IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. C/797/2009

(Arising out of Order-in-Appeal No. 112/Mumbai.III/2009 dated 18.5.2009 passed by Commissioner of Customs (Appeals), Mumbai)

Hima Dye Chem Corporation **Appellant**

Vs.

Commissioner of Customs (P), Mumbai **Respondent**

Appearance:

Shri N.S. Patel, Advocate, for appellant
Shri Chatru Singh, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. C.J. Mathew, Member (Technical)

Date of Hearing: 8.2.2018
Date of Decision: _______.2018

ORDER No. **A/86627/2018**

Per: Ramesh Nair

The issue involved in the present case is that the goods imported namely Vitamin AD/3 500/1000 IU/GM-2 imported from Israel is whether classifiable under Chapter Heading 2309.90 as claimed by the Appellant or classifiable under Chapter Heading 2936.90 as claimed by the revenue.

2. Shri N. S. Patel, Ld. Advocate appearing on behalf of the appellant submits that the goods Vitamin AD/3 500/100

IU/GM-2 is Poultry Feed Supplements contains the ingredients which were specially added to render the product to a particular use as Animal Feed Supplements. He submits that the Board vide Circular No. 188/22/96-CX dt. 26.03.1996 clarified that such product are classified as Animal Feed Supplements under Chapter 23. He further submits that the issue is already settled on identical products, he relied upon the judgments of Chokhani Associates (1994 (73) E.L.T. 925) (Tribunal), Tetragon Chemie Pvt. Ltd. (2001 (132) E.L.T. 525) (S.C.), Chokhani Pharma Vet (2001 (134) E.L.T. 101) (Tri.-Mum), Avet Chemicals (2001 (137) ELT 1304) (Tri.-LB), Abhi Chemicals & Pharmaceuticals Pvt. Ltd. (2006 (181) ELT 351)(S.C.), Dil Limited (2009 (239) E.L.T. 219).

3. Shri Chatru Singh, Ld. Assistant Commissioner (A.R.) appearing on behalf of the revenue reiterated the findings of the impugned order.

4. On careful consideration of submissions made by both the sides and perusal of records, we find that the goods Vitamin AD/3 500/100 IU/GM-2 imported from Isarel is the product in admixture of Vitamins and other ingredients which is a poultry feeds supplements and contains the ingredients specially added therein. This issue has been considered by

Board in Circular No. 188/22/96-CX dt. 26.03.1996 wherein the board has clarified as under:-

> *"Para 5: Heading 23.02 of Central Excise Tariff i.e. "preparations of a kind used in animal feeding including dog and cat food" corresponds to Heading 23.09 "Preparations of a kind used in animal feeding" of the HSN. As per Explanatory notes under Heading 23.09 of the HSN, the said heading covers complete animal feeds, supplementary animal feeds and preparations for use in making the complete feeds or supplementary feeds. The preparations for use in making complete feeds or supplementary feeds are known in the trade as "premixes". These preparations are compound compositions consisting of a number of substances - each type of these substances being present in the 'pemix' in varying proportions to serve a particular purpose. The explanatory notes under Heading 23.09 of HSN (pp. 177-178) further indicate that pre-mixes contain, in addition to the active substances (vitamins, amino-acids, anti-biotics, coccidiostats etc.) and slabilizers, anti-oxidants etc., certain organic or in-organic nutritive substances known as carriers which help in homogeneous dispersion and mixing of the active substances in the compound feeds to which the preparations referred to in the said explanatory notes are added.*
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> *Para 6: In this view of the matter, it would appear that preparations containing the active substances (vitamins or provitamins, amino-acids, antibiotics, coccidiostats etc.) along with the said carriers would fall under Heading 23.02 of the CET provided such preparations are of a kind used in animal feeding. It may however be noted that Heading 23.09 of the HSN excludes products of Chapter 29 and medicaments of Heading 30.03 or 30.04. Hence, while deciding the classification of the products claimed to be animal feed supplements, it may be necessary to ensure*

that the said animal feed supplements are ordinarily or commonly known in the trade as products for a specific use in animal feeding.

Para 7: In view of the foregoing discussions, the classification of each product being claimed as animal feed supplements may be decided on merits in the light of the above and in accordance with the explanatory notes to Heading 23.09 of the HSN read with Chapter Note 1 of Chapter 23 of the CET."

4.1 The product imported by the appellant is identical to the product discussed in the above circular, accordingly the goods imported by appellant is classifiable under Chapter Heading 2309.

5. On the issue of very same product, this tribunal in the case of Chokhani Pharma Vet V/s CCE, Mumbai (2001 (134) E.L.T. 101) (Tri.-Mumbai) held that Rovimix AD3 500/100 which contains vitamins as active ingredients like starch etc. is classifiable under Sub-heading 2309.90 of the Tariff Act, 1975 and heading 23.02 of Central Excise Tariff Act, 1985, as follows:-

"2. The appellants imported "Rovimix AD3 500/100 (Feed Grade) (Poultry Feed Supplement) and claimed classification under Heading 2309.90 CTA and 2302.00 CETA. The Customs contested the classification. After issue of show cause notice and hearing the appellants the Additional Commissioner of Customs judged the classification under the CETA under sub-heading 2936.00 and demanded the differential duty referred to above. The Larger Bench

judgment of the Tribunal (Misc. Order No. 248/98, dated 13-11-1998) [2001 (138) E.L.T. 414 (Tribunal - LB)] in the case of Tetragon Chemie Pvt. Ltd. & Ors. was cited before the Commissioner in appeal proceedings. The Commissioner without taking cognizance of that judgment upheld the lower orders. Hence the present appeal.

3. Shri J.C. Patel shows the memorandum of appeal before the Commissioner (Appeals) in which specific reliance was placed on the cited judgment of the Tribunal. He also shows us a copy of another order passed by the same Commissioner (No. 266/99 AP CL (NCH), dated 16-3-1999) in which similar products were held by him to be classifiable under Heading 23.09 of CETA, 1975 following the cited order of the Larger Bench. Shri Ramteke, on the other hand, supports the Commissioner's order.

4. We have carefully considered the submissions and have seen the cited order of the Larger Bench. The order covers similar products where the active ingredients are vitamins and other ingredients like starch are present. There is no doubt that the contested goods are akin to those goods which were before the Tribunal in making the judgment. When a precedent of a superior forum was cited before him, it was mandatory for the Commissioner to have followed it. In not doing so he has passed an order which does not sustain. We set aside this order, allow the appeal and direct consequential relief, if any."

6. The issue was also considered by Larger Bench in the case *Avet Chemicals* (Supra) wherein following order was passed:-

"2. The learned D.R. stated that in this case the respondents were importing a product called as "Microvit E Promix 50"

and claiming classification under Heading 23.09 as a preparation of a kind used in the animal feeding.

3. The Customs House, however, felt that it was classifiable under Heading 2936.28 of the Customs Tariff and 2936.00 of the Central Excise Tariff on the ground that the product was only Vitamin E in powder form (with Tiosil - 48, a special carrier of highly absorbent precipitated silica).

4. The matter was referred to the Larger Bench along with the case of M/s. Tetragon Chemie Pvt. Ltd.

5. The discussion before the Larger Bench merely centred on the product of M/s. Tetragon Chemie Pvt. Ltd. and the rival entries involved therein, namely, 23.02 and 29.36 of the Central Excise Tariff.

6. However, it was ultimately held that the products of this kind were preparations in the nature of a kind used in animal feeding classifiable under Heading 23.09 for Customs purposes and 23.02 for Central Excise purposes.

7. No other issue is involved.

8. Hence, he has nothing further to add.

*9. In view of the above position, the appea*l is rejected."

7. The Hon'ble Supreme Court in the case of Tetragon Chemie Ltd. (2001 (132) ELT 525) (S.C.) held that in respect of one or more vitamins mixed together with dilutants and used in a small quantity by addition to animal feed is classified as Animal Feed Supplements under heading 23.02 of Central Excise Tariff Act, 1975 and not as intermixture of

Vitamins under sub-heading 29.36 The judgment of the apex court is as below:-

> ***"[Order]. - C.A. No. 5833/99. -*** *The short question that arises for consideration in the present case relates to the products of the respondents which they represent as being animal feed supplements. It is not in dispute that the products of the respondents consist of one or more vitamins mixed together with dilutants and these products are used in a small quantity for improving animals' performance. The two competing entries are 2302 and 2936.*
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> ***2. Entry 2302 reads as follows :***
>
> *"For preparation of a kind used in animals feeding, including dogs and cats food" the rate of duty for this is nil.*
>
> ***3. Entry 2936 reads as follows :***
>
> *"The rate of duty prescribed is 15% for the vitamins."*
>
> ***4.****The Collector of Central Excise had come to the conclusion that the product did not fall under Entry 2302 because the product had to be added in a small quantity to the main feed to get desired performance of the live stocks or to enhance the performance of the live stocks beyond the normal levels. He further observed that he would have accepted the plea of the assessees that the products were animal feed had the product manufactured by them been directly used as such for animals feeding. The claim of the respondents herein was rejected because according to the Collector the products merely were to enhance the performance of live stocks by addition of these supplements to the animal feeds. From this it is evident that the Collector regarded the products in question as animal feed supplements.*
>
> ***5.*** *On further appeal to the Tribunal it came to the conclusion that animal feed supplements were rightly included in Tariff Item 2302 being preparation of a kind used in animal feeding including dogs and cats food. We agree with the conclusion of the Tribunal that even food*

supplements like the products of the respondents which are used in animals feeding would fall under the Heading 2302 and, therefore, we do not find any merit in this appeal. While affirming the decision of the Tribunal, this appeal is dismissed with no order as to costs."

8. As per the above judgments particularly in case of Chokhani (supra) which is on identical product, we hold that the issue is no more res integra. Accordingly impugned order is set aside and appeal is allowed.

(Pronounced in court on ________ 2018)

(C.J. Mathew)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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