PETITIONER:
M/S SUN EXPORT CORPORATION, BOMBAY

Vs.

RESPONDENT:
THE COLLECTOR OF CUSTOMS, BOMBAY & ANR

DATE OF JUDGMENT: 07/07/1997

BENCH:
S.C. SEN, K. VENKATASWAMI, V.N. KHARE

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

K. Venkataswami, J.

The appellant as well as the question of law is common in all these appeals. For that reason. the Customs. Excise and Gold (Control) Appellate Tribunal. New Delhi (hereinafter referred to as the 'Tribunal') has disposed of the appeals by a common order. Hence, these appeals are disposed of by this common Judgment.

Brief facts leading to the filing of these appeals are the following:

The appellant-Corporation imported six consignments of goods (Pre mix of vitamin Ad-3 Mix (feed grade, at Bombay and seven consignments of similar goods at Calcutta. These consignments were assessed to duty under the heading 29:01/45(17) of the Customs Tariff ACT, 1975 read with Item 68 of Central Excise Tariff Act. The Corporation paid the duty. Later on it claimed refund of the duty paid as countervailing duty contending inter alia that the goods imported were classifiable under item 23:01/07 as Animal Feed' and as per Notification 234/82 CE dated 1.11.82, those goods were exempted from levy of duty. Accordingly. Applications were filed for refund of the countervailing duty/additional duty Paid on such imports. The concerned Assistant Collector (Refunds) rejected the claim of the appellant holding that the goods imported were assessable to duty under the heading 29.01/45(17) of the then prevailing First Schedule to the Customs Tariff Act read with Item 68 of the Central Excise Tariff and. therefore, the exemption notification dated 1.11.82 was of no avail to the corporation.

Aggrieved by The rejection of refund applications the appellant preferred separate appeals one set before Collector of Customs (Appeals), Bombay, and another set before Collector of Customs (Appeals), Calcutta. The appellate authority at Bombay accepted the claim of the appellant and granted the relief holding the goods imported were in the nature of 'Animal Feed Additives, and as such fall under the heading 23: 01.07. However, the appellate authority at Calcutta rejected the claim of the appellant and dismissed the appeal accepting the view of Assistant

Collector (Refunds).

Against the order of the appellate authority at Calcutta the appellant preferred an appeal before the Tribunal and the Revenue preferred appeals before the Tribunal against the orders of the appellate authority at Bombay.

The Tribunal while unanimously holding that the goods imported fell under heading 29.01/45 (17) Of the Customs tariff Act differed on the question of exemption claimed by the appellant. The minority view was That the appellant was entitled to the benefit of exemption claimed by the appellant while the majority held otherwise.

Aggrieved by the common order Of the Tribunal of these appeals are preferred. Mr. Ramesh Singh learned counsel appearing for the appellant - corporation, supporting the minority view of the Tribunal invited our attention to a judgment of the Bombay High Court in Glindia Ltd. Vs. Union of India- 1988 (36) E.L.T. 479 wherein an identical question arose for consideration and the learned Single Judge took a view favourable to the assessee. In other words, the earned Judge held that animal feed supplements' would fall under the purview of Exemption Notification No.55/75-C.E. similar to the one under consideration.

The learned Additional solicitor General, Mr. K.N. Bhat on the other hand supporting the majority view of the Tribunal. submitted that a similar view taken by the Tribunal was challenged in appeal in this Court which was dismissed in limine at the admission stage. He further submitted that the view taken by the majority was the correct one.

In order to appreciate the rival submissions, it is necessary to set out the relevant Tariff Items as well as the relevant portion of the Exemption Notification. They are as follows:

23.01/07	Residues and waste or food industries (for example, inedible meat or fish flour or meals, milling residues, waste from sugar, brewing and distilling and starch industries; oil-cake and other residues from oil-extraction (except dregs) products of vegetable origin of a kind used for animal food, not elsewhere specified or included; sweetened forage and other prepared animal fodder.	
29.01/45	Organic compounds including antibiotics, Hormones sulpha drugs, Vitamins and other products specified in Notes 1 and 2 to this chapter.	
	.. .. ..	
	.. .. ..	
	17. Vitamins	100% 94%

The relevant Exemption Notification 234/82 dated 1.11.82 read as follows:

Exemption to certain specified goods. In exercise of the powers

conferred by sub-rule (I) Of rule of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) NO. 104/82-Central Excise, dated the 28th February, 1982, the central Government hereby exempts goods of the description specified in the Schedule hereto annexed and falling under item No.68 of the First Schedule to the Central Excises and salt Act, 1944 (I of 1944), from the whole of the duty of excise leviable thereon under section 3 of the said Act.

... ...

10. Animal feed including compound livestock feed.

This Notification was subsequently amended by bringing into new clause (10), which reads as follows:

"In exercise of the powers conferred by sub-rule (I) of rule 8 of the Central Excise Rules, 1944 the central Government hereby makes the following further amendments in the Notification of the Government of India in the Ministry of Finance (Department of Revenue No. 234/82-Central Excises, dated the 1st November, 1982, namely:-

In the said notification:-

(a) in the schedule, for serial No. 10 and the entry relating thereto, the following serial No. and entry shall be substituted, namely:

"10. Animal feed including compound live stock feed, animal feed supplements and animal; feed concentrates. "

(b) The Explanation shall be number ed as Explanation I, and after Explanation I as so numbered, the following Explanation shall be inserted, namely :-

" Explanation II -- For the purpose of this notification, the expression- (i) "animal feed supplements means an ingredient or combination of ingredients, added to the basic feed mix or parts thereof to fulfil a specific need, usually used in the micro quantities and requiring careful handling and mixing; (ii) "animal feed concentrates " means a feed intended to be diluted with other feed ingredients to produce complete feed optimum nutrient balance.

(Notification No. 6/84-C.E. dated 15.2.84)

Before proceeding further. it is necessary to state

that there is no dispute that the goods imported were pre-mix of vitamin AD-3 (feed grade) not for medicinal use. Again there is no dispute that the said pre-mix of vitamin AD-3 (feed grade) is an animal feed supplement. Even the majority view of the Tribunal proceeded on that footing. But they took the view that animal feed supplements by themselves are not animal feeds' for qualifying exemption under the notification dated 1.11.82.

Now, the question is whether the 'animal feed' supplement would fall under the Exemption Notification dated 1.11.82. As noticed earlier similar question was considered by the Bombay High Court and the learned Judge Expressed the View as follows :

> "The preparations in question are used to supplement animal feed. Sometimes animal feed or poultry feed is already fortified with these vitamins when sold. Sometimes, however, farmers prefer to add the vitamins either to animal feed or toe poultry feed separately. These products strengthen the nutritional quality of' animal' feeds. Thus, for example, items like Bournvita or Complan also acid nutrients to milk. But they are not for that reason, medicines. In a general sense every kind of nourishment strengthens the body against ailment. But such nourishment cannot be considered as a medicine or a drug. The two products are also known in the trade as animal feed supplements and they are sold by the suppliers of animal feed.
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> It is next contended by the respondent that even if the two products fall under Tariff item 68 the benefit of the exemption notification no.55 of 1975 cannot be given to these products because these products are not animal feeds. They are merely animal feed supplements. This exemption notification has been amended by another notification No.6 of 1984 dated 15th February 1984 as result of which the item animal feed including compound live stock feed" is now substituted by "animal feed including compound live stock feed, animal feed supplements and animal feed concentrates." After the coming into force of this notification, the petitioners have been given the benefit of full exemption. The only question is whether prior to this notification, the petitioners are entitled to exemption under the original notification No.55 of 1975.
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> In the case of the petitioners themselves namely Glaxo Laboratories India Ltd. V. The

State of Gujarat reported in 1979 43 sales Tax Cases, page 386 the Gujarat High Court was required to consider whether certain vitamin products including Vitablend WM Forte which were used for supplementing cattle and poultry feed should be classified as 'cattle feed" within the meaning Of Entry 21 Of Schedule of the Gujarat Entry tax Act. 1569 or "poultry feed" within the meaning of Entry 22 Of the Schedule 1 of that Act . The Gujarat High Court has held that the terms cattle feed" and "poultry feed" must include not only that food which is supplied to domestic animals or birds as an essential ration for the maintenance of life but also that feed which is supplied over and above the maintenance requirements for growth or fattening and or production purposes such as for production purposes such as for reproduction, for production of milk, eggs, meat, etc. or for efficient output of work The same reasoning would apply to the present case also. These products are also fed to animals or poultry to give them better nourishment. They would, therefore, quality as "animal feeds".

It was submitted by the respondents that the subsequent amendment expressly refers to animal feed supplements". This suggests that animal feed supplements were not previously included in The exemption notification.. This reasoning must be rejected. The amendment appears to be classificatory in nature. For example, the amendment now expressly refers also to animal feed concentrates which were not expressly referred to earlier. It cannot be said that animal feed concentrates are not animal feed and are generally added to animal feed and are generally added to animal fed are also covered by the generic terms "animal feed".

We are in agreement with the above view expressed by the Bombay High Court. NO doubt it was contended on behalf of the Revenue that the contrary view taken by the Tribunal has been challenged in this Court which was rejected in limine at the admission stage. we do not think that dismissal at the admission stage can be relied upon as a binding precedent. Even assuming that there are two views possible, it is well settled, that one favourable to the assessee in matters of taxation has to be preferred.

we have carefully gone through the minority and the

majority views of the Tribunal. We find that shri K. Gopal Hegde who has dealt with the issue in extenso, has taken note of the ratio laid down by the Bombay and Gujarat High Courts as well as a subsequent decision of the Tribunal itself in collector of central) Excise, Chandigarh vs. Punjab Bone Mills (Appeal No. 615/85-C with E/Cross/64/1988-C for coming to a conclusion that the goods imported by the appellants are eligible for exemption under Notification NO. 234/82. However, this view was minority view and, therefore, the exemption claimed by the appellant was denied. The majority view, appears, was influenced by the fact that a decision of the Tribunal in M/s. tries Aqro-Pet Industries pvt. ltd., VS. Collector of central Excise, Bombay, 1984 (16) ELT 467 taking a similar view, was challenged by filing civil Appeal NO. 17/84 and that was dismissed at the admission stage. It must be noted that presumably the admission stage. It must be noted that presumably the amendment to exemption Notification 234/82 by a subsequent notification No. 6/84-C.E. dated 15.2.84 was not before the court for consideration. The majority view also failed to take note of the subsequent amendment to the main exemption Notification as well as the effect of the amendment as noticed by the Bombay High Court in M/s. Glindia Limited case. Since we have already extracted in extenso the decision of the Bombay High Court, We do not think it necessary to repeat the same.

Accordingly, we hold that the appellant is entitled to the refund under the relevant Exemption Notification. However, it is for the concerned authority to further look into the refund applications and pass orders in the light of the ratio laid down bu this court in Mafatlal Industries Ltd. Vs. Union of India - 1997 (89) E.L.T. 247 (SC). The appeals are accordingly allowed. There will be no order as to costs.