CASE NO.:
Appeal (civil) 5210 of 2006

PETITIONER:
M/s. Deepak Agro Solution Ltd

RESPONDENT:
Commissioner of Customs, Maharashtra

DATE OF JUDGMENT: 08/05/2008

BENCH:
S.B. SINHA & V.S. SIRPURKAR

JUDGMENT:
JUDGMENT

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5210 OF 2006

M/s. Deepak Agro Solution Ltd. ....Appellant

Versus

Commissioner of Customs, Maharashtra .... Respondent

JUDGMENT

S.B. SINHA, J.

1. Whether "Brimstone 90" which contains about 90% of Sulphur and 10% of Bentonite by way of inert filler would come within the classification under "Heading 25.03" of the Customs Tariff and the Central Excise Tariff or "Heading 38.08" is the question involved in this appeal.

2. Appellant imported 200 MT of "Brimstone 90". The certificate of

analysis available on record shows the Sulphur content of the imported

goods was 90.10 % , inert filler (Bentonite) at 9.60 % and, the moisture content was 0.30 %.

3. "Brimstone 90" was classified under the Customs Tariff heading 25.03 by the Customs, Excise and Service Tax Appellate Tribunal in the case of Deepak Fertilsers & Petrochmeicals Corporation Ltd. vs. Commissioner of Customs, Nhava Sheva : 2002 (139) E.L.T. 328. The Tribunal held :-

> "8. Elemental sulphur has vide use as a fertiliser. Elemental sulphur has to be oxidised to sulphate before it can be absorbed by the plant. The rate of oxidisation depends upon the surface area of the sulphur particles. Rapid oxidisation is possible where the particle size is small. The fine particles, however, create handling problems. They can also be blown away by wind. They may float on the irritation to the eyes and lungs. They can also be blown away by wind. They may float on the irrigation water. To enable the sulphur to be applied in a safe manner it is mixed with other fertilisers such as phosphate, etc., or with inert fillers such as bentonite clay. Such mixture is applied to the plants. On application of water bentonite expands and disintegrates the sulphur particles surrounding it. Over the years 10% bentonite in the mixture has been established as appropriate.
>
> 9. The addition of bentonite clay does not alter the chemical properties of the sulphur particles. Therefore even in admixture of the bentonite the sulphur does not merit classification under any other tariff entry. The sulphur component of such mixture also continues to fall under the term 'unrefined sulphur'. Therefore such unrefined sulphur tracing its origin in refinery processing natural gas, etc. of which it is a

> by-product would continue to merit the title 'unrefined sulphur' without or without mixture with bentonite."

4. Appellant filed the bills of entry on 31st May, 2004 classifying the goods under "Heading 25.03" of the Customs Tariff. However, the Deputy Commissioner of Customs by his order dated 7th July, 2004 opined that the imported goods were classifiable under "Heading 38.08" of the Customs Tariff.

5. Indisputably a Notification bearing No.21/02-Cus., dated 1st March, 2002 had been issued granting benefit of exemption in respect of "crude or unrefined Sulphur" falling under heading 25.03. Consequent upon the said decision of the Deputy Commissioner of Customs dated 7th July, 2004, the benefits of the said exemption notification was not accorded to the appellant.

6. An appeal was preferred thereagainst before the Commissioner (Appeals). The Commissioner (Appeals) by an order dated 20th August, 2004 allowed the same relying on or on the basis of the said decision in Deepak Fertilisers and Petrochemicals Corporation Ltd. (supra).

7. Respondent preferred an appeal thereagainst before the Customs, Excise and Service Tax Appellate Tribunal. A Division Bench of the

Tribunal was of the opinion that its earlier decision in Deepak Fertilisers and Petrochemicals Corporation Ltd. (supra) was not correct. It referred the matter to a Larger bench stating :-

> "3. We have considered the submissions and the claim under Chapter 3808 canvassed by Revenue. We cannot appreciate that a packaging of 25 kgs. Of the product as imported would be included under Heading 38.08 when we find that Notes under Heading 2503 specifically excludes sulphur put up in forms of packing for reail sale as fungicide etc. which fall in Heading 3808. The sulphur in this case is packed in 25 kgs. Pack and there is no material for us to conclude that this packaging is for retail sale and therefore classification under heading 3808 cannot be approved. The order of lower authorities also did not bring out very clearly how this packaging is considered by them to be fit for retail sale. We would consider the Heading 3825 to be more appropriate after considering the Heading and Chapter Notes on Fertiliser. However, as in the appellants' own case, the sulphur imported was classified under Chapter 23 we would request the President to constitute a Larger Bench to determine the question of classification of the entity herein since the decision in appellants' own case is by a coordinate Bench of two members. The question referred to this case would be classifiable under Chapter 2503 as per importers or under Heading 3808 by Revenue or under 3825 as a product of Chemical Industries as viewed hereinabove."

The Larger Bench of the Tribunal, however, by its order dated 27th January, 2006 came to the conclusion that the said goods were classifiable under "Heading 3808.19 (sic) 3808.90".

8. Mr. A.R. Madhav Rao, learned counsel appearing on behalf of the appellant would submit that the Larger Bench of the Tribunal in arriving at the impugned judgment failed and/or neglected to consider not only the manufacturing process of "Brimstone 90", and the purpose for which the same is used but also the technical materials produced before it.

9. Mr. T.S. Doabia, learned senior counsel appearing on behalf of the respondent, however, would support the impugned judgment.

10. We may, at the outset, place on record the manufacturing process of the product in question, as noticed by the Tribunal itself:-

> "2. The manufacturing process and catalogue of Product was called as the goods were claimed to be crude and unrefined Sulphur. However, invoice described the goods as Brimstone 90 (Agricultural Sulphur). The product catalogue read as follows :-
>
> '(a) The Brimstone 90 plant that entered service in Saudi Arabia for NEAIS is based on Sandvik process system well known Roto form system. According to Sandvik by consistent incorporation 8-10 % of Bentonite in the Sulphur, the release qualities of the Sulphur in the soil are improved. In addition to this process, product is consistently sized granules with low flexibility and low dust content that are free flowing and easy to handle in storage and application.
>
> (b) Liquid Sulphur is trucked to the facility in the NEAIS tanker fleet. From the Aramco Refinery, a DISTANCE OF SOME 130 Kms. and is combined with the imported swelling agents at the plant. The specially developed Rotoform Process involve mixing liquid sulphur and powdered

Bentonite with batch handling in two mixing vessles overcoming the complications of processing the abrasive Bentonie and allowing semi continuous production of the fertilizer.

(c) The elements of this Sulphur based fertilizer process system is that the Liquid Sulpher arrives from the refinery at a temperature of 135o C and is pumped to a mixing vessel of approximately 25 cubic meters volume which contains a specially designed uniter Powered Bentonite, along with other agents, is fed into the liquid Sulphur and a homogeneous mixture obtained by intense stirring. The mixture is then pumped through a uniquely designed filtration sytem into the Rotoform System. Which consists of a Rotoform feed unit and a Sandvik steel belt cooler. Pastilies are discharged at the end of the steel belt cooler into bags which are then Palletised for shipping."

11. Section V deals with "Mineral Products". Chapter 25 deals with Salt, Sulphur, Earths and Stone; Plastering Materials, Lime and Cement.

Chapter Note 1 to Chapter 25, whereupon reliance has been placed by the Tribunal, reads as under :-

> "1. Except where their context or Note 4 to this Chapter otherwise requires, the headings of this Chapter cover only products which are in the crude state or which have been washed even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallization), but not products that have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading."

12. Entry 2503 speaks of Sulphur of all kinds, other than sublimed sulphur, precipitated sulphur and colloidal sulphur.

Entry 2503 00 10 read as under :

"Sulphur recovered as by-product in refining of crude oil".

13. Heading 3808 deals with insecticides, rodenticides, fungicides, herbicides, antisprouting 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). 3808 10 speaks of insecticides; 3808 20 fungicides ; 3808 30 herbicides, anti-sprouting products and plant-growth regulators and while 3808 90 speaks of other in the Schedule as stated by the Tribunal. There is no entry 3808 19.

14. The principal question which arises for our consideration is as to whether on the face of the said entries Chapter Note 1 of Chapter 25 would be applicable.

15. Entry 2503 speaks of Sulphur of all kinds other than those which are specifically mentioned therein. It is, therefore, evident that the said entry is of broad nature. Indisputably the product does not come within the purview of the excluded category.

16. It is well settled what is not excluded would be held to be included. Within the category of Sulphur, Sulphur recovered as by-product in the process of refinement of crude oil also finds place.

17. Chapter Note 1 of Chapter 25 starts with the words "except where their context or Note 4 to this Chapter otherwise requires".

It is, therefore, difficult to hold that the headings of the Chapter would cover only the products which are in the crude state or comes within the purview of other activities contained therein.

Interpretation of the said Note will depend upon the context in which the entries have been worded. If an entry is clearly worded and is broad in character, the same would lead to the conclusion that the context otherwise required.

18. An entry is to be given its ordinary meaning. If any goods fit in within one entry, the same for any purpose would not be held to be included in the other and in particular the residuary.

19. "Salt and Sulphur" are dealt with in Chapter 25. Sulphur may be used for different purposes including agricultural purposes. Brimstone 90 is used for agricultural purposes as would appear from the descriptions referred to hereinafter.

20. We may at this stage also notice that Sulphur does not find place in Chapter 38 which deals with agricultural operation. In all probabilities as Sulphur is dealt with in Chapter 25, it was not found necessary to be dealt therewith.

21. Appellant had filed certain documents by way of compilation before the Tribunal. We may notice some of them.

In Ullmann's Encyclopedia of Industrial Chemistry relating to Sulfur para 9.2.3 deals with formed Sulfur. It refers to the Sandvik Test. It is a granulating process undertaken for the purpose of transportation of Sulfur and better used in the agricultural processes. How this process is employed in the agricultural operation would appear from the "Journal Fertilizer Focus, April 1977" issue in the following terms :-

> "Brimstone 90
>
> The Technology
>
> The Brimstone 90 plant that entered service in Saudi Arabia for NEAIS is based on Sandvik process system well known Rotoform system. According to Sandvik by consistent incorporation 8-10 % of bentonite in the Sulphur, the release qualities of the Sulphur in the soil are improved. In addition, this process, produces consistently sized granules with low flexibility and low dust content that are free flowing and easy to handle in storage and application"

22. Manufacturing process of Brimstone 90 would appear from Physical and Chemical Analysis report dated 11th August, 2003 issued by the National Est. for Agricultural and Industrial Sulphur, Dammam in the following terms :-

> " Manufacturing Process of Brimstone 90
>
> We are submitted herewith the brief manufacturing process of Brimstone 90 received from our principals National Establishment for Agricultural and Industrial Sulphur. They receive molten sulphur from the refinery. It is pumped to a mixing vessel, which contains specially designed unit. Powdered bentonite along with other agent is fed into the liquid sulphur & a homogenous mixture is obtained by intense stiring. The mixture is then pumped through a uniquely designed filtration system into the roto form system, which consist of a roto form filtered unit & sandvik steel belt puller. The product from the steel belt puller is discharged into the bags which are then palletized for shipping."

23. Palletization means "the transportation and storing of loads by means of putting them onto a wooden frame or pallet" and "using pallets to carry a number of individual’s packages for shipment. How that is done, as indicated hereinabove, is contained in the Sandvik Process System.

24. The Fertilizer Research on Elemental Sulfur fertilizers and their use on crops and pastures published by Kluwer Academic Publishers show as under :-

> "Key words : Bentonite, cube root model, elemental sulphur fertilizers, rate of oxidation, sulphur coated urea.
>
> Introduction
>
> Elemental sulfur (S) is an ideal slow release sulfur (S) fertilizer. It is 100 % nutrient and this restricts the amount of fertilizer required. It is insoluble in water and therefore stable in damp or humid conditions. Although S is unavailable for plant uptake, it is oxidized to the plant-available sulfate-S form by soil micro-organisms. The key to its success as a fertilizer is the rate of oxidation from S to sulfate. Factors which affect the rate of oxidation in soils have been reviewed [51.139]. A cubic model of the oxidation process has been developed [65.142] and is discussed by Warkinson and Blair [143] in this journal."

25. Appellant contends, which has not been denied or disputed that Brimstone 90 is used for agricultural purposes.

26. What meaning should be assigned to Brimstone 90 may be noticed from Encyclopedia of Chemical Technology Fourth Edition at page 255, which states :-

> "Brimstone - see crude sulfur.
>
> "crude sulfur - commercial nomenclature for

> elemental sulfur; may be bright or dark but is free of arsenic, selenium, and tellurium."

27. The dictionary meaning of Brimstone is ‘crude sulfur’.

28. The description in the tariff entry not only covers refined but also unrefined Sulphur. Sub-notes to the tariff entry on the HSN prescribe the scope of the goods falling thereunder, the relevant part whereof is reproduced hereto below:-

> "(4). Unrefined sulphurs recovered as by-products in the purification of coal gas by the scrubbing of sulphurous furnace gases, from sour, natural gas and from the refining of sour crude miner oils, etc. These recovered sulphurs, sometimes referred to as "purified sulphur" or precipitated sulphur", must not be confused with the precipitated sulphur desired in the Explanatory Notes to heading 28.02"

29. Keeping in view the aforementioned background, we may have an analytical look at tariff entry No. 2808.

It principally deals with insecticides, fungicides, herbicides etc. The same is to be put up in forms or packings for retail sale or as preparations of articles. What has been stated by way of example is sulphur treated bands, wicks, candles and fly-papers and not Sulphur

itself. Sulphur treated bands etc. would be different from crude Sulphur or Brimstone 90.

30. The question which, therefore, should have been posed by the Tribunal while differing with the correctness of its earlier decision was as to whether the product is such which can be said to be insecticides, fungicides and herbicides etc. It is also of some significance that the Revenue was of the opinion that the product would come within the Entry 3808 30 40 being plant-growth regulators. The reference was in regard to the applicability of Entry 2503 and/or 3808 30 40. The Tribunal, however, made a new case by opining that it would come within Entry No. 3808 90, which is impermissible in law. [See - Saci Allied Products Ltd., U.P. vs. Commissioner of Central Excise, Meerut : 2005 (183) ELT 225(SC)].

31. The words 'for example' must be given its ordinary meaning. The principle of ejusdem generis noscitur a socis in a case of this nature would be applicable.

32. Sulphur which finds place in the said entry must be used for the purpose of insecticides, fungicides, herbicides etc. It is nobody's case that crude Suphur is used for the said purpose. Only some bands, candles, fly-papers etc., which are only Sulphur treated, are used.

33. The Tribunal itself in its referral order opined :-

> "The Sulphur in this case is packed in 25 kgs. Pack and there is no material for us to conclude that this packaging is for retail sale and, therefore, classfication under heading 3808 cannot be approved. The order of lower authorities also did not bring out very clearly how this packaging is considered by them to be fit for retail sale:"

34. The Tribunal also noticed that the heading 25.03 includes :-

> "25.03 Sulfur of all kinds, other than sublimed Sulfur, precipitated Sulfur and colloidal Sulfur.
>
> The heading include :

(1) crude mineral sulfur occurring in the free state, whether or note concentrated by mechanical processes to remove part of the rocky matter.

(2) Unrefined sulfur extracted from mineral sulfur by melting. This process may be carried out in sulfur kilns (calcaroni) furnaces (Gill furnaces), etc., or may be effected in the deposit itself by forgoing superheated steam through pipes sunk in a bore hole (Frasch process).

(3) Unrefined sulfur obtained by the roasting pyrites or by the treatment of other sulfur minerals.

(4) Unrefined sulfurs recovered as by products in the purification of coal gas, by the scrubbing of sulfurous furnace gases, from sour natural gas and from the refining of sour crude mineral oils, etc. These recovered sulfurs, sometimes referred to as "purified sulfur" or "precipitated sulfur". Must not be confused with the precipitated sulfur dined in the Explanatory Note to heading 28.02

The unrefined sulfurs in the last three paragraphs are sometimes fairly pure. This is especially true of the sulfur produced by the Frasch process which contains such small proportions of impurities that it is practically never refined; it is usually presented in rough lumps or as dust.

(5) Refined sulfur, obtained by rapidly distilling crude sulfur and condensing it in the liquid state; sulfur thus obtained can then be moulded into sticks or cakes, or crushed after solidification.

(6) Triturated sulfur, which is sulfur (impure or refined) in the form of a finely divided powder obtained by grinding and then sieving, either mechanically or by the gas suction. These products are known as "sieved sulfur", Winnowed sulfur", "automized sulfur", etc., according to the process employed and the fineness of the parties.

(7) Sulfur, obtained by the sudden cooling of sulfur vapours without passing through the liquid phase, which is insoluble, particularly in carbon disulphide (sulfur u).

The various types of sulfur classified in this heading are used in the chemical industry (preparation of numberous, sulfur compounds, sulfur dyestuffs, etc.) for vulcanizing rubber, as a fungicide in viticulture, in the manufacture of matches and sufur wicks and for the preparation of sulfur dioxide in the bleaching industries, etc.

The heading excludes sublimed sulfur, precipitated sufur and colloidal sulfur (heading 28.02). Sulfur put up in forms or packings for retail sale as fungicides, etc., falls in heading 38.08."

35. Paragraph 2 of the said heading refers to ‘Frasch process’ which indicates pumping hot water to get slurry out. It is not a permitted

process under Note 1. Only paragraph 4 refers to the product in question. It is not the case of the Revenue that clauses 5, 6 and 7 are attracted to the process which are used in obtaining crude Sulphur.

36. Regarding packaging of 25 kg., the Tribunal itself has noticed :-

> "The present purchase order was made in 25 kg. flat woven PE/PP bags with stickers of one ton Jumbo bags as per requirement. All bags were required to bear flexographic printing in English language. The markings should reflect the following.
> 'Product.....
> Supplier.....
> Origin.....
> Gross/Net weight.....
> Sate of Mfr.....
> Batch No.....
> Imported and Marketed by Deepak Agro Solutions Limited. -
> For Agricultural Use only' "

37. The Tribunal's finding that it was marketed by the importer in retail bags may not be correct as an agriculturist ordinarily would not purchase a bag containing 25 kgs. "Brimstone"

38. In H.P.L. Chemicals Ltd. vs. Commissioner of C. Excise, Chandigarh : 2006 (197) E.L.T. 324 (S.C.) whereupon strong reliance has been placed by Mr. Doabia, this Court was concerned with classification of Salt and 'denatured salt', The Tribunal in that case also held :-

> "...On a study of the process of manufacture we find that certain chemicals are reacted, none of these chemicals are classifiable under chapter 25, thus the Residue in question cannot be a product obtained after chemical processing e.g. (electrolysis). None is a bye-product of a treatment of certain ores. The product is obtained after crystallisation. The product is obtained as a bye-product or Residue while manufacturing Hydrazine. Hydrazine is admittedly a chemical. Thus the Residue in the instant case is nothing but a residue of chemical and allied industries. We note that there is specific heading for Residue of chemical and allied industries under the present chapter Heading 38.24. Since there is specific heading, we need not go to decide the issue by resorting to be Rules for interpretation of tariff. These Rules are attracted only when the heading is not specific or the product is a composite one."

The said finding of the Tribunal was held to be not correct by this Court stating that "Denatured Salt" is specifically included in Chapter Heading No. 25.01.

39. In regard to Chapter Note 1 of Chapter 25 in HSN, this Court observed :-

> "Apart from this, similar chapter notes also appears in Chapter No. 1 of Chapter 25 in HSN which clearly provides that residuary Sodium Chloride left after chemical processing is covered by Heading No. 25.01. Chapter note 2 does not provide anywhere that in order to be covered by Heading No. 25.01 the product must not contain impurities. The bracketed portion in

> Chapter note 2 is being totally misread by the Revenue. The only effect of the bracketed portion is that if the goods in question are washed, such wash may be even with chemical substances eliminating the impurities without changing the structure of the product. It is not as if Chapter note 2 provides that in order to be covered by Heading No. 25.01, all impurities must be removed. Similarly, it is not provided either in Chapter 25 of the Central Excise Tariff or in Chapter note 2 or in HSN that in order to be covered by Heading No. 25.01, the starting material must be salt. Residuary Sodium Chloride left after chemical processing is clearly covered by Heading No. 25.01 as per HSN."

40. We are, therefore, of the opinion that the Tribunal was not correct in its view.

41 For the aforesaid reasons the impugned judgment cannot be sustained and it is set aside accordingly. The appeal is allowed with no order as to costs.

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.....J.
(S.B. SINHA)

.....
.....J.
(V.S. SIRPURKAR)

New Delhi
May 8, 2008