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

Application No. E/MISC/86700/18 In Appeal No. E/605/11
&
Appeal No. E/1939/2010, E/604 & 605/2011

(Arising out of Order-in-Appeal No. SB/121-126/Th-I/2010 dated 20.8.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai-I).

Commissioner of Central Excise, Thane-I	Appellant

Vs.

M/s Tinco Chemicals	Respondent

Appearance:

Shri Anil Choudhary, DC (AR)	for Appellant
	for Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. S. SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 12.11.2018

Date of Decision: 12.11.2018

ORDER NO. **A/87945-87947/2018**

Per: Dr. D.M. Misra

These appeals are filed by the Revenue against Order-in-Appeal No. SB/121-126/Th-I/2010 dated 20.8.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai-I, since involve common issue, are taken up together for disposal.

2. Briefly stated the facts of the case are that the respondents are engaged in manufacture of excisable goods, namely, Potassium Nitrate, Potassium Sulphate, Mono Potassium Phosphate and Mono Ammonium Phosphate, which were classified under Chapter 28 of Central Excise Tariff Act, 1985 by the appellant prior to May, 2007. Subsequently, they claimed classification of the said product under Chapter 31 as Fertilizer and claimed exemption against Entry No. 63 of Notification No. 4/2006-CE dated 1.3.2006. On adjudication, the Assistant Commissioner by his order dated 1.5.2008 classified the product Potassium Sulphate under Chapter sub-heading 31043000 and Mono Ammonium Phosphate under chapter sub-heading 31054000 of Central Excise Tariff Act, 1985, whereas he classified the product namely, Potassium Nitrate and Mono Potassium Phosphate under chapter sub-heading 28342100 and 28352400 of Central Excise Tariff Act, 1985 respectively. Aggrieved by the classification under Chapter 28, in relation to the products Potassium Nitrate and Mono Potassium Phosphate, the respondent filed an appeal before the learned Commissioner (Appeals). In the meantime, periodical show-cause notices were issued to the respondent demanding duty on the aforesaid two products, which on adjudication were confirmed with interest and penalty. Appeals were also carried out against the said orders before the learned Commissioner (Appeals). The learned Commissioner (Appeals) by the impugned order decided all the appeals in favour of the respondent. Hence, the Revenue is in appeal.

3. Learned AR for the Revenue reiterates the grounds of appeal of the Revenue. He submits that the learned Commissioner (Appeals) on the basis of test report of a different departmental laboratory, on the samples drawn, without the presence of the departmental officer, relied upon the said test report and passed the impugned order holding that the products in question were fertilizers. He has contended that merely because the goods were supplied/sold to RCF cannot be considered as fertilizers when the goods in question were capable of multiple uses including that of as fertilizers. It is his contention that no evidence has been produced by the respondent to show that subject goods were not having more than one use, hence the order passed by the learned Commissioner (Appeals) considering the products as fertilizers is erroneous and to be set aside.

4. Learned Advocate for the respondent has submitted that the learned Commissioner (Appeals) besides analyzing the test result, also considered various other aspects namely, use of the products in question, classification of similar goods imported and the letter of RCF relating to the use of the said products. Also, in the report submitted by the jurisdictional Assistant Commissioner dated 12.8.2010 as per the direction of learned Commissioner (Appeals), it has been reported that the products in question were reported to merit classification under Chapter 31 of Central Excise Tariff Act, 1985.

5. We have carefully considered the submissions advanced by both sides and perused the records.

6. The short issue involved for consideration is whether the product Potassium Nitrate and Mono Potassium Phosphate manufactured by the respondent merit classification under Chapter 28 as chemicals or Chapter 31 as fertilizers. The samples of the said product have been subjected to chemical test in the Fertilizer Testing Laboratory, Pune of Government of Maharashtra, wherein the test result revealed that the tested products were fertilizers since these products satisfied the parameters prescribed under Fertilizer Control Orders. Further, in the impugned order the learned Commissioner (Appeals) took into consideration other evidences like the use of the said product by the buyers namely, M/s RCF Ltd., wherein it has been informed by M/s RCF that the same are used as fertilizers. Besides the learned Commissioner (Appeals) during the course of hearing obtained a report from the Field formation about the classification of the product, which were tested to be fertilizers in the Govt. laboratory. In the report, the jurisdictional Assistant Commissioner has informed that the products merit classification under Chapter 31 of Central Excise Tariff Act, 1985. Even though in the grounds of appeal, the Revenue has claimed that the test reports cannot be relied upon since the samples were not drawn in the presence of the officers of the Department, we do not understand as to why department has not independently drew samples before and during issue of periodical demand notices of the respondent from time to time. In absence of any contrary test report, we do not find merit in not accepting the test report of the Fertilizer Testing Laboratory, Pune of Govt. of Maharashtra that the products in question are fertilizers. Also, we find that the

jurisdictional Asst. Commissioner's report has not disputed the process of manufacture, its use, but on the contrary, reported that it merits classification as fertilizers. Consequently, we do not find any reason to interfere with the findings of the learned Commissioner (Appeals).

7. Accordingly, the Revenue's appeals are dismissed being devoid of merit. MA stands disposed of.

(Dictated and pronounced in Court)

(S. Srivastava) **Member (Technical)**	**(Dr. D.M. Misra)** **Member (Judicial)**

Sinha