

(1956) 10 PAT CK 0009
In the Patna High Court
Case No : Misc. Judl. Case No. 578 of 1955

Abdul Karim Abdul Majid

APPELLANT

Vs

Collector of Central Excise

RESPONDENT

Date of Decision : 05-10-1956

Acts Referred:

Central Excise Rules, 1944 — Rule 160, 49
Central Excises and Salt Act, 1944 — Section 35
Constitution of India, 1950 — Article 226, 227

Citation : AIR 1957 Patna 650

Hon'ble Judges : Ramaswami, C.J.; Raj Kishore Prasad, J

Bench : Division Bench

Advocate : B.C. Ghose and Shrideo Misra, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Raj Kishore Prasad, J.—The petitioner obtained a rule, from the High Court, on an application under Articles 226 and 227 of the Constitution of India, against the Collector of Central Excises, Patna, who is the sole opposite party, to show cause why a writ should not be issued, quashing his order dated 22nd March, 1955, passed u/s 35 of the Central Excises and Salt Act, 1944, being Act No. I of 1944, hereinafter referred to as "the Act", read with Rule 213 (1), of the Central Excise Rules, 1944), hereinafter referred to as "the Rules", framed by the Central Government, u/s 37 of the Act.

2. The opposite party has shown cause against the rule, through the Government pleader, and, also filed a counter-affidavit.

3. The petitioner is aggrieved, not against the entire order of the opposite party, but against only a portion of his order, as the petitioner's appeal, against the demand of duty under Rule 160 of the Rules, was partly allowed by him. The portion, complained of, is as follows :

"There is no ground for condonation of higher losses in excess of those already allowed by the Assistant Collector of Central Excise, Muzaffarpur. I, therefore, see no reason to interfere with the orders passed by the Assistant Collector of Central Excise, Muzaffarpur, on this point".

4. Mr. B.C. Ghose, who appeared, in support Of the rule, has attacked the above order, of the opposite party, on two grounds : (i) that the learn-ed Collector had not given reasons for the above order, by which, arbitrary percentage of storage losses, not permitted by the rules, allowed by the Assistant Collector, has been maintained; and (ii) that the result, of the impugned order of the Collector, is to affirm the order of the Assistant Collector, applying retrospectively the percentage of processing losses for 1949 to the period 1946 to 20th June, 1949, also.

5. The petitioner is a firm carrying on the manufacture, within the meaning of Section 2(f)(i) of the Act, of Biri and hookah tobacco. On the 13th June, 1953, the petitioner received a notice of demand of duty, under Rule 160 of the Rules, from the Inspector, Central Excise, Dalsingsarai, which is Annexure "A" to the affidavit. This notice is in the following terms :

"Take notice that on behalf of the Central Government, I hereby demand, under Rule 160 and In terms of the Bond in Form B-4 (Sur) execute ed by you on 22-6-1945, payment by you within 10 days from the date of this demand of the sum of Rs. 536-2-0 (Rupees five hundred thirty six and annas two only) only being the duty on 5,691 Nos. Of Biri Tobacco and 151 Nos. of Hukka Tobacco not properly accounted for".

6. Along with the above notice, the petitioner also received a letter from the Inspector, Which is Annexure "B" to the affidavit. It is to the following effect :

"As per Assistant Collector, C. E. Muzaffarpur"s C. No. iv(b)ii(ii)51/5108 dated 30-5-1952 endorsed under Superintendent, C. E. Samastipur"s C. No. (iv) (b) 22 (23) Tob/5/52/855 dated 22/27-1-1953 I beg to serve this demand notice upon you for the processing losses of Biri Tobacco and Hukka tobacco found in your warehouse from 1946 to 20-6-1949. Further it may be mentioned here that Assistant Collector WOP pleased enough to condone losses up to 3% in case of Biri tobacco and up to 4% in case of Hukka tobacco".

7. In reply, to the above notice, the petitioner sent a letter, to the Inspector, in which he said that had he been instructed before he would have shown storage losses before taking the quantity of the goods into processing, and, therefore, he prayed that the quantity, upon which the duty had been levied, should be ignored as it was actually due to storage losses.

8. The petitioner, thereafter, went up in appeal partially, and, directed certain storage losses, Included in the processing losses, to be excluded from the processing losses; but, he disallowed the claim of the petitioner for condonation of higher storage losses in excess of those already allowed by the Assistant

Collector.

9. The petitioner claimed storage losses at 4 per cent in biris, and, 8 per cent in hookah tobacco. The Assistant Collector allowed storage losses up to 3 per cent in case of biri tobacco, and, up to 4 per cent in case of hookah tobacco; and this order was upheld by the Collector on appeal.

10. The petitioner, therefore, is aggrieved, by the above orders, only to this extent he now claims condonation of more storage losses up to 1 per cent in case of biri tobacco and up to 4 per cent in case of hookah tobacco, in excess of the condonation of losses already allowed by the Assistant Collector, and, the learned Collector, which were disallowed.

11. His case is that until 1949, no percentage of losses in processing had been prescribed, and, in 1949, for the first time, only the upper limit of percentage of processing losses was prescribed, and, no percentage of processing losses had been fixed during the years 1946 to the 20th -June, 1949. He, therefore, contends that the Excise Officers were not justified in applying the rate of 1049 retrospectively to the years 1946 to the 20th June, 1949, during which period there was no fixation of any percentage of processing losses. The petitioner, accordingly, has moved this Court, under Articles 226 and 227 of the Constitution, on which the High Court issued the rule under consideration.

12. For a proper appraisal, and, determination, of the points in controversy, it is desirable, at the outset, to extract the requirements of the Act, and, the Rules.

13. Excise duty is a tax on manufactured goods. Under the Excise Act, tobacco becomes excisable goods, within the meaning of item 9 in the first schedule, u/s 3(1) of the Act. The subsequent use of such manufactured goods, ia making different articles, only affects the rate of tax. Therefore, tobacco becomes subject to excise duty when it reaches the stage of manufacture as mentioned in item 9 of the first schedule of the Act. Even before it is converted into biris, or hookah tobacco, or, any other article manufactured in the factory, it becomes excisable goods and liable to pay excise duty. Section 3 provides for levy and collection of duty on all excisable goods, as, and, at the rates set forth in the First Schedule.

Biri and hookah tobacco are mentioned in the First Schedule under items 9, 1(5) and (6). The rate of duty mentioned for biris is -/14/-, and for hookah tobacco -/6/- per lb. Section 6(b) of the Act provides that no person shall, except under the authority, and, in accordance with the terms and conditions of a licence granted under this Act, engage in inter alia, storage of any excisable goods specified in this behalf in Part 9 of the Second Schedule of the Act, which includes tobacco under item 1. Section 8 imposes restriction on possession of excisable goods, specified in Part B of the Second Schedule of the Act, which includes under item 1 "tobacco", in excess of the prescribed quantity.

Section 2(f) of the Act has defined "manufacture" as including any process incidental or ancillary to the completion of a manufactured product; and in

relation to tobacco, under Sub-clause (i) of Clause (f) of Section 2 of the Act, includes the preparation of biris or hookah tobacco also. u/s 37, the Central Government have been empowered to make rules to carry into effect the purpose of the Act.

14. Rule 7 provides for recovery of duty from also a person who stores such goods in a ware-house. Rule 9-A provides that the rate of duty shall be the rate in force on the date on which duty is paid, or, if the goods are cleared from a factory, or a ware-house, on the date of the actual removal of such goods from such factory, or ware-house. Rule 10-A gives residuary powers to the Government for recovery of sums due to Government in case of any deficiency in duty, if the duty has, for any reason, been short-levied. Rule 47 provides for storage of goods, and, requires a manufacturer to provide a store-room, Or other place of storage, at his premises for depositing goods made on the same premises without payment of duty.

Such a store-room, or place of storage, has to be declared by the manufacturer and approved by the Collector. Under Rule 47 (4), the manufacturer has to maintain an Entry Book in the proper Form in which he shall on the same day on which goods are deposited in,, or, removed from such store-room, or other place of storage, write and enter, in the proper column, the date of such deposit or removal, the full description, quantity, weight and value of the goods so deposited or removed, the number of and the marks and numbers on, the packages (if any) in which they are contained, and such other particulars as may be required by general or special order of the Collector or the Central Board of Revenue.

Rule 48 enjoins on the manufacturer to enter into bond for payment of duty, and requires him to produce for charge of duty, or to deposit in a store-room or other place of storage approved by the Collector, or, to account for satisfactorily otherwise, all goods prepared upon his premises. Rule 49 provides for payment of duty on, excisable goods made in a factory when they are about to be issued" out of the place of storage or the like. The proviso to Rule 49 is important, because It entitles the manufacturer to claim deductions on one or more of the grounds mentioned therein from the duty leviable on any goods not accounted for in the manner specially provided in the Rules.

15. Rule 54 requires every manufacturer to submit to the officer concerned, within seven days after the close of each month, a monthly return in the Form prescribed. It provides, among other things, that the manufacturer shall show the quantity of excisable goods removed on payment of duty from the store-room, or, other place of storage approved by the Collector under Rule 47. Rule 160 provides, inter alia, that if goods are improperly removed from the ware-house without permission, or if any -goods are not accounted for to the satisfaction of the proper officer, that officer may thereupon demand, and, the owner of the goods shall forthwith pay, the full amount of duty chargeable thereon.

Rule 174 (2) provides that all holders of private bonded store-rooms, or ware-houses, in respect of unmanufactured products shall be required to take out a licence. Rule 223 requires that all excisable goods should be stored in the premises of a licensed person or in a public ware-house and shall be stacked in an orderly manner. Rule 223-A gives power to the Collector to take account of stock of goods in a factory or warehouse to be taken and the balance to be struck.

It further provides that if the quantity weighed, measured, counted, or otherwise ascertained, is less than the quantity which ought to be found in such premises (after taking into account receipts and deliveries, and making such allowance for waste by evaporation, or other natural causes, as the proper officer may consider reasonable), the owner of such goods, or of the premises be a public bonded ware-house, the keeper thereof, shall, unless the deficiency be accounted for to the satisfaction of the proper officer, be liable to a penalty which may extend to five times the duty chargeable on such goods as are found deficient.

16. From the above scheme of the Act and the Rules, therefore, it is manifest that the licensee, who enters into a bond under Rule 48, is responsible not only for storage of the excisable goods, but also for satisfactorily accounting for the quantity of the excisable goods stored in a public bonded ware-house, or in any other place of storage approved by the Collector under Rule 47, and, no such goods can be removed from the approved premises before the proper duty has been paid. Such a manufacturer is required to pay the duty levied on any goods, which are not accounted for in the manner specifically provided in the Rules.

If goods are improperly removed without permission, or, if any goods found in the ware-house, or in any other place of storage, are "not accounted for to the satisfaction of the proper officer", it is open to such an officer to demand the duty payable on such unaccounted for goods, and, the owner of such goods has therefore, not only to pay the duty thereon, but, if the occasion arises, to pay also the penalties and other charges thereon. Rules 48, 49 and 160 make, the above position clear. In accounting for the goods found in the ware-house of the licensee, it is open to him under the proviso to Rule 49, and also under Rule 223-A, to claim deductions, on one or more of the grounds mentioned therein. On such a claim being made, it will be open to the officer concerned to allow or disallow it totally or partially on the materials placed before him.

17. In the present case, as appears from annexure "A", the petitioner entered into a bond as required by Rule 48 on the 22nd June, 1945. The quantity of tobacco mentioned in the notice, which was found in the ware-house, was "not properly accounted for", and, therefore, the petitioner was asked, under Rule 160, to pay the duty demanded for. The petitioner claimed deduction on account of storage losses, as stated before, up to 4 per cent, in case of biri tobacco, and, up to 8 cent in case of hookah tobacco, from processing losses for explaining the deficiency in the stored goods found in the ware-house. The officer concerned was, obviously, not satisfied that the deficiency had been accounted for to his

satisfaction, and, as such, the claim for condonation of storage losses in excess of what was allowed by the Assistant Collector was disallowed.

18. The determination of the first point, therefore, depends upon the interpretation of the proviso to Rule 49 and, of Rule 160, of the Rules the material portions of which, omitting the unnecessary portions, are in these terms :

"49. Duty chargeable only on removal of the goods from the factory premises or from an approved place of storage.....

Provided that the manufacturer shall on demand pay the duly leviable on any goods which are not accounted for in the manner specifically provided in these rules, or which are not shown to the satisfaction of the proper officer to have been lost or destroyed by natural causes or by unavoidable accident during handling or storage in such store-room or other approved premises.

160. If goods are improperly removed from, were-house or allowed to remain beyond time fixed, or lost or destroyed. Collector may demand duty, etc. -- If any goods axe removed from the warehouse without permission,.....or if any goods are....."not accounted for to the satisfaction of the proper officer" that officer may thereupon demand and the owner of the goods shall forthwith pay, the full amount of duty chargeable thereon (Underlined (herein" ") by me)."

19. The question is what is the true scope and meaning, and correct interpretation, of the proviso to Rule 49 and of the words "not accounted for to the satisfaction of the proper officer" occurring in Rule 160.

20. In considering the question of claim for condonation of storage losses, Rule 160 has to be read along with the proviso to Rule 49. In the present case, as appears from annexure "A", the petitioner has been asked to pay duty under Rule 160, and, in terms of the bond executed toy him under Rule 48, for the quantity of tobacco -- biri and hookah both -- found in the petitioner's warehouse, but "not properly accounted for." In such a case where there has been a default, by a licensee as regards, supplying information to the authority concerned, to explain the deficiency in the quantity of goods found in the warehouse, or in any other place of storage, it is natural to expect that the officer concerned would make an assessment of the probable loss on account of storage, or processing, or the like, to the best of his judgment. It was open to the petitioner to satisfy the Excise Officer concerned, and to account for the shortage of the goods found in the ware-house by production of his books maintained under Rule 47 (4), the monthly returns submitted under Rule 54, or the like. But, obviously, the petitioner, for reasons best known to him, did not do so; and, therefore, the officer concerned was left to make an assessment of the losses to the best of his judgment, that is, to his own satisfaction on whatever materials were placed before him, or were in his possession. The opposite party has stated in his counter-affidavit that the percentage of losses in processing was in existence even before 1949 according to the instructions and circulars issued

from time to time by competent authorities, obviously, under Rule 233. He has further stated that the notes in the registers of the petitioner from the year 1946 to 1949, show losses varying between 2.28 to 7.4 per cent. In such circumstances, on the materials before him, and, in the absence of better materials, which, the licensee alone could produce, as the onus lay on him the officer concerned was justified in making his own estimate of the probable losses on account of shortage during the years under assessment.

21. In my opinion, therefore, in the case of default of the license, in accounting for the deficiency of the goods found in his ware-house, or in any other place of storage, or premises, the Excise Officer, under the Act, may give deductions on account of storage losses, in the processing losses, before fixing the quantity of goods on Which the duty would be levied, according to his best judgment without any bias.

22. My concluded opinion, therefore is that:

1. The words "to the satisfaction of", occurring in Rule 160, of the Rules, have some deeper significance, and they must be construed to mean "reasonably satisfied". The satisfaction, which the legislature requires in the Excise Officer, is something which must be based upon adequate material, and will not depend upon his vagaries and caprices. A bald statement of being satisfied will not serve the purpose of the rule, but there must be materials to indicate that the officer concerned applied his mind to them and other circumstances, if any, and then was satisfied with the measure that he was going to adopt. The true scope and meaning, therefore, of the words "not accounted for to the satisfaction of the proper officer", occurring in Rule 160, of the Rules, is that the officer concerned, for being satisfied, has to be guided only by legal consideration of the facts relating to the goods found in the warehouse of the licensee.

The authority under the Act, therefore, has to be guided only by considerations that are relevant by rules of justice, equity and good conscience and not by any desire to punish the licensee for the default he has made. The licensee has to satisfy the officer concerned; and it is his satisfaction, and his satisfaction alone, on the materials placed before him by the licensee, or in possession of the officer himself, which is required and contemplated by Rule 160 of the rules.

2. In making an assessment, or estimate, of the probable losses, contemplated by the proviso to Rule 49, of the Rules, on the ground of storage or otherwise, for allowing such deductions in the processing losses, the Excise Officer must not act dishonestly, or vindictively, or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the percentage of such losses, in default by a licensee in supplying adequate materials, and, material informations to the officer's satisfaction; and, though there must necessarily be guess-work in the matter, it must, however, be honest guess work.

In that sense, too, no doubt, the assessment: or estimate of the losses must be

to some extent arbitrary; but this does not mean that the assessment may be made capriciously or in an arbitrary manner. The officer is not entitled to make a pure guess, and, make an assessment of the losses without reference to any evidence, or any materials at all. There must be something more than bare guess and suspicion, to support the estimate of the losses.

23. In the present case, the learned Collector has agreed with the finding and decision of the Assistant Collector, and, found no ground for condonation of higher losses as claimed. The Assistant Collector, in his order, has given reasons for not allowing the entire claim on account of storage losses made by the petitioner, and, those reasons have been accepted by the learned Collector. It is true it may often be open to argument that the materials which have been accepted by one Court as establishing a certain conclusion were not in themselves sufficient to support the conclusion if their legal weight had been properly measured and ascertained by the appellate Court.

It is that consideration that has the real foundation of the petitioner's argument, but, in this case, as the burden of accounting for the deficiency in the goods to the satisfaction of the proper officer under Rule 160 was on the licensee, in my opinion, the materials however Inadequate may be, which were before the Assistant Collector, enabled him to come to the conclusion to which he did. It is true that the learned Collector has not given elaborate reasons for agreeing with the conclusions of the Assistant Collector but in a case of judgment of affirmance it was not necessary to repeat the reasons in the decision which the Assistant Collector came to. The reasons of the Collector are clear.

He had considered the materials mentioned in the order of the Assistant Collector, and saw no reason for differing from the conclusions at which the Assistant Collector had arrived. In such circumstances, it cannot be said that the learned Collector committed any error of law apparent on the face of the record so as to entitle the High Court to interfere with his order. It cannot also, therefore, be said that the Collector in mentioning the order of the Assistant Collector, has allowed arbitrary percentage of storage losses not contemplated by the proviso to Rule 49 of the Rules. For the reasons given above, the first contention of Mr. Ghose, therefore, must be overruled.

24. The second contention of Mr. Ghose is equally groundless, because he has got the relief on that account. In para, 14 his affidavit, the petitioner has mentioned that he filed an appeal to the Collector on the ground that the rates prescribed could not have retrospective effect. This part of the appeal of the petitioner was allowed by the Collector, because in the order dated the 22nd March, 1955, which is under consideration, he has said that "the rate of duty on losses in processing charged to duty should be the rate prevalent at the time of completion of processing In each case."

He has obviously followed Rule 9-A of the Rules. The petitioner, therefore, was granted the proper and necessary relief on that score. There is, therefore, no

substance in this contention as well, and, accordingly, it must be rejected.

25. For the reasons given above, in my opinion, the petitioner has not made out any case for issuing any writ to quash the order, complained of, passed by the Collector on the 22nd March, 1955.

26. In the result, the rule is discharged ; the application fails, and, is, accordingly, dismissed with costs : hearing fee Rs. 100.

Ramaswami, C.J.

27. I agree.