

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench

Court – I

Central Excise Appeal No. 1604 of 2012

(Arising out of Order-in-Original No.30/2012-RS dt.12.03.2012 passed by Commissioner of Customs & Central Excise, Visakhapatnam-II)

KPR Fertilizers Ltd

Nallamilli Road, Biccavolu Mandal,
East Godavari Dist., AP – 533 343

.....Appellant

VERSUS

**Commissioner of Customs, Central
Excise & Service Tax, Visakhapatnam - II**

Port Area, Visakhapatnam,
Andhra Pradesh – 530 035

.....Respondent

Appearance

Shri Y. Sreenivasa Reddy, Advocate for the Appellant.

Shri A. Rangadham, Authorized Representative for the Revenue.

Coram:

HON'BLE MR. ANIL CHOUDHARY (JUDICIAL)

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30091/2022

Date of Hearing: 06.09.2022

Date of Decision: 15.09.2022

[Order per: P.V. SUBBA RAO]

This appeal has been filed by M/s KPR Fertilizers Ltd¹ assailing Order-in-Original dated 12.03.2012 passed by the Commissioner of Central Excise & Customs, Visakhapatnam-II Commissionerate. The operative part of the impugned order is as follows:

"

ORDER

- a. I order for classification of the "micronutrients" manufactured and cleared by M/s KPR Fertilisers Limited, Biccavolu under Chapter sub-heading No.38089340 of the Central Excise Tariff Act, 1985;*
- b. I confirm the demand duty of Rs.1,23,49,088/- (Rupees One Crore Twenty Three Lakhs Forty Nine Thousand Eighty Eight only) (Cenvat*

¹ Appellant

Rs.1,19,89,406/-, Education Cess of Rs.2,39,788/-, Secondary and Higher Education Cess of Rs.1,19,894/-) on M/s KPR Fertilisers Limited, Nallamilli Road, Biccavolu, Biccavolu Mandal, East Godavari Dist, A.P. under the Section 11A of the Central Excise Act 1944 on the micronutrients cleared by them without payment of duty during the period from April 2007 to January, 2011;

- c. I demand Interest on the amount of duty at (b) above at the appropriate rates under the provisions of Section 11AB of Central Excise Act, 1944 as amended;*
- d. I impose a penalty of Rs.1,23,49,088/- (Rupees One Crore Twenty Three Lakhs Forty Nine Thousand Eighty Eight only) under Section 11AC of the Central Excise Act 1944, on M/s KPR Fertilisers Limited, Biccavolu."*

2. The facts of the case, in brief are that the appellant manufactures micronutrients for plants and has classified them under Chapter heading 3105 of Central Excise Tariff Act, 1985. A show cause notice dated 14.03.2011 was issued to the appellant covering the period 2007-08 to 2010-11 proposing to classify the micronutrients manufactured by the appellant as plant growth regulators under Chapter heading 38089304 of Schedule to the Central Excise Tariff Act and consequently recover the differential duty of Rs.1,23,49,088/- under proviso to section 11A(1) of Central Excise Act along with interest under section 11AB. It was further proposed to impose a penalty on them under section 11AC and under Rule 25 of the Central Excise Rules, 2002. The appellant contested the proposal before the Commissioner both on merits and on limitation. After following due process, learned Commissioner has passed the impugned order. Hence, this appeal.

3. The undisputed facts of the case are that the appellant was manufacturing micronutrients. Plants obtain their carbon, oxygen and hydrogen from water and air and the remaining nutrients from the soil. Since the naturally available nutrients in the soil are not sufficient, fertilisers either in the form of compost or farmyard manure or in the form of synthetic fertilisers are used to supplement. The synthetic fertilisers provide various nutrients i.e., chemical elements required for the plants in forms in which they can absorb. The nitrogen, phosphorous and potassium (N, P, K) are required in very large quantities and are referred to as primary nutrients. Other elements such as calcium, magnesium and sulphur (Ca, Mg, S) are required in relatively smaller quantities and are referred to as secondary nutrients. Still other minerals such as Boron, Cobalt, Iron, Molybdenum,

Manganese and Zinc etc., are required in still smaller quantities and are referred to as micronutrients. The terms macro and micro are referred to the relative quantities of the nutrients required and not their relative importance. Fertilisers will be required as per the plants grown and the nature of the soil and the availability of the nutrients in it.

4. In addition to the nutrients there are another set of compounds which are used in agriculture known as plant growth regulators or plant hormones. These are chemicals such as auxins, gibberelins, cytokinins, etc. The plant growth regulators are used in very small quantities and have very specific effect such as boosting growth of the plant, hastening flowering, hastening the formation of fruit, defoliation, etc.

5. The show cause notice proposed and the impugned order confirmed classification of the micronutrients manufactured by the appellant as plant growth regulators under Chapter heading 3808 of the Schedule to Central Excise Tariff Act.

6. We have heard learned Counsel for the appellant and learned Authorised Representative for the Revenue. Learned Counsel for the appellant submits that the nutrients for the plants and the plant growth regulators are two distinct sets of chemicals which are used in agriculture. While the nutrients provide nutrition to the plants, plant growth regulators regulate the growth and are in the nature of the plant hormones. Of the nutrients such as N,P,K are used in large quantities and others which are used in small quantities and are referred to as micronutrients. The proposal of the revenue to classify the micronutrients manufactured by them as plant growth regulators is clearly not sustainable because they are two different types of products. He also submits that the distinction between micronutrients and plant growth regulators was explained in detail by the CBEC in Circular dated 06.04.2016 after consulting Indian Council of Agriculture and Research. Elements such as Iron, Manganese, Zinc, Copper, Molybdenum, Boron, Nickel, and Chlorine have clearly been mentioned as micronutrients in the circular. Even for this reason, the proposed classification is not sustainable.

7. He further submits that at any rate this is only a question of classification as proposed by the Revenue and as classified by the assessee. Therefore, there is no case to invoke an extended period of limitation or impose a penalty upon the appellant.

8. Learned Authorized Representative for the Revenue does not dispute that the appellant was manufacturing micronutrients and not auxins, gibberellins, etc. However, he submits that the appellant has classified the micronutrients under Chapter heading 3105. Chapter note 6 to Chapter 31 reads as follows:

*"6. For the purposes of heading 3105, the term **"other fertilisers"** applies only to products of a kind used as fertilisers and containing, as an essential constituent, at least one of the fertilising elements nitrogen, phosphorus or potassium."*

9. It is clear that this tariff heading applies only to fertilisers which contain at least one of the fertilising elements nitrogen, phosphorous or potassium as an essential constituent. That is not the case in the goods manufactured by the appellant. He draws the attention of the bench to para 5 of the CBEC circular dated 06.04.2016 which reads as follows:

*"5. **Mixtures** of micronutrients/multi-micronutrients with fertilisers are also manufactured and sold. They shall be classified according to their essential characters and general rules of interpretation of the schedule to the tariff. Where the essential constituent giving character to the mixture is one or more of the three elements namely Nitrogen, Phosphorous or Potassium, the mixture shall be classified under any of the heading of Chapter 31, depending upon its composition. On the other hand, where the essential character of the product is that of mixture of micronutrients/multi-micronutrients having predominately trace elements, it shall be classified under CETH 3824 as chemical products not elsewhere specified or included."*

10. He submits that although the proposal in the show cause notice and the confirmation in the impugned order is classifying the goods as plant growth regulators which apparently is not correct considering the nature of the goods manufactured, they cannot be classified under CETH 3105 as well. Therefore, the appropriate heading is CETH 3824 as chemical products not elsewhere specified or included.

11. On a specific query from the bench as to whether this was the proposal in the show cause notice, learned Authorized Representative for the Revenue submits that it is not so but he asserts that it is necessary that the Tribunal indicates the correct classification of the goods in question even if such classification was not mentioned in the show cause notice or in the impugned order.

12. Rebutting these submissions, learned counsel for the appellant submits that neither the Tribunal nor the Original Authority could have gone beyond the show cause notice which has only proposed classification of the products manufactured by them as plant growth regulators, which is clearly not sustainable. If the proposal is to classify their goods under a different heading an appropriate show cause notice must be issued before any adjudication.

13. Further, he also contends on another ground. He draws the attention of the bench to the composition of the goods manufactured by them which are reproduced in the Order-in-Original as follows:

<u>1. Formulation No:1</u>	
Zinc	7.575
Ferrous	15.385
Manganese	2.585
Magnesium	48.91
Nitrogen	15.385
Phosphorous	2.585
Potash	7.575
Total	100

<u>2. Formulation No:4</u>	
Zinc	18.18
Ferrous	10.255
Manganese	5.00
Copper	4.16
Borax	9.525
Molybdenum	0.09
Magnesium	28.01
Nitrogen	10.255
Phosphorous	5.00
Potash	9.525
Total	100.00

<u>3. Formulation No:5</u>	
Zinc	2.50
Ferrous	1.00
Manganese	1.00
Borax	0.50
Magnesium	90.50
Nitrogen	2.5
Phosphorous	1.00
Potash	1.00
Total	100.00

<u>4. Formulation No:6</u>	
Zinc	7.575
Ferrous	5.250
Manganese	4.165
Borax	4.760
Magnesium	61.26
Nitrogen	7.575
Phosphorous	5.250
Potash	4.165
Total	100.00

<u>4. Formulation No:6</u>	
Zinc	7.15
Ferrous	1.25
Manganese	1.80
Magnesium	10.00
Stonechips	60.55
Nitrogen	8.000
Phosphorous	1.250
Potash	10.000
Total	100.00

14. He submits that the only requirement in the Chapter note 6 of Chapter 31 is that Nitrogen or Phosphorous or Potassium must be one of the essential ingredients for the goods to fall under Tariff heading 3105. As can be seen, one or more of these three elements are a part of each formulation which they had manufactured. Countering this argument, learned Authorized Representative for the Revenue submits that Nitrogen, Phosphorous or Potassium etc., though available in the formulations, they are not essential ingredients and they were not providing nutrition but were acting as chelating agents.

15. We have considered the arguments on both sides and perused the records. Clearly, macronutrients, micronutrients and plant growth regulators

are three distinct known to agricultural experts, as known in the market and as clarified by the CBEC. The show cause notice proposed to classify the micronutrients manufactured by the appellant as plant growth regulators. Learned Authorized Representative for the Revenue also admits that such classification is not sustainable. Therefore, the impugned order upholding such classification and demanding differential duty cannot be sustained and needs to be set aside.

16. We also find that the alternative submission by the learned Authorized Representative, that the correct classification should be determined by this Tribunal regardless of the fact that such proposition was not in the show cause notice, is clearly not sustainable. One of the basic principles of natural justice is that "no man shall be condemned unheard". If the proposal is to classify the goods under a different tariff heading than one proposed in the show cause notice, a show cause notice must be issued and adequate opportunity should be provided to the appellant to explain why such classification should not be adopted.

17. We further find that the formulations as presented before us and discussed above clearly show that the assessee's products indeed, had Nitrogen or Phosphorous or Potassium or more than one of these three as an ingredient in them. The argument of the learned Authorized Representative is that although they were present in these formulations they were not essential. We do not find any basis to hold as to which of these elements in the products are essential and which are not. It is his submissions that they were only chelating agents. We find nothing in the Chapter note 6 to Chapter 31 which says that Nitrogen, Phosphorous & Potassium cannot be part of chelating agents or the chelating agents are not essential ingredients. We do not find any reason to go merely by the assertion of the learned Authorized Representative in this regard. Since one of these elements is available, the classification of the goods under Chapter heading 3105 is clearly sustainable. The alternative classification as plant growth regulators is not sustainable.

18. We also find considerable force in the argument of the learned counsel for the appellant that the dispute is regarding classification viz., opinion of the assessee versus the opinion of the Revenue and it is not a case of fraud or collusion or wilful misstatement etc. No ground, whatsoever, exists for

invoking extended period of limitation. Similarly, there is no ground, whatsoever, to impose any penalty.

19. We, therefore, find in favour of the assessee both on merits and on limitation.

20. The impugned order is set aside and the appeal is allowed with consequential relief, if any, to the assessee.

(Pronounced in the Open Court on 15.09.2022)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)