IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Appeal Nos. E/00719/2010 & E/00125/2011

(Arising out of Orders in Appeal No. 48/2010 C. Ex. (SLM) & 76/2010 C. Ex. (SLM) dt. 18.08.2010 & 15.12.2010 both passed by the Commissioner of Central Excise (Appeals) No. 1, Salem)

Commissioner of Central Excise, Salem : Appellant

Vs.

M/s. Bannari Amman Sugars Ltd. : Respondent

Appearance:-

Shri R. Subramaniyan, AC (AR)
for the Appellant

Shri J. Shankaraman, Advocate
for the Respondent

CORAM:

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision:**25.06.2018**

Final Order No. 41888-41889 / 2018

Per Bench,

Brief facts are that respondents are engaged in manufacture of white crystal sugar and molasses in their Bio-lab situated in a place opposite to the factory. They have produced certain Bio-products from the mother culture of micro-organisms purchased from Tamil Nadu Agricultural University, Coimbatore and Sugar Cane Breeding Institute, Coimbatore.

These Bio-products, namely, 1. Azospirillum 2. Phosphobacterium 3. VAM 4. Beauvemet 5. Trichoderma Viride 6. Pseudomonas Fluorescens, are mixed with talc powder and sold to the sugarcane growers for developing 'soil fertility', 'pest control' and 'disease management' of the plant. Show Cause Notice dated 20.04.2009 was issued to the appellants proposing to classify these Bio-products as 'Plant Growth Regulators' and falling under CSH 380820, attracting duty. Vide notification No. 2/2008 dated 01.03.2008, the duty is reduced from 16% to 14%. After due process of law, the original authority confirmed the demand of Rs. 30,70,342/- along with interest and imposed equal penalty. In appeal, the Commissioner (Appeals) accepted the classification of the respondent-assessee and set aside the demand. Hence, the Department is now before the Tribunal.

2. The learned AR, Shri R. Subramaniyan, supported the grounds of appeal. He submitted that these Bio-products are used to regulate the growth of plant by way of increasing the soil fertility, controlling the attack of pests and disease. Thus, the products fall under plant growth regulators and are rightly classifiable under 3808934. Up to 01.03.2008, the products attracted duty of 16% and, thereafter, vide notification No. 2/2008, the duty was reduced to 14%. The impugned products are the broth containing cultures of living micro-organisms mixed with talc powder as carrier material. These products are packed in polythene bags and stored in an air

conditioned atmosphere till they are marketed. As per the write-up given by the respondents, mother culture is purchased from Tamil Nadu Agricultural University with maximum cell population of 10^{10} to 10^{11} cfu/ml. The broth harvested from the bulk culture has a population of 10^{9} cells cfu/ml which is prepared by treating the starter culture in fermentor. The broth culture drawn from the fermentor is added to the sterilized carrier and mixed well by blended @ 1:3 ratio, i.e. 300 ml per kg of talc powder. These are intermediate preparations having a basis of cultures of micro-organisms and are nothing but plant growth regulators and, therefore, would merit classification under CETH 38.08. That the Commissioner (Appeals) has wrongly relied upon the decision in *T. Stanes and Co. Vs. C.C.E., Coimbatore – 2009 (235) E.L.T. 183 (Tri. – Chennai)*

3. Learned Counsel, Shri J. Shankaraman, appeared and argued on behalf of the learned Consultant Shri P. C. Anand. Written submissions were also furnished by the learned Consultant. The details of the appeals are furnished as under:

Sl. No.	**SCN No. & Date**	**Period**	**O/O No. & Date**	**Demands (Rs.)**	**O/A No. & Date**
1.	15/2009-ADC dt. 20.4.2009	1.4.2004 to 30.11.2008	15/2009 (ADC) dt. 30.11.2009	30,70,342/- Set aside by O/A	48/2010 dt. 18.8.2010
2.	32/2009 dt. 18.12.2009	1.12.2008 to 31.8.2009	04/2010 –DC (Erode-II) dt. 28.5.2010	3,09,902/- Set aside by O/A	76/2010 (CE) (SLM) dt. 15.12.2010

It is explained by him that the Bio-lab of the company purchases certain formulations containing high number of micro-organisms from the Tamil Nadu Agricultural University at Coimbatore. These latent micro-organisms were allowed to grow under certain laboratory conditions. Resultant broth is mixed with the inert talc powder of 200 microns and the mixture is allowed to cure at room temperature. Subsequently, the broth and admixture with talc, is packed with LDPE bags and stored in an air conditioned atmosphere when the living micro-organisms have the ability to multiply and generate into large numbers. In terms of chemical names, the micro-organisms would be termed

- Azospirillum
- Phospho-bacteria
- Vesicular arbuscular mycorrhiza (VAM)
- Beauveria
- Trichoderma
- Viride & pseudomonas

4. The Commissioner (Appeals) has given details of all these micro-organisms in the impugned order after relying on expert's text books. The discussion made clearly brings out that these micro-organisms are not plant growth regulators. Further, a certificate was given By Dr. K. Hari,

Senior Scientist, Micro-Biology of the Sugarcane Breeding Institute (ICAR), Coimbatore wherein an elaborate discussion and the list of micro-organisms used for field application to agricultural crops for maintaining the health of the crops, in particular, at the root zone, is given. The Assistant Director of Agriculture, Quality Control, Erode, has specified that these micro-organisms only increase the soil microbial activities and that they do not contain any chemical fertilizers. He submitted that the very same issue was analysed by the Tribunal in the case of *T. Stanes and Co.* (supra) wherein the Tribunal held that the impugned goods would fall under Heading 3002.

5. Heard both sides.

6. The issue to be considered is whether these micro-organisms fall under classification 3808, as contended by the Department, or would fall under 3002, as claimed by the respondents. It is pertinent to note that these microbial cultures are living beneficial organisms which facilitate general soil conditions by increasing the population of beneficial micro-organisms in the soil/root zone so as to maintain the health of the crops. The Department is of the view that these are plant growth regulators and can either inhibit or promote the physiological processes in the plants. For

better understanding the competing tariff headings are reproduced as under:

Tariff Item	Description of goods	Unit	Rate of duty
3808 93	-- *Herbicides, anti-sprouting products and plant-growth regulators :*		
3808 93 10	--- Chloromethyl phenozy acetic acid (M. C. P. A.)	kg.	16%
3808 93 20	--- 2:4 Dichloro phenoy acetic acid and its esters	kg.	16%
3808 93 30	--- Gibbellic acid	kg.	16%
3808 93 40	**--- Plant growth regulators**	**kg.**	**16%**
3808 93 50	--- Weedicides and weed killing agents	kg.	16%
3808 93 90	--- Other	kg.	16%
3808 94 00	--- Disinfectants	kg.	16%
3808 99	-- Other:		
3808 99 10	--- Pesticides, not elsewhere specified or included	kg.	16%
3808 99 90	--- Other	kg.	16%

And the tariff heading with regard to 3002 is :

3002		Human blood; animal blood prepared for therapeutic Prophylactic or diagnostic uses; antisera and other blood Fractions and modified immunological products, whether or not obtained by means of biotechnological processes: vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products
3002 10	-	Antisera and other blood fractions and modified immunological products, whether or not obtained by means of biotechnological processes
3002 90	-	Other
3002 90 10	---	Human Blood
3002 90 20	---	Animal blood prepared for therapeutic prophylactic or diagnostic uses
3002 90 30	**---**	**Cultures of micro-organisms (excluding yeast)**

7. It can be seen that Chapter 38 deals with insecticides, rodenticides and other miscellaneous chemical products whereas 3002 deals with micro-organisms which are living organisms. The Tribunal in the case of *T. Stanes*

and Co. (supra) had occasioned to analyse the very same issue and observed as under:

> *"**8.** The ld. Counsel for Stanes submitted that initial SCN had proposed classification of the microbes under CH 3808 as insecticide. HSN Explanatory notes under CH 3808 excluded cultures of micro-organisms used as a basis for rodenticide etc. from that chapter under clause (a)(v) of the note. Those cultures of micro-organisms fell under CH 3002. Microbes were micro-organisms and not preparations based on cultures of micro-organisms. They were removed on carriers such as tapioca powder and oats. The Commissioner (A) had found in his Order in Appeal No. 40/05 dated 28-2-05 that the moot point to be determined was whether the products were aids to plant growth classifiable under CH 3002. This being a deep biological question, the Commissioner (A) had remanded the question to original authority for making enquiries. No other question survived. These organisms were applied at the base of the plant or on the leaves. They consumed and exhausted the nutrients in the neighbourhood so that other undesirable bacteria/fungi were deprived of any life sustaining material and perished. This was a prophylactic operation. Disease was prevented by annihilating harmful bacteria by starving them of nutrition. This could be an insecticidal operation. That the impugned products had an insecticidal application had basis in the opinion furnished by TNAU, Kovai which had indicated that the microbes could be used for the control of plant diseases. These microbes were bio-organisms cultivated for organically fighting harmful bacteria and fungi. The procedure was termed bio-control. The microbes did not directly act on pests like conventional pesticides. As per HSN notes the microbes had to be classified under CH 3002.*
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> ***9.** SDR brings to our notice the material on the website of Stanes i.e. www.tstanes.com and submits that the microbes are advertised unambiguously as insecticides/fungicides by the assessee.*
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> ***10.** We have studied the case records and submissions by both sides. The issue involved is classification of five products namely, Bio-Cure (F), Bio-Cure (B), Bio-Catch), Priority and Bio-Power. These are cultures of microbes (bacteria and fungi) prepared and sold on carriers such as tapioca powder and oats. Department had initially sought to classify them as fertilizer under CH 3101. The original authority decided them to be not fertilizer as the entry CH 3101 covered only chemical fertilizers. These preparations had no chemicals present in them. Vide Order-in-Appeal No. 40/25 dated 28-2-05 passed in appeal against the above order, Commissioner (A) had observed as under :*
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> *"It is seen that in the appellant's case, the end products were in fact spores of fungus and was removed as carrier based microbes. Whether it is for plant growth is a moot point, which could be decided only knowing its characteristics from the biological examination,*

as directed above. The lower authority shall also consider the above point raised with regard to classification under 30.02 while deciding the matter afresh."

He remanded the case to decide whether the microbes were fertilizer, fungicide or goods of CH 3002. Following the remand, the Additional Commissioner examined the classification in the light of the opinion rendered by the Department of Agricultural Microbiology, TNAU, Coimbatore. TNAU had certified that the products were cultures normally used for bio-control of the pests and disease in the crops. Additional Commissioner found that the products found application in bio-control of pests. They were not insecticides/fungicides as they were not chemicals and did not kill pests. He dropped the proposal to classify the microbes as insecticides of CSH 3808 10. On appeal by the department against the above order, in the impugned orders, Commissioner (A) decided that the products were insecticides of CSH 3808 10. He found that CH 3808 for pesticides, fungicides etc. specifically covered the microbes in question. He found that CH 3808 for pesticides, fungicides etc. specifically covered the microbes in question and the Additional Commissioner had gone astray in his search when he had found that microbes were not conventional pesticides.

10.1 *We find that in passing the impugned orders, the Commissioner (A) has not travelled beyond the confines of the SCN. We note that the website of Stanes explains the use and function of microbes as fungicides or insecticides as found by the Commissioner (A). However this finding is the outcome of investigation not envisaged in the remand order and hence not sustainable. Commissioner (A) rightly found that the original authority had ruled out classification of microbes under CH 3808 on wrong grounds that they were not chemicals and did not directly kill pests.*

10.2 *There is no dispute that the microbes are cultures of micro-organisms. 'Cultures of micro-organisms (excluding yeasts)' figure in CH 3002 of the tariff. Relevant extracts of Chapter Heading 30.02 of the tariff are reproduced below.*

3002		***Human blood; animal blood prepared for therapeutic, prophylactic or diagnostic uses; antisera and other blood fractions and modified immunological products, whether or not obtained by means of biotechnological processes; vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products***
3002 10	-	*Antisera and other blood fractions and modified immunological products, whether or not obtained by means of biotechnological processes :*
		…………………………………………..
3002 90	-	*Other :*

3002 10	*90*	*---*	*Human blood*
3002 20	*90*	*---*	*Animal blood prepared for therapeutic, prophylactic or diagnostic uses*
3002 30	*90*	*---*	*Cultures of micro-organisms (excluding yeast)*

HSN Explanatory notes to Chapter 3002 clarifies that the heading includes 'cultures of micro-organisms for technical purposes (eg. for aiding plant growth). 'Whether the microbes aided plant growth was a biological question, the Commissioner (Appeals) had left to the original authority when he had passed the Order-in-Appeal No. 40/05 dated 28-2-05. This is answered in the affirmative by the original authority. We note that his finding is correct. It is significant that the note on coverage of microbes under CH 3002 does not restrict it to those that serve as fertilizers but broadly to those that aid plant growth. Experts consulted certified that microbes treated diseases in the plants. In any case microbes being cultures of micro-organisms are covered by CH 3002."

8. Appreciating the facts of the case and applying the ratio laid in the case *of T. Stanes and Co.* (supra), we are of the opinion that the Commissioner (Appeals) has rightly classified the impugned goods under 3002. We find no grounds to interfere with the impugned order.

9. The appeals filed by the Department are dismissed.

(Operative part of the order was
pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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