

Ranadey Micronutrients

Vs

Collector of Central Excise

Civil Appeals No. 5404 of 1993 With No. 5405 of 1993

(S. P. Bharucha, K. Venkataswami JJ)

10.09.1996

ORDER

1. These appeals concern the classification of micronutrients for the purposes of excise duty. Micronutrients are mixtures of soluble salts of elements like calcium, magnesium, manganese, zinc, iron, copper, boron and molybdenum. They are mixed in stated percentages to get a formulated product which assists the growth of plants. The appellants manufacture micronutrients.
2. The facts being similar, we set out those of one of the two appeals.
3. During the period October 1989 to November 1989, samples of micronutrients were drawn and tested by the Deputy Chief Chemist of the Union of India who opined that micronutrients were not "plant growth regulators". However, on 6-11-1989, the Collector of Central Excise issued to the appellants (in Civil Appeal No. 5404 of 1983) a notice to show cause why the micronutrients made by them should not be classified as "plant growth regulators" under heading 38.08.90. The show-cause notice related to the period 1-4-1986 to 23-9-1989. The appellants showed cause and led evidence at the personal hearing before the Collector on 6-12-1989. On 11-12-1989, an addendum was issued to the show-cause notice dated 6-11-1989, which required the appellants to show cause why their micronutrients should not be classified under heading 38.23 as "residual products of chemical or allied industries, not elsewhere specified". On 22-2-1990, a corrigendum was issued to the show-cause notice aforementioned which sought to classify the micronutrients under heading 38.23 as "chemical products and preparations of the chemical or allied industries (including those consisting of mixture of natural products) not elsewhere specified". On 14-4-1990, the appellants showed cause.
4. On 20-6-1990, a circular (now called "the earlier circular") was issued by the Central Board of Excise and Customs (now called "the Board"), addressed to all Collectors of Central Excise, on the subject of the classification of micronutrients for the purposes of Central Excise. The circular stated that a doubt had been expressed regarding the classification of micronutrients, namely, whether they should be classified under heading 31.05 as 'fertilisers' or under heading 38.08 as "plant growth regulators". The matter had been examined in consultation with the Deputy Chief Chemist who had opined that heading 31.05 covered only those compounds in which one of the elements was nitrogen or phosphorus or potassium. Since micronutrients did not contain these, micronutrients did not merit classification as fertilisers under heading 31.05. The opinion of the Deputy Chief Chemist was that micronutrients contained other elements which made them classifiable as "plant growth regulators". "In view of the above", the earlier circular stated, "it is clarified that the appropriate classification of the product 'plant growth regulator' would be under heading 38.08 of CET". The earlier circular required the Collectors of Central Excise to bring the clarification it contained to the notice of the

lower field formations and suitably advise trade interests. The earlier circular also stated, "All pending assessments may be finalised on the above basis".

5. On 23-7-1990, the Collector of Central Excise wrote to the appellant a further letter in connection with the show-cause notice dated 6-11-1989. It cancelled the addendum dated 11-12-1989, and the corrigendum dated 22-2-1990, and reverted to the stand taken in the show-cause notice itself, namely, that the micronutrients were classifiable as "plant growth regulators" under heading 38.08. After hearing the appellants, the Collector confirmed the demand made in the show-cause notice on 6-11-1990. The appellants appealed to the Central Excise and Gold (Control) Appellate Tribunal which, by the order under appeal, upheld the classification but limited the demand to the period of six months immediately preceding the date of the show-cause notice.

6. Subsequent to the filing of the appeals in this Court, a circular (now called "the later circular") was issued by the Board which is crucial to these appeals. The later circular is dated 21-11-1994. It was addressed to all Collectors of Central Excise on the subject of the classification of micronutrients for the purposes of Central Excise. The later circular invited attention to the earlier circular and "the instructions contained" therein. It noted that the earlier circular had stated that micronutrients were appropriately classifiable under heading 38.08 as "plant growth regulators". The Indian Micro Fertilisers Manufacturers' Association had represented that micronutrients should be classified under heading 31.05 as "other fertilisers" and had produced certificates issued by various Agricultural Universities as evidence in support of their claim. The Board had carefully re-examined the entire issue in consultation with the Ministry of Agriculture and the Chief Chemist. The Ministry of Agriculture had clarified that micronutrients were recognised as fertilisers under the Fertiliser (Control) Order, 1985. The Chief Chemist had opined that in technology and trade micronutrients were classifiable along with fertilisers. In terms of Rule 4 of the Interpretative Rules of the Central Excise Tariff, micronutrients merited classification as fertilisers. The later circular added :

"4. Therefore, it is clarified that micronutrients listed under Sr. No. 1(F) of Schedule 1 Part (A) of the Fertiliser (Control) Order, 1985 and their mixture (with or without NPK) as notified by the Central Government or a State Government would be appropriately classifiable under heading No. 31.05 as 'Other Fertilisers'.

5. The above clarification may be brought to the notice of the lower field formations and the trade interests may also be suitably advised.

6. Board's earlier Circular No. 26/90-CX. 3 dated 26-6-1990 (sic 20-6-1990) accordingly stands withdrawn.

7. All pending assessments may be finalised on the above basis."

7. The appellants have placed the later circular on the record, annexed to an affidavit, and have relied upon it in argument and contended that, in view thereof, their micronutrients cannot be classified except as therein stated. It has also been pointed out that for periods subsequent to those with which we are concerned in these appeals, their micronutrients have been classified in terms of the later circular.

8. To the affidavit annexing the later circular, an affidavit in reply has been filed by M.K. Gupta, working as Director in the Department of Revenue, Ministry of Finance, New Delhi. He states that

Section 37-B of the Central Excises and Salt Act, 1944 empowers the Board to issue instructions in order to ensure uniform practice of assessment of excisable goods throughout the country. Instructions thus issued by invoking Section 37-B get "statutory status and significance". Any instructions issued otherwise by the Board through a circular, but without invoking Section 37-B, are advisory in nature and do not possess statutory significance. In this sense, the earlier circular, not having been issued under Section 37-B, had to be regarded as advice. The Section Notes and Chapter Notes in the Tariff Act, 1934 were enacted provisions. Thus, Note 6 of Chapter 31 governed the issue. (It states that for the purpose of heading 31.05 the term "other fertilisers" applies only to products of a kind used as fertilisers which contain as an essential constituent at least one of the fertilising elements, nitrogen, phosphorus or potassium.) Such products as did not contain these elements could not be brought under the statutory definition of fertilisers by the invocation of the Interpretative Rules. The earlier and later circulars, not having been issued under the provisions of Section 37-B, were merely advisory in nature and could not have any statutory effect. The scope of Chapter 31 to include micronutrient mixtures as fertilisers had to be by enactment and not by advisory circulars. In the absence of any amendment by enactment of Chapter 31, the appellants could not take shelter under the later circular in the matter of the classification of their product, which classification had already been judicially decided by the Tribunal to be under heading 30.08.90. The later circular could not be given retrospective effect once the classification dispute for the relevant period had been settled by the earlier circular.

9. The learned counsel for the appellants relied upon the later circular and proceeded further, but we intervened for we wanted to hear the learned counsel for the Revenue upon the earlier and later circulars.

10. The learned counsel for the Revenue submitted that the later circular "flies in the face" of Note 6 of Chapter 31. Micronutrients did not contain any of the fertilising elements, nitrogen, phosphorus and potassium and, therefore, the later circular had no effect on their classification. Both the earlier and the later circulars were only advisory in nature because it was clear on the face thereof that they had not been issued by invocation of the provisions of Section 37-B. In any event, and assuming that the later circular had been issued under the provisions of Section 37-B, it could only have prospective effect and would not alter the decision on the Tribunal in the present appeals.

11. We may add that the learned counsel for the Revenue stated that there was no provision in the Excise Act other than Section 37-B by which the Board could issue circulars such as the earlier and later circulars, but he submitted that the Board had been issuing circulars even before Section 37-B was introduced into the Excise Act.

12. Section 37-B reads thus :

"37-B. Instructions to Central Excise Officers. - The Central Board of Excise and Customs constituted under the Central Board of Revenue Act, 1963 (54 of 1963) may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board :

Provided that no such orders, instructions or directions shall be issued -

- (a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or
- (b) so as to interfere with the discretion of the Collector of Central Excise (Appeals) in the exercise of his appellate functions."

13. Section 37-B contemplates the issuance by the Board of orders, instructions and directions to Central Excise Officers. Such orders, instructions and directions are to be issued when the Board considers it necessary or expedient to do so to achieve uniformity in classification of excisable goods and the levy of excise duty thereon. Central Excise Officers are obliged to observe and follow these orders, instructions and directions. The orders, instructions and directions may not relate to a particular assessment or case or interfere with the appellate functions of a Collector.

14. The first question, now, is whether the earlier and later circulars are orders, instructions or directions to Central Excise Officers within the meaning of Section 37-B which the Central Excise Officers are bound to observe and follow. Both circulars are addressed to all Principal Collectors of Central Excise and Customs, all Collectors of Central Excise and Customs, all Collectors of Central Excise, all Collectors of Customs and all Collectors of Central Excise and Customs (Appeals). Both circulars require that their contents "be brought to the notice of the lower field formations and the trade interests may also be suitably advised". Both circulars require, "All pending assessments may be finalised on the above basis." The later circular refers to the contents of the earlier circular as 'instructions'. Both circulars have been issued in the context of doubts having arisen and representations having been received by the Board. Both circulars have been issued by the Board in consultation with the Chief and Deputy Chief Chemist and, in the later case, the Ministry of Agriculture.

15. There can be no doubt whatsoever, in the circumstances, that the earlier and later circulars were issued by the Board under the provisions of Section 37-B, and the fact that they do not so recite does not mean that they do not bind Central Excise Officers or become advisory in character. There can be no doubt whatsoever that after 21-11-1994, excise duty could be levied upon micronutrients only under the provisions of heading 31.05 as "other fertilisers". If the later circular is contrary to the terms of the statute, it must be withdrawn. While the later circular remains in operation the Revenue is bound by it and cannot be allowed to plead that it is not valid.

16. We reject the submission to the contrary made by the learned counsel for the Revenue and in the affidavit by M.K. Gupta, working as Director in the Department of Revenue, Ministry of Finance. One should have thought that an officer of the Ministry of Finance would have greater respect for circulars such as these issued by the Board, which also operates under the aegis of the Ministry of Finance, for it is the Board which is, by statute, entrusted with the task of classifying excisable goods uniformly. The whole objective of such circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of excise duty. It does not lie in the mouth of the Revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision. Consistency and discipline are of far greater importance than the winning or losing of court proceedings.

17. The argument that the later circular has only prospective operation and that it cannot apply to these appeals because the Tribunal had already decided them must also be rejected. It is not open to the Revenue to raise a contention that is contrary to a binding circular issued by the Board. It cannot but urge the point of view made binding by the later circular.

18. The appeals are allowed. The judgment and order of the Tribunal under appeal is set aside. The micronutrients manufactured by the appellants being exempt from the payment of excise duty, no order in this regard is required.

19. The deposits made by the appellants, pursuant to the interim orders of the Tribunal and continued by the interim orders of this Court, may now be withdrawn by them. The bank guarantees given by the appellants, pursuant to the interim orders of the Tribunal and continued by the interim orders of this Court, shall now stand discharged.

20. The Revenue shall pay to the appellants the sum of Rs 25,000 (Rupees twenty-five thousand) as the aggregate costs of these appeals.