

CASE NO.:
Appeal (civil) 5646 of 1999

PETITIONER:
Commissioner of Central Excise, Pune

RESPONDENT:
Abhi Chemicals & Pharmaceuticals Pvt. Ltd.

DATE OF JUDGMENT: 21/02/2005

BENCH:
S.N. Variava, Dr. AR. Lakshmanan & S.H. Kapadia

JUDGMENT:
J U D G M E N T

Dr. AR. Lakshmanan, J.

This civil appeal is directed against the judgment and final order No. 243/99-D in Appeal No. E/2546/93-D dated 11.03.1999 passed by the Customs, Excise & Gold (Control) Appellate Tribunal (for short 'the CEGAT') at New Delhi.

The respondent is the manufacturer of Dailymix. Four show cause notices were issued alleging that they had mis-classified their products under C.S.H. No. 2302.00 and cleared at nil rate of duty. The show cause notices added that these products are intermixture of vitamins and, therefore, correctly classifiable under C.S.H. No. 2936.00 and as such chargeable to duty at the rate of 15% advance (BED) + 5% BED (SED).

The Assistant Commissioner in his order dated 24.01.1991 held that the products Dailymix and Briples were correctly classifiable under Chapter Sub-heading 2302.00. He, however, confirmed the demand of Rs.2,04,129.18. In respect of 'RECOVIT' with which we are concerned in this appeal, he held that it is classifiable under Chapter Sub-heading 2936.00 as animal feed supplement. The conclusion of the Assistant Commissioner was arrived at on the basis of Dy. Chief Chemist's report which stated that Recovit may be considered as an organic chemical (intermixture of vitamins) marked as Annexure-P2. The assessee filed an appeal before the Commissioner (Appeals) who, by his order dated 27.07.1993, set aside the order of the Assistant Commissioner and held that Recovit was correctly classifiable under Chapter Sub-heading 2302.00 as animal feed. The revenue filed an appeal against the order of the Commissioner (Appeals) which has been decided by the CEGAT vide its order dated 11.03.1999. The Tribunal has dismissed the appeal of the Department relying upon the decision of a larger Bench of the Tribunal in the case of Tetragon Chemie (P) Ltd. & Ors. Vs. CCE, Bangalore & Ors. reported in 1999 (82) ECR 98 dated 13.11.1998. The Tribunal has further held that the contention of the revenue that Recovit is merely a mixture of vitamins alone is not borne out on facts. The Tribunal held that such a product, however, if it contains other things such as anti-oxidants, solvents, stabilisers and used as animal feed will not be classified under Chapter sub-heading 2936, but will be correctly classified under Tariff heading 23.02. Aggrieved by the order of the Tribunal, the Revenue has come up in appeal.

As stated earlier, we are concerned in this appeal in regard to the classification of a product known as Recovit. Now the question is whether animal feed (Recovit) is classifiable under Tariff Heading 29.36 as intermixture of vitamins or under Tariff heading 23.02 as animal feed.

We heard Mr. R.Venkataramani, learned senior counsel for the appellant and Mr. Makarand D.Adkar, learned counsel for the respondent.

Learned senior counsel appearing for the appellant invited our attention to the show cause notices issued and the orders passed by all the authorities including the Tribunal and submitted that both the Commissioner (Appeals) and the CEGAT have totally ignored the Dy. Chief Chemist's report dated 06.12.1990 in respect of Daily mix, Recovit etc. and that Recovit should be treated as animal feed supplement containing vitamins and minerals. He would further submit that both the Commissioner (Appeals) and the CEGAT have erred in placing total reliance on the judgment of Tetragon Chemie (P) Ltd. (supra). According to the learned senior counsel, the product in that case consists of a mixture of vitamins, minerals and various other ingredients which is not similar to the product 'Recovit' as the same consists of only intermixtures of vitamins and, therefore, it is correctly classifiable under Chapter Sub-heading 2936.00. Before proceeding further in considering the submission made by learned senior counsel for the appellant, it is better to reproduce both the entries.

"Heading No.	Sub-heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
23.01	2301.00	Residues and waste from the food industries, including bagasse, other waste of sugar manufacture and oil cakes	12%
23.02	2302.00	Preparations of a kind used in animal feeding, including dog and cat food	Nil

XI. PROVITAMINS, VITAMINS AND HORMONES

29.36	2936.00	Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent"	15%
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The assessee has declared these three products in that classification list which had been approved by the Assistant Collector. They are:-

- Daily mix :- \005..
- Recovit :- It is a mixture of vitamins but it contains stabilisers and anti-oxidants also, in addition to solvents.
- Briplex :- \005..

According to the assessee, the classification list for these products has already been approved by the Assistant Collector and, therefore, the Assistant Collector is not competent to change his own decision. The assessee had claimed the classification of these products under Chapter sub-heading 2302 as animal feed supplement and the Department had claimed that the correct classification would be under Chapter sub-heading 2936 as organic chemicals. It is stated that the product is used as animal feed only and is meant for consumption by animals. It is not fit for human consumption. It basically consists of mixture of vitamins, minerals, anti-oxidants and stabilisers. The Assistant Collector has wrongly classified the product under Chapter 29 as intermixture of vitamins merely because it consists of solvents, stabilisers and anti-oxidants. It was further stated that once powder is meant for use as an animal feed supplement, it should be classified under Chapter Sub-heading 2302. In our view, the products which have mixture of vitamins and minerals with addition of other ingredients and which are used for animal feed and are not fit for human consumption are to be classified as animal feed supplement under Chapter Heading 2302 and not under Chapter 29.

Learned senior counsel for the Department sought to place reliance upon the report of the Dy. Chief Chemist which has been annexed. It has

come on record that the product Recovit basically consists of mixture of vitamins, solvents, anti-oxidants and stabilisers. It has also come on record that Recovit is used as animal feed only and is being consumed by animals only. It is a finding of fact recorded by the Commissioner (Appeals) and also by the Tribunal. It may not be out of place to mention that the composition of product was argued before the Tribunal. However, the Department could not contradict or dislodge the findings recorded by the Commissioner (Appeals). Both the Commissioner (Appeals) and the Tribunal examined the facts of the case and decided the matter in favour of the assessee.

Our attention was invited to the reply affidavit filed by the assessee in this appeal. It is seen that a trade notice No. 34/1990 was issued by the Collector of Central Excise and Customs, Pune whereby it was clarified by the Department that the product having vitamins, stabilisers, anti-oxidants and solvents merits classification under Chapter 29 Heading 29.36 and not under Heading 23.02 of the schedule to the Central Excise Tariff Act, 1985. Apparently based on the above trade notice, a show cause notice was issued which led to the present appeal. Trade notice No. 34 of 1990 reads as follows:-

"OFFICE OF THE COLLECTOR OF CENTRAL EXCISE & CUSTOMS, PUNE
PMC'S COMMERCIAL BUILDING, HIRABAUG, TILAK ROAD, PUNE \026 2.

PUNE CENTRAL EXCISE & CUSTOMS, COLLECTORATE
TRADE NOTICE NO. 34 / 1990
(1/Ch. 23 / 90)

Sub :- Central Excise Classification of intermixtures of Vitamins used as animal feed supplements whether classifiable under Heading 23.02 or in Chapter 30 or Chapter 29 \026 regarding.

A doubt has been raised regarding the correct classification of products which consists of only different vitamins in definite proportions and no other ingredients except the solvents or stabilisers or anti-oxidants. Such products are generally used as animal feed supplements. The doubt raised is whether the such products which are mixtures of vitamins are classifiable under heading 23.02 or as medicaments under heading 30.03 or an inter mixture of vitamins under heading 29.36.

The matter has been examined and it is observed that such animal feed supplements which are just inter mixture of vitamins only and that there are no other ingredients except solvents, stabilisers or anti-oxidants are specifically covered under heading 29.36 of C.E.T. as inter mixture of vitamins. Even though they are used as animal feed supplements, they can be classified under heading 23.02 as preparations of kind used in animal feeding, because this is a general heading. Inter mixture of vitamins are specified in so many words in heading 29.36 and accordingly products of the type referred above are correctly classifiable under heading 29.36.

All Trade Associations and Chambers of Commerce and Industries are requested to bring the contents of this Trade Notice to the notice of their member constituents.

Hindi version is enclosed.

ATTESTED:

SUPERINTENDENT (TECH)
C. EX & CUS. PUNE \026 2

F.No. V.Ch. 23 (8)2/TC/90

Sd/-
(L. Joyaseelan)
Additional Collector
Central Excise & Customs Pune.
Pune, the 30th June, 1990."

Trade Notice No. 34 of 1990 seems to have been issued on the basis of the Board Circular No. 1 of 1990 dated 01.01.1990. The Central Board of Excise and Customs vide its circular No. 188/22/96-CX dated 26.03.1996 has clarified that when premix contains in addition to active substances, stabilisers, anti-oxidants etc. and if such preparations are of a kind used in animal feeding the same is classifiable under Heading 23.02. The said circular reads as follows:-

"Animal Feed Supplements
Circular No. 188/22/96-CX
Dated 26/3/96
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs, New Delhi

Subject: Classification of Animal Feed Supplements under Sub-heading No. 23.02 or 29.36 or Chapter 30 \026 Instructions \026 Regarding.

It has been brought to the notice of the Board that a large number of products with supplements'/additives/premixes etc. but are being classified either under heading 23.02 or heading 29.36 or under Chapter 30 of the Central Excise Tariff in various Commissionerates.

2. It would be recalled that in its Circular No.1/90 dated 1.1.1990, issued from F.No.15/20/89-Cx.I, Board had observed that animal feed supplements which are just inter-mixtures of vitamins only without other ingredients, except solvents, stabilizers or anti-oxidants, cannot be classified under heading 23.02 even though they are used as animal feed supplements. Board had observed that such inter-mixtures of vitamins are specifically covered under heading 29.36.

3. Trade interests have however represented that animal feed supplements use vitamins, pro-vitamins, amino-acids, anti-biotics, 'Coccidiostats' etc. in very small quantities (micro-quantities) and that the feed supplements contain other organic and in-organic feed ingredients as well. They have also represented that such micro-nutrients do not have any independent identity as pure chemicals, that they cannot be easily separated into individual pure chemicals: nor do they conform to standard laid down for medicaments. As such, it is claimed that animal feed supplements cannot be classified under Chapter 29 or Chapter 30 of the Central Excise Tariff merely because they contain the said micro-nutrients.

4. The matter has been further examined by the Board in consultation with the Chief Chemist, Central Revenue Chemical Laboratory (CRCL), New Delhi.

5. Heading 23.02 of Central Excise Tariff i.e. "preparations of a kind used in animal feeding including dog and cat food" corresponds to Heading 23.09 "Preparations of a kind used in animal feeding" of the HSN. As per Explanatory notes under Heading 23.09 of the HSN, the said heading covers complete animal feeds, supplementary animal feeds and preparations for use in making the complete feeds or supplementary feeds. The preparations for use in making complete feeds or supplementary feeds are known in the trade as "premixes". These preparations are compound composition consisting of a number of substances \026 each type of these substances being present in the 'premix' in varying proportions to serve a particular purpose. The explanatory notes under Heading 23.09 of HSN (pp, 177-178) further indicate that pre-mixes contain, in addition to the active substances (vitamins, amino-acid, anti-biotics, coccidiostats etc.) and stabilizers, anti-oxidants etc., certain organic or in-organic nutritive substances known as carriers which help in homogeneous dispersion and mixing of the active substances in the compound feeds to which the preparations referred to in the said explanatory notes are added.

6. In this view of the matter, it would appear that preparations containing the active substances (vitamins or provitamins, amino-acid, antibiotics, coccidiostats etc.) along with the said carriers would fall under Heading 23.02 of the CET provided such preparation are of a kind used in animal feeding. It may however be noted that Heading 23.098 of the HSN excludes products of Chapter 29 and medicaments of Heading 30.03 or 30.04. Hence, while deciding the classification of the products claimed to be animal feed supplements are ordinarily of commonly known to the trade as products for a specific use in animal feeding.

7. In view of the foregoing discussions, the classification of each product being claimed as animal feed supplements may be decided on merits in the light of the above and in accordance with the explanatory notes to Heading 23.09 or the HSN read with Chapter Note 1 of Chapter 23 of the CET.

8. Board's Circular No.1/90 dated 1.1.1990 stands modified to the extent indicated above.

F.No.23/1/94-CX.1
India"

Sd/-
(S.C. Bhatia)
Under Secretary to the Govt. of

It may be extremely relevant to point out that the Board's Circular No. 1 of 1990 dated 01.01.1990 stands modified accordingly. Similarly, the Dy. Director General of Foreign Trade vide its policy Circular No. 44 (RE 99/1997-2002 dated 25.11.1999 has re-confirmed that if such pre-mixes are for use exclusively for animal feed as supplements, the same continued to be classified under Heading 23.09 of the Customs Tariff Act, 1975. Policy circular No. 44 runs as follows:-

"POLICY CIRCULAR
No.44(RE-99)/1997-2002
Dated 25th November, 1999

Attention is invited to Policy Circular No. 22(RE-99)/1997-2002 dated 27.7.99, regarding classification of animal feed supplements.

In this regard it is further clarified that 'Pre-mixes' containing vitamins or pro-vitamins, aminoacids, coccidiostats etc. for use exclusively in animal feed as supplements continue to be classified under the Heading 23.09, as per Explanatory Notes to Harmonized Commodity Description and coding system. This issues with the approval of DGFT.

Sd/-
(O.P. Hisaria)
Deputy Director General of Foreign Trade

F.No.01/89/180/00072/AM99/PC I-A
Dated 25th November, 1999
Issued by:
Ministry of Commerce
Directorate General of Foreign Trade
New Delhi."

It may also be relevant to point out that on 27.09.1990, the Central Excise Department has drawn a sample of the product Recovit and the same was sent for chemical analysis to the Deputy Chief Chemist at Mumbai. While drawing the sample, a test memo was prepared by the Inspector under F. No. BR II/CL/Abhi/90 dated 27.09.1990. It can be seen from the said test memo that the said product Recovit had in addition to the intermixture of vitamins other ingredients such as anti-oxidants, solvents and stabilisers and that the product prepared cannot, therefore, be called as only intermixture of vitamins.

The said test memo reads as follows:-
"OFFICE OF THE SUPERINTENDENT OF CENTRAL EXCISE,
BHOSARI RANGE II, BHOSARI, PUNE \026 411 039
TEST MEMO

F.No.BR II/CL/ABHI/90/
The Deputy Chief Chemist,
Central Excise Laboratory,
Estrella Batteries Compound,
Dharawi Road, Matunga,
BOMBAY \026 400 019.

Bhosari, the 27.09.1990

Dear Sir,

A sample of Recovit has been sent by hand delivery dated 27.09.90 for test.

1. Name of the factory & address : Abhi Chemical & Pharmaceutical
Pvt. Ltd. T36\02638, MIDC, Bhosari, Pune\02626.

2. Description of sample : Animal Feed Supplement \026 Recovit.

3. Identification mark, if any : Batch No. 338-A.
 4. Date of Drawal and Batch No. : 27-9-90 Batch No.338-A
 5. No. of containers : 4 Nos.
 6. Quantity : 100 ml.
 7. The sample is to be tested for : The party has classified this product under Chapter Heading 2302.00. The classification may please be confirmed.

8. Other information

(i) Chemical nature & %age of ingredients in the product : As per separate sheet attached.
 (ii) Brief outline of manufacturing Process : As per separate sheet attached.
 (iii) Mode of its application (and use) : Animal feed supplement
 (iv) Any printed literature if Available may be sent. : Label enclosed.

For Abhi Chemical & Pharmaceutical Pvt. Ltd. Sd/-
 (Authorised signatory) Sd/-
 Inspector of Central Excise
 Bhosari Range II, Bhosari
 PUNE \026 39

DECLARATION

Four representative samples of Recovit at Abhi Chemical & Pharmaceutical Pvt. Ltd. have been drawn by the Inspector of Central Excise, Bhosari Range II, Bhosari, Pune \026 411039 and these have been sealed in our presence. One of the sealed samples have been given to us. We are perfectly satisfied with the manner of sampling.

For Abhi Chemical & Pharmaceutical Pvt. Ltd.
 Sd/-
 (Authorised signatory)"

"CHEMICAL NATURE AND PERCENTAGE OF INGREDIENTS IN RECOVIT AS FOLLOWS:

S.No.	Name of ingredients	Chemical nature	% in product
1.	Tween \026 80 (Polysorbate)	Brownish yellow oily liquid	34.97%
2.	Bulytated Hydroxy Anisol	Crystalline powder	0.02%
3.	Bulytated Hydroxy Toulene	Crystalline powder	0.02%
4.	Vitamin A Palmitate	Yellow oily substance	2.57%
5.	Vitamin B3	White powder	0.01%
6.	Vitamin B 12	Red orange powder	0.0026%
7.	Vitamin E Acetate	Pale yellow golden Viscuss liquid	4.37%
8.	Glycerine	Colourless viscuss liquid	26.85%
9.	Sodium Ascorbate	White crystalline powder	9.62%
10.	Gracial Acetic Acid	Colourless liquid	0.34%
11.	Water		21.23%

OUTLINE OF MANUFACTURING PROCESS

Step 1. Mix Vit A, Vit E, Vit D3, BHA & BHT completely in vessel.
 Step 2. Warm Tween \026 80 upto 40 degree C and add to it mixture No.1 in a thin stream. Stirr it well.
 Step 3. Add Glycerine in a think stream with stirring in 2.
 Step 4. Take 60 Ltrs water (D'mineralised) add to it Sodium Ascorbate dissolve it completely adjust FH to 6.0 with Glacial Acetic Acid add this soln. To main soln. Stir for 15 minutes. And filter then add vit B12 (Prepare with

small qty. of D.M. water and add to main soln.) Product is kept over night & ready for filling.

For Abhi Chemical & Pharmaceutical Pvt. Ltd.

Sd/-

(Authorised signatory)"

The order passed by the larger Bench of the CEGAT dated 13.11.1998 was also placed before us. We have gone through the same and we approve the classification laid down by the CEGAT in regard to the subject-matter of controversy and the principles laid down therein. In fact, the said order of the larger bench was challenged before this Court. This Court in Collector of Central Excise, Bangalore vs. Tetragon Chemie P. Ltd. reported in 2001 (132) E.L.T. 525 (Three-Judge Bench) upheld the view taken by the Tribunal that the products in question are animal feed supplements and that the animal feed supplements were rightly included in Tariff Item 23.02 being preparation of a kind used in animal feeding including dogs and cats food. The Bench has agreed with the conclusion of the Tribunal that even food supplements like the products of the respondents therein which are used in animals feeding would fall under Heading 23.02. This Court while affirming the decision of the Tribunal dismissed the civil appeals.

For the foregoing reasons, we are of the opinion that the contentions in the civil appeal are apparently contrary to the stand taken by the Department in the circulars mentioned supra and we, therefore, have no hesitation in dismissing the appeal as bereft of any merits. However, we say no costs.