

ORDER IN APPEAL

M/s. Atul Manufacturing Pvt. No. 291/01-3/55 Industrial Estate, Dhruva, Bhavnagar (hereinafter referred to as the appellant) has filed this appeal against CIO No. 04 to 5426000 Demand 1748 dated 18.2.2019 issued by the Assistant Commissioner, Central GST Division, Bhavnagar (hereinafter referred to as the lower adjudicating authority).

2. The brief facts of the case are that Audit revealed that the appellant had wrongly classified their new excisable goods namely, "Zymegold Plus Granules" under Tariff item 34010000 attracting Nil rate of duty. It was also noticed from the audit result that the appellant has failed to mention their true product, "Zymegold Plus Granules" as "Animal or Vegetable Fertilizers whether or not mixed together or chemically treated; Fertilizers produced by the mixing or chemical treatment of animal or vegetable products" under Central Excise Tariff item 34010000 attracting an ML rate of duty from May 2010 and onwards. The audit found that the process and end use were almost similar to their other products i.e. Plant Growth Regulator manufactured by the appellant and hence this product should be under the category of Plant Growth Regulator under Chapter No 38 of the Central Tariff Act, 1985 attracting Central Excise duty. A sample of the said product i.e. "Zymegold Plus Granules" was drawn on 23.02.2010 in presence of the authorized representative of the appellant and the same was sent to the Chemical Examiner, Customs House, Kandla on 24.02.2010, along with manufacturing process and details of inputs, for the purpose of testing to arrive at a proper classification.

2.1 On the basis of test result reported vide letter File No. KCI/42/Cent Ex (2000-10) dated 17.03.2010 of the Chemical Examiner, Customs House, Kandla, Show Cause Notices were issued to the appellant, proposing to classify "Zymegold Plus Granules" under Tariff item 38039240 attracting Central Excise duty. The matter was remanded back by the Hon'ble CESTAT vide Order dated 23.8.2012 with a direction to provide a copy of Test Result dated 17/3/10 to the Appellant. The demand in subsequent SCN's were also cancelled. Appellant preferred Appeal, which was decided by the then Commissioner (Appeals) remanding the matter back to the adjudicating authority.

2.2 In the remand proceedings the demand was cancelled by the adjudicating authority. However, in the Appeal proceedings, the matter was

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remanded granting certiorari for cross-examination of the Chemical Examiner by the Appellate. The Hon'ble CESTAT vide final order dated 15.2.2014, in the matter of OIA BVI/EXCUS-000-APP-173/13-14 dated 30.1.2014 also remanded the matter to the lower adjudicating authority for cross examination of the Chemical Examiner. The Joint Commissioner, C. Excise and Service Tax decided six S/CNs covering the period from March, 2010 to June, 2016 vide OIA No. BHV-EXCUS-000-IC-42 to 62-2010-17 dated 08.09.2017. The Appellant again preferred Appeal, which was decided by Commissioner (Appeal) vide OIA No. BHV-EXCUS-000-APP-008/2018-18 dated 25.4.2018.

3. The Appellant filed the present Appeal against the impugned order conferring demand of Rs.50,37,540/- (Rs.27,50,880/- +Rs.07,255/- + Rs.21,63,787/-) in the adjudication of 6 S/CNs dated 27.7.2018 dated 8.5.2017 and order 4/10.2017 covering the period from July, 2018 to June,2017 under Section 11A of the Act along with interest and late fee penalty of Rs.50,37,540/- (Rs.27,50,880/- +Rs.07,255/- + Rs.21,63,787/-) under Section 11AC of the Act with order to pay minimum penalty of 25% under provision Section 11AC of the Act. The appellant against the appeal, inter-alia on the following grounds:

(i) the impugned order issued in law as it has been passed beyond the scope of Show Cause Notices wherein as the only basis for change in classification is the opinion of the Chemical Examiner as contained in the two test results dated 17.05.2016 and 04.10.2016 that the product Zynogold Plus does not meet classification as a Fertilizer although a blind statement not supported by any evidence that the product Zynogold Plus does not contain N, P or K, the impugned order has contained change in classification by relying on the details as contained in the trademark registration certificate and the details as allegedly displayed on the website of the Genraj Agrovet Limited to come to a conclusion that the product Zynogold Plus is not a Fertilizer. The impugned order has been passed beyond the scope of the Show Cause Notices as it relies on Rule 30 of the Interpretation Rules. It is held that the product Zynogold Plus is classifiable as Part Chemical Fertilizer under Tariff Heading 38099240 and does not meet classification as a fertilizer under Tariff Heading 31010099 when the Show Cause Notices do not refer and rely on the Interpretation Rules for change in classification. The impugned order has been passed contrary to the settled law as laid down by the Hon'ble Supreme Court in the case of *M/s. Loyal Engineering Limited* reported in 2008 (201) ELT 519 (SC); that the lower adjudicating authority while adjudicating the Show Cause Notices instead of examining the

validity of the information relied upon in the SCN, has carried out his own investigation and relies on information which is not the part of SCN. If the adjudicating authority can no improve the allegations made in the Show Cause Notice, then the Adjudicating Authority has come to a conclusion, that the Department has discharged its onus cast on it for change in classification relied for and researched information / data which is not part of the Show Cause Notice viz details in the taxpayers application and on the website of Goxite Agrovet Limited, that the change in classification is based on the two test reports, which is nothing but the opinion of the Chemical Examiner which is against the settled law that Chemist cannot opine on classification but has to provide the technical substantiation; that the chemist / examiner in the cross examination has stated that testing was done with a view to determine the classification of the product.

(ii) That the Department has not discharged the onus cast on it for changing the classification from "Fertilizer" under Tariff Entry 31010099 to "Plant Growth Regulator" Tariff Entry 38023340; that the classification as earned by the assessee has to be accepted and relief on as held in the following case laws:

- (i) Hindustan Feroce Ltd - 83 ELT 15,
- (ii) Cogate Marmolva - 1980 ELT 268,
- (iii) Nevasaram Rubber - 1993 ELT 988,
- (iv) Bombay Paints & Allied Products - 21 ELT 365.

(iii) That Show Cause Notices do not give any cogent reasons for the proposed change in classification but merely relies on the two test reports dated 17.02.2010 and 01.07.2011, that the test report dated 17.02.2010 does not provide any technical data to a trained analyst on analysis of the sample but it merely states that the sample has been examined in light of the Central Excise Tariff Act 1995, HSN. Laboratory findings and findings and further states that the sample does not indicate properties required for classification under tariff Heading 31010099, that the report of 01.07.2011 merely states that the product does not contain any of the three basic fertilizer elements which is the mandatory requirement to be covered under the definition of Fertilizer that both the test reports do not specify the nature of test which has been carried out on the sample, that both the test reports do not specify the methods adopted for carrying out the test, that the Cross Examination of the Chemical Examiner conducted on 30.07.2014 clearly brings on record the fact that the test reports were issued based on report which was initially issued by the chemist and after discussion between the Chemical Examiner and the chemist, the test reports

were issued that there is no report of the chemical analysis that the Chemical Examiner Dr. G.S. Sharma has not provided any details of the method used for testing.

(vii) The impugned order fails to appreciate that the product 'Zymegold Plus' is a fertilizer that 'Fertilize' is any material organic or inorganic natured or synthetic which supplies one or more of the chemical elements required for plant development and its function as fertilizer is to provide one or more of the chemical elements required for plant development that a plant growth regulator is organic compound other than nutrient which in small amounts promotes, inhibits or qualitatively modifies plant growth and acts like a toxin in contrast to fertilizers that their product 'Zymegold Plus' is manufactured from seaweed extracts which is of organic and vegetable origin comprises of proteins, amino acids and carbohydrates which are made up of plant nutrient elements; that 'Zymegold Plus' supplies essential nutrient elements to the plants just as fertilizer provides nutrient elements for plants that test report issued by M/s. Microchem Laboratory P Ltd shows that their product contains various nutrients including N,P,K and since it is made from seaweed extracts there may be traces of naturally occurring plant growth regulator which cannot be removed; that any organic fertilizer derived from plants like farm yard manure will contain some traces of naturally occurring plant growth regulator; that the impugned order discards report of independent laboratory on factually incorrect basis that test reports are not challenged; that they never accepted the test reports dated 17.2.2013 and 17.2.2014 but the demand is confirmed on the basis of merely relying on the audit objections without any independent application of mind; that the impugned order does not deal with all the contentions and case laws cited by the Appellant in support of his earlier order.

(viii) That it is settled law that when facts have been discovered suppression with intention to evade duty can not be substituted as held in the case law (i) Andia Nishikawa [166 F.T. 143] (ii) P. K. Kolling Mills 249 C.L.T. 232 as confirmed by the Supreme Court reported in 260 E.L. 337, (iii) Mauli Udyog Ltd [147 F.T. 88] (iv) CCE Vs. Vimal Organic Inds. (Tribunal) 203 F.T. 244

(ix) The Appellant further submit that as no duty is payable for the reasons stated above penalty is not imposable; that there is no suppression of facts with intention to evade duty as explained above penalty is not imposable under Section 114C of the Act and the same be set aside. That the dispute between the

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Appellant and the Department pertaining to classification and a question of interpretation issue and hence suppression of facts w.l. intention to evade duty cannot be attributed to the Appellant; that therefore, no penalty under Section 11AC of the Act is imposable upon them.

4. Personal hearing in the matter was fixed on 19/12/2018 which was adjourned to 31/12/2018 upon Appellant's request vide letter dated 17/12/2018; however, appellant did not attend on 31/12/2018. Appellant also not availed the opportunity of personal hearing fixed on 31/1/2019 and again on 19/2/2019 and they submitted written submission dated 19/2/2019 with request to decide the matter on the grounds of Appeal as mentioned in Appeal Memorandum and on the basis of their written submissions dated 10/2/2019.

4.1 The Appellant has not availed opportunities of personal hearing granted to him and hence I proceed to decide the appeal on the basis of the grounds of appeal and on the basis of submissions made by the Appellant and on the basis of available records.

FINDINGS

5. I have carefully gone through the facts of the case, the impugned order and the grounds of appeal and submissions made by the Appellant. The issue to be decided in this appeal is whether manufactured goods 'Zyregold Plus' by the Appellant merit classification under Tariff item 31010039 or under Tariff item 39063040 of the First Schedule to Central Excise Act.

6. It is the appellant's contention that the test report by the Chemical Examiner is not acceptable inasmuch as I find that the sample drawn was in presence of authorized signatory and the Chemical examiner (Greece-I), Kanpur vide letter dated 1.7.2011 has opined as under:

"It is inferred from the laboratory findings that sample does not contain any one of the three basic fertilizing element which is a mandatory requirement to be covered in the definition of fertilizer. Moreover, the sample also does not exhibit the nature and composition of mineral and vegetable origin in order to be covered under the SH-3101 of CH-21 of HSN explanatory notes.

"As the sample is devoid of all the items necessary for it to be covered under the chapter 31. Contrary to this, party has itself verified that the sample is pure chemical salt i.e. zinc sulphate which substantiate the facts that the sample is close to the nature of a pure chemical product used as Dent Guard Regulator Energy covering under the SH-3208 of HSN explanatory notes."



8.1 I find that the chemical examiner in his report dated 17.3.2010 has categorically stated that it is mainly composed of inorganic materials and does not indicate the procedure required for the goods, classified under SI 21010569 of CBTA. These facts remain that the sample drawn in presence of the Appellant did not contain three basic fertilizing elements and also do not form vegetable origin. I find that the appellant has not brought out on records any contradiction to the contents of the sample recorded in the above test reports ever after Cross Examination granted to them. I find that the Chemical Examiner during the Cross Examination, in reply to Q.No.4 has stated that the sample was tested for presence of NPK and other ingredients and in reply to Question No.5 states that the testing method was as per Indian Standard (SI)

8.2 I find that the very purpose of sample drawn and sent to ascertain whether it contains three basic fertilizing elements or not, whereas the Appellant raised only technical grounds and did not prefer merit. I also find that last report obtained by the Appellant on his own from a private laboratory is not valid at all.

8.3 I further find that the Appellant has himself stated that the product is named 'Zymegold Plus Granules' which is part of the records and hence incorporating details of marketing of this product to ascertain the facts of the case cannot be held to be beyond the scope of the SCN. There is no bar for the department looking all relevant facts to incorporate while adjudicating the case. I find that the lower adjudicating authority has discussed the actual use of the product and thus tested the principal manufacturing content on the product which establishes that the product is nothing but Plant Growth Regulator and Biostimulant as can be seen from Para 21 to 23 of the impugned order. The adjudicating authority has also recorded that the product 'Gadrel Zymegold Plus Granules' are not registered in the category of 'Fertilizer' in their Trade mark certificate. The appellant has not adduced any evidence challenging the facts recorded in the impugned order and hence not in dispute. Therefore, the facts on records are as under:-

- (i) The sample drawn in presence of representative does not contain 3 basic fertilizing elements;
- (ii) The product is not being sold for use as fertilizer
- (iii) Trade mark certificate for the product is not registered in the category of 'Fertilizer'
- (iv) The product is sold under the category of 'Plant Growth Regulator and Biostimulant'

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§ 4 It is that the distinction between 'fertilizer' and a 'plant growth regulator' can only be determined on the basis of its composition and its use. It is on record that the product in dispute does not contain any one of the fertilizing elements, namely, nitrogen, phosphorus or potassium in its composition. As per Chapter Note 6 of Chapter 31 read with GFTO Circular No. 15221/G2016-0X dated 04.2016, for classification under Chapter 31, at least one of the elements should be essential constituent of the fertilizer. GFTO circular dated 04.2016, supra, at Para 4 also recognize use of the product in addition to elementary composition. The relevant portion of the Circular reproduced below for ease of reference.

12.3 ...
 ...
 ... However, in the trade practice use of micronutrients as micronutrient fertilizers would not lead to classification thereof under chapter 31 as fertilizers for the purpose of General Exise Tariff. For classification under chapter 31, at least one of the elements, namely, nitrogen, phosphorus or potassium should be an essential constituent of the fertilizer as per chapter note 6 of chapter 31.

4 ...
 ... For the purpose of classification of any product as 'other fertilizers', chapter note 6 of Chapter 31 is relevant which provides that the term 'other fertilizers' applies only to products of a kind used as fertilizers and contain as an essential constituent at least one of the elements nitrogen, phosphorus or potassium. It is quite clear that for any product to meet classification under Chapter 31 as other fertilizers, the product must have nitrogen or phosphorus or potassium or any combination as an essential constituent providing the essential character to the product. The chemical elements - nitrogen, phosphorus and potassium are also referred as macronutrients or primary fertilizers and are required in higher quantity to the plants.

§ 5 The fact as discussed above, do not recognize the product as fertilizer and the classification decided in the impugned order is after examination of chemical aspect i.e. no fertilizing element exist in the product as well as trace practice followed by the Principal manufacturer. Thus, therefore of the considered view that Appellant failed to justify their claim that the product manufactured by them is a 'Fertilizer' as discussed hereinabove.

7. It is found that the Hon'ble Supreme Court in the case of M/s. Karnataka Agro Chemicals reported as 2009 (227) EIT 12 (SC) after deliberating various aspects has held that product not containing three fertilizing agent can not be considered as fertilizer to hold that the product sought in that case was Plant Growth Regulator and not 'other Fertilizer' as claimed by the Appellant in that case. Relevant portion of the judgment reads as under:-

"2a. In the above cases, no objection was made by the Department that the impugned product(s) is a defined chemical compound. Therefore, the only question is whether the impugned product(s) contains nitrogen as an essential constituent. According to the assessment, the impugned product(s) is a mixture of various inorganic substances whose essential constituent is nitrogen which makes it a fertilizer. It is this point which arises for consideration, viz. whether 0.31% of nitrogen found to exist in the impugned product(s) would make it a fertilizer or not. Since then, the assessment authority study indicates that FGRs are organic compounds other than urea. As mentioned in comments which play a major role in the plant growth as a whole. FGRs play a secondary role. FGRs do not contain 0.31% N as the impugned product(s) manufactured by the assessee. Therefore, the question to be asked is whether presence of more 0.31% of nitrogen would make the FGR as the impugned product classifiable as other fertilizers or not? 0.31% N in urea also essentially the impugned product is FGR. However, assessee contends that the impugned product(s) is a mixture of various inorganic substances and therefore it is for the Assessing Authority to go into composition and find out whether 0.31% of nitrogen would convert FGR into fertilizer being under 0.31% N. Another view addition of 0.31% of nitrogen, the FGR becomes other fertilizer or not? 0.31% N is the question which needs to be examined by the Assessing Authority as it is the case of the Department that the assessee has added nitrogen only as a pretence so that the impugned product(s) should be classified as other fertilizer under 0.31% N.".

7.1 The Hon'ble CESTAT in remand proceedings, in the case of M/s Karnataka Agro Chemicals, supra, reported as 2012 (241) E.L. 1067 (Tr-Bangl) also took note of the fact that the appellant was not marketing the goods as fertilizers while holding the cases against the Appellant. The Hon'ble High Court of Karnataka while upholding the order of the Hon'ble CESTAT also held that without essential presence of fertilizing element (i.e. 0.31 % of Nitrogen in this case) product cannot be considered as "fertilizer".

7.2 I further find that the Hon'ble CESTAT in the case of M/s. KIR Fertilizers Ltd reported as 2014(310) TLT 600 (Tr-Bangl) in Misc Order has considered the Chemical Examiners report and the Hon'ble Supreme Court's judgment in the case of M/s. Karnataka Agro Chemicals, supra and held as under:-

"2. ...
 ...
 ... From the extracts of para 2a made above it can be seen that Hon'ble Supreme Court clearly observed that FGR do not contain 0.31% N. According to the Chemical Examiners report submitted by the assessee, 0.31% N found out of the records and not disputed by the Revenue, manufactured fertilizers manufactured by the appellants contain 0.31% N. The above observation would show that the appellants have made out a prima facie case on merits. Accordingly the requirement of 0.31% N is waived and also against recovery granted during the pendency of appeal."

7.3 I also find that the Hon'ble CESTAT in the case of M/s. Jindal Ferrous P Ltd reported as 189(12) E.L. 32 (Trichina) has held that the vegetable based

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product was classifiable under Sub heading 380800 on the basis of its use and applicability and not rejected the classification under Chapter Heading 31.01 applied by the Appellant.

8. I find that this is a periodical demand and the fact has not been disputed in the impugned order and hence, suppression of facts by the Appellant can be alleged as held by the Hon'ble Supreme Court in the case of *M/s. Nizer Sugar Factory* reported as 2006 (137) EL: 486 (SC). I, therefore, hold that the allegation of suppression of facts etc. is not established in this case and thus no penalty is imposed on the Appellant under Section 11AC of the Act. Accordingly I set aside the penalty imposed under Section 11AC of the Act in the impugned order.

9. In view of above I hold that appeal filed by the Appellant does not sustain on merit to classify the product under Tariff item 31310299 and accordingly I uphold the impugned order confirming demand of Rs. 50,37,540/- (Rs.27,53,596) + Rs.27,255/- = Rs.21,63,787/-). However, penalty of Rs. 50,37,540/- under Section 11AC of the Act is set aside and appeal is allowed to this extent.

10. अपीलकर्ता द्वारा उक्त सीमाई अपील का निचला अपील करने से विना ज्ञात है।

11. The appeal filed by the appellant stands allowed off in above terms.

ॐ श्री गणेशाय नमः
 ॐ श्री कृष्णाय नमः
 ॐ श्री लक्ष्मणाय नमः
 ॐ श्री रामाय नमः
 ॐ श्री हनुमत्स्य नमः
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 ॐ श्री हनुमत्स्य नमः
 कुमार सोनी
 प्रशा. प्र. सु. (आ. नि. नि.)

प्रो. कृष्ण शंकर शर्मा

To

M/s. Alul Manufacturers,
 Plot No. 231/3,
 GIDC Industrial Estate,
 Chitre
 Bhavnagar

गोदावरी नदी
 पो. ३३३
 श्री गणेश श्री कृष्ण श्री लक्ष्मण श्री राम श्री हनुमत्स्य
 विना ज्ञात है

द्वारा

1. प्रधान सचिव आचूकन, केन्द्रीय गल्लू एवं रोजा कर एंड कन्ट्रोल डिवीजन, मुंबई, मुंबई महानगर का जानकारी हेतु
2. आयुक्त केन्द्रीय गल्लू एवं रोजा कर एवं केन्द्रीय गल्लू शुल्क, इन्डियन आयुक्तलय, न. बन्स र की जानकारी कार्यकारी हेतु
3. सहायक आचूकन, केन्द्रीय गल्लू एवं रोजा कर एंड कन्ट्रोल, इन्डियन डी. इन्डियन की जाने आयुक्त के विभागे हेतु

आई प्रो. कृष्ण

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