

**IN THE CUSTOMS, EXCISE AND SERVICE TAX  
APPELLATE TRIBUNAL  
WEST ZONAL BENCH AT MUMBAI**

**APPEAL NO: E/709/2007**

[Arising out of Order-in-Original No: 26/2006 dated 27<sup>th</sup> November 2006 passed by Commissioner of Central Excise, Mumbai – II.]

Commissioner of Central Excise  
Mumbai – II

*... Appellant*

*versus*

Aries Agro –Vet Industries Ltd

*...Respondent*

Appearance:

Shri Hitesh Shah, Commissioner (AR) for the appellant

Shri V Sridharan, Senior Advocate for respondent

**CORAM:**

**Hon'ble Shri Anil Choudhary, Member (Judicial)  
Hon'ble Shri C J Mathew, Member (Technical)**

**Date of hearing: 11/01/2018**

**Date of decision: 31/05/2018**

**ORDER NO: A/86615 / 2018**

Per: CJ Mathew

This appeal of Revenue challenges order-in-original no. 26/2006 dated 27<sup>th</sup> November 2006 of Commissioner of Central Excise, Mumbai-II, which dropped the proceedings initiated against M/s Aries Agro-Vet Industries Ltd for not discharging the appropriate

duty liability on ‘plant growth regulators’, classifiable under heading no. 3808 20/3808 30 40 of First Schedule of the Central Excise Tariff Act, 1985. In three show cause notices decided upon in the impugned order, differential duty on the goods manufactured between 1998 to 2006 and claimed as ‘other fertilizer’, under heading no. 3105/3105 90 90 of the Schedule, was sought to be recovered by altering the classification.

2. Learned Authorized Representative drew attention to the patent infirmity in the impugned order having restricted itself to three of the products, viz., ‘Agromin’, ‘Chelamin’ and ‘Chelafir’, without rendering a finding on nine other products manufactured by respondent and covered in two of the notices. Taking note of this, we restrict this proceeding to the three covered by the impugned order. As to the fate of the other nine, we shall address that in due course.

3. Noting that the submission on facts, and the chronology of the dispute, made by Mr Hitesh Shah, appearing for Revenue, and Mr V Sridharan, Learned Senior Counsel for respondents, are common ground, we consider it necessary to pause for a perspective of the patchy canvas on which we are called upon to apply the strokes of our brush for we tread on quicksand – a combination of the unwillingness of the executive branch to articulate its intent to tax and the repercussions impacting that most basic human want, food – and are swamped with a plethora of scientific material and judicial decisions

of all hues to persuade us of the correctness of the rival claims.

4. Though Learned Senior Counsel may be anguished by our choosing to describe the impugned goods as chemicals we believe that it may not be a cause of cavil. For that is what ‘fertilisers’ are and our choice is amply justified given that the rival classifications lie within section VI of the First Schedule of the Central Excise Tariff Act, 1985, *i.e.* PRODUCTS OF THE CHEMICAL AND ALLIED INDUSTRIES. Yet, ‘fertilisers’ are privileged enough to warrant an entire separate chapter in this section of the Schedule. We can posit that this is not without design. Fertilisers are critical to national policy formulation across the globe for its contribution to agriculture which is indispensable as the plant kingdom alone is capable of generating its own food and providing sustenance to the animal kingdom not being blessed with the wherewithal to do so. And in the complexity of that very schedule lies the discord.

5. The dispute traces its origin to the adoption of the new tariff in 1985 with its comprehensive enumeration – this is apparent in the decisions cited before us. The new system afforded the advantage of re-engineering the tax structure but, in the process, the certainty of intent of government that was manifest in the preceding regime had to be sacrificed. Despite the cause, and perpetuation, of the dispute being apparent, little effort was made by the executive to resolve the ambiguity. That resolution could have been tailor-made for, and

restricted to, these chemicals used, again indisputably, for sustenance of agricultural productivity. This policy inertia is made even more glaring in the ambivalence of its instructions. We have only to consider circulars no. 26/90-CX dated 24<sup>th</sup> May 1990 and no. 79/79/94-CX dated 21<sup>st</sup> November 1994 of Central Board of Excise & Customs that prompted the Hon'ble Supreme Court to lay down an important rule in *Ranadey Micronutrients v. Collector of Central Excise [1996 (87) ELT 19 (SC)]* while disapproving of the attempt by the executive to distance itself from the latter of the two. Thus we take note that the conflict was allowed to fester when a simple statement of intention could have been articulated to restrict or broaden the scope of chapter 31 of the Schedule to the Central Excise Tariff Act, 1985.

6. There is no judicial precedent to fall back on. Probably out of deference to the criticality of agricultural policy and the role, as well as responsibility, of the executive, decisions have preferred to accord primary to circulars and instructions. Unfortunately, in anticipation of accountability on the qualified assertion in these executive clarifications enable lower authorities to rely upon the adjurements to initiate recoveries that are unable to survive the first stage of adjudication. It would appear that the efforts are aimed at classification that obtains higher rate rather than the rate appropriate to fitment within the description in the Schedule.

7. This Schedule is not a doomsday book; it is also not a

manifesto for the chemical or fertiliser industry. It is the creation of a global body of experts that has been adopted as a tool to promulgate duty rates for different articles or goods. With the objective being limited to the determining of the tariff applicable to various goods between competing headings, extensive scientific or industrial research is not a requisite for the task.

8. We, therefore, propose to refer to the voluminous literature placed before us only if unavoidable. The submissions of Learned Authorised Representative are that presence of the principal agents - nitrogen, phosphorous and potassium - in various combinations, is the primary qualification for placement in chapter 31 of the Schedule and that presence, without functional relevance, should not suffice. It is contented that in the impugned goods, none of these three elements are essential to the function. According to Learned Authorized Representative, commercial literature of the respondent, pertinent to the products in question, gives the lie to the finding of the adjudicating authority that the packaging is bereft of any indication of intended use as 'plant growth regulator'.

9. There is no dispute that the three products are 'micronutrients'. It is also clear that 'micronutrient' is not a specific entry in the Schedule. Therein lies the nub: owing to privileged treatment accorded to 'fertilizers', manufacturers would prefer to classify 'micronutrients' as 'fertilisers' with Revenue preferring to deny them

that privilege. The dispute is not about the fitment of the description of the goods over the description in the Schedule and is characterised by culling out aspects of rival descriptions, circulars and judicial decisions to suit the claims on the rate to be adopted. Considering the unwillingness of the executive to notify its intentions and our conclusion that it is not the conformity with the description that has led to the dissonance, we take it upon ourselves to go to the root of the issue.

10. In addition to a patient hearing accorded to both sides, we have considered the literature made available to us during the hearing. Before proceeding to render our decision, it is necessary to ponder over the importance of fertilising agents, the scheme of the Schedule of the Tariff, the manner in which classification is mandated to be undertaken, the scope of the circulars on the subject and, not the least, the precedent decisions.

11. Plant life is critical to the existence of living world; the single distinguishing feature of the fundamental dichotomous grouping of living world is the absence of ability to generate food in the life process of the animal kingdom. Animals feed upon other animals and plants but animal life would have been extinct in the absence of plant life which is blessed with the capacity of photosynthesis. Plants deploy resources available around them at three levels. Hydrogen, carbon and oxygen are drawn from air and water while the fertilizing

agents are drawn from the soil. These consist of major and minor fertilizers with nitrogen, phosphorous and potassium being the former. The correction of deficiency in, or the enrichment of, any of these is remedied by human intervention. Thus fertilizers are essential for survival of the eco-system and are, deservedly, bestowed with hallowed status in policy formulation all over the world. To the extent that ‘micronutrients’ are ‘fertilizers’, denial of that privilege imperils the very sustainability of human life.

12. A scientific and rational tariff bears the distinct advantage of easy formulation of duty structure for insertion against the appropriate heading without exhaustive inventorising. Coupled with exemptions notified under section 5A of Central Excise Act, 1944, the government is thus enabled to implement its tax policy. Manufacturers are also enabled to ascertain the classification that their products would best fit – and extending to goods that are yet to be thought of, or engineered by, human ingenuity. The range, and the limitation thereof, necessitates certain rules for fitment that have evolved by consensus.

13. On examination of the Schedule, we note that ‘fertilizers’ and ‘pharmaceuticals’ are favoured enough to merit separate chapters on their own, justified by their importance for the human race. At the same time, they, being chemicals, are ensconced in section VI of the Schedule to the Central Excise Tariff Act, 1985, *i.e.* PRODUCTS OF

CHEMICAL AND ALLIED INDUSTRIES – reflecting strict adherence to the arrangement of goods in the Schedule. The section, commencing with organic chemicals and inorganic chemicals, recognises that ‘fertilizers’ and ‘pharmaceuticals’ may fall under either and acknowledges that they are to be distinguished from their doppelganger in the other two chapters. Though, the Hon’ble Supreme Court has held in *Commissioner of Central Excise v. Mannampalakkal Rubber Latex Works* [2007 (217) ELT 161 (SC)] that, in ascertainment of classification, intended use cannot normally be a determining factor, specific qualification in the particular heading or in the notes to the chapter or section are deviation sanctified by law. Again, as per rule 1 of General Rules for Interpretation of the First Schedule of the Central Excise Tariff Act, 1985, though titles of sections or chapters have no legal standing, they do, assuredly, act as guidance for ascertainment. The statutory carving out of some chemicals, coupled with the titles assigned to chapter 30 and chapter 31, evidences the legislative intent to sanctify use as the determinant. This ascertainment is further facilitated by the regulatory mechanism, under central and/or state legislation, for ‘fertilizer’ and ‘pharmaceutical’ industry. Statutory authorities administer these regulations and, while we concur with Revenue that jurisdiction assigned over some chemicals to these regulators should not, generally, influence the classification, that very jurisdiction indicates the use.

14. Of no less import are the notes in chapter 31, of which note 1(b) excludes separate chemically defined compounds but with the qualification

*‘other than those answering to the descriptions in Note 2(a), 3(a), 4(a) and 5 below’*

implying that where the use is unambiguous, its twin heading in another chapter merits discarding. These notes refer to ‘mineral or chemical fertilizers’ distinguished by the presence of primary element, viz., nitrogenous, phosphatic or pottasic, in combination, besides ‘ammonium dihydrogen orthophosphate’ and ‘diammonium hydrogen orthophosphate’. From a straight reading of the relevant notes, it would appear that classification as ‘fertilizer’ is merited on clearance of goods specified in the referred notes pertaining to heading 3102, 3103 and 3104 cleared in bulk packing, even if these may find fitment in other chapters. From the remaining sub-notes pertaining to these headings, it is apparent that these are the only compounds where such ambivalence exists owing to specific description elsewhere whereas chapter 31 may contain only a generic description. The individual identification of two compounds in note 5 as classifiable in chapter 31 does not exclude others which answer to the description in heading 3105. Learned Authorized Representative places heavy emphasis on note 6, i.e.

*‘For the purposes of heading 3105, the term “other*

*fertilisers” applies only to products of a kind used as fertilizers and containing, as an essential constituent, at least one of the fertilising elements nitrogen, phosphorous or potassium.’*

to contend that the impugned goods are separately defined compounds and, not being ‘fertilizer’, in the absence of nitrogen, phosphorous or potassium, must not be accorded the privilege due to ‘fertilizers.’ According to him, this was the very error that the adjudicating authority was led into. It was further contended that this exclusion could not have been overcome, as the adjudicating authority did, by retaining an incorrect classification even where the alternative proposed was not in compliance with the General Rules for Interpretation of the First Schedule of the Central Excise Tariff Act, 1985. The adjudicating authority, after considering the allegations in the show cause notice against acceptance of the declared classification and the finding of non-applicability of the proposed classification, did resort to rule 4 of General Rules for Interpretation of the First Schedule of the Central Excise Tariff Act, 1985, viz.,

*‘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 akin.’*

15. We are unable to approve of the proposition made on behalf of Revenue that the classification claimed should have been rejected. Rejection of a claimed classification is not an end in itself as duty

liability can be computed only after application of the rate legislated by Parliament to the appropriate value. Such application will require ascertainment of the rate and a plethora of judgements have squarely placed the onus at the doorstep of tax authorities to determine a rate if not satisfied with a claim for a particular rate. We refer to the decision of the Hon'ble Supreme Court in *Hindustan Ferodo Ltd v. Commissioner of Central Excise* [1997 (89) ELT 16 (SC)] and in *HPL Chemicals v. Commissioner of Central Excise, Chandigarh* [2006 (197) ELT 324 (SC)]. Having made ourselves clear on this point, we do not, at this stage, examine the merit of adopting rule 4 *supra* to which we shall address ourselves presently.

16. Four circulars issued by Central Board of Excise & Customs are relevant to this proceeding. Having considered the importance of the products, it was thought fit, in circular no. 26/90-CX dated 26<sup>th</sup> June 1990, that 'micronutrient' should be classified as 'plant growth regulator' under heading 3808 of First Schedule of the Central Excise Tariff Act, 1985. On reconsideration, in circular no. 79/79/94-CX dated 21<sup>st</sup> November 1994, it was advised that 'micronutrients' listed in Fertiliser (Control) Order, 1985, and whether containing nitrogen, phosphorous or potassium or not, should be classified under heading 3105 of the First Schedule to the Central Excise Tariff Act, 1985; apparently, the wisdom of the regulatory authority in bringing 'micronutrients' under regulatory control was sufficient to consider

these as fertilizers for classification. When this latter was sought to be disowned, as having been invalidated by being contrary to law, leading to disapproval by the Hon'ble Supreme Court, in *re Ranadey Micronutrients*, of the denial of classification as 'fertilizer', the view was again altered in circular no. 392/25/98-CX dated 19<sup>th</sup> May 1998 to classify 'micronutrients' as 'other fertilizers' in heading 3105 of the First Schedule of the Central Excise Tariff Act, 1985 to conform with note 6 in chapter 31 of the First Schedule. This circular, while not excluding coverage of 'micronutrients' under the broad heading of 'other fertilizers', required the field authorities to ascertain if these were 'separate chemically defined component' and, if not, to be subjected to ascertainment of the presence of the primary elements, before allowing classification as 'other fertilizers.' Even here, the confusion is palpable for the circular requires such goods, as are found to be 'separate chemically defined compounds, to be classified under chapter 28 or 29 as organic or inorganic chemicals. Obviously, it does not envisage the classification now espoused by Learned Authorized Representative.

17. Learned Authorized Representative and Learned Senior Counsel invited our attention to circular no. 1022/10/2016-CX dated 6<sup>th</sup> April 2016 which, having rescinded all the above referred circulars, went on to instruct field authorities to classify 'micronutrients' as 'other fertilizers' only if the three macronutrients

are essential to the goods and to classify under chapter 28 or 29 if these were 'separate chemically defined compounds'; it is abundantly clear that these are not 'plant growth regulators'. There are inconsistencies, however, in this sample of distilled wisdom. Highlighting the extending of concessional rate of duty for 'micronutrients' under chapter 28, 29 and 38 that are also covered by Fertilizer (Control) Order, 1985, there is an explicit denial of relevance to the said order in determining classification. This is contrary to the law laid down by the Hon'ble High Court of Calcutta in *Naffar Chandra Jute Mills Ltd v. Assistant Commissioner of Central Excise* [1993 (66) ELT 574 (Cal)] and by the Hon'ble Supreme Court in *Maestro Motors Ltd* [2004 (174) ELT 289 (SC)] requiring that the same rules of interpretation should apply to the classification as well as for coverage in exemption notification. The reference to Fertilizer (Control) Order, 1985 in the exemption notification should apply equally to classification as 'fertilizers' especially in conjunction with note 6 of chapter 31 of First Schedule of the Central Excise Tariff Act, 1985. In paragraph 5, the circular overlooks its own instruction in paragraph 2.3 to direct classification under residual heading 3824 as 'chemical products not elsewhere specified' if these micronutrients be composed only of trace elements. This instruction to classify 'micronutrients' under the residual sub-heading 3824 90 of a residual chapter 38 of the First Schedule to the Central Excise Tariff Act, 1985 runs counter to the statutory mandate

to assign classification with reference to notes of chapter and sections in rule 1 of the General Rules for Interpretation of the First Schedule of the Central Excise Tariff Act, 1985; note 1(a) of chapter 38 clearly excludes separate chemically defined compounds, barring a few, from coverage under this chapter and, if ‘micronutrients’ are not fertilizers, they are to be classified on merit based on their composition. The decisions of the Tribunal in *Rajasthan Synthetic Industries Ltd v. Collector of Central Excise* [1989 (42) ELT 24 (Tribunal)] and of the Hon’ble High Court of Bombay in *Subash Photographics v. Union of India* [1992 (62) ELT 270 (Bom)] leave no room for doubt on this score. The impugned goods will have to be classified under section 28 or 29 if they be separate chemically defined compounds. Consequently, considering the nature of heading 3808 of the First Schedule of the Central Excise Tariff Act, 1985, it would appear that unless intended use of the goods is markedly inherent in commercial nomenclature, classification will have to be restricted to chapter 28 or 29.

18. In *re Ranadey Micronutrients*, though the dispute pertained to classification as ‘other fertilizers’ claimed by the manufacturer on the basis of the circular of 1994, the Hon’ble Supreme Court was called upon to adjudge on the propriety of disowning of a circular by the Central Board of Excise & Customs. According to Learned Authorized Representative, the Hon’ble Supreme Court in

*Commissioner of Central Excise v. Karnataka Agro Chemicals [2008 (227) ELT 12 (SC)]*, had accorded a finality to the dispute by holding that ‘micronutrients’, which do not contain any one of the three macronutrients, was liable to duty as ‘plant growth regulators’ and that the remand to original authority was merely to ascertain the threshold of presence of macronutrients for qualification as essential. Learned Senior Counsel urged us to follow the decision of Hyderabad bench of the Tribunal in *Commissioner of Central Excise & Service Tax, Hyderabad-IV v. Aries Agrovat Industries Ltd [Final order no.30767-30768/2017 dated 19<sup>th</sup> June 2017]* confirming the very same goods under heading 3105 of the First Schedule to the Central Excise Tariff Act, 1985. We find ourselves unable to agree with the far-fetched proposition of Learned Authorized Representative; the decision of the Hon’ble Supreme Court in *re Karnataka Agro Chemicals Ltd*, by remanding the matter for a decision on the extent to which composition of micronutrient would determine essentiality to the metal, has concurred with the Tribunal that note 6 of chapter 31 in the First Schedule cannot be interpreted to exclude classification under heading 3105 and has not endorsed the circular of Central Board of Excise & Customs on classification as ‘plant growth regulator.’ The observations that Learned Authorized Representative highlighted to presage approval of the stand of Revenue is nothing but reiteration of the view of the Hon’ble Supreme Court in *re Ranadey Micronutrients* that the circular would prevail unless its validity was

in doubt. We have expressed ourselves sufficiently on the credibility of these circulars.

19. With this trove of knowledge, we turn to 'plant growth regulators.' Plants gather nutrients from air, water and soil. These, in normal circumstances, may be sufficient for normal growth of, and yield, from plants. While air and water are not within the power of humankind to replicate or relocate, enrichment of deficient soil is. This is where macronutrients, comprising of nitrogen, phosphorous and potassium, in various chemically defined compounds supplied through fertilizers, are important. Micronutrients in trace quantity also remedy deficiency of such soil. These are administered by adapting the metal element with a chelate to attach a chemical that would either prevent the alkalinity of soil from rendering a 'micronutrient' insoluble and unusable by the plant or overcome imperviousness of foliage that blocks assimilation of the 'micronutrient.' A chelate does not alter the essential character of the 'micronutrient' as a metal nutrient needed by plants. Such chemically modified metals, denominated as coordinating complex compounds, have widespread use in various delivery systems in the pharmaceutical or metallurgical industries but in the agricultural sector when these are designated as chelate. The chemical used for engineering the chelate contains nitrogen; indeed, without that nitrogen it would not be able to provide the barrier necessary for impeding insolubility of the metal. The

contention of Learned Authorized Representative that, being chemical compounds, the impugned goods are not classifiable under chapter 31 of First Schedule to Central Excise Tariff Act, 1985 is out of accord with our finding on the scope of exclusion of 'separate chemically defined compounds' *supra*.

20. 'Micronutrients' manufactured in factories are, in our opinion, 'fertilizers', both by use as reflected in Fertilizer (Control) Order, 1985 and the deficiency that is sought to be remedied by their addition to the soil or by foliage application. The chelated metal that is designated as 'micronutrient' requires nitrogen to be such. The test results relied upon by Learned Authorized Representative is not conclusive on the absence of nitrogen and, from the contents of the report, it would appear that the test was limited to ascertainment of conformity with declaration of ingredients on the product itself. That may explain the want of the test memo and test report in the appeal filed by Revenue. Notwithstanding the argument of Learned Authorized Representative that the decision of the Tribunal in the respondent's own case at Hyderabad, which for want of benefit of the decision of the Hon'ble Supreme Court is not good law, considering the extent of finality in the said judgement noted *supra* by us and our finding on the existence, nay, essentiality of nitrogen in any 'micronutrient', we cannot but be in agreement with the Hyderabad bench.

21. The circular of Central Board of Excise & Customs issued in 2016 has discarded the earlier advice to classify ‘micronutrients’ as ‘plant growth regulators.’ And not without reason. ‘Plant growth regulators’ are hormones. Plants lack glands that produce hormones; cells themselves can be induced to produce hormones but these are not sufficient to engineer the growth of a plant in a desired way. Hormones are signalling molecules that direct a cell to act in a particular manner. Hence these regulators, grouped as ‘plant growth promoters’ (auxins, gibberellins and cytokinins) and ‘inhibitors’ (abscisic acid and ethylene), are not essential for plants but are a means for human interference in normal plant growth distinct from nutrient enrichment. As regulators are not nutrients, ‘plant growth regulators’ does not include ‘micronutrients’. In accordance with our findings on the scope of classification under heading 3808 of First Schedule to the Central Excise Tariff Act, 1985, ‘plant growth regulators’ are such as may be generically described elsewhere but are made available as ‘plant growth regulator’ by the manufacturer and are subject to such regulation as such specific products are bound, under particular statutes, to comply with.

22. Therefore, we may sum up our findings thus:

- i. ‘Micronutrients’ and ‘macronutrients’ are required for agriculture as fertilizers. In classifying them thus, it is the intended use that must prevail as inferred from the

scheme of Schedule. 'Micronutrients' are not 'plant growth regulators'. With the notices proposing classification of the products as 'plant growth regulators', the proceedings against respondent fails on this count alone.

- ii. To the extent that these are enumerated with reference to note 2 of chapter 31, the specific compounds of nitrogen, phosphorous and potassium, even if not designated as 'fertilizer' would be classifiable in chapter 31 along any others described as 'fertilizer' except those under heading 3105, with the exception of the compound specified in note 5, and those containing any one of the three primary fertilizing elements. The notes in the chapter are not intended to restrict classification in chapter 31 when intended for use as 'fertilizer' unless specifically and deliberately excluded by the notes of the chapter.
- iii. The circulars and precedent judgements, save the decision of the Tribunal in the dispute of the respondent themselves, have not examined the classification and scope of heading 3105 of First Schedule of Central Excise Tariff Act, 1985.
- iv. The presence of nitrogen in chelates is sufficient to bring

it within the ambit of heading 3105 of First Schedule of the Central Excise Tariff Act, 1985 owing to its indispensability despite the negligibility of the quantity. Classification under heading 3105 claimed by the manufacturer cannot be denied to them.

23. For the above reasons, we find no merit in the challenge to classification of ‘Agromin’, ‘Chelafer’ and ‘Chelamin’ and dismiss the appeal of Revenue to that extent. The original authority is directed to proceed with re-classification of the other nine products only if ‘diethylamine’ has not been deployed and if the substitute to ‘diethylamine’ does not contain nitrogen.

24. The appeal is accordingly disposed off.

*(Pronounced in Court on 31/05/2018)*

**(Anil Choudhary)**  
***Member (Judicial)***

**(C J Mathew)**  
***Member (Technical)***