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

REGIONAL BENCH- COURT NO.3

Custom Appeal No. 12684 of 2018- DB

(Arising out of OIO-MUN-CUSTM-000-COM-17-18-19 dated 05/09/2018 passed by Commissioner of CUSTOMS-MUNDRA)

Mosaic India Private Limited **.........Appellant**
11th Floor, Building 8c, Dlf Cyber City, Phase-ii,
Gurgaon, Haryana

Versus

C.C.-Mundra **.........Respondent**
Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat-0370421

WITH

Custom Appeal No. 12685 of 2018- DB

(Arising out of OIO-MUN-CUSTM-000-COM-17-18-19 dated 05/09/2018 passed by Commissioner of CUSTOMS-MUNDRA)

Robin Edwin **.........Appellant**
Director, M/s Mosaic India Private Limited.,
11th Floor, Building 8c, Dlf Cyber City, Phase-ii,
Gurgaon, Haryana

Versus

C.C.-Mundra **.........Respondent**
Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat-0370421

APPEARANCE:
Shri Pranjal Srivastava learned Advocate for the Appellant
Shri Rajesh Nathan, Assistant Commissioner (AR), for the Respondent

CORAM:
HON'BLE MR. RAJU, MEMBER (TECHNICAL)
HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)

Final Order No. 11107-11108/2024

DATE OF HEARING: 04.01.2024
DATE OF DECISION: 03.06.2024

RAJU

This appeal has been filed by Mossaic India Private Limited against change of classification of the product imported by them.

2. Learned Counsel pointed out that the appellant had imported item namely Biofos Mono Calcium Phosphate (BMP) vide Bill of Entry No. 5180867 dated 07.05.2016. The product was imported in bulk. Learned Counsel claim that the goods imported by them are Aquatic feed, poultry feed, cattle feed and feed supplement are not for medicinal use.

3. Learned Counsel pointed out that after import in bulk goods are packed in 50 Kgs bags and sold to customer in India. He pointed out that there are many other importer who import goods already packed in bags and directly sale the product in the market. Learned Counsel pointed out that while they had been importing the goods under tariff heading 2835 2810 while they were classifiable under 2309 9090.

4. Earlier the appellant had imported vide bill of entry No. 6911527 dated 29.09.2014, 9267 506 dated 18.05.2015 and 2031901 dated 27.05.2015 and 3038087 dated 26.10.2015 and classified the same under heading 2835 2610 and paid duty at the rate of 26.428%. Imports by Bill of Entry No.7680674 dated 02.12.2016 and No. 9741324 dated 18.05.2017, the appellant classified the product under heading 2309 9090 and paid duty at the rate of 20.6 %. Thereafter, the revenue started investigation and the matter was decided against the appellant. In the impugned order reliance has been placed on Rule 3(a) of the general Rules of interpretation of import tariff which states that most specific description shall be preferred to a general description. The revenue has relied on the fact that 'mono calcium phosphate' appears as specific heading under custom tariff under CTH 28352619 and therefore goods should be classifiable in the said heading. The revenue has held that 0.16% to 0.19% of fluorine appearing in the said goods is merely impurity and that

cannot be reason for change of classification. The revenue was also relied on the fact that US based manufacturer of the goods has classified the product 'mono calcium phosphate' for animal use under tariff heading 2835.26. The impugned order also reject reliance on the CBEC circular 47/1/97– EX dated 03.03.1997 on the ground that the said classification does not relate to 'mono calcium phosphate' but to 'di calcium phosphate' and the fact that the said circular had been withdrawn by circular No. 675/66/2002-EX dated 05.11.2002.

5. Learned Counsel pointed out that the only reason for the reclassification of the product under heading 2835 by revenue is that the appellant had earlier sought classification under the said heading. He argued that the revenue has not produced any evidence in the form of test report etc as to why product is classifiable under heading 2835. He argued that the appellant had earlier classified goods MCP (Mono Calcium Phosphate) under heading 2835 2610 as the product Mono Calcium Phosphate is specifically covered in the said sub heading. He argued that while they have classified product under chapter 2835 2610, the product does not meet the requirement of chapter 28 and the same needs to be classified under chapter 23. He argued that as per the chapter note 1 to chapter 28 the headings of chapter 28 applied only to separate chemical elements and separate chemically define compounds whether or not containing impurities. He pointed out that calcium phosphate mono basic is used as baking powder, fertilizer, mineral supplement, stabilizer for plastics to control PH in molt in glass manufacture and as foaming agents. He pointed out that the product Biofos MCP is also known as deflorinated phosphate. However, the product is not completely fluorine free. It contain fluorine to the extent of 0.16% to 0.19%. He argued that fluorine is equally important element for animal nutrition and important part of animal fit. He argued that the presence of small quantity of fluorine is not as impurity and therefore, the product does not qualify to fall under chapter 28 due to the presence of

fluorine to extent of 0.16% to 0.19%. He argued that substance deliberately left in the product with a view to make it suitable for specific use rather than general use. Therefore, it cannot be regarded as impurity.

6. He also relied on the HSN that prescribes that Calcium Hydro Genortho Phosphate containing not less than 0.2% by weight of fluorine calculated on dry and hydro product is excluded from CTH 2835 and is covered under heading 31.03 or 31.05. He argued that similar logic the product imported by them cannot be classify under chapter 28 to under note 1 to chapter 28.

7. Learned Counsel argued that biofos MCP is correctly classifiable under heading 2309 as preparation of use kind animal feeding. He argued that retention of 0.16% by weight of fluorine in the Biofos MCP is for the specific for use of animal feed. As therefore the product is classifiable under chapter 23.

8. Learned Counsel also relied on the CBEC circular vide order No. 47/1/97 dated 03.03.1997 that had clarified that classification of die calcium phosphate die hydrate as animal feed grade would depend upon the fluorine content. He argued that fluorine content is relevant factors for the purpose of classification of goods as animal feed grade. He also relied on the decision of Hon'ble Gujarat High Court in case of Reman Blues and Chemical works 2000 (117) ELT 29 Gujarat, wherein the 37B circular issued by CBEC classifying die calcium phosphate under heading 2835 was quashed. He also relied on the fact that CBEC Circular No. 675 /66 /2002- cx dated 15.11.2002 has withdrawn the circular dated 03.03.1997.

9. Learned Counsel relied on the decision of larger bench of Tribunal in case of tetra Gone Kanal Pvt Ltd 2000 (138) ELT 414 Tribunal larger bench to assert that note of heading 23.02 of Central Excise Tariff Act 1985 has to be read to extend scope of heading so as to include preparation not confined only

to those obtained by processing animal or vegetable material but to preparation containing synthetic material also.

10. Learned Counsel also relied on the CBEC circular 23.06.1996 to assert that the ordinary and common appreciation of the product in the trade has to be examined while classified the goods as animal feed. Learned Counsel further argued that there was no suppression what so ever. The product was described correctly in the bill of entry. He argued that matter of classification is matter of interpretation and on that count no charge of specification of suppression can be revoked. He argued that in this circumstances invocation of section 111(M) in the Custom Act is totally unwarranted. He argued that no penalty can be imposed in this circumstances as the actions of the importer were purely bona fide.

11. Learned AR relied on the impugned order he also relied on the decision of Hon'ble Apex Court in the case of Fizer Limited 2015 326 ELT 421 and also on the decision of authority of advance ruling in case of BASF India Limited.

12. We have considered this submissions the product imported by the appellant is "Biofos Mono Calcium Phosphate" in bulk. The appellant had classified the same under CTH 2309 9090. The revenue was of the opinion that goods are classified under CTH 2835 2610. Revenue had found that the appellant was earlier classifying the goods under CTH 2835 2610 attracting total duty at the rate of 26.428%. Total duty under CTH 2309 9090 worked out to 20.60%. The CTH 2309 9090 and CTH 2835 2610 read as follows:-

Tariff Item	Description of goods	Unit	Rate of Duty	Preferential Area Rate
2309	PREPARATIONS OF A KIND USED IN ANIMAL FEEDING	Kg.	20%	
2309 10 00	Dog or cat food, put up for retail sale			
2309 90	Other :			
2309 90 10	Compounded animal feed			
2309 90 20	Concentrates for compound animal feed			

 2309 90 31 2309 90 32 2309 90 39 2309 90 90	Feeds for fish (prawn, etc.) : Prawn and shrimps feed Fish meal in powdered form Other Other			
2835 2835 10 2835 10 10 2835 10 20 2835 10 90 2835 22 00 2835 24 00 2835 25 00 2835 26 2835 26 10 2835 26 20 2835 26 90 2835 29 2835 29 10 2835 29 20 2835 29 30 2835 29 40 2835 29 90 2835 31 00 2835 39 00	2835 PHOSPHINATES (HYPOPHOSPHITES), PHOSPHONATES (PHOSPHITES) AND PHOSPHATES; POLYPHOSPHATES, WHETHER OR NOT CHEMICALLY DEFINED Phosphinates (hypophosphites) and phosphonates (phosphites) : Calcium hypophosphite Magnesium hypophosphite Other Phosphates : - Of mono-or disodium Of potassium Calcium hydrogenorthophosphate ("dicalcium phosphate") Other phosphates of calcium : Calcium monobasic phosphate Calcium tribasic phosphate Other Other : Magnesium phosphate, monobasic Magnesium phosphate, dibasic Magnesium phosphate, tribasic Sodium hexametaphosphate Other Polyphosphates : Sodium triphosphate (sodium tripoly-phosphate) Other	Kg.	7.5%	

It has been argued that in terms of chapter note 1 to chapter 28 the headings of chapter 28 applies only to separate chemical element and separate chemically define compound weather or not containing impurity. Revenue is relying on the fact that the product imported is Mono Calcium Phosphate with some impurities ranging from 0.16% to 0.19%. Chapter note 1 to chapter 28 reads as follows :-

" Chapter Notes:

Chapter No. 28

Inorganic chemicals, organic or inorganic compounds of precious metals, of rare-earth metals, of radioactive elements or of isotopes

NOTES:

<u>1. Except where the context otherwise requires, the headings of this Chapter apply only to:</u>

<u>(a) separate chemical elements and separate chemically defined compounds, whether or not containing impurities;</u>

(b) the products mentioned in (a) above dissolved in water,

(c) the products mentioned in (a) above dissolved in other solvents provided that the solution constitutes a normal and necessary method of putting up these products adopted solely for reasons of safety or for transport and that the solvent does not render the product particularly suitable for specific use rather than for general use:

(d) the products mentioned in (a), (b) or (c) above with an added stabilizer (including an anti-caking agent) necessary for their preservation or transport:

(e) the products mentioned in (a), (b), (c) or (d) above with an added anti-dusting agent or a colouring substance added to facilitate their identification or for safety reasons, provided that the additions do not render the product particularly suitable for specific use rather than for general use."

On the one side the revenue is treating presence of fluorine as mere impurity, the appellant is suggesting that fluorine is in the nature of micro nutrient essential for the purpose of animal feed. The appellant is of the view that the fluorine of the extent of 0.16% to 0. 19% has been left deliberately in the product to enhance quality of the product.

13. It has been argued on behalf of the appellants that "Biofos" MCP is also known as de florinated phosphate. It has been argued that the product is not completely fluorine free and contains fluorine to the tune of 0.16% to 0.19%, as fluorine is an important element in the animal nutrition.

14. It has been argued that on behalf of the appellant that fluorine is deliberately left in the product with view to make it more suitable for the use as animal feed. In this circumstances the fluorine product cannot be called impurity. The safety data sheet about this product was submitted by the appellants. In the Section 3 thereof showing composition, information and ingredients following as mentioned:-

SECTION 3	COMPOSITION INFORMATION ON INGREDIENTS			
Formula:	$H_4CaO_8P_2 \cdot H_2O$			
Composition:	Monocalcium Phosphate - Monohydrate Dicalcium Phosphate Dihydrate Iron Phosphate Calcium Sulfate Dihydrate Calcium Carbonates	CAS 10031-30-8 CAS 7789-77-7 CAS 31096-47-6 CAS 10101-41-4 CAS 1317-65-3	70-75% 20-25% 2–4% 0.5-1.0% 0.5-1.0%	Skin Irritant Category 2 Eye Irritant Category 2B STOT SE 3 (Lungs, Inhalation)

It can be seen from the same that it consists of Mono Calcium Phosphate Mono Hydrate to the extent of 70% to 75% Di Calcium Phosphate Di hydrate to the tune of 20% to 25%, Iron Phosphate to the tune of 2% to 4%. It is seen that there is the no mention of fluorine in the said composition chart. From the above it is apparent that fluorine is not deliberately left item but only the impurity because if the fluorine was item deliberately left it would be figure out composition or ingredients of the product and marketed as a feature of the product.

15. The perusal of the CTH 2835 shows that sub heading 283526 specifically covers Phosphates of Calcium other than Di Calcium Phosphate falling under sub heading 2835 2500. It is seen that the entire defense of the appellants is based on the fact that the fluorine content in the product is not an impurity but deliberately left item. If it had been so, the name fluorine contain would have appeared in the composition information or ingredients of the product. In this circumstances we do not find any merit in the argument that the fluorine contained in the product has been deliberately left and is not in the nature of impurity.

16. Thus, goods would be classify under chapter 28 in terms of note 1(a) of Chapter 28. The goods consist of mixture of various product as can we seen from the composition, information, ingredients reproduced above. The product consists predominantly of Mono Calcium Phosphate Monohydrate. This product is specifically covered under sub heading 2835 2610. The interpreted rules to the custom tariff prescribed as follows :-

Statistory Provisions

Customs Tariff Act, 1975

'THE FIRST SCHEDULE-IMPORT TARIFF

(See section 2)

General rules for the interpretation of this Schedule

Classification of goods in this Schedule shall be governed by the following principles:

1. The titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken *to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.*

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) when goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind

normally used for packing such goods. However, this provision does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related sub-heading Notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."

17. In terms of Rule 3(a) the heading which gives most specific description shall be prefer to providing more general description. We find that sub heading 2835 2610 provides absolute specific description whereas the heading 2309 9090 provides a general description.

18. This view is also supported by observation of Hon'ble Apex Court in case of PFIZER LTD 2015(326)ELT 431 (SC) wherein Hon'ble Court has observed as follows :-

*"The question that falls for consideration is as to whether the Virginiamycin imported under brand name STAFAC 1000 is classifiable under Customs Tariff Heading 2941.90 and Central Excise Tariff Heading 2941.90 or under Customs Tariff Heading 2309.90 and Central Excise Tariff Heading 2302.00. The Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT") by impugned decision dated 5-9-2006 has followed its judgment rendered by the Chennai Bench in the case of Tetragon Chemie Pvt. Ltd. & Ors. v. CCE [1999 (30) RLT 366 = 2001 (138) * E .LT 414 (Tribunal- LB)]. We may mention that the aforesaid judgment was upheld by this Court dismissing the appeal of the Revenue.*

2. The contention of the appellant/Department in challenging the aforesaid findings of the CESTAT is that the said judgment in Tetragon Chemie Pvt. Ltd. is not applicable in the instant case. On the other hand, it is pointed out by Mr. K Radhakrishnan, learned senior counsel appearing for the Department, that the CESTAT has totally ignored the fact that they have placed the decision of this Court classifying these products under sub-heading 2941.90 of the Central Excise Tariff that it is not premix animal feed under sub-heading 2302.00. It is pointed out that this view has been taken in the case of the same assessee in Pfizer Ltd. v. Commissioner [2005 (186) E.L.T. A117 (S.C.)].

3. We find substance in the aforesaid submission of learned senior counsel. We may mention that insofar as the judgment in Tetragon Chemie Pvt. Ltd. is concerned, which was upheld by this Court [2003 (152) E.L.T. A92 (S.C.)). it pertains to two competent *classifications, ie., 29/36 as Vitamins or 23.09/23.02 as preparation of a kind used in animal feed. In that case, the product was a premix, the additional items in the product were calcium carbonate, benzene, dextrose, lactose, yeast. soya flour etc. On the other hand, in the present case, imported goods Virginiamycin is a well defined chemical of 100% purity with anti-bacterial properties included specifically under Chapter 29 by virtue of Chapter Note 1(a). The judgment of Tetragon Chemie Pvt. Ltd has, therefore, no application to the facts of the present case."*

The ratio of above decision is equally applicable to instant case.

19. Now we examine if there was a deliberate attempt to misclassify. In the instant case appellants were earlier classifying the goods under chapter heading 2835. The heading is very specific leaving no room for doubt. The appellants made a claim that fluorine left in biofos MCP also known as 'deflorinated phosphate' is intentional. The said claim has not been substantiated by any literature or by product safety data sheet. In these circumstances we hold that there was a deliberate attempt to misclassify the goods to avail a lower duty rate.

20. Thus we hold that there is no merit in the appeal and the same is dismissed.

(order pronounced in the open court 03.06.2024)

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(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

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