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

APPEAL NO: E/873/2009

[Arising out of Order-in-Appeal No: PII/PAP/74/2009 dated 23rd February 2009 passed by the Commissioner of Central Excise (Appeals), Pune – II]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Commissioner of Central Excise
Kolhapur … ***Appellant***

versus

Bahar Agrochem & Feeds Pvt Ltd ***…Respondent***

Appearance:

Shri S Hasija, Superintendent (AR) for appellant

Shri Yogesh Patki, Advocate for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 12/07/2018
Date of decision: 06/11/2018

ORDER NO: A/87962 / 2018

Per: C J Mathew

This appeal of Revenue lies against order-in-appeal no. PII/PAP/74/2009 dated 23rd February 2009 of Commissioner of Central Excise (Appeals), Pune-II which set aside the order of the original authority disposing of 8 show cause notices classifying 'Zymegold' manufactured by the respondent, M/s Bahar Agrochem & Feeds Pvt Ltd as 'plant growth regulator' under heading 310100 of the First Schedule to the Central Excise Tariff Act, 1985 instead of under 'fertilisers' as claimed by the respondent. Accordingly, the differential duty of ₹ 22,50,473, along with interest thereon, and penalty under section 11AC of Central Excise Act 1944 was dropped resulting in the present proceedings.

2. The issue had been disputed before the first appellate authority immediately after the decision of the original authority on the first five of the eight show cause notices and, upon remand, had been re-adjudicated along with the other three show cause notices. Learned Authorised Representative points out that the impugned order has not gone into the merits of the classification adopted by the original authority but had set aside the classification on the ground that the re-

adjudicated order was not compliant with the specific directions in the order of remand and that the order impugned before the first appellate authority was merely a reiteration of the earlier order besides imposing that penalty found, in appeal, to be not invokable. According to Learned Authorised Representative, the first appellate authority erred in rendering this finding in view of the detailed discussion in the order of the original authority and despite compliance, to the extent possible, with directions in order of remand. It is also his contention that respondent marketed the product as 'plant growth regulator' and, by the 'common parlance test' laid down in decisions of the Hon'ble Supreme Court in *Commissioner of Central Excise, New Delhi v. Connaught Plaza Restaurant (P) Ltd [2012 (286) ELT 321 (SC)]* and in *Commissioner of Central Excise, Nagpur v. Shree Baidyanath Ayurved Bhawan Ltd [2009 (286) ELT 321 (SC)]*, cannot be classified elsewhere. It is further contended that cross-examination of the Deputy Chief Chemist had been rightly denied in consonance with the decision of the Hon'ble High Court of Bombay in *Patel Engineering Ltd v. Union of India [2014 (307) ELT 862 (Bom)]* which was the approval of the Hon'ble Supreme Court. It was also argued that the jurisdictional authorities had discharge the onus of classification following which the burden shifted to the assessee and no further evidence was required to be provided to support the proposed classification. Hence, he concluded that the terms of the remand had been complied with the extent possible and, that in the context of detail findings by the original authority, the dismissal of those in the impugned order was not proper and legal.

3. Learned Counsel submits that all the issues raised by the first appellate authority should have been looked into by , after being made aware. It is his contention that Revenue had not appealed against the remand direction issued by the first appellate authority.

4. The controversy over the attempts by central excise authorities to subject goods claimed to be dutiable as ‘fertilizers’ in an alternative classification as ‘plant growth regulators’ is not new. In the context of unscientific approach to re-classification, there have been occasions of non-conformity to settled principles that should govern adjudication, appeal and remand which has been the primary contention in the proceedings before the first appellate authority. The first appellate authority has found the blatant disregard thereof to be sufficient to hold in favour of the present respondents. We do not propose to go into those submissions but, relying on admitted facts in the present dispute, instead resolve the classification itself in the light of precedent judgments. The test result, on which the scientist-expert has ventured to classify the product, does not dispute the presence of nitrogen and chlorine. That should suffice to characterize the product as ‘fertilizer’ based on the decision of the Tribunal in *Commissioner of Central Excise, Mumbai-II v. Aries Agro-vet Industries Ltd [final order no. 88615/2018 dated 31st May 2018 in appeal no. E/709/2007].*

The principles that govern coverage as ‘fertilizer’ or as ‘plant growth regulator’ has been examined at length thus

‘5. 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.’

5. The presen facts and circumstances are no different. In view of the elaboration in *re Aries Agro-vet Industries Ltd*, the appeal of Revenue is without merit and is dismissed.

(Pronounced in Court on 06/11 /2018)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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