IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 19/02/2018.
DATE OF DECISION : 19/02/2018.

Customs Appeals No. 51580-51584 of 2017

[Arising out of the Order-in-Original No. 06/2017/K/VJ/PR-COMMR dated 30/06/2017 and No. 05/2017/K/VJ/PR-COMMR dated 23/06/2017 both passed by The Principal Commissioner of Customs, New Customs House, New Delhi.]

M/s Midas Import Corporation]
Ms. Rashmi Jain] Appellants
M/s Midas Fertchem Impex Pvt. Ltd.]
Shri Manish Jain]

Versus

CC (I&G), New Delhi Respondent

Appearance

S/Shri Amit Jain and Raghav Khurana, Advocates - for the appellants.

Shri R.K. Manjhi, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice Dr. Satish Chandra, President**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 50710-50714/2018 Dated : 19/02/2018

Per. B. Ravichandran :-

These five appeals are involving common dispute regarding correct classification of goods imported by two main appellants.

2. The brief facts of the case are two appellants (M/s Midas Import Corporation and M/s Midas Fertchem Impex Pvt. Ltd.) were importing goods declared as "0.1% Natural Brassinolide fertilizer". They have claimed classification of the said goods under Heading 31010099 as "other animal or vegetable fertilizer whether or not mixed together or chemically treated; fertilizer produced by the mixing or chemical treatment or animal or vegetable products". The Revenue objected to the said classification and sought classification of the product under Heading 38089340 as "plant growth regulators", under the main heading which among things dealt with insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant growth regulators etc. Upon such re-classification the consequences will be differential duty and penal proceedings against the appellant. The Original Authority held against the appellant and confirmed the differential duty demand due to such re-classification alongwith penalties under Section 114A and 114AA of the Customs Act, 1962. The three individual appellants were also imposed with penalty under Section 112 and 114AA of the Customs Act, 1962.

2. The learned Counsel appearing for all the appellants submitted on the following lines :-

(a) they have been importing the impugned goods from 2010 onwards. In fact, they have initially classified the goods under Heading 3105. The Revenue raised various queries (evidence of the same submitted) stating that the goods are more appropriately be classifiable under 3101 having 7.5% duty. The appellants that time accepted the proposal of the Revenue and in fact paid differential duty for the past imports also. The classification made that time was on detailed examination of product, literature, processes and on physical examination of the goods ;

(b) the review of the classification has been done based on certain intelligence and further investigation including verification of documents in their premises. Though, they had certain sales literature claiming the product as Brassinolide (PGR), as per the common understanding of the trade the classification should be guided by the Tariff entries and whatever claimed in the product literature ;

(c) the Revenue never conducted chemical test of the impugned goods which would have thrown more light to resolve the dispute. The appellant did get the test from Shriram Institute for Industrial Research, which was not accepted by the Revenue as the same was not done as per the approved procedure ;

(d) the Board in 1998 vide their circular dated 19/05/1998 clarified the classification of such items. The said clarification was revised by the latest circular dated 06/04/2016. The reliance placed by the Revenue on this Circular as well as the modification in the pesticide schedule of Insecticide Act as well as clarification issued by the Central Insecticides Board & Registration Committee cannot be the guiding principle for deciding the classification under Customs ;

(e) relying on the Chapter note 1 (a) (2) of Chapter 38 it is submitted that the product imported by the appellant are in bulk form and required further dilution for sale to retailers. They are traders selling it to further traders who made the product fit for retail sale. As such, classification under 3808 is barred".

3. Contesting the imposition of penalties, it is submitted that the import of the impugned goods have been assessed and cleared for the past many years and the products are physically examined, literature studied and thereafter assessments were done. As already noted in 2010 detailed enquiries were also made. If the classification has to be changed due to change in technical literature and classification by the allied Acts, the allegation of suppression, fraud cannot be alleged against the appellant. As such, the demand for extended period as well as penalties are not sustainable.

4. The learned AR contested the appeals on the following grounds :-

"(i) the appellants' documents for sale of the imported goods clearly bring the fact that these are known and identified in the market by the persons who are dealing, as Brassinolide (PGR). These are marketed as plant growth regulator only. The presence of NPK in the product by itself will not make them fertilizer ;

(ii) the appellant deliberately mentioned in the sale invoice the term 'fertilizer' which was found on verification from the buyers who stated that they never insisted of such documentation ;

(iii) there is no bar for the Department re-looking the correct classification of the product when material facts are available to them to support such re-opening*.*

5. We have heard both the sides and perused the appeal record. The point under dispute is the correct classification of Brassinolide. The appellant claimed the same as fertilizer. The Department contends the product to be plant growth regulator. We note that there is only a fine distinction between 'fertilizer' and a 'plant growth regulator'. While fertilizer is generally for promoting the growth of plant or crop for desired increased harvest, the plant growth regulators work on specific areas resulting in modified growth or even retardation of certain growth. Without further going into the technicalities, we note that the experts who are dealing with the products of Indian market namely, Central Insecticides Board & Registration Committee and also the statutory provisions of Insecticides Act clearly recognize Brassinolide as plant growth regulator. The Board's classification dated 06/04/2016 also elaborately discusses about the scope of 'fertilizer' and 'plant growth regulators' for customs purposes. The impugned goods are listed by the said circular as "growth stimulators" for agricultural and horticulture crops. This clarification has been issued after detailed examination of technical literature as well as common trade practice. As such, we find that the claim of the appellant regarding the product being only a fertilizer and not a plant growth regulator is not tenable.

6. However, the appellants raised a legal issue regarding classification under Heading 3808. This is with reference to note 1 (a) (2) of the said Chapter 38. The learned Counsel fairly accepted that this was not examined earlier as this was not raised/contested also. Since, this has a bearing of classification this aspect should be examined before arriving at classification under 3808 as the same is guided by chapter note also. Further, in the absence of chemical test in the present imports the classification has necessarily to be done based on documents recovered, literature filed by the appellant. When specifically asked about availability of current imports or samples from past imports we were informed no such samples were available and no imports currently. In such situation the classification has to be done with available literature and import documents only.

7. In view of the above discussion and analysis, we note that the matter has to go back to the Original Authority to re-decide based on the observations made above. The applicability of chapter note and also the instructions issued by the Board alongwith that of competent authorities of Central Insecticides Board & Registration Committee, Insecticides Act etc. are to be examined by the Original Authority. The applicability of limitation as strongly contended by the appellant, as well as liability of the penalty, may also be decided afresh.

8. Keeping in view of the above observation, the appeals are allowed by way of remand.

(Order dictated and pronounced in open court.)

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

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