

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 1364 of 2010

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

Karnataka Agro Chemicals

.....Appellant

No. 180, 1st Main Road,
Mahalakshmi Layout,
Bangalore 560 086

VERSUS

**Commissioner of Central Excise,
Bangalore-III**

.....Respondent

PB No. 5400, Queens Road,
C R Building, Bangalore
Karnataka 560 001

WITH

(i) Excise Appeal No. 1365 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(ii) Excise Appeal No. 1366 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(iii) Excise Appeal No. 1367 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(iv) Excise Appeal No. 1368 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(v) Excise Appeal No. 1369 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(vi) Excise Appeal No. 1370 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(vii) Excise Appeal No. 1371 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(viii) Excise Appeal No. 1372 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(ix) Excise Appeal No. 1373 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(x) Excise Appeal No. 1374 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xi) Excise Appeal No. 1375 of 2010 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xii) Excise Appeal No. 20087 of 2015 (Sri Mahesh G Shetty vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 15/2014-15 dated 17.10.2014 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xiii) Excise Appeal No. 20088 of 2015 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 15/2014-15 dated 17.10.2014 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xiv) Excise Appeal No. 21306 of 2015 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-27-14-15 dated 27.02.2015 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xv) Excise Appeal No. 21307 of 2015 (Sri Mahesh G Shetty vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-27-14-15 dated 27.02.2015 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xvi) Excise Appeal No. 20236 of 2016 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-13-15-16 dated 20.11.2015 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xvii) Excise Appeal No. 20237 of 2016 (Sri Mahesh G Shetty vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-13-15-16 dated 20.11.2015 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xviii) Excise Appeal No. 20246 of 2017 (Sri Mahesh G Shetty vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-20-16-17 dated 25.11.2016 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xix) Excise Appeal No. 20247 of 2017 (Karnataka Agro Chemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-20-16-17 dated 25.11.2016 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xx) Excise Appeal No. 21212 of 2018 (Karnataka Agro Chemicals vs. CCE, Bangalore-West)

[Arising out of Order-in-Original No. 4/2017-PR Commr dated 09.10.2017 passed by the Pr. Commissioner, Bangalore West]

(xxi) Excise Appeal No. 21215 of 2018 (Sri Mahesh G Shetty vs. CCE, Bangalore-West)

[Arising out of Order-in-Original No. 4/2017-PR Commr dated 09.10.2017 passed by the Pr. Commissioner, Bangalore West]

(xxii) Excise Appeal No. 20011 of 2021 (Karnataka Agro Chemicals vs. CCE, Bangalore-West)

[Arising out of Order-in-Original No. 12/2020-(PR Commr) dated 12.10.2020 passed by the Pr. Commissioner, Bangalore West]

(xxiii) Excise Appeal No. 20012 of 2021 (Sri Mahesh G Shetty vs. CCE, Bangalore-West)

[Arising out of Order-in-Original No. 12/2020-(PR Commr) dated 12.10.2020 passed by the Pr. Commissioner, Bangalore West]

Appearance:

Present for the Appellants: Sh. G. Shivadass, Sr. Advocate

Sh. M.S. Nagaraja, Advocate

Present for the Respondent: Sh. P.R.V. Ramanan, Special Counsel, A.R.

Coram:

Hon'ble Dr. D. M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

FINAL ORDER NO. 21456 to 21479 of 2023

DATE OF HEARING: 27.07.2023

DATE OF DECISION: 22.12.2023

Per: Dr. D. M. Misra

These appeals are filed against respective Orders-in-Original passed by the Commissioner of Central Excise, Bangalore, since involve common issues are taken up together for hearing and disposal.

Sl. No.	Appeal No.	Impugned Order No.	Period	Amount involved
1 to 12	E/1364 to 1375/2010	OIO No. 06-17/2010 dated 31.03.2010	August 2001 To 31.12.2009	Rs.2,89,64,308/-, Rs.23,26,36,443/- +interest and penalty of Rs.1,50,00,000/-
13 to 14	E/20087/2015 and E/20088/2015	OIO No. 15/2014-15 dated 17.10.2014	January 2010 To August 2013	Rs.31,33,73,346/- +interest +Rs.31,33,73,346/- as penalty Rs.3,15,00,000/- penalty on Shri Mahesh G Shetty
15 to 16	E/21306/2015 and E/21307/2015	OIO No. BLR-EXCUS-003-COM-27-14-15 dated 27.02.2015	September 2013 To June 2014	Rs.9,81,15,243/- +interest +Rs.98,00,000/- as penalty Rs.10,00,000/- penalty on Shri Mahesh G Shetty
17 to 18	E/20236/2016 and E/20237/2016	OIO No. BLR-EXCUS-003-COM-13-15-16 dated 20.11.2015	July 2014 To March 2015	Rs.9,74,30,425/- +interest +Rs.97,00,000/- as penalty Rs.10,00,000/- penalty on Shri Mahesh G Shetty
19 to 20	E/20246/2017 and E/20247/2017	OIO No. BLR-EXCUS-003-COM-20-16-17 dated 25.11.2016	April 2015 To September 2015	Rs.8,58.83,708/- +interest +Rs.8,58,83,371/- as penalty

				Rs.10,00,000/- penalty on Shri Mahesh G Shetty
21 to 22	E/21212/2018 and E/21215/2018	OIO No. 4/2017-PR Commr dated 09.10.2017	October 2015 To March 2017	Rs.23,97,79,059/- +interest +Rs.2,20,00,000/- as penalty Rs.44,00,000/- penalty on Shri Mahesh G Shetty
23 to 24	E/20011/2021 and E/20012/2021	OIO No. 12/2020-PR Commr dated 12.10.2020	April 2017 To June 2017	Rs.5,10,13,235/- +interest +Rs.51,02,000/- as penalty Rs.5,00,000/- penalty on Shri Mahesh G Shetty

2. Briefly stated the facts of the case are that the appellant, a partnership firm, are engaged in manufacture of micronutrients fertilizers for soil application and also for foliar application. The appellants have been granted necessary license by the Karnataka State Government under the Fertilizer (Control) Order, 1985 to manufacture and market micronutrient fertilizers in various states. During the relevant period, the appellant had manufactured and cleared micronutrients fertilizers without payment of duty claiming its classification as “other fertilizers” under Chapter Heading 3105 of Central Excise Tarriff Act, 1985. On the basis of intelligence and investigation initiated in the year 2000, and on completion of the same, show cause notice was issued to the appellant alleging that the product micronutrient is classifiable as “Plant Growth Regulator” (PGR in short) falling under chapter sub-heading 3808.20 of CETA, 1985 and duty with interest demanded invoking extended period. On adjudication, demands were confirmed with interest and penalty. Aggrieved by the said orders, the appellant approached the Tribunal.

This Tribunal vide Final Order No. 341-347/2007 dated 26.02.2007 set aside the adjudication order and allowed the appeals. The Revenue challenged the said order before the Hon'ble Supreme Court and vide its order dated 15.05.2008, the Hon'ble Supreme Court setting aside invoking the extended period, remanded the matter to the adjudicating authority for de novo adjudication. In de novo proceeding, the learned Commissioner re-examined the issue and concluded the classification under chapter sub-heading 3808.20 as "PGR" and confirmed the demands for the normal period. Also, periodical show cause notices issued from time to time for normal period have also been confirmed with interest and penalty in the novo proceeding. Hence, the present appeals.

3.1 The learned Sr. Advocate for the appellants submits that this is the second round of litigation before this Tribunal pursuant to the remand order by the Hon'ble Supreme Court. He submits that subsequent to the order of Hon'ble Supreme Court, remanding the matter to the adjudicating authority to examine the process of manufacture of the goods in question, a committee was appointed by the Commissioner to visit the appellant's factory for verification of the process of manufacture. Consequently, the committee visited the factory of the appellant on 06.01.2009 and report was submitted by the committee on 08.05.2009 after conducting necessary verification of manufacturing process at the factory of the appellant. On 10.06.2009, the appellant sought copy of the report furnished by the committee before attending the personal hearing allowed by the Commissioner. Thereafter, on 12.09.2009, the departmental officer

visited the factory to collect the samples of the goods and on 16.10.2009, a letter from Commissioner was written to the Director, Department of Agriculture, Govt. of Karnataka requesting for testing the samples to ascertain percentage of each mineral and whether the same is a PGR/micronutrient/fertilizer. The Director, Department of Agriculture, Govt. of Karnataka submitted his report on 25.11.2009. Later, the Commissioner on 03.12.2009 sought the opinion of Mr. N. R. Bhaskar, Advocate, Supreme Court of India, on the legality of the Committee constituted in light of Supreme Court's direction. On 07.12.2009, in his opinion Mr. N. R. Bhaskar indicated that in terms of the Supreme Court's direction, the Commissioner/Adjudicating Authority had to themselves verify the process of manufacture without constituting an expert committee. Consequently, the Commissioner visited the factory of the appellant to examine the method of manufacture of micronutrient and the classification of which has been in dispute.

3.2 It is his contention that the sequence of events indicates a pre-meditated approach by the Revenue in the de novo proceedings, wherein the committee's report was totally ignored.

3.3 Further, challenging the findings of the Id. Commissioner, it is submitted that even though the Supreme Court vide its order dated 15.05.2008, specifically directed the adjudicating authority to examine the process of manufacture for determination of the classification of micro-nutrient. Pursuant to the said direction, the committee was constituted, who in its report dated 05.05.2009 made the following findings:

(a) Nitrogen is used in the form of Urea, Potassium Nitrate and Calcium Nitrate and Potassium is contained in the form of Potassium Nitrate; such compounds are added at the beginning of the manufacturing process itself and are mixed thoroughly, inferring that the compounds of Nitrogen and Potassium are an integral part of the manufacturing process and not used as a pretence for the purpose of classification.

(b) There is a presence of Nitrogen to the extent of 5% to 7% as had already been declared by the appellant, although the percentage of a compound in the product does not have any bearing regarding the essentiality of compound.

(c) As per the Circular No. 392/25/98-CX dated 19.05.1998, for classification under Chapter 31, the micro-nutrients must be separate chemically defined compounds and it should contain Nitrogen. The micronutrients in the instant case adhere to both the conditions.

(d) The Hon'ble Supreme Court vide its order dated 15.05.2008 has stated that plant growth regulators are organic compounds. The micronutrients are clearly not organic compounds and thus, they may not be called plant growth regulators.

3.4 The learned Advocate for the appellants has further submitted that by not accepting the report the Order of the Supreme Court has not been followed. The order of the Supreme Court should have been strictly followed in the remand proceedings. In support, he placed reliance on the decision of Hon'ble Gujarat High Court in the case of *Indian Oil Corporation Ltd vs. UOI – 2010*

(262) *ELT 94 (Guj.)* and the decision of Hon'ble Supreme Court in the case of *UOI vs. Kamlakshi Finance Corporation Ltd – 1991 (55) ELT 433 (SC).*]

3.5 He has further submitted that the Revenue/Respondent was bound to follow the specific directions of the Hon'ble Supreme Court and by failing to do so, the Respondent has violated the principle of judicial discipline.

3.6 He has further submitted that the finding of the Commissioner that Nitrogen has been added to the subject products only from the year 2000 onwards and not an essential constituent, is contrary to facts and law. The fact of presence of Nitrogen in the micronutrients cleared by the appellant, has been consistently recorded in the proceedings. The question of presence of Nitrogen was raised by the Revenue in the year 1994 and based on the chemical analysis report by the Chief Chemist, New Delhi, demands were dropped and classification under Chapter Heading 3105 was approved. The samples which were seized and provided to the Chemical Examiner for the chemical test, also indicated presence of Nitrogen in the samples in its report dated 11.01.2001. In the show cause notice dated 26.08.2002, even though it was alleged that Nitrogen was not present as fertilizing element but acknowledged presence of Nitrogen as a chelating agent. Thus, the presence of Nitrogen has been confirmed all along.

3.7 Further, he has submitted that the presence of Nitrogen has also been recorded by the Tribunal in its order dated 26.02.2007 and by the Hon'ble Supreme Court in its order dated 15.05.2008.

3.8 He has further submitted that the learned Commissioner has wrongly placed reliance on the Fertilizer (Control) Order, 1985 and the formulations submitted by the appellant to the Department of Agriculture in ascertaining the presence of Nitrogen or otherwise in the micronutrients manufactured by the appellant.

3.9 He has also submitted that the Fertilizer (Control) Order, 1985 held to be irrelevant for determination of classification under Central Excise in the Circular No. 392/25/98-CX dated 19.05.1998.

3.10 Further, he has submitted that the Commissioner is bound to follow the Board's Circular, which is binding on him. In support, he has placed reliance on the decision of Hon'ble Supreme Court in the case of *CCE & ST, Rohtak vs. Merino Panel Products Ltd - 2023 (383) ELT 129 (SC)*.

3.11 Referring to Note 6 of Chapter 31, HSN Explanatory Notes and Note 1 to Chapter 38 of the CETA, 1985, the Id. Advocate for the appellant has submitted that the subject goods are mixtures of micronutrients containing Nitrogen and Potassium, and are not separate chemically defined compounds, which are not classifiable as 'plant growth regulator' under Chapter Heading 3808 of the CETA, 1985. In support, he referred to following case-laws:

(i) *Leeds Kem vs. CCE, Aurangabad - 2001 (134) ELT 294 (Tri. Del.)*

(ii) *CCE, Rohtak vs. Safex Chemicals (I) Ltd - 2017 (7) GSTL 234 (Tri. Chan.)*

(iii) Northern Minerals Ltd vs. CCE, Delhi – 2001 (131) ELT 355 (Tri. Del.) approved by Hon'ble Supreme Court reported as 2003 (156) ELT A161 (SC)

(iv) Ranadey Micronutrients vs. CCE – 1996 (87) ELT 19 (SC)

(v) CCE, Hyderabad-IV vs. Aries Agrovat Industries Ltd – 2017 (7) GSTL 317 (Tri. Hyd.)

(vi) San Industry vs. CCE, Hyderabad-I – 2018 (11) GSTL 320 (Tri. Hyd.)

(vii) Shivshakti Bio Plantec Ltd vs. CCE, Hyderabad – 2019 (20) GSTL 243 (Tri. Hyd.)

(viii) Sree Ramcides Chemicals Pvt Ltd vs. CCE, Trichy – 2016 (337) ELT 412 (Tri. Che.)

(ix) Narmada Bio Chem Pvt Ltd vs. CCE, Vadodara-I – 2019 (370) ELT 1276 (Tri. Ahmd.)

(x) KPR Fertilizers Ltd vs. CCE, Vishakhapatnam-II – 2023 (384) ELT 216 (Tri. Hyd.)

3.12 Further, it is his submission that the subject micronutrient fertilizers with pre-determined proportions of various micronutrients and containing 5% to 7% Nitrogen and Potassium during the relevant period of dispute are classifiable as 'other fertilizers' under Chapter Heading 3105 of CETA, 1985.

3.13 Further, he has submitted that the process of mixing of micronutrients, does not amount of 'manufacture'. It is submitted that the manufacturing activity concerning soil application powder is mainly manual, whereas that of powder foliar spray is partially mechanized and the major portion of mechanized activity relates to packing of finished product. In simple terms, the entire activity of manufacturing of the products is limited to mixing various raw materials obtained from different sources in specific proportions and packing them, which is ready for consumption. Admittedly, the

process of manufacturing is devoid of any chemical reaction. The source of Nitrogen is Urea introduced at the time of mixing various raw materials. The learned Commissioner has held that in the absence of chemical reaction, the method of manufacture has no bearing whatsoever on the issue of classification. The same method of manufacture has also been reported by the committee of officers in their report dated 08.05.2009.

3.14 It is his contention that the process of mixing various micronutrients in predetermined proportions for use of the resultant mixture as fertilizers, has not resulted in emergence of a different commodity with different identity, character and use. Each micronutrient in the mixture is a unique nutrient and independently contributes its nutritive value to the soil or plant. It is submitted that in the absence of a new commodity emerging as a result of the process, no 'manufacture' of the goods took place in terms of Section 2(f) of the Central Excise Act, 1944.

3.15 Further, he has submitted that the individual micronutrients do not undergo any change in their nutritional character or nutritive value and their function as fertilizing element. The purpose of mixing different micronutrients is providing each nutrient in the required proportion, dose or quantity as per the requirement of the plant and soil conditions. The process of mixing does not alter or change the basic character or utility of each constituent of the mixture of micronutrients. Each micronutrient retains its original nutrition value for soil and plant. They have not lost their identity and combined with other micronutrients to form a different

commodity with different identity, character and use. The mixture of micronutrients is marketed based on the proportion of each constituent micronutrients. There is no chemical reaction or transformation of micronutrients into a different commodity. The process of mixing duty paid organic and inorganic chemicals into a mixture of micro-nutrients does not amount to “manufacture” of a different commodity. In order to attract duty, the goods must emerge as a result of manufacture and must be marketable. The twin tests need to be satisfied. In support, he relied on the following judgments of Hon’ble Supreme Court:

(i) UOI vs. Delhi Cloth and General Mills Co Ltd – 1977 (1) ELT J199 (SC)

(ii) South Bihar Sugar Mills Ltd vs. UOI – 1978 (2) ELT J336 (SC)

(iii) UOI vs. J G Glass Industries – 1998 (97) ELT 5 (SC)

(iv) CCE vs. Tarpualin International – 2010 (256) ELT 481 (SC)

(v) Metflex (I) Pvt Ltd vs. CCE, New Delhi – 2004 (165) ELT 129 (SC)

(vi) Crane Betel Nut Powder Works vs. CCE, Tirupati – 2007 (210) ELT 171 (SC)

3.16 It is his submission that the re-packing and re-labeling of Multiplex Samras does not amount to ‘manufacture’ being accepted in the impugned orders. Regarding the re-packing of Multiplex Sulphur, it was held by the Tribunal vide its order dated 26.02.2007 that if the value of micronutrient classified under Chapter Heading 3105 is excluded, the aggregate value of clearance would come within the exemption limit under SSI Exemption Notifications.

3.17 Further, he has submitted that the imposition of personal penalty under Rule 26 of the Central Excise Rules, 2002 on Sri Mahesh G Shetty, Partner is not sustainable in view of the judgments of Hon'ble Gujarat High Court in the cases of *CCE vs. Jai Prakash Motwani – 2010 (258) ELT 204 (Guj.)* and *Pravin N Shaw vs. CESTAT – 2015 (305) ELT 480 (Guj.)*.

4.1 Per contra, the Id. Senior Special Counsel for the Revenue submits that the first round of litigation went upto the Hon'ble Supreme Court and vide order dated 15.05.2008, the matter was remanded for *de novo* consideration with specific observations/directions for consideration of the adjudicating authority. The invoking of extended period of limitation was set aside.

4.2 It is his submission that in the remand order, the Hon'ble Apex Court noted that the adjudicating authority had not examined the method of manufacture of the impugned products; the plea of the appellant that Nitrogen is an essential constituent, hence, classifiable as 'other fertilizers', was not considered. Further, it is observed that the impugned products are mixtures of various inorganic substances and the method of manufacture has a strong bearing on the question of determination of classification.

4.3 Further, he has submitted that the Hon'ble Apex Court observing that the impugned product being essentially PGR, directed the adjudicating authority to go into the composition and find out whether 0.31% of Nitrogen would convert PGR into a nutrient falling under Chapter Heading 31.05 and whether with the addition of

0.31% of Nitrogen, PGR becomes 'other fertilizers' under the same Chapter Heading.

4.4 Further, he has submitted that pursuing the said direction of the Hon'ble Supreme Court, the adjudicating authority visited the factory of the appellant and conducted a detailed study of the raw materials required and the manufacturing process. Summarizing the findings of study conducted, he has submitted as follows:

- (i) Basically, the raw materials necessary for the manufacture of the impugned products are mixed in a required proportion and then mixed, ground and packed.
- (ii) Raw materials required namely Zinc Sulphate, Calcium Nitrate, Ferrous Sulphate, Urea, Borax, Manganese Sulphate etc., are procured from various manufacturers.
- (iii) The process of manufacture is devoid of any chemical reaction.
- (iv) Basic process involved is simply mixing the raw materials in a fixed ratio and packing.
- (v) Most part of the manufacturing process is manual and the only level of sophistication involved is in packing the foliar spray.
- (vi) The products are mixtures of organic and inorganic substances and not distinct compounds.
- (vii) Nitrogen is added in the form of Urea.

4.5 The adjudicating authority, on the basis the study conducted, reached the following conclusions:

- (a) The process of manufacture of impugned products is devoid of any chemical reaction. The Nitrogen content is not due to any chemical reaction but due to the addition of Urea, which can be done even at the time of final use. Thus, the method of manufacture adopted by the appellant has no bearing on the classification of impugned products.
- (b) It is not mandatory to include Nitrogen or Phosphorus or Potassium in micronutrients. Nitrogen is not a basic/fundamental constituent element in the impugned products. Nitrogen is not the element, which makes the impugned products what they are. Conversely, the presence of Nitrogen in the impugned products does not qualify the goods to be classified as 'other fertilizers' under Heading 3105.
- (c) For any product to merit classification under heading 31.05, it is mandatory that elements such as Nitrogen or Phosphorus or Potassium, if present, should function as a fertilizing element. In terms of Note 6 to Chapter 31 of the CET mere presence of Nitrogen is not sufficient to hold that any product would fall under Heading 3105. Nitrogen should be present as a fertilizing element. As observed by the Apex Court, a micronutrient may be fertilizer but not in terms of composition and that Nitrogen or Phosphorus or Potassium is not a constituent element of micronutrient. Thus, it transpires that the impugned products are excluded from the scope of 3105.00 of CET by virtue of Chapter Note 6.

- (d) Nitrogen content in the impugned products was 0.31% for the period when the Apex Court gave its Order in May, 2008. For the subsequent period, gradually the percentage content of Nitrogen has been raised to 5%. One of the important criteria to be satisfied for classification of any product under Heading 3105, is that Nitrogen or Phosphorus or Potassium contained in the product should be an essential constituent of the product.
- (e) The impugned products contain in principle Zinc Salts, Boric Acid, Ferrous Salts, Manganese Salts, Calcium, Magnesium and Urea. The absence or presence of Nitrogen in the impugned products has no bearing on the classification of the goods under the Fertilizer Control Order. In the instant case, the presence of Nitrogen whether at 0.31% or 5% is not altering the nature of the subject goods, namely, micronutrients. Hence, the addition of Nitrogen in the form of Urea to PGR.
- (f) Nitrogen is not an essential constituent of the impugned products. Its addition in the form of Urea was pretence/non-essential additive, so that the impugned products could be classified as 'other fertilizers' falling under Heading 3105.00.

4.6 The learned Commissioner examining the issue in the light of Notifications/Registration Certificates issued by the State Agriculture Department, recorded his findings that elements other than Zn, Fe, Mn and B are not mandatory but optional. In the

impugned product, Nitrogen is not the basic or fundamental constituent element.

4.7 Further, referring to the printed labels on the impugned products, it is held that Nitrogen is not indicated as constituent element of the product.

4.8 Further, analyzing the cost worksheets in respect of some of the impugned products, it is recorded that Nitrogen was not shown to be present prior to year 2000. The department also not raised the classification of the products during that period. It was only after the appellant commenced adding Urea to the micronutrients to seek classification of the impugned products under Chapter Heading 3105, which was a pretence to show the presence of Nitrogen in the impugned products. Consequently, following the judgment of Hon'ble Supreme Court and examining the issue accordingly, it is held that the impugned products are to be classified under Chapter Heading 3808 and not under Chapter Heading 3105 of the CETA, 1985.

4.9 Responding to the arguments of the appellant on the objection of non-acceptance of the report of the committee of the officers constituted, it is submitted that the adjudicating authority had initially constituted a committee to study the aspects indicated by the Hon'ble Apex Court in its judgment. The committee submitted its report. Thereafter, a doubt arose whether in terms of the order of the Hon'ble Apex Court, it was permissible to set up the committee without the permission of the Hon'ble Apex Court.

Consequently, the opinion of the Senior Standing Counsel of the Central Government was sought, who opined that without express permission of the Hon'ble Apex Court, it would be ultra-vires the direction of the Court and that the question has to be necessarily determined by the adjudicating authority by verifying the facts himself. Accepting the said opinion, the learned Commissioner himself visited the appellant's factory on 16.12.2009. Hence, non-reliance on the report of committee set up earlier, is of no consequence.

4.10 Further, he has submitted that there are reasonable grounds for the adjudicating authority in not accepting the report of the committee of Superintendents. While he has not differed with the technical details cited in the said report, but he has rejected the opinions/recommendations contained in the said report. Further, he has submitted that the adjudicating authority is not bound to follow the opinions/recommendations contained in the report.

4.11 Further, replying to the contention of the appellant that in the case of another manufacturer (*CIBA India Ltd vs. CC, Chennai*), the issue has been settled in favour of the assessee, he has submitted that the issue in the said case was determination of classification between the headings 29.22 and 31.05 and the claim that the subject product was used as fertilizer was not disputed. Hence, reliance cannot be placed on the said decision. Besides, in the first round of litigation, the Hon'ble Apex Court itself have opined that the impugned product is essentially a PGR.

4.12 Also, responding to the argument that the products are not classifiable under Chapter Heading 38.08, since mixtures of individual chemicals or other elements, cannot be considered as PGR, he has submitted that the judgment cited by the appellant would have little value since the Hon'ble Supreme Court has considered all the issues in the context of the impugned products and has observed that the products are essentially PGR after referring to several technical literatures on the subject.

4.13 Further, he has submitted the as per Note 1 to Chapter 38, what is excluded from that chapter, are separate chemically defined elements or compounds, usually classified under Chapter 28 or 29, other than such elements and compounds used as insecticides, rodenticides, fungicides etc. including PGR, put up as described in heading 38.08. Further, this chapter covers a wide range of chemicals and related products including both organic and inorganic products and also mixtures of chemicals. Further, he submits that therefore, the correct classification of the impugned products be concluded as under Heading 3808.

5. Heard extensively both sides, considered the written submissions and perused the records.

6. This is the second round of litigation before this Tribunal. In the earlier round, this Tribunal has decided the issue viz., classification of Micro Nutrient Fertilisers manufactured by the appellants classifiable as "Other Fertilisers" under Chapter Sub-heading 31.05 of Central Excise Tariff Act, 1985.

7. Revenue's contention all along has been that the products in question are classifiable as Plant Growth Regulator (PGR) falling under Chapter Subheading 38.08 of Central Excise Tariff Act, 1985. Hence, aggrieved by the order of the Tribunal, the Revenue approached Hon'ble Supreme Court. The Hon'ble Supreme Court while disposing Revenue's appeal analysed the issues in detail and remanded the matter to the adjudicating authority with certain observation/direction to consider the issue of classification a fresh.

8. We are of the view, therefore, addressing the issues now raised in the present appeals, challenging the de novo order should be limited to the extent of analysing implementation of the observation/direction of the Hon'ble Supreme Court in remanding the case for deciding the classification of the products viz. micronutrients.

9. The adjudicating authority, pursuant to the remand, commenced the de novo proceeding by appointing a Committee of Officers to examine the process of manufacture of the impugned products and submit their report accordingly. The Committee comprising of two Superintendents visited the factory of the Appellant, examined the process of manufacture and submitted their report to the Commissioner on 08.5.2009.

10. Later, the Ld. Commissioner sought the advice of the Government Standing Counsel on the question, that is, whether in the light of the observation of Hon'ble Supreme Court, delegating the task of examination of the manufacturing process to a

Committee of officers, instead of the adjudicating authority himself, would be correct or otherwise. The learned Standing Counsel by his opinion dated 7.12.2009 communicated as:

"On a plain reading of the Hon'ble Supreme Court's order it becomes clear that the question of determination of whether with the 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 had added nitrogen only as a pretence so that the impugned product(s) could be classified as "other fertilizer" under CSH 3105.00. Further, their Lordships have expressed that in their 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 therefore the opinion of the undersigned that constitution of a expert committee without the express permission of the Hon'ble Supreme Court would be ultravires the directions of the apex Court. The issue in question would necessarily have to be determined by the Commissioner/adjudicating authority by duly verifying and by considering and taking into account all determinants that would go to decide the issue in question."

11. Based on the said legal advice/opinion, the Commissioner himself visited the factory premises of the appellant on 16.12.2009 and examined the process of manufacture of the impugned products.

12. The procedure adopted by the learned Commissioner in carrying out the direction/observation of the Hon'ble Supreme Court, in the denovo proceeding has been assailed by the appellant. The appellant's contention is that the report of the Committee of Superintendents has been discarded without any basis; it is vehemently argued that the report is not accepted by the Ld. Commissioner as the same is not to the desired expectation of the

department. Therefore, such an approach of the Commissioner is pre determined and bad in law.

13. We find that the Ld. Commissioner while analyzing the said allegations of the appellant held that since his predecessor after receiving the report of the Committee of officers neither commented nor recorded his opinion on the report, therefore, with a change of adjudicating authority, a reference was made to the departmental standing counsel seeking legal opinion on delegation of the task of examination of method of manufacture to the Committee of officers. The opinion of the learned Standing Counsel was that constitution of a Committee without express permission of the Hon'ble Supreme Court would be ultra vires of the direction of the apex court. Following the said legal advise, the adjudicating authority himself visited the factory premises of the Appellant to examine the process of manufacture before, re-adjudicating the case in the light of the observation/direction of the Hon'ble Supreme Court.

14. Analyzing the reasoning recoded by the Ld. Commissioner on the objection of the Appellant, we do not see any error or illegality in his approach in not considering the report of the Committee of Officers appointed by his predecessors and ascertaining the process of manufacture himself. Secondly, the direction given by the Hon'ble Supreme Court is specific and it is to the adjudicating authority to examine the manufacturing process and decide the case accordingly. Therefore, reading the said direction of the Hon'ble Supreme Court and legal opinion of the Standing Counsel, the course of action adopted by the Ld.

Commissioner within the contours of *de novo* proceedings. Further, on merit, we find that reading the Committee's Report on the process of manufacture and that of recorded by the Ld. Commissioner after visit to the factory premises of the appellant, we do not see any material difference on the facts. What is noticed is that in addition to stating the process of manufacture, the committee of officers in its report proceeded further by interpreting the order of the Hon'ble Supreme Court, applicability of Note 6 of Chapter 31 and Circular dated 19.5.1998 observing that the goods are rightly classifiable under Chapter 31.05 and the products may not be called as 'Plant Growth Regulator. In our view, the interpretation of the Circular, Order of the Hon'ble Supreme Court and applying the same to the facts of the present case, by the Committee of officers is beyond the scope of authority delegated to the Committee whose only task is to physically verify the process of manufacture by visiting the factory and report the same to Commissioner. Therefore, the report of the Committee of officers commenting on the classification dispute and deciding the classification cannot stand the scrutiny of law and rightly rejected by the learned Commissioner.

15. Now, before analyzing the finding of the adjudicating authority in carrying out the direction of the Hon'ble Supreme Court in the *de novo* proceedings, it is necessary to analyze the context and the observations of the Supreme Court in remanding the case to the adjudicating authority.

16. The Hon'ble Supreme Court in the said judgement examined the issue in detail, that is, whether the impugned products be classifiable as Plant Grow Regulator (PGR) under Chapter Subheading 3808.20 alleged by the Revenue or under Chapter Subheading 3105.00 as "Other Fertilizers" claimed by the appellant. The observations are reproduced as below:

.....

"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.*

17. Their Lordships analysing the scope of the terms micronutrient, PGR and other fertilizers, in the backdrop of rival claims, observed that admittedly nitrogen is present as a chelating agent, not as a fertilizing agent; even if it is a fertilizing agent, would not amount to an essential constituent under explanatory note 6 of chapter 31.

18. Therefore, it is clear from the said observation of Apex court is that to verify the categorical claim of the appellant that Nitrogen is an essential constituent of the products (multi micronutrients) in question, it is said at para 23 of the judgement that to an answer to the said question, the method of manufacture of 'multi-micronutrient' becomes relevant.

19. Thus, the direction of the Hon'ble Supreme Court is to examine the process of manufacture, so as to ascertain the claim of the appellant that Nitrogen is present as an 'essential constituent' of the

impugned product, hence fall under Chapter Subheading 3105.00. This is further clear, when we read the observation at para 24; the department's allegation that N, P or K not an essential constitute of a 'Multi Micro Nutrient' has been agreed by their Lordships as a general argument, but proceeded in observing that the impugned product is "Multi Micro Nutrient", which the assessee claims to be a mixture of various inorganic substances. Thereafter, referring to the Circular which laid down two tests, it is observed that if the subject products are separate chemically defined compounds, then it goes out of Chapter 31.05, otherwise it is to be examined whether the product contains N, P or K as essential constituent element in terms of Explanatory Notes 6.

20. The observation of the Hon'ble Supreme Court case reads as below:

"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 aforesaid 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." (emphasis supplied).

21. Analyzing the process of manufacture, the learned Commissioner came to the conclusion that the entire process is devoid of any chemical reaction and the source of nitrogen is urea which is added at the time of mixing various raw materials. He has inferred that the Nitrogen found in the product are not due to any chemical reaction emerging during the course of manufacture, but introduced artificially as chemical urea at the time of mixing. Further, he has held that adding urea to the products at any point of time is not going to change the nature of this product i.e., whether it is added at the beginning, during or at the end of the process of mixing. In this context, he has held that the method of manufacture as directed to be examined by the Hon'ble Supreme Court found to have no bearing on the issue of determination of classification. In other words, the method of manufacture could not help to determine the presence of 'Nitrogen' as an essential constituent of the disputed products.

22. The said finding of the learned Commissioner has been assailed by the Appellant submitting that it is contrary to the

observation/direction of the Hon'ble Supreme Court. It is submitted that the Supreme Court in the order has held that it is the method of manufacture which has a strong bearing on the question, whether the product needs to be classified under Chapter Subheading 3808 or 3105, which aspect was not examined by the adjudicating authority in the first round of litigation. Accordingly, direction was issued to examine the process of manufacture.

23. We are of the view that the Commissioner's observation that the manufacturing process has no bearing on the issue of classification is read out of context, in as much as the case was remanded to the adjudicating authority to examine whether Nitrogen is an 'essential constituent' and by addition of the same, which admittedly constitute 0.31% (later increased upto 5% during the relevant period) the impugned product held to be PGR by Hon'ble Supreme Court comprising of various inorganic substances, would convert PGR into a fertilizer falling under Chapter Sub-heading 3105.00. Even though the Hon'ble Supreme Court theoretically agreed with the argument of the Revenue that N, P or K is not an essential constituent of the 'micronutrients', but for examination of the categorical claim of the Appellant that it is present as an "essential constituent" of the impugned products, remanded the case for verification of the process of manufacture to ascertain the said fact, as the adjudicating authority had earlier not verified the process of manufacture of the products in determine its classification.

24. In the de novo proceeding, the learned Commissioner after verifying the process of manufacture held that it is purely a physical

process of mixing of various constituents; the Nitrogen which is added in the form of urea does not undergo any chemical reaction with any of the constituent of the impugned product, it remains as it is, therefore, adding the same at the beginning or at the end of the process of physical mixing would not make any difference. Accordingly, he has concluded that the process of mixing undertaken by the appellant could not lead to their claim that adding Nitrogen containing chemical urea converts PGR into nutrient falling under Chapter 31.05.

25. In our considered opinion, the said finding of the Ld. Commissioner answers/satisfies the question raised by the Hon'ble Supreme Court in remanding the case to ascertain whether process of manufacture would demonstrate the presence of 'Nitrogen' as an essential constituent though present as a 'chelating agent'.

26. But, instead of concluding the classification on the outcome of the verification of the manufacturing process, in furtherance of the compliance of the Order of Hon'ble supreme court, the learned Commissioner analysed other evidences on record to examine whether presence of Nitrogen in the form of urea is an 'essential constituent' of the products. The learned Commissioner examined the cost sheet of each of the products and the value of nitrogen in the total cost in accordance with the percentage of nitrogen present. Also, he has examined the Notification of the Government of Karnataka setting out standard in respect of micro nutrient fertilizers to conclude that the elements which make up micro nutrients are Zinc, Manganese, Boron which constitute as an essential constituent of the impugned product. Further, he has analyzed that by adding Nitrogen in the form of urea

whether it would make nutrient an essential constituent and recorded that there is no mandatory requirement of adding a particular percentage of Nitrogen to the micro nutrient, hence, nitrogen is not a basic and fundamental constituent element for the products manufactured by the appellant. Also, he has considered the literature/labels marketing the micro nutrient of these products by the appellant. After analyzing the said documents, he has held that these are all marketed as micro nutrient without any emphasis on the presence of Nitrogen as a fertilizing element. Taking note of all these factors into consideration, the learned Commissioner arrived at the conclusion that Nitrogen is not an 'essential constituent' of the impugned product. Consequently, these products do not satisfy the chapter Note 6 of Chapter 31 to be classified as other fertilizers.

27. Assailing the said finding, the learned advocate for the appellant submits that as per Chapter Note 6 to Chapter subheading 3105, it is necessary that the micro nutrient in question is used as fertilizer and must contain N, P or K as an essential constituent. He has submitted that since the impugned products of the appellant are registered under the Fertilizer Control Order, 1985 have been recognized as fertilizers since 1994 and the Hon'ble Supreme Court observed that the impugned product contains N, P or K and no percentage prescribed under Chapter 31 for a constituent to be termed as essential constituent, it is to be classified as fertilizer. Also, it has been submitted that addition of Nitrogen, Potassium and fertilizer element at the beginning of the process of manufacture is necessary for the product to be used as fertilizer and hence, it is to be considered as essential constituent of the

subject product. In support of their submission that no percentage is prescribed in the Chapter Note, it is submitted that presence of Nitrogen in the product of fertilizer element is sufficient to classify the item under Chapter Subheading 3105. He has referred to the judgment of the Tribunal in the case of Commissioner of Central Excise & Service Tax, Hyderabad-IV Vs. Aries Agrovvet Industries Ltd.: 2017 (7) GSTL 317 (Tri.-Hyd.); KPR Fertilizers vs. CCE and Service Tax, Visakapatnam: 2023 (384) ELT 216 (Tri.-Hyd.)

28. We do not find substance in the submissions advanced on behalf of the appellant in as much as the Hon'ble Supreme Court in its judgment noted the said arguments and observed that presence of Nitrogen as chelating agent is not sufficient to classify the products as Fertilizer, rather the presence of Nitrogen should be as an 'essential constituent' to satisfy the Chapter Note 6 of Chapter 31. Thus, it is directed for examination of the process of manufacture so as to ascertain whether Nitrogen is present as an 'essential constituent'. The learned Commissioner after analyzing the process of manufacture and other aspects discussed above held that Nitrogen is not an essential constituent of the product and concluded that by addition of Nitrogen the products held to be PGR by Hon'ble Supreme Court is not converted to Fertilizer classifiable under heading 31.05 of CETA, 1985. Therefore, the case laws cited by the Appellant in support of their submission that in absence of prescription of any percentage of Nitrogen, its mere presence in the products would make the same as other Fertilizers are not relevant to the facts of the case in view of the observation of the Hon'ble Supreme referred as above.

29. In the result, we uphold the finding of the Ld. Commissioner that the impugned goods merit classification under CSH 3808.20 (38089340) of CETA, 1985. Consequently, confirmation of demands with interest is also upheld. Since the issue relates to classification and interpretation of law, imposition of penalty under Rule 25 on the company and personal penalty under Rule 26 CER, 2002 on the Appellant Shri Mahesh G Shetty is unwarranted and accordingly set aside. The impugned orders are modified and the appeals filed by the Company are partly allowed to the extent mentioned above and Appeals filed by Shri Mahesh G Shetty are allowed.

30. Appeals are disposed off.

(Order pronounced in the open court on 22.12.2023)

(D. M. Misra)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

RA_Saifi