

**Commissioner of C. Ex. Vs. J.B. Mangharam Food Ltd.**

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

**Decided On :** Aug-13-1999

**Reported in :** (2000)LC730Tri(Delhi)

**Appellant :** Commissioner of C. Ex.

**Respondent :** J.B. Mangharam Food Ltd.

**Judgement :**

1. Question involved in this appeal is regarding classification of "floor sweeping and damaged biscuits (under - baked over - baked)".

Revenue contends that the product is classifiable under Tariff Heading 23.01, as held by the original authority, namely, the Assistant Collector of Customs. Assessee-respondent, on the other hand, contends that the aforesaid product is not excisable. Lower appellate authority has accepted the contention of the assessee-respondent herein. Hence this appeal by the Revenue.

2. It may be mentioned at this stage that initially the show cause notice on filing of classification list by the respondent herein was issued by the Revenue to the said respondent to show cause as to why the said product be not classified under Tariff Heading 1905.11.

However, on examination of the product after studying the process of manufacture, the Assistant Collector dropped the proposed classification under sub-heading 1905.11. He came to the conclusion that the correct classification will

be under 2301.00.

2.1 Respondent herein being aggrieved against the said finding of the Assistant Collector filed an appeal before the Collector (Appeals) who, as mentioned above, has held that the product is not excisable.

2.2 Revenue has now urged in support of its appeal that Chapter Note 1(b) of Chapter 19 of HSN categorically states that the biscuits or other articles made from flour specially prepared for use in animal feeding is not covered by Chapter 19. It is also urged that in Explanatory Notes under Heading 23.09 pertaining to "preparation of a kind used in animal feeding", biscuits for dogs or other animals usually made of flour, starch or cereal products mixed with greaves or meat meal are covered under the said Heading 23.09 of HSN. It is pointed out that the said product is made of flour and is being sold to the trade for use in the fisheries industries. The price that is being fetched by this product is Rs. 2.40 per kg. It is, therefore, urged that the goods being marketable and covered under Chapter Heading 23 of CETA, 1985, proper classification would be under Tariff Heading 2301.00.

3. Learned JDR Shri R.S. Sangia has reiterated the aforesaid contentions given in the memorandum of appeal.

4. Learned Advocate Shri K.P. Jagdeesan, on the other hand, appearing for the respondent submits that these are floor sweepings and over-baked or under-baked biscuits. They are merely rubbish. Mere fact that these are sold does not mean that this is sold as a product known to the market as animal feeding. Even junk or rubbish can fetch price but it does not become goods, as has been held by the Apex Court in the case of U.O.I. v. Indian Aluminium Industries Ltd. 1991 (77) E.L.T.268. He also draws attention to the fact that an identical product under the old Tariff was examined by the Tribunal in the case of Britannia Industries Ltd. v C.C.E. 1997 (93) E.L.T. 719 where the Revenue wanted to classify the product under the residuary Tariff Item 68 of the old Tariff but this contention of Revenue was not accepted by the Tribunal in its judgment in the said case of Britannia Industries, supra. In this connection we reproduce Para 5 of the said judgment :-  
"5. The excisability of wastes has been the subject matter of a number of decisions

in the judgment of Delhi High Court in the case of Modi Rubbers which was followed by the Tribunal in the case of Aluminium Industries Ltd. reported at 1987 (31) E.L.T. 748 which judgment has been cited in the appeal memorandum, it was held that even if the waste of scrap was capable of fetching some sale price, that fact could not form the criteria for the event of manufacture.

As against this, the Tribunal in their judgment in the case of C.C.E. v. India Gelatine and Chemicals reported at 1996 (88) E.L.T 425 following the Supreme Court's judgment in the case of Commissioner of Sales Tax v. Bharat Petroleum Corpn. reported at 1995 (77) E.L.T. 790 have held that where waste and scrap is regularly sold, it is considered as marketable product in the impugned order, the Additional Collector himself has recorded that although these floor sweepings were purchased by dairy owners, being distress sale, the sale price depended upon the whims of the buyer.

In such a situation it cannot be held that the goods had a ready market and that they had regular sales, and that they were marketable. On the other hand as was observed by the Delhi High Court in the cited judgment, there were chance sales. On this count there is no basis for finding of the Additional Collector that the impugned goods were excisable products." He has also drawn attention to the detailed finding of the lower appellate authority as to why the classification under Tariff sub-heading 2301.00 is not applicable. He submits that the lower appellate authority has arrived at its finding after examining the scheme of Tariff Headings 23.01 and 23.02 as also the scheme of HSN under Chapter 23. The said authority has held that in order to be covered by Tariff Heading 23.01, the product should be derived from vegetable material or products of animal origin used by the food preparing industries. But it is only a floor sweeping containing certain other waste materials. He further finds that the Assistant Collector has observed in the order-in-original that the product in question in the condition in which it is removed consists of ingredients like flour, sugar, salt, biscuits in crushed stage, broken or other miscellaneous over-baked or burnt biscuits. In view of this mixture of various waste products, the said authority has held the product is a waste or scum not covered by Chapter 23.

4. In his rejoinders, learned JDR, Shri Sangia submits that Tariff Heading 23.01 speaks of residues and wastes from industries. It is not disputed that the product in question is a waste. Biscuit Industry is a food industry. He, therefore, submits that on plain terms Tariff Heading 23.01 would cover the product. Its marketability is also not questioned inasmuch as it is sold by the respondents. The judgment of the Tribunal in the case of Britannia Industries relied upon by the respondents, submits the learned JDR is in respect of old Tariff Item 68 which was a residuary item. There is a vast difference in view of the specific description under Tariff Heading 23.01. Learned JDR, therefore, prays for allowing the appeal.

5. We have carefully considered the pleas advanced from both sides. We observe that in order to determine the character of the product how it comes into existence is also necessary to note. This has been described in the order-in-original. The process of manufacture of biscuits is described as follows :- "Therefore, on 23-3-19921 visited the manufacturing premises of the Noticee.

It is observed that various ingredients like Maida, flour, sugar, salt etc. are mixed and made into dough. This dough is layered and passed through the rollers to form a sheet of required thickness.

This sheet moves on the cotton conveyors. This sheet is purchased with the dies to cut in the shape of the biscuits. The remnant dough is re-mixed at the primary stage. This purchased biscuit shape material moves into the oven for baking on the conveyors.

The biscuits when came out of the oven after baking are manually checked and under baked/deshaped are picked up and kept separately.

Identically the over-baked/ burnt biscuits are also removed.

Another stage of check is metal detection. When the conveyor with biscuits passes through a metal detecting device, if there is any trace of metal whole of the row of biscuits fall automatically and properrows passl to the stage of packing. At this stage also same biscuits all on the floor or get broken." Thereafter the Assistant Collector describes as to how the product in question comes into existence :- "

During this process of making biscuits certain raw-material get dusted on the floor, dough pieces also fall on the floor and certain biscuits also fall on the floor which may be broken or not. The entire material which fall on the floor is swept and consists of mixture of flour, maida, sugar, salt dough and mainly of biscuits which have fallen on the floor and the biscuits which have burnt by overbaking and containing metallic substances as removed by metal detectors.

This is the material which is in dispute and is removed by the noticee for sale." 5. It is thus clear that the product in question is a floor sweeping consisting of mixture of flour, maida, sugar, salt dough and mainly of biscuits which have fallen on the floor and the biscuits which have burnt by overbaking and containing metallic substances as removed by metal detectors. In our view the product as described above, is a waste of the biscuit industry and cannot be considered to be a preparation for animal feeding. As rightly pointed out by the lower appellate authority, it cannot be considered to be a residue from the food industry. It is merely a rubbish or scum which is collected by the respondents for keeping its manufacturing premises clean. Mere fact that it brings some price is no ground to treat it as an excisable goods deliberately manufactured by an industry. In our view no fault can be found with the finding of the lower appellate authority.

Revenue's reliance on Explanatory Notes under HSN Heading 23.09 in our view is not appropriate. That Heading speaks of preparation of a kind used in animal feeding. The expression "preparation" speaks of a deliberate act of manufacture of something which is used for animal feeding. Process of coming into existence of this product, as described above, cannot by any stretch of imagination be treated as deliberate one as undertaken by the respondent. Accordingly, we do not find any substance in Revenue's appeal. Hence, we dismiss the same.

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