090 as nitrogenous fertilizers but can be classified as 'Chemical Products not elsewhere specified or included' under CETSH 38249090.

3. It was proposed to classify the Soil Conditioner and Organic Manure products as "Chemical products not elsewhere specified or included" under CETSH 38249090 and to demand duty of Rs. 3,72,78,082/- for the period October 2011 to March 2016 on NPK Fertilizers, Soil Conditioner and Organic Manure along with interest and penalty u/s 11AC and Rule 25 of Central Excise Rules, 2002. The demands were confirmed by the adjudicating authority vide impugned order. Hence the present appeal.

4. Ld. Counsel Shri J.C. Patel, appearing for the Appellant submits that the show cause notice was issued by discussing and demand issued only on two products, i.e. Power Gold and Bio Gold. No allegation regarding classification of NPK Fertilizer was made in the show cause notice nor any demand was made upon the same. However inspite of accepting the classification of NPK Fertilizer under Chapter 31, while computing the duty demand, the notice also demanded duty on NPK fertilizer under tariff heading 38249090. Since in the entire body of the show cause notice, no dispute was raised in respect of NPK fertilizer, therefore, the demand on the same is illegal.

5. As regards classification of product Power Gold, he submits that the duty has been demanded by disputing the classification under tariff heading 31.03 on the ground that it does not meet the requirement of Note-3 of Chapter 31. It was contended that it does not contain any of the essential nutrients, viz. nitrogen, phosphorous or potassium and that the present of phosphorous is only in traces. He submits that it is evident from the Chapter Note 3(a)(iii)& (c) of Chapter 31 that a fertilizer consisting of single super phosphate and mixed with chalk, gypsum and other inorganic substances is covered under tariff heading 31.03, which covers mineral or chemical fertilizers-phosphatic. The composition of Power Gold clearly shows that it consists of Single Super Phosphate (SSP) Gypsum and other inorganic substances, viz. Calcium, Magnesium, Sulphur,Mud, Dolomite and Bentonite. Thus, it meets the requirement of subject note and it is classifiable under tariff heading 31.03. The test report of Chemical Examiner, Vadodara also confirms that the goods contain phosphorous (P_2O_5) – 2.8%. The contention of the adjudicating authority that 2.8% of phosphorus is too less and it must contain minimum 16% of phosphorous is not a condition of Chapter Note 3 of Chapter 31. It mainly requires presence of Super Phosphate along with chalk, gypsum and other inorganic substances and no minimum percentage of phosphorous has been stipulated. The HSN Explanatory Note under heading 31.04 also states that the mixture of Super Phosphate with gypsum and other inorganic substances may be in any proposition. Chapter Note-3 specifically mentions basic slag in which phosphorous content is much less than 16%. Therefore, the

contention of the department that a product to fall under heading 31.03, it must have minimum phosphorous 16% is erroneous. Even otherwise the percentage requirement of Phosphorus percentage as 16% in terms of Fertilizer Control order is not applicable as it has been held in various judgments that FCO is not relevant for classification matters He further submits that the Commissioner in para 87 of the impugned order proceeded on the basis that the test report has found presence of phosphorous pentoxide (P_2O_5), which is not the same as phosphorous. He submits that the reasoning of the Commissioner is erroneous. He relies upon the website https://www.agroservicesinternatinal.com/Education/Elements.html that though the symbol of Phosphorus is P, its nutrient content is expressed as % P_2O_5. Infact no fertilizer contains the pure element such as N, P or K. In their pure form these elements are of no use to Plants and some such as P and K are actually dangerous substance. They can be used only in combination with other element. P is measured as P_2O_5, K as K_2O, Mg as MgO and Ca as CaO. The contention of Notice that Power Gold is a Soil Conditioner and therefore not a fertilizer is clearly untenable in law. There is no basis for holding that soil conditioner is not a fertilizer. The certificate issued by the Directorate of Agriculture, Gandhinagar clearly considers Power Gold as a Fertilizer. Since Power Gold is made from Superphosphate and is on test found to contain phosphorous, it will clearly fall under Heading 31.03 or alternatively under Heading 31.05.

6. In case of Bio Gold, he submits that it is made from Poultry Manure, Carbon, Bentonite and Dolomite. It is therefore an animal fertilizer covered by tariff heading 31.01. On test, the product was found to contain phosphorous, potassium and nitrogen and therefore, it would fall under heading 31.05. The test results of Bio Gold match with the specifications of organic manure given in Schedule IV (Sl.No. 4) of Fertilizer Control Order, 1985. There is no basis for holding that soil conditioner is not fertilizer. He also relies upon the certificate issued by the Directorate of Agriculture, Gandhi Nagar wherein the product Bio Gold has been considered as a fertilizer. He places reliance upon the judgments in case of Ranadey Micronutrients 1996 (87) ELT 19 (SC), Sree Ramcides Chemicals P. Ltd. 2016 (337) E.L.T. 412 (Tri. - Chennai) and Transpek Industry Ltd. 2008 (230) E.L.T. 351 (Tri. -

Ahmd.) He further submits that the impugned order has classified Power Gold and Bio Gold under chapter sub heading 3824 9090. Chapter 38 covers chemical products, preparations of the chemical or allied industries (including those consisting of mixtures of natural products) not elsewhere specified or included. However no reason has been given as to how these preparations would fall under said CETSH. He also submits that since the issue involved is the question of interpretation of the tariff, there is no reason to demand duty for the extended period and no penalty is imposable.

7. Ld. AR Sh. S. K. Shukla appearing for the Revenue reiterates the findings of the adjudicating authority in the impugned order.

8. Heard both the sides and perused the case records. We find that chapter 31 pertains to fertilizers whether Animal or vegetable, Mineral or Chemical, nitrogenous, Phosphatic, potassic under chapter 3101 to 3104. CETSH 3105 covers goods viz. Mineral or Chemical fertilizing elements nitrogen, phosphorous and Potassium; other fertilizers; goods of this chapter in tablets of similar forms or in packages of a gross weight not exceeding 10 Kgs.

Chapter Note 3 to Chapter 31 reads as under :

"3. Heading 3103 applies only to the following goods, provided that they are not put up in the forms or packages described in heading 3105:
(a) Goods which answer to one or other of the description given below :
(i) basic slag
(ii) natural phosphates of heading 2510, calcined or further heat-treated than for the removal of impurities;
(iii) superphosphates (single, double or triple)
(iv) calcium hydrogen orthophosphate containing not less than 0.2 per cent by weight of fluorine calculated on the dry anhydrous product
(b) fertilizers consisting of any of the goods described in (A) or (B) above, but with no account being taken of the fluorine content limit
(c) fertilizers consisting of any of the goods described in (A) or (B) above, but with no account being taken of the fluorine content limit, mixed with chalk, gypsum or other inorganic non-fertilising substances."

9. The chapter sub-heading 3824 under which the classification by the Revenue has been proposed covers "*Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.*"

10. A bare perusal of both the entries under Chapter 31 and Chapter 38 when read with Chapter Note -3 to Chapter 31 would clearly reveal that Chapter 31 deals with Fertilizers whereas 3824 deals with miscellaneous chemical products. The impugned products as per Annexure- 4 to show cause notice consists of various constituents. As per chemical examiner test report in case of NPK Fertilizer the composition of goods is Nitrogen 29.70%, Phosphorous (as P_2O_5) 11.60%, Potassium (as K_20) 10.37, In Power Gold the composition is Calcium (Ca)-21.1%, Magnesium (Mg)-5.9%, Sulphur (S)20.9% and in Bio-Gold composition is Carbon-13.92%, Moisture-12%, Ash-76%. In case of Bio Gold the report also says that the sample is composed of carbon bearing material and small amount of Phosphorous, Potassium and nitrogen bearing inorganic compounds alongwith clay matter. However the test report does not give percentage of same. Coming to the constituents we find that as far as NPK Fertilizer is concerned there is no doubt about its classification based upon constituents. Even the show cause notice accepted its classification under CETSH 3101 but it is not known as to why the duty was demanded. Nor the impugned order discusses anything about its classification and hence there is no case of revenue for classification under any other chapter. In case of Power Gold from test reports the constituents are apparent i.e. it consists of Single Super Phosphate (SSP), Gypsum and other inorganic substances, viz. calcium, magnesium, sulphur, mud, dolomite and bentonite and thus it clearly meets the requirement of Chapter Note-3 (a) (iii) (c). to cover it under CETSH 3103.We also find from the Report of the Chemical Examiner shows that the product in question Power Gold contains 2.8% of phosphorous. Chapter Note 3 in turn stipulates presence of super phosphate and there is no minimum percentage of phosphorous in said chapter note. The Explanatory Note of 31.03 also states that mixture of super phosphate may be in any proportion. The adjudicating authority has held that presence of phosphorous

pentoxide (P2O5) was found, which is not same as phosphates. We find from the website https://www.agroservicesinternatinal.com/Education/Elements.html that its nutrient content of Phosphorous is expressed as % P_2O_5. The contention of adjudicating authority that Power Gold is a Soil Conditioner and therefore not a fertilizer is clearly untenable in law as CETSH 31.03 covers the phosphatic fertilizer whether mineral or chemical. There is no basis for holding that soil conditioner is not a fertilizer. The certificate issued by the Directorate of Agriculture, Gandhinagar clearly considers Power Gold as a Fertilizer. Since Power Gold is made from Superphosphate and is on test found to contain phosphorous, it will clearly fall under Heading 31.03. As regard Bio Gold (organic manure), we find that the same is made from poultry manure. On test, it is found to contain phosphorous, potassium and nitrogen. We also find that the test report of Bio Gold matched with the specifications of organic manure given in Schedule IV (S.No. 4) of Fertilizer Control Order 1985. The certificate issued by the Directorate of Agriculture, Gandhi Nagar also considers Bio Gold as fertilizer. In such view of facts that when the Directorate of Agriculture has considered the product as Fertilizer and even as per nature of the product - the products fall under Chapter 31.01. For both the above products we do not find any reason to classify the products under 38249090, which is a residuary entry for miscellaneous chemical products. We therefore are of the view that the impugned goods i.e. Power Gold and Bio Gold merits classification under chapter sub heading 3103 and 3101 respectively and when falling under chapter 31 are eligible for exemption under Notification No. 1/2011 - CE dated 1.3.2011 and Notification No. 12/2012 dated 17.3.2012 during material period. As regard NPK Fertilizer we find that no dispute about its classification was raised in show cause notice. However in impugned order no reason has been assigned for duty demand and therefore the impugned order is devoid of any merit as far as demand of duty on NPK is concerned. In case of Power Gold and Bio Gold, we hold that the product Power Gold merits classification under CETSH 3103 and Product Bio Gold merits classification under CETSH 31.01. Also the said products being falling under chapter 31 they are thus eligible for exemption from duty in terms of Notification under Sl.No. 40 of Notification No. 1/2011-CE dated 1.3.2011 till

16.3.2012. Afterwards exemption from duty in excess of 1% under S.No. 128 of Notification No. 12/2012 dated 17.3.2012. Further we also find that the issue involved is of classification and hence no case of suppression or intention to evade duty is made out. Thus in view of our above observations, we set aside the impugned order and allow appeals with consequential reliefs.

(Order pronounced in the open court on 09.07.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Neha