

Collector of C. Excise Vs. Hindustan Cocoa Products Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-08-1996

Reported in : (1996)(87)ELT299TriDel

Appellant : Collector of C. Excise

Respondent : Hindustan Cocoa Products Ltd.

Judgement :

1. This appeal from the Revenue relates to the question whether "Milk Crumb", an in-process material for the finished product Milk Chocolate was excisable and dutiable under Tariff Item No. 68 as it then existed.

The Collector relying upon the judgment of the Supreme Court in the case of Union Carbide India Ltd. -1987 (24) E.L.T. 169 (SC) held that the product Milk Crumb was not only intermediary products but also could not be called 'goods' inasmuch as they could not be bought and sold in the market. Against this decision the present appeal is filed.

2. The case before us was presented for Revenue by Shri A.K. Madan, SDR. Respondents were represented by Shri M.P. Baxi, Advocate and Ms.

Tasneem Ahmadi, Advocate.

3. For better appreciation of the merit of the case, it is necessary to define the product Milk Crumb. The product has been described in the Bombay High Court judgment dated 16-8-1984 as follows :- "The petitioners have annexed an extract

from an Article by J. Koch "Milk Crumb : The Modern Chocolate Engredient". It sets out the "Crumb" style of manufacture of milk chocolates. Milk Crumb is a special sort of cocoa-milk-sugar preparation which is used as the basic ingredient of many milk chocolates. Under this style of manufacture milk and cocoa are mixed while the milk contains an appreciable quantity of moisture. Traditionally it is a three stage process. At the first stage milk is condensed to .25-30 per cent residual moisture. Thereafter sugar is added and the product is recondensed to 14-18 per cent moisture. Cocoa mass is added to this moisture and it is followed by vacuum stove drying until the moisture has been eliminated. The product at this stage comes out of the final vacuum stove in the form of a hard brown slab or cake; sometimes also in the form of a crumbled rope of hard material. As far as the petitioners' factory is concerned, this product comes out in the form of hard lumps. This is known as milk crumb or chocolate crumb. Thereafter it has to be crushed, mixed with cocoa butter, refined and couched in order to produce milk chocolates which are marketed as such to the consumers." 4. About this product the respondents have had a running battle with the Excise Department. In January, 1972 the Department sought to classify the product under Tariff Item No. 1A - confectionery. In July, 1973 the Collector held that crumbs were not excisable. In their order in review dated 30-10-1975 the Government of India held that crumb was "basically chocolate" and ordered its classification under Tariff Item No. 1A. The Bombay High Court in their order referred to above held that crumbs were not excisable under Tariff Item No. 1A. On 22-4-1985 the Assistant Collector classified it under the Residuary Item T.I. 68 but extended the benefit of Notification No. 118 of 1975 which exempted any dutiable goods when captively consumed in the manufacture of further dutiable goods. Against this order the Collector (Appeals) passed the impugned order. Significantly after the change over to the new Tariff, the respondents continued to file classification showing crumbs as falling under sub-heading 1804 and claiming benefit of the Notification No. 88 of 1986, dated 10-2-1986.

5. Learned SDR claimed that the reliance placed by the Collector on the judgments of the Supreme Court in the case of DCM and South Bihar Sugar Mills was misplaced. These cases dealt with captive consumption whereas in the present case the Milk Crumb was physically moved from one factory to another

factory. Such movement out of the factory attracts duty in terms of Rules 9 and 49 of the Central Excise Rules. Such removal would establish that the goods are excisable even if they are not final products. Even in terms of the said order of the Bombay High Court there is no bar to the classification under T.I. No. 68. The learned Advocate made the following submissions : 1. Milk Crumbs are not "goods" as they are not marketable or capable of being bought and sold. 2. By settled law, the burden of establishing that a product is marketable is upon the Department. In the present case, the Department has completely failed to discharge the burden, as not an iota of material has been produced by the Department.

3. In any event, mere removal from one factory to another would not by itself make a product chargeable to excise duty, even in terms of Rules 9 & 49.

4. Merely because product is removed from factory cannot make the product "goods". For example, in terms of Rule 57F(3) and erstwhile Rule 56B, as also Notification No. 119/75, even semifinished or semi-processed goods were permitted to move from one factory to another.

5. T.I. 68, although a residuary item, only applies to "goods", and could not cover non-marketable products.

6. The judgment of the Bombay High Court in WP-5051/76 cannot be construed to mean that milk crumb was chargeable to duty under T.I.6. In reply to a query learned Advocate clarified that that unit at Indori was not a separate profit centre. There were no sales. The goods moved under a challan both ways. In reply to another query he stated that the crumbs had shelf life of 2-3 months.

7. Learned DR in his counter submitted that at all times the respondents had been agitating on the classification of the impugned goods. At no time they had challenged the identity of the impugned goods as "goods" under the definition of the Central Excise Law. Even after the judgment of the Collector, they had continued to file classification lists showing the goods as excisable. He submitted that sale or purchase in the market was not the essence for determination of any product as goods but the fact that any goods were marketable made them

excisable. He urged that the distinction between raw materials, intermediate goods and final goods was not absolute but dependent upon the terminology used by user. He submitted that a job worker who did not market the goods also was a manufacturer and his products were excisable goods. The impugned goods had long shelf life. They were capable of being used by any other manufacturer of chocolates using the crumb process and therefore, these were excisable goods.

8. At this stage we examined the samples shown to us by the learned advocate. The chocolate crumb was in the form of brown coloured hard lumps which broke under considerable pressure into small segments but not into powder.

9. We have carefully considered the submissions made by both the sides.

The issue before us is whether Milk Crumb can be treated as goods and if yes, whether the same can be classified under T.I. 68. The Collector relying upon the judgment of the Supreme Court in the case of Union Carbide India held that the impugned products were not capable of being sold to the consumer and held that the same were not goods. In holding so he took cognizance of the submission of the assessee that these products were unfinished, intermediary products not sold or capable of being sold in the market.

10. There is a large body of judgments on this issue. The early judgments favoured the stand of the Revenue. In their decision in the case of Indian Oil Company v. CCE, Calcutta - 1984 (15) E.L.T. 456 the Tribunal held that where the intermediate goods were used by the manufacturer themselves in further processes their marketability was proved by their utility for such purposes. However, in the latter judgment in Union Carbide India Ltd. v. Union of India -1986 (24) E.L.T. 169 the Supreme Court held that the term "goods" must refer to articles which are capable of being sold to consumers. Citing this judgment of the Supreme Court, the Bombay High Court in the case of Union of India v. Shakti Industry Pvt. Ltd. - 1989 (39) E.L.T. 509 (Bombay) held that - to become goods an article must be something which can ordinarily come to the market to be bought and sold and therefore, intermediate products like varnish arising during the process and manufacture of resin could not be termed as "goods". In their judgment in the case of U.O.I. v. Delhi Cloth and Cotton Mills - 1977 (1) E.L.T.(J

199) (S.C.) the full Bench of the Supreme Court held that only those goods which can come to the market to be bought and sold are excisable goods. In this case raw oil during the process of manufacture of vanaspati underwent a process where it could be termed as refined oil.

This stage was held to be a dutiable stage by the Department. Hon'ble Supreme Court rejected this claim on the observation that the oil under process did not become at any stage refined oil as was known to the consumers and the commercial community.

11. There had been some instances where the intermediate goods were clearly not marketable but there was a tariff entry covering such goods. In such a case the Supreme Court in the case of Bhor Industries Ltd. - 1989 (40) E.L.T. 280 observed that an article was not liable to excise merely because of its specification in the Tariff Schedule unless it was known in the market as "goods". The Tribunal in their judgment in the case of TISCO v. CCE, Jamshedpur - 1995 (76) E.L.T. 602 following the judgment of the Supreme Court in the case of Bhor Industries Ltd. held that even if molten iron was specifically enumerated in the Tariff, since it was not marketable it could not be termed as "goods".

12. Who has to prove the marketability? The ratio of available judgments is that this burden has to be discharged by the Department.

The Supreme Court in their judgment in the case of CCE v. Ambalal Sarabhai Industries - 1989 (43) E.L.T. 214 (SC) held that where the assessee claims that the goods were not marketable, the burden is on the Department to prove that such goods were either marketed or were marketable. The Tribunal in their decision in the case of Jagatjit Cotton Textile Mills v. CCE - 1990 (50) E.L.T. 379 had also held the same view.

13. In the present case the Revenue has urged that these goods were moved from Induri to Thane, that such movement itself amounts to sale.

This establishes the capacity of the goods as being marketable. Learned advocate was quick in pointing out that these two units are not independent profit centres,

that there is no financial accountal in these transfers which in fact are merely inter-departmental transfers.

Therefore, on the basis of the submissions made by the respondents and also the failure of the Department to adduce adequate evidence, the belief of the Collector that the milk crumb was not goods requires to be upheld.¹⁴ Even in the judgment of the High Court at Bombay, the marketability of the impugned milk crumb had been examined. The Hon'ble Court in this connection observed : "It is now well settled that a tariff item has to be understood in the manner in which it is understood by people in the trade. It is, therefore, necessary to see whether milk crumb is understood in the trade as 'chocolate'. The petitioners have relied upon the affidavit filed by P.K. Irani of Great Western Stores to show that milk crumb is not marketable in India at all, much less as chocolate. In the order of 30th October, 1975, however, the respondents have said that crumb is sold as a commercial article in coarse powder form in western countries. In the first place, there is nothing on record in support of this conclusion arrived at by the respondents. There is no material on record to show that crumb is sold in the market in western countries. Similarly there is nothing which would indicate that crumb is sold as chocolate in western countries.

In the present case there is absolutely no material on record which would suggest that milk crumb is marketed in western countries as chocolates or that it is understood in common parlance in western countries as chocolates. Even assuming that to be so, such common parlance in western countries is not relevant for the purpose of construing a tariff item in our country. There is no material on record which would show that milk crumb is either understood in common trade parlance in our country as chocolates or that it is marketed as chocolates.

That milk crumb falls within the tariff item 1A. Thus, in the case of Colgate Palmolive (India) Ltd. v. Union of India and others reported in 1980 Excise Law Times p. 268 Lentin J. observed that if the department wants to classify a product under a particular tariff item, then it is for the department to establish that the said product is liable to duty under that particular tariff item and it is not for the

manufacturer to establish a negative. I may also refer in this connection to my decision in *Garware Nylons v. Union of India* and others reported in 1980 (6) E.L.T. 249 when I was sitting in a Division Bench, to the same effect. The respondents have failed to discharge this burden.

15. Before we part with this case some submissions made by Revenue need to be settled. It was argued that the issue whether the impugned articles were goods or not was first raised before the Collector (Appeals) and was never raised in the lower proceedings which were limited to the issue whether the article fell under T.I. 1A or T.I. 68.

We observe that this issue involves a point of law and therefore, can be taken up for the first time in the higher forum also. The second issue raised by Revenue is that the assessees had continued to classify these goods as excisable even after receipt of the Collector's judgment. Learned advocate accepted this fact and claimed that whatever duty they had paid on these articles was utilised by them for payment of duty on the final products and therefore, they were not at loss. The fact that they continued to voluntarily classify the goods as excisable, to our mind, is not material. The benefit conferred upon them by the Collector's judgment was not washed away by this action of the assessee. The third point raised by the Revenue was that the goods had long shelf life and therefore, were marketable. Shelf life is a factor determining marketability but it is not the sole criterion.

Masticated rubber also has considerable shelf life but the Kerala High Court in their judgment in the case of *Superintendent of Central Excise v. Ancher Treads Pvt. Ltd.* -1993 (65) E.L.T. 480 (Ker.) held that it was not excisable.

14. In the result we find no infirmity in the Collector's order. We uphold the order and reject this appeal from Revenue.

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