

CULPABLE HERBICIDE

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The Central Board of Excise & Customs, vide its Circular No 26/90 – CX.3 dated 26.06.1990, had clarified that “Micro-Nutrients” would be appropriately classifiable under heading 3808 of CETA 1985 as “Plant Growth Regulators”. Subsequently, the Board, vide its Circular No 79/79/94 – CX dated 21.11.1994 withdrew the earlier Circular No 26/90- CX 3 dated 26.06.1990 and it had been clarified that the “Micro-Nutrients” listed under Serial No.1 (F) of Schedule 1 Part (A) of the Fertilizer (Control) Order, 1985, and their mixtures (with or without N,P,K), as notified by the Central Government or the State Government would be appropriately classified under heading 3105 of CETA 1985 as “Other Fertilizers”. Subsequently, the Board vide its Circular No. F.No. 106/1/98/ CX 3 dated 19.05.1998, modified the above Circular No.79/79/94 – CX dated 21.11.1994 and clarified that:

- If the micro-nutrient is a separate chemically defined compound then it will be classified under chapter heading 28/29 of CETA 1985/2005, as the case may be.
- If not so, and if in accordance with Note 6 to Chapter 31, it contains N, P or K, it will be classifiable under chapter heading 31.
- Notification under Fertilizer (Control) Order is irrelevant in deciding the classification under Central Excise Tariff.

First let's see as to whether the “micro – nutrients” would merit classification under Chapter heading 28 or 29 of CETA, 2005 as separate chemically defined compounds.

Basically, in Chemistry, all substances are classified into three basic structures, namely, Elements, Compounds and Mixtures.

ELEMENTS:

- An Element is a singular substance (Homogenous material) and is made of only one kind of atom. The Elements are listed in the Periodic Table.
- **Example:** Aluminum (Al), Hydrogen (H), Calcium (Ca), Mercury (Hg) etc.

COMPOUNDS:

- A Compound is obtained when two or more elements chemically react and combine in a definite ratio.
- **Example:** Water (H₂O), Salt (NaCl), Ammonia (NH₃) etc.

MIXTURES:

- A Mixture is obtained when two or more elements / compounds blend together without combining chemically. Mixtures are generally separated by physical or mechanical means. These Mixtures can be either Heterogeneous or Homogenous.
- **Example:** Vinegar, Soil, Rock, Limestone etc.

Kind reference is also drawn to the Explanatory Notes of the Harmonised Commodity Description and Coding System (hereinafter referred to as HSN) of Chapter heading 29, wherein, the term "Chemically Defined Compounds" is explained as under:

- *"A Separate Chemically defined Compound is a substance which consists of one molecular species (example covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a definitive structural diagram. In a crystal lattice, the molecular species corresponds to the repeating unit cell."*

- *Separate Chemically defined Compounds containing other substances deliberately added during or after their manufacture (including purification) are EXCLUDED from this Chapter."*

Micronutrients are a MIXTURE of various chemical compounds and elements, namely, Iron (Fe), Manganese (Mn), Copper (Cu), Zinc (Zn), Boron (B), Molybdenum (Mo), etc along with other compounds and hence cannot be considered as CHEMICALLY DEFINED COMPOUNDS as per the above definition, as the said product does not contain a single molecular species but consists of more than one molecular species and hence the "micronutrients" would summarily fail to answer the definition of a Separately Defined Chemical Compound to be classified either under Chapter Heading 28 or 29 of CETA, 2005.

Now, it has to be seen as to whether the impugned Micro-Nutrients would merit classification as "Other Fertilizers" under Chapter heading 3105 of CETA 1955/2005 or as "Plant Growth Regulators" under chapter heading 3808 of CETA 1985/2005.

The Board has clarified that "Micro-Nutrients" satisfying Note 6 of Chapter 31 would merit classification under Chapter 3105 of CETA 1985/2005 as "Other Fertilizers".

Note 6 to Chapter reads as under:

"For the purposes of heading 3105, the term "Other Fertilizers" applies only to products of a kind used as fertilizers and containing, as an essential constituent, at least one of the fertilizing element Nitrogen, Phosphorus or Potassium."

Subjecting the impugned "Micro-Nutrients" to the above Note 6 to Chapter 31, it has to be found out, as to whether the same is used as fertilizer and it contains

any one of the fertilizing element namely Nitrogen, Phosphorous or Potassium, as an essential ingredient.

It is a fact that the "Micro-Nutrients" are sold and purchased as "fertilizers" in the trade. Now, it has to be seen that, whether the impugned "Micro-Nutrients" contain any of the fertilizing element such as Nitrogen, Phosphorous or Potassium. If it contains any of the above fertilising elements, then it has to be seen that, whether the fertilizing element, namely, Nitrogen present in the impugned "Micro – Nutrients", is an "essential ingredient" or not.

Reference is drawn to the decision of the Hon'ble Supreme Court in the case of **CCE, Bangalore Vs Karnataka Agro Chemicals as reported in 2008 (227) ELT 12 SC**. In the said case, the Hon'ble Apex Court has remanded the issue to the Adjudicating Authority to find out that whether the addition of mere 0.31% of Nitrogen to the product would render them as "Other Fertilizers" under Chapter Heading 3105 of CETA 1985/2005 or it is only a pretence to get out of the classification as "Plant Growth Regulators". In the said case, the Hon'ble Apex Court has observed that only a meagre percentage of 0.31% of Nitrogen was contained in the product in dispute, which appears to have failed the test of being an "Essential Constituent" in terms of Note 6 to Chapter 31.

With the above ratio, the department is going haywire in interpreting the presence of the fertilising element, namely N, P or K, as a predominant percentage in the micro nutrients would only make it as an essential constituent and not otherwise.

Now to the crux of this piece. Note 6 of Chapter 31 mandates only that the fertilising element, namely N,P or K shall be an "essential constituent" and do not propose any quantitative presence. If in a pot of milk, .00001% of cyanide is

enough to be an “essential ingredient” to poison the whole pot of milk, how the percentage of presence would determine the essentiality of the ingredient?

In our opinion, like in the case of Ujagar prints, the Apex Court should clarify the Karnataka Agro decision *supra*, or otherwise, there is a threat of “culpable herbicide” by the department!!!

Before Parting ...

A perusal of Chapter heading 3808 would reveal that the “Plant Growth Regulators” classified in the said Chapter heading are intended to alter the natural life processes of the plant. Parallel could be drawn to the Hormone Injections for human lives, whereby, such injections are administered to alter the natural metabolism and artificially increase or decrease the metabolism. The impugned “Micro-Nutrients” are not intended to alter the life processes of a plant but are added to the soil or foliage to supply nutrients and promote their natural growth and thus, in our opinion, cannot be considered as “Plant growth regulators” under Chapter heading 3808 of CETA 1985 / 2005.