

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Excise Appeal No.741 of 2012

(Arising out of OIA-CS/41/SURAT-II/2012 dated 28/05/2012 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

Agro Pack

Plot No. 227/1, Gidc, Panoli,
Bharuch, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Surat-ii

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat-395001

.....Respondent

APPEARANCE:

Shri Vinay Kansara, Advocate for the Appellant

Shri. Vijay G. Iyengar, Assistant Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
 HON'BLE MEMBER (TECHNICAL), MR. C.L. MAHAR**

Final Order No. A/ 10862 /2023

DATE OF HEARING: 23.02.2023

DATE OF DECISION: 11.04.2023

C L MAHAR

The brief facts of the case are that the appellant is engaged in the manufacture of 'MIRACULAN' falling under chapter sub heading no. 38083040 of CET, 1985 and applying provision of section 4A of Central Excise Act, 1944 for valuation purpose by taking abatement of 35% on MRP value as per notification no. 02/2006-CE (N.T.) dated 01.03.2006. The said notification was amended by another notification no. 11/2006-CE (NT) dated 29.05.2006 effective from 01.06.2006. Under this notification, the rate of abatement in respect of plant growth regulator falling under CETH 38083040 was reduced from 35% to 30%. The appellant continued to clear their product namely 'MIRACULAN' taking abatement at the rate of 35% from their MRP value even after 31.05.2006.

02. It has been the contention of the department that the product literature of the said product 'MIRACULAN' as given on the website of M/s. Dow Agro Science, USA which reveals that since 'MIRACULAN' contains

Traicontanol as active ingredient and the same is used as plant growth regulator for increasing yield of the agriculture products. It has further been contended by the department that the appellant's product is solely marked by M/s. Dow Agro Science as plant growth regulator and since the marketing agency considers the subject product as Plant Growth Regulator, the appellant's should have claimed abatement of 30% only from their MRP Value after 01.06.2006.

2.1 On the basis of the above contentions, a show cause notice dated 30.06.2008 came to be issued on the following points;

- (i) the product viz. "MIRACULAN" should not be classified under Chapter Sub-heading no. 3808 3040 as "Plant Growth Regulator" during the period from 1/6/2006 to 29/12/2006 and thereafter because change in Tariff sub heads from 29/12/2006, and therefore the subject product should be classified under Chapter Sub-heading no. 3808 93 40;
- (ii) The amount of duty Rs. 1195677/- (Rs. 846626/- (+) Rs. 349051/-) claimed as Refund vide their applications dated 26/5/2007 and dated 15/4/2008 should not be rejected under the provisions of Section 11B of Central Excise Act, 1944.

The above referred show cause notice was adjudicated by Order-In-Original dated 06.06.2011 wherein, the learned Deputy Commissioner confirmed the charges of the show cause notice primarily on the ground that the sample of the product namely 'MIRACULAN' was sent for the chemical test to Chief Chemical Examiner, Central Excise & Customs, Vadodara with a specific query from the department to ascertain as to whether the product is plant growth regulator or plant growth promoter. The chief chemical examiner in its report has confirmed that the sample contains of 0.05% Traicontanol and it may be considered as a plant growth regulator. The learned Deputy Commissioner accordingly, rejected the refund claim of the appellant and held that the product under consideration is nothing but a plant growth regulator and not plant growth promoter. An appeal was preferred by the appellants before the Commissioner (Appeals) against the above mentioned order of the learned Deputy Commissioner which was decided by the Commissioner (Appeals) vide his Order dated 28.05.2012 upholding the views of the Order-In-Original. The appellants are before us against the above impugned order-in-appeal.

2.2 It has been the contention of the appellants that their product 'MIRACULAN' is a plant growth promoter and not a plant growth regulator. It has been mentioned that they have been classifying their product under chapter sub heading no. 38089340 of Central Excise Tariff Act, 1985. It was during the audit of the records by the department that audit party objected to their classification saying that the product manufactured by them is not plant growth promoter but a plant growth regulator and therefore, this should be classified under chapter sub heading no. 38083040 of the Central Excise Tariff Act, 1985. It is further been forcefully submitted by the appellant that their product 'MIRACULAN' primarily contains Traicontanoll which is an insecticide and the product 'MIRACULAN' is being only a plant growth promoter and not plant growth regulator and in support of their claim they produced the label pasted on the bottle of 'MIRACULAN' which categorically mentions that the product content therein is a plant growth promoter.

03. Learned advocate appearing for the appellant has also relied upon case laws of BAHAR AGROCHEM & FEEDS PVT. LTD. V/s. CCE- 2007 (213) E.L.T. 33 (Tri.-Mumbai), CCE V/s. BAHAR AGROCHEM- 2008 (221), E.L.T. 6 (S.C.) and BAHAR AGROCHEM & FEEDS PVT. LTD.- 2012 (277) E.L.T. 382 (Tri.-Mumbai). It has also been contention of the learned Advocate that duty was paid by them under protest and therefore, it was required for the department to issue show cause notice under the provision of Section 11A of the Central Excise Act, 1944 even after filing refund claim within the prescribed time limit, no show cause notice under Section 11A has been issued to them.

3.1 As regard to classification of their product namely 'MIRACULAN', the main contention of the learned advocate has been as under :-

i) The case of the department is that the product, in question, is a 'Plant Growth Regulator' falling under the Chapter Sub Heading No.38083040/38089340 and hence the rate of abatement should have been considered @30% instead of 35%.

ii) In this case, the appellant further submits that the contentions of the department are not backed by any documentary evidences as the said product is not a plant growth regulator but it is simply a sort of an insecticide which enhances and promotes the growth of the plant. 'MIRACULAN' contain 'Tricontanoll' which is an insecticide and the said product contains only 0.5% by weight. The said product i.e., MIRACULAN is

being marketed only as Plant Growth Promoter and not as Plant Growth Regulator. Further, the said product, namely 'MIRACULAN' is also registered in India as Plant Growth Promoter with the Directorate of Plant Protection Quarantine and Storage, Faridabad.

ii) As regard the contention of the Commissioner (A) that 'nowhere it is mentioned that product 'MIRACULAN' is an insecticide containing Triacntanol 0.5% by weight is registered as Plant Growth Promoter'. The appellant has submitted that in the Annexure to the said certificate, it has specifically been mentioned the wordings 'PLANT GROWTH PROMOTER TRICONTANOL' 0.5% EC'. On the basis of above it has thus been submitted that the Commissioner (A) has erred in holding their product as Plan Growth Regulator. It is also further submitted that the contentions of the department do not have any technical basis. Further, in the following case, the Hon'ble Tribunal has already decided that the 'Triacntanol' is not a 'Plant Growth Regulator'

- Bahar Agrochem & Feeds Pvt. Ltd. - 2007 (213) ELT 33 (T)
- CCE VS. Bahar Agrochem & Feeds Pvt. Ltd. - 2008 (221) ELT 6 (SC)
- Bahar Agrochem & Feeds Pvt. Ltd. Vs. CCE 2012 (277) ELT 382 (T)

iv) As regard the test report issued by the Chemical Examiner, Vadodara is concerned, it is submitted that that the Chemical Examiner had visited the appellant's factory for carrying out test and the test was carried out in their own laboratory situated within the factory premises. In this context, it has been submitted that the appellant had very small laboratory and did not have facility to carry out test whether the particular product is Plant Growth Promoter or Plant Growth Regulator. In absence of carrying out a proper test, it was wrong on the part of Chemical Examiner to conclude the nature of the product. Thus, such test report cannot be relied upon to determine the classification.

v) Further, it has been mentioned in the said test report that the product is composed of Triacntanol, this fact has never been disputed by the appellant. Only because the product is composed of 'Triacntanol', it cannot be concluded that the product is Plant Growth Regulator. In case of M/s Bahar Agrochem & Feeds Pvt. Ltd., reported in 2007 (213) ELT 33 (T), though the product was composed of 'Triacntanol', the Hon'ble CESTAT had declared the product as a 'Plant Growth Promoter'.

vi) The said Chemical Examiner has not given the detailed reasons to conclude the nature of product, under dispute, as 'Plant Growth Regulator'. Thus, the classification of their product as Plant Growth Regulator is not based on any technical analysis.

04. We have also heard the learned Departmental representative who has reiterated the findings given in the Order-In-Appeal.

4.1 The issue before us to decide whether the product 'MIRACULAN' which primarily contains Traicontanol equivalent to 0.05% of weight can be classified as a plant growth regulator or a plant growth promoter. We find that primary basis of the department to hold that subject product 'MIRACULAN' is a plant growth regulator is on the basis of the chemical test report given by departmental chemical examiner which says that the product contains Traicontanol equivalent to 0.05% by weight and may be considered as a plant growth regulator. We find that as per the certificate of registration obtained by the appellant from the Directorate of the Plant Protection, Quarantine and Storage, Faridabad which works under the Ministry of Agriculture, Government of India as per requirement of Section 9(3) of the Insecticides Act, 1968. The registration which have been obtained by the appellant is for the Traicontanol 0.05% wherein, this product namely Traicontanol has been considered as insecticide. We have also considered the literature which have been pointed out by the learned advocate for the appellant wherein, the Traicontanol 0.05% EC has been considered as the plant growth promoter.

4.2 We also find that since product 'MIRACULAN' is based on Traicontanol 0.05% EC which is nothing but an insecticide as it requires a registration under Section 9(3) of the Insecticides Act, 1968 with the Directorate of the Plant Protection, Quarantine and Storage, Faridabad. From the literature as well as from the registration obtained by the appellant, we are of the view that the product 'MIRACULAN' which is nothing but Traicontanol equivalent to 0.05% EC is a product of the insecticides.

4.3 Now coming to the department's claim whether the 'MIRACULAN' can be considered as a plant growth regulator. Before proceeding further in this regard it will be proper to have a look at the relevant entries in the Central Excise Tariff Act, 1985.

3808 10	- Insecticides :		
	--- Aldrin, aluminium phosphite, calcium cyanide, chlor- dane, chloro benzilate, DDVP, DDT :		
3808 10 11	--- Aldrin	kg.	16%
3808 10 12	--- Aluminium phosphite (for example phostoxin)	kg.	16%
3808 10 13	--- Calcium cyanide	kg.	16%
3808 10 14	--- Chlordane	kg.	16%
3808 10 15	--- Chloro benzilate	kg.	16%
3808 10 16	--- D.D.V.P. (Dimethyl-dichloro- vinyl-phosphate)	kg.	16%
3808 10 17	--- D.D.T. (excluding D.D.T. of heading 2903 62)	kg.	16%
	--- Diagonal, heptachlor, lindane, methyl bromide, parathion methyl, dimethoate technical, malathion :		
3808 10 21	--- Diagonal		
3808 10 22	--- Heptachlor	kg.	16%
3808 10 23	--- Lindane	kg.	16%
3808 10 24	--- Methyl bromide	kg.	16%
3808 10 25	--- Parathion, methyl	kg.	16%
3808 10 26	--- Dimethoate, technical grade	kg.	16%
3808 10 27	--- Malathion	kg.	16%
	--- Endosulphan technical, quinal phos, isoproturon, fenthion, cipermethrin technical, allethrin, synthetic pyrethrum :		
3808 10 31	--- Endosulphan, technical grade	kg.	16%
3808 10 32	--- Quinal phos	kg.	16%
3808 10 33	--- Isoproturon	kg.	16%
3808 10 34	--- Fenthion	kg.	16%
3808 10 35	--- Cipermethrin, technical grade	kg.	16%
3808 10 36	--- Allethrin	kg.	16%
3808 10 37	--- Synthetic pyrethrum	kg.	16%
	--- Other :		
3808 10 91	--- Repellants for insects such as flies, mosquito	kg.	16%
3808 10 92	--- Paper impregnated or coated with insecticide such as D.D.T. coated paper	kg.	16%
3808 10 99	--- Other	kg.	16%
3808 30	- Herbicides, anti-sprouting products and plant-growth regulators :		
3808 30 10	--- Chloromethyl phenozy acetic acid (M.C.P.A.)	kg.	16%
3808 30 20	--- 2 : 4 Dichlorophenozy acetic acid and its esters	kg.	16%
3808 30 30	--- Gibberellic acid	kg.	16%
3808 30 40	--- Plant-growth regulators	kg.	16%
3808 30 50	--- Weedicides and weed killing agents	kg.	16%
3808 30 90	--- Other	kg.	16%
3808 40 00	- Disinfectants	kg.	16%
3808 90	- Other :		
3808 90 10	--- Pesticides, not elsewhere specified or included	kg.	16%
3808 90 90	--- Other	kg.	16%

A glance at the above mentioned a scanned copies of the relevant entries of the Central Excise Tariff i.e. 380810 and 380830, it becomes clear that plant growth regulators are the products which fall under the category of Herbicides, anti sprouting products and plant growth regulators classifiable under sub heading 380830 while the product which is under consideration is nothing but a Traicontanol which is an insecticide and thus, we are of the view that the product insecticide will clearly fall under the sub heading 380810. The products which are of nature of Herbicides, anti sprouting products and plant growth regulators fall under chapter heading no. 380830. In view of the above, we are of the view that product 'MIRACULAN' which primarily contents of Traicontanol which is an insecticide will certainly cannot be considered as a plant growth regulator.

4.4 We have also gone through this tribunal's decision in the case of BAHAR AGROCHEM & FEEDS PVT. LTD. reported under 2012 (277) ELT 382 (Tri.-Mumbai)

7.8 *It is an admitted fact that Triacontanol has been notified as an insecticide and all the procedures prescribed under the Insecticide Act, 1968 and Rules made there under are applicable not only to Triacontanol but also to the preparations containing Triacontanol and the appellant has been complying with those provisions of the Insecticides Act, 1968. Section 38 of the Insecticide Act specifically provides that the provisions of said Act will not apply to any substance specified or included in the schedule or preparation containing any one or more substances, if such substance or preparation is intended for the purpose other than preventing, destroying, repelling or mitigating any insects, rodents, fungi, weeds and other forms of plant or animal life not useful to human beings. If the appellant's contention is that Vipul Booster is not used or capable of being used as an insecticide, they could have claimed exemption under Section 38 of the Insecticides Act and they need not have followed any of the procedures prescribed under the said Act or the Rules made there under. However, they have not exercised this option available under the law. This clearly shows that the appellants, by their very conduct, have agreed that their product is an insecticide coming within the purview of the Insecticides Act. If they did not want to market their product as an insecticide at all they should have sought exemption under Section 38 of the said Act rather than following the procedures, such as, registration, labeling, packing, providing statutory warning, etc. applicable to insecticides and preparations thereof in respect of said product. So from this angle also, it is clear that the product under consideration merits classification as an insecticide and not as a plant growth regulator.*

7.9 *The appellants have also contended that a number of products such as boric acid, copper sulphate, sodium chlorate, gibberellic acid etc. (which are insecticides) are classified not under heading No. 3808.10 but under various other headings in Chapter 28 or 38 of the excise tariff. However, it has to be borne in mind that in those cases there was a specific heading covering those products and, therefore, the classification of the product was made under those heads, as per the rules of interpretation of the tariff. In the case of Triacontanol or preparations thereof there is no such specific heading covering the product and, therefore, taking into account the essential nature of the product, it has to be classified as falling under the category of insecticides only and not as anything else.*

7.10 *The appellants have relied upon a number of judicial pronouncements in support of their various contentions. We, however, find that the appellants have not made out any strong case in their favour to show that the facts of those case were similar or identical to the facts involved in the present case. On the contrary, we find that the facts of the present case are substantially different from the cases relied upon by the appellant. In view of this position,*

we are unable to agree with the appellant that the case laws cited by them have any bearing or relevance.

7.11 *In the light of the above, we are of the view that the product Vipul Booster, which has as its active ingredient, Triacontanol, which is an insecticide merits classification as an 'insecticide' under heading No. 3808.10 of the Central Excise tariff and not as a 'plant growth regulator' under heading No. 3808.20. Since heading No. 3808.10 has been notified under section 4A of the central excise act, its valuation for the purpose of charging excise duty has to be done under the provisions of the said section and we hold accordingly.*

8. *The next issue for consideration is whether there is any suppression or willful mis-statement of facts on the part of the assessee with an intent to evade duty. The allegation in the show cause notice is that the appellant failed to bring to the notice of the department the fact that Triacontanol is an insecticide under the provisions of the Insecticides Act, 1968, which is a material fact to decide the classification of the said product and they also failed to submit to the department copies of the certificate of registration obtained under the Insecticides Act. In view of these omissions, they have suppressed the facts and willfully mis-stated the facts with an intent to evade duty.*

8.1 *The composition of product was known to the department right from 1989 onwards. The product Triacontanol, which is the active ingredient was brought under the Insecticide Act, 1968 vide gazette notification dated 3-1-1996. Thereafter, the appellants took registration under the said Act and started complying with the procedures specified thereunder. Merely because they did not inform the department of their product registration under the Insecticides Act, 1968, it cannot be held that they have suppressed the facts with an intent to evade payment of duty. So long as the constitution of product was known to the department and the notification of Triacontanol under the purview of the Insecticides Act was made under a Gazette notification, which is a public document, it was the responsibility of the department to take note of the changes in the law and reclassify the product accordingly. As has been held in a number of judicial pronouncements which have been relied upon by the appellant as mentioned in paras 3.6 to 3.8 (supra), mere omission to inform the department of the registration of the product under the Insecticides Act, 1968 can not be held as suppression or willful mis-statement of facts with an intent to evade duty. The department has not adduced any evidence to prove the charge of suppression on the part of the appellant. Therefore, no suppression of facts can be alleged in the instant case and hence the demand of duty invoking the extended period of time has to be necessarily set aside.*

9. *As regards the imposition of penalty equal to the duty demanded, once there is no suppression, there cannot be any imposition of penalty under Section 11AC of the Central Excise Act. Further, the issue relates to classification of the product where different views are possible and it is an accepted legal position that*

imposition of penalty is not warranted in disputes relating to classification.

10. *There are also two appeals [E/1017/07 and E/1018/07] filed by the department where the issue involved is the same. In these cases, the department had confirmed a duty demand of Rs. 98,12,136/- for the period April-September, 2005 (vide order dated 28-09-2006) and a demand of Rs. 9,07,813/- for the period December, 2004 to January, 2005, (vide order dated 8-7-2006) classifying the product Vipul Booster' as an insecticide falling under heading No. 3808.10 of the Central Excise Tariff and on the basis of assessment under Section 4A of the Central Excise Act, 1944 and also imposing equivalent penalty under Section 11AC. The appellant had filed appeals against the said orders before the Commissioner (Appeals), Pune, who vide his order-in-appeal dated 30-3-2007 had set aside the orders. This order was passed by the Commissioner (Appeals) based on this Tribunal's order dated 6-3-2007. The department is in appeal against the said order-in-appeal. Since the said Tribunal's order was set aside by the Hon'ble Apex Court with a direction to reconsider the case afresh, the order-in-appeal dated 30-3-2007 does not survive. In view of our finding that the product Vipul Booster' is an insecticide classifiable under heading No. 3808.10 of the Central Excise Tariff, the aforesaid duty demands will sustain subject to the demand being within the normal period of limitation. However, as the issue relates to classification, penalties are not warranted. Accordingly we allow the appeals filed by the department subject to the modification as mentioned above.*

11. *In sum, we hold that the product "Vipul Booster" manufactured by the appellant, which has Triacantanol 0.1% w/w as its active ingredient is classifiable under heading No. 3808.10 as an insecticide under the Central Excise tariff. Accordingly, the valuation of the product has to be done in accordance with the provisions of Section 4A of the Central Excise Act, 1944. However, as the department has failed to prove any suppression or wilful mis-statement of facts with an intent to evade duty on the part of the appellant, the demand of duty has to be restricted to the normal period of one year from the relevant date as per the provisions of Section 11A of the Central Excise Act, 1944. In the instant case the show cause notice has been issued on 28th December, 2004 demanding differential excise duty for the period from March, 2003 to September, 2004. Therefore, the duty demand for the period from March, 2003 to November, 2003 will be beyond the normal period of one year and is liable to be set aside and we do so. Consequential interest liability under Section 11AB of the said Act will also accrue. As the matter essentially relates to a classification dispute, imposition of penalty is not warranted and accordingly we set aside the same. The appeals filed by the department against the order in appeal dated 30-3-2007 are allowed subject to the modification specified in para 10 above. The appeals are disposed of in the above terms.*

It can be seen from the above decision of the tribunal that the similar product which contains Traicontanol has been classified as insecticide and not a plant growth regulator and since the issue at hand is similar to the one decided by the above decision, we hold that the product 'MIRACULAN' which primarily contains Traicontanol 0.05% by weight is a product under the category of Insecticides and cannot be considered as the plant growth regulator.

05. In view of the above, we find no merit in the impugned order-in-appeal. We set aside the same and appeal is allowed.

(Pronounced in the open court on 11.04.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C.L. MAHAR)
MEMBER (TECHNICAL)

Mehul