

ORDER-IN-APPEAL :

M/s. Atul Manufacturers, Plot No. 251/3, GIDC Industrial Estate, Chitr., Bhavnagar (hereinafter referred to as the 'appellant') have filed this appeal against C.O.No. 514V-EXCUS-208-IC-42 TO 62-2018-17 dated 03.01.2017 of the Joint Commissioner of Central Excise, Bhavnagar (hereinafter referred to as 'lower adjudicating authority').

1. The briefly stated facts of the case are that the appellant was subjected to various proceedings and a number of orders have been passed. Debar Order in Original 514V-EXCUS-208-IC-42 TO 62-2018-17 dated 03.01.2017 passed by the lower adjudicating authority, an amount of duty to the tune of Rs. 75,50,727/- has been confirmed alongwith interest and proposed Penalty of Rs. 75,50,727/- and Rs.13,000/- upon appellant.

2. Total 21 SCKs have been received with the impugned Order by the adjudicating authority. Being aggrieved by the impugned order the appellant filed the present appeal on the ground that the Joint Commissioner has erred in confirming the twenty one Show Cause Notices for the period May-2008 to June-2012, thereby changing classification of the product "Zynegold Plus" from a Fertilizer under Tariff Heading 31013099 as claimed by the Department and consequent to this change in classification confirmed demand alongwith interest and imposed penalty upon them.

3. The facts of the case are that during the course of audit it was observed that apart from other products, the appellant has started manufacturing and clearing new items viz. "Zynegold Plus Granules", falling under the category of Plant Growth Regulator covered by Chapter Heading No. 38 of the Central Excise Tariff Act, 1985 and attracting Central Excise duty. However, the appellant has classified the same under Chapter Sub Heading 31070000 which attracts 7% rate of duty. Since the process and end use were found almost similar to their other products i.e. Plant Growth Regulator manufactured by the appellant, a sample of the said product i.e. "Zynegold Plus Granules" was drawn on 24.02.2010 in presence of its authorized representative of the appellant and the same was sent to the Chemical Examiner, Customs House, Kandla on 24.02.2010, alongwith manufacturing process and details of inputs, for the purpose of testing to arrive at a proper classification.

4. It was also noted from the ER-1 return that the appellant has started to mention their final product "Zynegold 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".

Order Central Excise Tariff sub hearing No. 10/10/09 assessing a NIL rate of duty in the monthly return of ER-1 for the month of May-2010 and onwards.

6. On the basis of test result conveyed by the Chemical Examiner, Customs House, Kandla, and letter F No. K/142/Cent.Ex.2009-15 dated 17.03.2010, two Show Cause Notices were issued to the appellant, proposing to classify 'Gungold Plus Granules' manufactured by them under Chapter Sub Heading No. 28099000 attracting Central Excise duty instead of Sub Heading No. 29010015, as claimed by the appellant. The adjudicating authority adjudicated the said SCNs and confirmed the levy of Central Excise duty under Section 11A of the Central Excise Act, 1944, alongwith interest and imposed penalties vide Section 11A2 of the Act and Rule 25 of the Rules. The adjudicating authority also relied upon test result dated 01.07.2011 issued by the Chemical Examiner, Customs House, Kandla for the subsequent 19 Show Cause Notices issued to the appellant on the same ground.

7. The impugned Order has been issued in the default round of the 1st Round of litigation:

8. The first two SCNs (i) No. W/15-01/09/0-11 dated 30.04.2010 and (ii) No. W/15-23/Demand No/2310-11 dated 15.02.2011 were adjudicated by the adjudicating authority (Assistant Commissioner) vide O/O No. 04 to 30/04-Excise/2011-12 dated 11/12.07.2011 confirming the demand alongwith interest and Penalties and the same was upheld by this office vide O/A No. 75 to W/2011/DVR/Compt/WRDT/Raj dated 26.11.2011. Thereafter, the file CERTAT had remanded the case to the original adjudicating authority without expressing any opinion on the merits of the case vide Order No. A/1300-190106/WR-40/2012 and W/15/01/09/23/2012 dated 21.09.2012 with a direction to provide copy of test result dated 01.07.2011 issued by the Chemical Examiner, Customs House, Kandla, which was relied upon by the adjudicating authority but did not provided to the appellant.

Second Round of litigation:

9. Subsequently, SCN No. W/15 10/09/11-2 dated 24.02.2011 and W/15-58/D/2011-12 dated 26.7.2011 were adjudicated vide Order in Original No. 353 to 30/23/11-12 dated 20.02.2012 confirming the demand. Being aggrieved, the appellant preferred appeal before this office and this office had remanded the case back to the original adjudicating authority vide O/A No. 146-147/2012 (W/15/23/20/Compt/RA) dated 26.12.2012.

Third Round of litigation:

10. Subsequently, the Assistant Commissioner, Central Excise, City Junior, Ludhiana adjudicated remanded cases (4 SCNs) alongwith other SCNs (total 8 SCNs) for the period September-2011 to October 2012 vide O/O No. 63 to

15/Directive 2013-17 dated 17.03.2013 and one more DIO No. 2/DIO/Ex-0013-14 dated 21.11.2013. Both these DIOs were challenged by the appellant before this office, and this office vide DIA No. 496-EXCUS-0014/PP-136-173-12-14 dated 31.01.2014 remanded the matter to the Original Adjudicating authority after permitting appellant to cross examine the Chemical Examiner. The appellant preferred appeal before the CESTAT and CESTAT had also remanded the matter to the Original Adjudicating authority and permitted Cross examination of the Chemical Examiner.

Fourth Round of litigation:

11. Thus, this is fourth round of litigation wherein the erstwhile levy (now Commissioner, Central Excise & Service Tax, Chennai) passed DIO No. DIO/EXCUS 020 JO 42 to 52-2011-17 dated 16.01.2017, wherein decided total 27 SCNs covering period from March 2010 to June-2013.

12. Being aggrieved by the impugned orders, the appellant preferred the present appeals on the grounds that

(i) the impugned order is bad in law as it has been passed beyond the scope of the levy and (2) Show Cause Notice passed as the only basis for change in classification in all the Show Cause Notices is the name of the Chemical Examiner as contained in the two best records dated 17.03.2013 and 31.01.2014 that the product Zymegold Plus does not merit classification as a Fertilizer alongwith a bland statement not supported by any evidence that the product Zymegold Plus does not contain N-P or K; the impugned order has maintained change in classification by relying on the details as contained in the trademark registration certificate and the labels as allegedly displayed on the website of the Grower/Agriuser Limited to come to a conclusion that the product Zymegold 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 to hold that the product Zymegold Plus is classifiable as Plant Growth Regulator under Tariff Heading 39096340 and does not merit classification as a fertilizer under Tariff Heading 31010093 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 Iyys Engineering Limited reported in 2011 EIT 612, wherein it has been held that an order passed beyond the scope of the Show Cause Notice is bad.

(ii) the impugned Order is bad as the adjudicating authority while adjudicating the Show Cause Notice has not acted in his capacity as a Cross Jurisdiction authority as much as instead of examining the validity of the information

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relied upon in the notice, he has carried out his own investigation and relies on information which he feels is relevant to decide the classification issue when the information he relies on has not been relied upon in the Show Cause Notice; that the adjudicating authority can not overrule the allegations made in the Show Cause Notice; that the Adjudicating Authority has come to a conclusion that the Department has discharged the onus cast on it for change in classification, calls for and received information / data which is not call of the Show Cause Notice viz details in the trademark application and on the website of Geonij Agrovet Limited, that the Adjudicating Authority has acted fairly and impartially while disposing a dispute and the impugned Order is an information therefore, be set aside on this ground alone, consequently, classification as a fertiliser under Tariff Heading 31010090 as claimed by the Appellant be upheld.

- (ii) The impugned Order is bad as it relies on order dated November 24, 2015 issued by Smt. Laxmi S. Dhakale of SSA, Ghazalkot, wherein after referring to the letter issued by the AGO, Amavajgar asking for documents referred to in the cross examination of Dr. G.P. Sharma, the letter issued by Smt. Dhakale encloses the required literature for standard test methods of M.P.K and further goes on to state that even though test report was not issued, no reply was received from the in charge Customs Laboratory, Kumbha; that the letter was issued by Smt. Laxmi S. Dhakale and not by Dr. G.P. Sharma, the Chemical Examiner who had issued the test test reports (March 17, 2011) and July 1, 2011) and who in his cross examination stated that he will provide details of the methods adopted for testing the samples and copy of the report issued by the chemist, that the subject test results were the only basis for change in classification were issued by Dr. G.P. Sharma and therefore, only Dr. G.P. Sharma could state that which methods were used in the year 2010 and 2011 for testing the samples of the product Zymogold Plus; that no other person could state which methods were used for testing the samples in the year 2010/11; that as there has been no information provided by Dr. G.P. Sharma about the methods used for testing the samples and as Dr. G.P. Sharma has also failed to provide copy of the report issued by the chemist, the validity of the test reports as the basis for change in classification have to be examined in light of these facts.
- (iii) The impugned order is bad as it upholds the change in classification based on the test test reports, which is nothing but the opinion of the Chemical Examiner on classification of the product Zymogold Plus under Central Excise ignoring the settled law that Chemical Examiner's opinion on classification but has to merely provide the technical specifications; that the core function of tariff classification is beyond Chemical Examiner's realm and ruled off.

Amra Ayurveda Vs. ICGE (Supreme Court) reported in 150 F.T.R., (i) Purb City Organics Pvt. Ltd. Vs. CGE (Tribunal) reported in 146 ELT 563, (ii) Titan Synthetics Fibres Pvt. Ltd. Vs. CGE (Tribunal) reported in 108 ELT 357, (iii) Stafford Paper Mills Vs. ICGE (Gujarat High Court) reported in 110 ELT 744, (iv) United Industries V. CGE (Tribunal) reported in 70 ELT 141, (v) Datta (i) Pvt. Ltd. V. CGE (Tribunal) reported in 125 ELT 513, (ii) Dattal Chembazla Pvt. Ltd. V. CGE (Tribunal) reported in 112 ELT 844 and (vi) N.H. Venkatarman Iyer V. CGE (Tribunal) reported in 28 ELT 471. The appellant further submitted that during the course of cross examination also the Chemical Examiner on oath has specifically stated that the test is done with a view to determine the classification of the product that answer No. 3 of the Cross Examination may kindly be referred in this regard.

- (v) The impugned order is held to be null and void to appreciate that the Department has not discharged the onus cast on it for changing the classification from Fertilizer under Tariff Heading 31010200 to Plant Growth Regulator Tariff Heading 31010300; that if the Department does not discharge the onus cast on it for change in classification, the classification as claimed by the assessee has to be accepted and relied on (i) Hindustan Tereks Ltd. V. CGE (1851) reported in 95 ELT 16, (ii) Singato Pahuise V. ITO (Bombay H.C.) reported in 1887 ELT 258, (iii) Newscrum Kuthar V. Supd. Of C.Ex. (Kerala H.C.) reported in 1903 ELT 1148 and (iv) Bombay Woods and Allied Products V. ITO (Bombay H.C.) reported in 21 ELT 100. They further submitted that the weekly one Show Cause Notice do not give any cogent reasons for the proposed change in classification but merely relies on the two test reports dated 17.01.2010 and 01.07.2011 that the test report dated 17.03.2013 does not provide any technical data as arrived at on analysis of the sample as it merely states that the sample has been examined in light of the Central Hanks Tariff Act, 1965, HSN, Laboratory findings and findings and further states that the sample does not indicate properties required for classification under Tariff Heading 31010200. If at all 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 concluded 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, however there is no report of the chemist available that the Chemical Examiner Dr. G.P. Sharma has not provided any details of the

measures used for testing in spite of stating on each Certificate will provide the same

- (vi) The impugned order fails to appreciate that said product 'Zymogen Flux' is a fertilizer.
- (vii) The impugned order discards report of independent laboratory on factual basis that test reports are not challenged.
- (viii) The impugned order is bad as it has confirmed the Show Cause Notices which have been issued merely relying on the said objections without any independent application of mind.
- (ix) The impugned order is bad as it does not deal with all the contentions and issues raised by the Appellant in support of the submission that classification as claimed by the appellant is correct.
- (x) The impugned order is bad as it has been passed contrary to the settled law that when facts have been disclosed, suppression with intention to evade duty can not be attributed as held in the case laws: (i) Anand Nishkawa Vs. CCE (S.C.) reported in 166 ELT 146; (ii) P. K. Kaling Mills Vs. CCE (Tribunal) reported in 248 ELT 232 as confirmed by the Supreme Court reported in 260 ELT 864; (iii) Manji Udyog Ltd. Vs. CCE (Tribunal) reported in 147 ELT 194; (iv) CCE Vs. Misan Organics Ltd. (Tribunal) reported in 223 ELT 244.
- (xi) The Appellant further submits 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 11AC of the Act and the same be set aside; that the dispute between the Appellant and the Department pertains to classification and is observed that it is purely an interpretation issue and in these facts, suppression of facts with intention to evade duty cannot be attributed to the Appellant and penalty imposed under Section 11AC of the Act be set aside on the ground; that penalty is not imposable under Rule 27 of the Basic Rules hence be set aside.

13. Subsequently, in pursuance of Board's Notification No.26/2014-15 (N1) dated 17.10.2017 issued with Board's Order No.05/2017-ST dated 16.11.2017, the instant appeal has been taken on hold for passing Order in Appeal.

14. Personal Hearing in the matter was granted and held on 28.02.2018. Shri Yogesh S. Patil, Advocate appeared on behalf of the appellant reiterated the submission already made in the case. He systematically explained his position regarding classification of the appellant's product and submitted copies of case laws in support thereof, which has been taken on hold.

15. I find that in case of instant appeal, the impugned order was received by the appellant on 12.01.2017 and date of filing of appeal is 07.03.2017. Hence the appeal has been filed within the stipulated time period and there is no delay in filing the appeal. Since the appellant has deposited an amount of Rs. 13,16,505/- i.e. 10% of the duty demanded and submitted copy of the challans alongwith the appeal, accordingly the condition of pre-deposit also stand fulfilled.

16. I have carefully gone through the records placed before me, appeal memorandum and the various submissions made orally as well as in writing during the persons hearing. I proceed to decide the appeals on merits. The issue to be decided is whether the respondent department is correct in its stage of classification of the product Zynogold Plus Granules from tariff heading 31010390 as claimed by the appellant to 32062840 or otherwise.

17. On going through the impugned orders, I find that lower authority has classified "Zynogold Plus" under Chapter Sub-Heading No. 32062840 instead of Chapter Sub-Heading No. 31010390 originally classified by the appellant. For changing classification, the lower authority has relied upon two test reports dated 17.03.2011 and 01.07.2011 issued by the Chemical Examiner, Customs House Laboratory, Kerala. I find that all the 21 Show Cause Notices issued by the impugned order were based on the above mentioned two Test Reports.

18. I find that the 110 case was deleted at the time of audit and subsequently based on the Audit Report department drawn samples and got it tested at Kerala Revenue Control Laboratory at Kerala. I find that all the 21 Show Cause Notices heavily rely on the above mentioned two test reports.

19. I find that this is fourth round of litigation in the instant case. Hon'ble CESTAT had first remanded the case for non supply of test reports and a further time for oral providing cross examination of the Chemical Examiner and this time also remanded the case back on the same ground.

20. I find that the appellant has objected for the test reports and requested for Cross Examination of the then Chemical Examiner and the same was granted by the lower adjudicating authority before issuing the impugned order. The main contention of the appellant was (1) the Chemical Examiner can not opine on classification of the sample in his test report (2) the method by which the samples were tested by the Laboratory is not mentioned in the test reports and the Chemical Examiner failed to explain the method during the Cross Examination and afterwards.

21. I find that the contention of the appellant is correct that the Chemical Examiner can not opine regarding classification of the goods but has to give

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technical details about the samples and has relied on various decisions in this regard. I also find that there were no marks made either by specimen or by the respondent department for testing of remnant or duplicate samples from or the material lots or subsequently.

22. I find that the lower authority has confirmed the same based on (i) Test Reports dated 17.03.2010 and 01.07.2011; (ii) Description of the product "Zynegold Plus" on the website of the principal manufacturer Godrej Agrovet; and (iii) General Rules for Interpretation of Customs Excise Tariff Act, 1995.

23. I find that the plea of the Appellant that the lower authority has revealed beyond the Show Cause Notice is not correct as the allegations laid out in the Show Cause Notice and confirmed in the Impugned order are same i.e. Change of classification of the product "Zynegold Plus" from Chapter Sub-Heading No. 31010089 to Chapter Sub-Heading No. 38036040, since the reliance placed by the appellant on various case laws are misleading and not proper as no new allegations are made or confirmed by the lower authority against appellant in the said impugned orders. I find the plea of the appellant that the lower authority has not functioned as Quasi-Judicial Authority is also not correct. I find that the Show Cause Notice was issued for change of Tariff of the product "Zynegold Plus" from Chapter Sub-Heading No. 31010089 as originally classified by the appellant to Chapter Sub-Heading No. 38036040 and that the test results were challenged by the appellant on technical grounds and on the basis of decisions at various courts in this regard. I find that the appellant is registered taxpayer with the Central Excise Department since long time and is having full knowledge of Central Excise Tariff classification as they were already manufacturing Plant Growth Regulator prior to the production of the product in question i.e. "Zynegold Plus". I find that the product "Zynegold Plus" was registered Trade Mark of M/s. Godrej Agrovet Ltd., Mumbai. Thus, the appellant was acting duly on behalf of the principal manufacturer and had chosen not to pay duty for their product "Zynegold Plus" and classified the same under Tariff Heading 31010089. I further find that the appellant was aware that his Principal Manufacturer M/s. Godrej Agrovet Ltd. was marketing and selling the product "Zynegold Plus" under Plant Growth Regulators and Bio-Stimulants i.e. more than Fertilizer as evident from their website though instead of classifying the product under Plant Growth Regulator under Tariff Heading No. 38036040 as alleged by various Show Cause Notices, by the respondent department, the appellant preferred to classify and clear the product under Tariff Heading 31010089 at Nil rate of duty and thus avoided payment of Central excise duty. I also find that the result of test reports issued by the Chemical Examiner dated 17.03.2010 and 01.07.2011, Trade Mark Registration Certificate in respect of the product "Zynegold Plus" and description on the product on the website of M/s. Godrej Agrovet Ltd. are all resulting to the same and the same fact that the product "Zynegold Plus" is Plant Growth


Regulator, hence, the plea of the appellant purely on technical ground is far from the fact, which is well known to the appellant also.

24. From the above discussion, I hold that the appellant was well aware about the correct classification of the their product. Zynegold Plus[®] (a). Intentionally preferred to clear the same at Nil rate of duty even though pointed out by the respective department chosen to challenge the Show Cause Notices on frivolous technical grounds. I also find that the lower adjudicating authority has verified and taken on record various aspects viz. Trade Mark Registration Certificate and information on Website of M/s. Gemini Agrivet Ltd., Mumbai in addition to the test Reports dated 17.03.2010 and 01.07.2011 issued by the Chemical Examiner, Central Forensic Control Laboratory, Kerala (though not mentioned in the Show Cause Notices bears arising at the conclusion). I further hold that the objections made by the lower authority to arrive at conclusion and challenged by the appellant were logical and correct and it cannot be termed as beyond the scope of the Show Cause Notices or 'researched' or 'investigation' by the lower authority as the said information was either provided by the appellant themselves (Trade Mark Registration Certificate) or was available in the public domain (Website of M/s. Gemini Agrivet Ltd.). Hence the plea of the appellant is neither correct nor acceptable. I hold that the appellant had intentionally evaded the product "Zynegold Plus" under Tariff Heading 39013099 and cleared at Nil rate of duty though having full knowledge of the correct classification of said product. Accordingly, I hold that Central Excise duty alongwith interest levied and partly imposed by the lower authority is proper.

25. In view of the above, I uphold the Impugned orders and reject the appeal filed by the appellant.

26. The appeal filed by the appellant stands disposed off in above terms.


 P. A. Vignesh
 Commissioner (Appeals)
 CCST & Central Excise
 Kuttan (Central Office)


 (P. A. Vignesh)
 Commissioner (Appeals)
 Commissioner
 CCST & Central Excise
 Kuttan (Central Office)

- No. U942P907017

Date: 12/04/2018

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