

CASE NO.:
Appeal (civil) 3876 of 1999

PETITIONER:
UNION OF INDIA AND ORS.

RESPONDENT:
PESTICIDES MANUFACTURING & FORMULATORS ASSON OF INDIA

DATE OF JUDGMENT: 23/10/2002

BENCH:
SYED SHAH MOHAMMED QUADRI & RUMA PAL

JUDGMENT:
JUDGMENT

2002 Supp(3) SCR 231

The Judgment of the Court was delivered by

RUMA PAL, J. This appeal has been preferred from the decision of the Delhi High Court striking down a Circular dated 28th October, 1997 issued by the Central Board of Excise and Customs (briefly CBEC). The circular directed the classification of technical grade of pesticides, insecticides etc. under Chapters 28 and 29 of the Schedule to the Central Excise Tariff Act, 1985 (referred to as the '1985 Act') and not under the Heading No. 38.08 of the Schedule. Technical grade pesticides are chemical compounds in a concentrated form. The respondent before us is an association of the manufacturers of Technical grade pesticides (TGP) and insecticides and formulations thereof. It claimed before the Delhi High Court that TGP, Insecticides etc. are classifiable under Tariff Heading 38.08 and not under Chapter 28 and 29 and prayed inter-alia for cancellation of the circular and for a direction on the appellants before us, to classify TGP etc. and bulk formulations under sub-heading 3808.10 and for a refund of the enhanced duty paid for the past under protest or any excess amount received by the Department. The Delhi High Court accepted the respondent's contention and allowed the writ petition. On the application of the appellants, leave was granted by this Court to appeal against the High Court's judgment.

While impugning the decisions of the High Court, the appellants have conceded that prior to 1996 TGP and insecticides etc. in bulk were classified under the Tariff Heading No. 38.08 of the Act. According to the appellants, because this tariff heading was amended in July 1996, after 1996 TGP etc. in bulk concentrated forms were excluded from Heading No. 38.08 and were covered under Chapter 28 or 29 of the Act depending upon the composition. This position, according to the appellants, was further clarified when Chapter 38 Note 1(a) (2) was amended in 1997.

According to the respondent the amendments in 1996 and 1997 have made no difference to the classification of bulk pesticides and insecticides etc. It is submitted that the amendments were intended to and in fact serve the purpose of extending the liability to excise to insecticides, pesticides etc. in retailable forms. The issue, therefore, is - did the 1996 and 1997 amendments to Chapter 38 serve to remove bulk TGP, insecticides etc. from that Chapter and place them in Chapter 28 or 29?

In approaching the problem, the first stamp is to look at the background in which the amendments were effected to the relevant portions of the 1985 Act and its Schedule. There was no relevant amendment to the Act between 1987 and 1996. In 1987, Chapter 28 of the Schedule to the Act related to inorganic chemicals, organic or inorganic compounds of precious metals of rare earth metals of radioactive elements or isotopes. Note 1(a) of that

Chapter provided that except where the context otherwise required, the headings of the Chapter applied only to: "Separate chemical elements and separate chemically defined compounds, whether or not containing impurities". Chapter 29 related to organic chemicals and also provided in Note 1(a) thereof that the headings of the Chapter would apply only to: "Separate chemically defined organic compounds, whether or not containing impurities". The Chapter headings, the Notes and the Tariff Headings within Chapter 28 and 29 have not been changed or amended in their application to separate chemically defined compounds by the 1996 or 1997 amendments for the period in question. Therefore, generally speaking all separate chemically defined compounds are classifiable under Chapter 28 and 29 depending on their composition.

Chapter 38 of the Schedule relates to 'Miscellaneous Chemical Products' and carves out an exception to this general classification of separate chemical compounds under Chapter 28 and 29. Between 1987 to 1996, the Notes to this Chapter in so far as they are relevant read as follow:

"1. This Chapter does not cover,

(a) Separate chemically defined element or compounds with the exception of the following:

- (1)
- (2) Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products."

The Two negatives in the Chapter Note make it clear that the Chapter covered the items mentioned in Note 1(a)(2). This was also reflected in the Tariff Heading 38.08 which then read as:

"38.08 Insecticides rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products."

Therefore the respondent's products were expressly classifiable under this tariff heading and this position is not now disputed by the appellants. Incidentally the concession was also made before the High Court in the appellants' affidavit. Besides the circular dated 27th July 1995 issued by CBEC under S.37B of the Central Excise Act, 1944 stated that "The Pesticide Chemicals and formulations will both be classified under heading 38.08 of the CETA, 1985". Similarly the Department of Revenues's circular dated 28th October 1997 records, "Prior to the 1996 Finance Bill (2), there was no distinction between bulk packings and retail packings, and all pesticides were falling under heading no. 38.08". However, earlier a question had arisen as to whether the processing of concentrated basic pesticidal chemicals through addition of inert carriers/solvent and dispersing and stabilising agents which rendered them suitable for use either directly or after addition of water amounted to manufacture of a separate excisable product. In other words, if the bulk forms of insecticides etc. were made fit for retail sale would such retailable products be separately subjected to excise duty under the Tariff Heading 38.08? The Collector (Appeals), Central Excise, New Delhi decided the question against the Revenue. The matter was taken by the Department before the Central Excise and Gold (Appellate) Tribunal (CEGAT). By its decision in Collector of Central Excise v. Markfed Agro Chemicals,' the Tribunal held that the process described did not amount to 'manufacture' of a new excisable item within the meaning of Section 2(f) of what was then the Central Excise and Salt Act, 1944 (which is now known as the Central Excise

1. 1993 (68) ELT 848 (Tribunal) Act, 1944 and is hereinafter referred to as the "1944 Act") as the process did not result in a new product having a distinctive name, character and use. Thus the Revenue's attempt to rope in insecticides and pesticides in a retail form as a separate excisable item under Chapter 38.08 was thwarted.

Despite the decision of the Tribunal in Markfed Agro Chemicals, the CBEC issued a circular on 27th July 1995 in exercise of powers under Section 37 B of the 1944 Act and ordered that:

"The addition of chemicals and other ingredients like inert carriers or solvents and also surface active dispersing and stabilising agents to pesticidal chemicals in highly concentrated form would amount to 'manufacture' within the meaning of Section 2(f) of the Act since it results in the emergence of a new and distinct product having different properties viz., pesticide/insecticide fit for direct use. The Pesticide Chemicals and the formulations will both be classified under Heading 38.08 of CETA, 1985."

The circular was challenged before the High Court of Delhi by way of several writ petitions. The High Court by its decision in Kissan Chemicals v. Union of India, (1996) 88 ELT 648 (Del.) held that it was not open to the CBEC to reverse the decision of the Tribunal by issuing a directive under Section 37B of the 1944 Act.

It was to overcome the effect of the Tribunal's decision in Markfed Agro Chemicals that amendments were effected by the Finance Act, 1996 to Chapter 38 to incorporate statutorily the substance of the circular which had been struck down by the Tribunal. As far as the Chapter Notes were concerned. Note 1 was left untouched but Note 2 was inserted which reads:

2. In relation to products of heading No. 38.08, addition of chemicals and other ingredients like inert carriers or solvents, surface active, dispersing and stabilising agents, emulsifiers, wetting and dispersing agents, deodorant, masking agent, attractants and feeding stimulants to pesticidal chemicals in concentrated form, labelling or relabelling of containers intended for consumers and repacking from bulk pack to retail packs or the adoption of any other treatment to render the product marketable to the consumer shall amount to 'manufacture'."

Patently, Chapter Note 2 of Chapter 38 proceeds on the basis that TGP is covered by Chapter 38. Were it not so it was not necessary to provide that the addition of chemical pesticides and re-packing and labelling etc. of the product would amount to manufacture. The language in Chapter Note (2) that "addition of chemicals and other ingredients" to "products of heading No. 38.08" and adoption of any other treatment to render the product marketable would amount to manufacture, plainly understood means that (i) the product (without additives, or any treatment) as well as (ii) the product after administration of additives and (iii) the product after treatment for the purposes of retail sale were all but separately exigible to duty under the Chapter. The importance of the Chapter Notes in the matter of interpretation is manifest from Section 2(f)(ii) which defines 'manufacture' to mean:

"which is specified in relation to any goods in the section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture."

Then again the Schedule to the 1985 Act before providing for rates of duty leviable thereunder sets out Rules for the interpretation of the Schedule. Rule 1 states:

"The titles of sections and chapters are provided for case of reference only: for legal purposes, classification shall be determined according to the terms of the headings and any relative section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the provisions hereinafter contained."

As far as Tariff Heading 38.08 was concerned after the phrase Insecticides, rodenticides etc. the phrase: "put up in forms or packings for retail sale or as preparations or articles (for example, sulphur-treated bands, wicks and candles, and fly papers)", was added by the amendment.

In other words, the Tariff Heading covers -

- (1) Insecticides, pesticides etc. put up in forms or packing for retail sale;
- (2) Insecticides, pesticides etc. as preparatons,
- (3) Insecticides, pesticides etc. as articles (for example sulphur-treated bands, wicks and candles, and fly papers)

What is manufactured by the respondent's members is Technical grade pesticides (TGP) and insecticides. No doubt they are separate chemically defined compounds as contended by the appellants. But the word 'compound' itself denotes a mixture of components. The word "preparation" denotes not only the action or process of preparing the components to produce the compound, but also that which is prepared, in this case insecticides, pesticides etc.

We see no ambiguity in the heading. Even if there were, the doubt must be resolved with reference to the Chapter Note which clearly covered insecticides, pesticides etc. before further formulation by way of additives or treatment. This would include the respondent's product.

There is also substance in the submission of learned counsel for the respondent that classification of TGP, inserticides etc. in bulk form under Tariff Heading 38.08 would be in keeping with the Rules for interpretation of the schedule to the 1985 Act.

The Rules in so far as they are relevant provide:

"2(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substances."

(3) When by application of sub-rule (b) of rule 2 or for any other reason, goods are prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set, these headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b)

(c) When goods cannot be classified by reference to (a) or (b) they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration." Paraphrased and simply put, the quoted extracts of the rules direct that the goods would include its formulations and that the more specific heading should be preferred and if there are two such specific headings to which a product can be referred, the one occurring subsequently would prevail.

Chapter 28 and Chapter 29 are, as already noted, general provisions relating inter alia to separate chemical compounds. Chapter 38 is the specific chapter dealing with particular chemical compounds viz., insecticides, pesticides etc. In keeping with the Rules quoted, the TGP manufactured by the respondent are classifiable under the particular subsequent provision and not under the residuary headings occurring earlier.

This is also how the appellants understood the effect of the 1996 amendment. Trade Notice No. 40/96 dated 23.7.96 enclosed Notes explaining important changes made in excisable duty by the Finance Bill, 1996. Paragraph 19.1 and 19.3 of the Explanatory Notes make the position of the appellants abundantly clear:

19.1. Concessional rate of excise duty of 10% on Incesticides fungicides etc. (sub-heading No. 3808.10) and Plant growth regulators is being continued. Tariff rate for these products is also being prescribed at 10%. A new sub-heading No. 3808.20 is created for plant growth regulators (relevant bill entries refer).

19.2

19.3. A new Chapter is being added so as to make the process of making formulations out of pesticide concentrates as "manufacutre". With the introduction of this chapter note, the process of making formulations out of duty paid pesticides, insecticides concentrates is also liable to excise duty. The chapter note is introduced to avoid any disputes on classification."

The use of the words "continued" and "also" as emphasized above, indicate that what was originally classified under Tariff Heading 3808 viz. concentrates would continue to be so classified and in addition formulations of such concentrates would be liable to excise duty. It was therefore not the intention of the 1996 amendment to exclude concentrates of insecticides etc. in bulk form from Chapter 38 but to extend the incidence of excise duty to formulations from and retail packages of the concentrates.

It is not open to the Revenue not to take a stand contrary to what had been expressed in the Trade Notice. As stated by this Court in Collector of Central Excise, Bombay v. Kores (India) Ltd 2

"A Tariff Advice or a Trade Notice issued by the Board certainly does not bind the Tribunal or the Courts and an assessee may argue that it is erroneous; but it is not open to the Revenue to advance arguments that are contrary to the terms thereof."

(See also Steel authority of India v. Collector of Customs, Bombay 2000 (15) ELT 42 SC.)

In 1997, there was a further amendment to the Chapter Note of Chapter 38. By this amendment. Chapter Note 2 which had been introduced by the 1996 amendment was left untouched as also the Tariff Heading but Chapter Note 1 (a)(2) was altered by the addition of the phrase "put up as described in Heading No. 38.08".

The final position as it now stands is that Chapter Note 1(a)(2) and 2 of Chapter 38 read:

" 1. This Chapter does not cover:

(a) Separate Chemically defined elements or compounds with the exception of the following:

(1)

(2) Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products, put up as described in Heading No. 38.08;

2. In relation to products of heading No. 38.08, addition of chemicals and other ingredients like inert carriers or solvents. Surface active dispersing and stabilising agents, emulsifiers, wetting and dispersing agents, deodorant masking agent, attractants and feeding stimulants to pesticidal chemicals in concentrated form, labelling or relabelling of containers intended for consumers and repacking from bulk pack to retail packs or the adoption or any other treatment to render the product marketable to the consumer shall amount to manufacture."

Tariff Heading 38.08 now reads as:

_____ "Insecticides, rodenticides, fungicides, herbicides, anti-sprouting

2. (1997) 89 ELT 441 (SC) products and plant-growth regulators, disinfectants and similar products put up in forms or packings for retail sale or as preparations or articles (for example, sulphur-treated bands, wicks and candles, and fly-papers)"

What is notable is that the 1997 amendment did not change Chapter Note (2) which has been construed by us earlier as including TGP etc. All it did was to extend the exception to the general classification under Chapter 28 and 29 to treated and retailable forms of the already excepted chemical compounds. It brought about a parity of language between Tariff Heading as amended in 1996 and Chapter Note 1(a)(2) and we have already seen that the Tariff Heading as amended in 1996 continues to cover insecticides, pesticides etc.

The Harmonized System of Nomenclature (HSN) provides for an identical classification of insecticides etc. in heading 38.08. Indeed, it is the appellants' case that the 1996 and 1997 amendments to Chapter 38 were effected to bring it on par with the HSN. Sub-headings 3808.10, 3808.20, 3808.30, 3808.40 and 3808.90 respectively of the HSN refer to "Insecticides", "Fungicides", "Herbicides", "Disinfectants" and "others." The explanatory note clarifies that the classification covered products (1) when they are put up in packings or in such forms that there can be no doubt that they will normally be sold by retail and (2) when they have the character of preparations. It also says:

"Intermediate preparations, requiring further compounding to produce the ready for use insecticides, fungicides, disinfectants, etc. are also classified here, provided they already possess insecticidal, fungicidal etc. properties."

Hence preparations with insecticidal, fungicidal properties are classifiable under Heading 38.08.

The HS of Commodity Classification which was developed by the World Customs Organisation, Brussels was adopted by India also in the ITC (HS) Classification of Export and Import Items, 2002-2007 which was issued by the Government under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 read with paragraph 2.1 of the Export and Import Policy, 2002-2007. The ITC (HS) like the Schedule to the 1985 Act, also contains several chapters which correspond exactly with the Schedule to the 1985 Act at least as far as the relevant parts of Chapter 38 are concerned. Chapter Note 1(a)(2) and the Heading 38.08 of the ITC (HS) are identical with the Schedule to the 1985 Act. In the ITC (HS), under the several sub-headings to Heading 38.08, the different forms of insecticides, pesticides etc. have been provided for from which it is clear that insecticides etc. in their concentrated bulk forms are covered by the Heading 38.08 at least for the purposes of the Import/Export Policy. For example sub-heading 3808.10.11 mentions 'Aldrin' as a form of insecticide. Against that sub-

heading, it is provided that it is freely importable/exportable "if registered and not prohibited for import under Insecticides Act, 1968 and formulations thereof. Similarly, 3808.90.10 provides for 'pesticides, not elsewhere specified.' It is treated as a free item under the policy "if registered and not prohibited for import under the insecticides Act, 1968 and formulations thereof. Undeniably insecticides, pesticides etc. in whatever form are covered by the Insecticides Act. The description demonstrates that bulk concentrates and formulations are covered by the sub-heading 'Aldrin'. The use of the same words in the Tariff Heading in the Schedule to the 1985 Act as has been used for the purposes of the Import Trade Control Policy is an additional reason for holding that insecticides, pesticides concentrates in bulk forms are includible within the Tariff Heading. See *Dunlop India Ltd. v. Union of India and Ors.*, [1976] 2 SCC 241.

For all these reasons, we are unable to accept the appellants' submission that the amendments Chapter 38 in 1996 and 1997 served to exclude TGP or insecticides etc. in bulk forms from Chapter 38.

We, accordingly dismiss the appeal without any order as to costs. Civil Appeal No. 6009-6011/1999 etc. etc.

ORDER

In view of our judgment and for the reasons stated in Civil Appeal 3876 of 1999 titled *Union of India and Ors. v. Pesticides Manufacturing & Formulators Association of India* delivered today, these appeals are also dismissed without any order as to costs.