

**Borax Morarji Ltd. Vs. the Commissioner of Central**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Jun-21-2004

**Reported in :** (2004)(97)ECC421

**Judge :** K Kumar, A M Moheb

**Appellant :** Borax Morarji Ltd.

**Respondent :** The Commissioner of Central

**Judgement :**

1. This appeal is against the order of the Commissioner (Appeal) who in the impugned order confirmed the demand for duty of Rs. 3,22,901/- and an equal amount of penalty under Section 11 A (1) and 11 AC of Central Excise Act respectively.

2. The appellants manufacture excisable goods falling under Chapter heading 28, 29 & 39 Central Excise Tariff Act 1985. The dispute pertains to a product called 'AGRIBOR' which was classified by the appellants as 'other fertilizer' falling under chapter sub-heading 31.05 of Central Excise Tariff Act In their classification declaration dated 1.2.99. The appellants claimed the benefit of Notification No.5/99 dated 1.3.99 under which the product attracts 'Nil' rate of duty with effect from 1.3.99. The Department contends that the product did not merit classification under 31.05 in view of chapter note 6 of chapter 31 read with Boards' circular No. 392/25/98 CX dated 19.5.98 as it did not contain the requisite elements of nitrogen, phosphorous or potassium (N P or P). This contention of the Department

was confirmed by chemical text. The product was found to be Borax, a chemically defined product falling under chapter heading 28.40 of Central Excise Tariff Act. The allegation is that the appellant misclassified the goods in their C.L declaration with an intent to evade duty during the period 12/99 to 10/2000. The appellant accept that their goods fall under chapter 28. The only dispute therefore is whether larger period of limitation can be invoked against them while demanding differential duty. We proceed to examine the issue whether larger period of limitation can be invoked in the facts and circumstances of the case.

The other contention of the appellant is that in case the decision is against them they may be allowed to avail of MODVAT credit on the inputs that have gone into the making of their product.

4. The Ld. Advocate Shri J.C. Patel contended that prior to the issue of the above said Board's clarification; the appellants were classifying the goods as 'other fertilizer', under chapter 31.05 In view of the Boards' earlier circular No. 79/79/94-CX dated 21.11.94.

This circular clarified that Micronutrients listed under Sr. No. 1(F) of Schedule 1 part (A) of the Fertilizer (control) order 1985 and their mixtures (with or without NP or K) as notified by the State or Central Government are appropriately classifiable under heading 31.05 as 'other fertilizers'. This circular was however withdrawn by the Board by their circular dated 19.5.98 in which it is clarified that a notification under Fertilizer (control) order is irrelevant for deciding classification under Central Excise Tariff Act and regardless of such notification (issued by State or Central Government) the appropriate consideration should be whether or not the micronutrients in question is a separate chemically defined compound or not. The appellant, it was argued, did not notice the change in the department's stand and continued to classify the product under 31.05 claiming the benefit of notification No. 5/99 Central Excise. It is contended that under these circumstances mis-declaration can not be alleged against them, and therefore the show cause notice is time barred.

5. The Ld. SDR Shri Vimlesh Kumar contended that the appellant classified their product under 31.05 taking advantage of the Boards' clarification dated 21.11.94

even though they were aware of the fact that the above mentioned circular was withdrawn and revised T.N. was issued to that effect. Once classification list to be filed by assessee are done away and a classification declaration was introduced, the burden to classify the goods correctly is cast on the assessee. Such a burden can not be discharged by an assessee claiming ignorance. Further the concerned Commissionerate issued a Trade Notice clarifying the correct position in regard to classification of micronutrient by T.N.No. 37/C-Ex. Dated 13.07.98. Every assessee is expected to be aware of such a position. When the appellant chose to declare his product in a particular manner In order to claim the benefit of a notification he should also bear the consequences of such a declaration. The department has rightly invoked the larger period of limitation when it was found that; the product 'AGRIBOR' did not contain N.P. or K as prescribed in the chapter note.

6. We have considered the rival contentions. In regard to the appellants' contention that he did not mis-declare his product we observe that the appellant declared his goods as other fertilizer falling under chapter heading 31.05 claiming the benefit of notification No. 5/99. It is not possible to agree with the appellant's contention that he did so out of ignorance. If he was aware of the Boards' earlier clarification In the matter of classification of his product it should be reasonably presumed that he was aware of the latter circular which held that the product in question is classifiable under chapter 28 Central Excise Tariff Act. The appellant has mis-declared the classification of his goods in as much as he claimed that: his product satisfies the test prescribed under chapter note 6 of chapter 31.

7. We also observe that the Commissioner (Appeals) confirmed only Rs. 3,22,901/- as against Rs. 3,84,406/-originally demanded but ruled that penalty under Section 11 AC is imposable equal to the amount of duty sought to be evaded. The facts and circumstances of the case, in our opinion, do not call for such maximum penalty. Having regard to this we reduce the penalty to 25% of the amount of penalty determined by the Commissioner (Appeals).

8. The issue whether the appellant is entitled to claim MODVAT credit on the inputs that have gone into production of the final product has not been examined

by the lower appellate authority properly. We are therefore inclined to remand the case In so far as it relates to admissibility of MODVAT credit. We direct that the issue be examined in the light of provisions of Rule 57E (3) of Central Excise Rules.

b) Penalty is reduced to 25% of the amount directed by the Commissioner {Rs. 322901/4 = Rs. 80,725/- c) The lower appellate authority is directed to decide the issue of admissibility of MODVAT credit on the inputs.

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