M/S. RANADEY MICRONUTRIENTS ETC. A

v.

COLLECTOR OF CENTRAL EXCISE

SEPTEMBER 10, 1996

[S.P. BHARUCHA AND K. VENKATASWAMI, JJ.] B

Central Excise Act, 1944—Central Excise Tariff—Heading 31.05 "fertilisers"—38.08 "plant growth regulators" 38.23—"residual products of chemical or allied industries, not elsewhere specified"—Circulars issued by the Central Board of Excise and customs—Micronutrients—Classified under 38.08—On C *appeal held duty could be levied under 31.05 after the later circular—If later circular contrary to statute it must be withdrawn—While it remains in operation Revenue is bound by it—It does not lie in the mouth of Revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision.*

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5404 of 1993 Etc.

From the Judgment and Order dated 13.5.93 of the Customs Excise and Gold (Central) Appellate Tribunal, New Delhi in Appeal No. E/25/91-C, Order No. 179 of 1993-C. E

A. Hidayatullah Joseph Vellapalli, C.A. Sundram, A. Sheerazi and Mukul Mudgal for the Appellants.

M. Gaurishanker Murthy, V.K. Verma and A.K. Srivastava for the Respondent. F

The following Order of the Court was delivered :

These appeals concern the classification of micronutrients for the purposes of Excise duty. Micronutrients are mixtures of soluble salts of G 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.

The facts being similar, we set out those of one of the two appeals. H

A 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 6th November, 1989, the Collector of Central Excise issued to the appellants (in Civil Appeal No. 5404 of 1983) a notice B 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 1st April, 1986, to 23rd September, 1989. The appellants showed cause and led evidence at the personal hearing before the Collector on 6th December, 1989. On 11th December, 1989, an Addendum was issued to the show-cause notice dated 6th November, 1989, which C 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 22nd February, 1990, a Corrigendum issued to the show-cause notice aforementioned which sought to classify the micronutrients under heading 38.23 as "chemical products and D preparations of the chemical or allied industries (including those consisting of mixture of natural products) not elsewhere specified". On 14th April, 1990, the appellants showed cause.

On 20th June, 1990, a circular (now called "the earlier circular") was issued by the Central Board of Excise and Customs (now called "the E 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". F The matter had been examined in consultation with the Deputy Chief Chemist who had opined that hearding 31.05 covered only those compounds in which one of the elements was nitrogen or phosphorous 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 ele- G ments 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 H lower field formations and suitably advise trade interests. The earlier

circular also stated, "All pending assessments may be finalized on the above basis". A

On 23rd July, 1990, the Collector of Central Excise wrote to the appellants a further letter in connection with the show-cause notice dated 6th November, 1989. It cancelled the Addendum dated 11th December, 1989, and the Corrigendum dated 22nd February, 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 30.08. After hearing the appellants, the Collector confirmed the demand made in the show-cause notice on 6th November, 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. B C

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 21st November, 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 "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 Agricultural 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 : D E F G

"4. Therefore, it is clarified that Micronutrients listed under Sr. No. 1(F) of Schedule 1 Part (A) of the Fertilizer Control Order, H

A 1985 and their mixture (with or without N.P.K.) as notified by the Central Government or a State Government would be appropriately classifiable under heading No. 31.05 as "Other Fertilizers."

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

6. Board's earlier Circular No. 26/90-Cx. 3 dated 26.6.90 accordingly stands withdrawn.

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

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 D with which we are concerned in these appeals, their micronutrients have been classified in terms of the later circular.

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 37B of E the Central Excise & Salt Act 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 37B get "statutory status and significance". Any instructions issued otherwise by the Board through a circular, but without invoking Section 37B, are advisory in nature and do not possess statutory significance. In this sense, the F earlier circular, not having been issued under Section 37B, had to be regarded as advice. The Section Notes and Chapter Notes in the Tariff Act were enacted provisions. Thus, Note 6 of Chapter 31 governed the issue. (It states that for the purposes of heading 31.05 the term "other fertilisers" applies only to products of a kind used as fertilisers which contain as an G essential constituent at least one of the fertilising elements, nitrogen, phosphorous 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 issue under the provisions of Section 37B, were merely H 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.

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

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, phosphorous 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 37B. In any event, and assuming that the later circular had been issued under the provisions of Section 37B, it could only have prospective effect and would not alter the decision of the Tribunal in the present appeals.

We may add that learned counsel for the Revenue stated that there was no provision in the Excise Act other than Section 37B 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 37B was introduced into the Excise Act.

Section 37B reads thus :

> "S. 37-B.- Instructions to Central Excise Officers. - The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) may, if it considers it necessary of 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

A 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 -

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(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

C (b) so as to interfere with the discretion of the Collector of the Central Excise (Appeals) in the exercise of his appellate functions."

Section 37B 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.

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 37B 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.

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 37B, 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 21st November, 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.

We reject the submission to the contrary made by 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.

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.

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.

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

A 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.

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

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G.N. Appeal allowed.