

(1975) 08 CAL CK 0029
In the Calcutta High Court
Case No : Civil Rule No. 8296W of 1972

I.C. and E. Morton (India) Limited and Others	APPELLANT
Vs	
Superintendent of Central Excise and Others	RESPONDENT

Date of Decision : 08-08-1975

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 10A, 173J, 9(2)
Constitution of India, 1950 — Article 226

Citation : (1980) 6 ELT 99

Hon'ble Judges : A.K. Mookherjee, J

Bench : Single Bench

Advocate : R.N. Bajoria and P.L. Khaitan, for the Appellant; S.N. Sanyal, for the Respondent

Judgement

A.K. Mookherjee, J.—Petitioners carry on the business of manufacturing various kinds of confectionery in their factory at Marhowrah in Bihar and sells its products under the trade name "Morton". In course of manufacture of confectionery, various small bits and dusts of assorted sorts fallen out into the trays and on the floor, the accumulate of which are known as "scraps". The said scrap is, therefore, collected and sold at a nominal price of about 1.10 per Kg. (as against the average price of about 7.50 per Kg. for the actual confectionery) to the various small buyers, who usually melt the same to extract sugar for the purpose of preparing cheap syrups used in preparation of lowgrade sweetmeats. The said scrap is not known or sold in the market as confectionery" nor is the same covered by any of the items in the Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as the "Act").

2. The said scrap is not edible or sold for consumption as such. Between the periods of 19th April, 1968 and 30th June, 1971 the petitioners cleared a total quantity of about 91,40,000 Kgs. of the said scraps which were accumulated in the course of manufacture. According to petitioners, the said scrap is non-excisable under the Act. Without paying the duty and with the full knowledge and

approval of the respondents, the Scraps were removed from the petitioners' factory. In the relevant returns for the relevant period, the petitioners duly showed the removal of the said scrap along with the said returns, copies of the Gate passes relating to the "scraps" were sent. After considering the said returns, the said Gate passes and other documents accompanying them, assessments were finalised. The returns submitted by the petitioners were accepted and no objection was raised about the payment of any excise duty on the said scraps as the same were not liable to any duty. Three notices of demand for duty all dated 30-11-71 for a total of Rs. 41,312.24 were issued by the Superintendent, Central Excise, S R.P. Range to the petitioners under Rule 9(2) of the Central Excise Rules in respect of the confectionery "scraps" removed by the petitioners during the period from 19-4-68 to 30-6-71. On or about the 7th February, 1971, the petitioner No. 1 made a representation to the respondent No. 2 against the said demands. By an order dated 3rd July, 1971, the respondent No. 2 informed the petitioner that he had no reasons to withdraw the said three demands. The said respondent No. 2 also held that the impugned demands had been issued under Rule 10A of the Central Excise Rules, 1944 and not under Rule 9(2) thereof. On or about 14th September, 1972, the petitioners preferred an appeal to the respondent No. 3 against the said order of the respondent No. 2 dated 3rd July, 1972. The hearing of the said appeal was concluded on the 25th November, 1972. On or about 21st December, 1972, the petitioners were served with an order passed by respondent No. 3 dated 8th December, 1972 wherein the Collector held that the confectionery in question was liable to excises under Tariff Item 1A of the First Schedule to the Central Excises and Salt Act.

* * * * 3. Mr Bajoria, appearing on behalf of the petitioners, contended that the scrap obtained in course of manufacture of confectionery is not "confectionery" within the meaning of item 1A of the First Schedule to the Act or any other items thereof. The findings of the Appellate Collector that the scraps were nothing but parts of boiled sweets in various forms, irregular shapes and sized and those were made for marketing purpose for the sole object of consumption by human being are perverse and without any evidence :

The tariff Item 1A reads as follows :-

"Confectionery Cocoa powder and chocolates in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power, namely (1) Boiled sweets, toffees, caramels candies, nuts (including almonds) and fruit kernels coated with sweetening agent, and chewing gums".

4 The Appellate Collector observed in his order "I find that M/s. Morton Confectionery and Milk Products Factory manufacture boiled sweets as confectionery and market them in various names. The question is whether scrap obtained out of manufacture of confectionery is a confectionery within the meaning of the tariff item 1A. The scrap is nothing else than part of these various products like boiled sweets, caramels etc. They may become broken

parts of a particular shape or size of a sweet in which it is marketed but basically it remains as boiled sweets, toffees, caramels etc. It also remains as good as the sweets which are in whole form. It is sold as confectionery and for the purpose of eating it is the confectionery. I was shown the samples in the course of hearing that these are packed in polyethylene packets and does not look less attractive compared to the price on which they are sold."

5. It is primarily for the taxing authority to determine the head or entry in tariff schedule under which any particular commodity fell; but if in doing so, these authorities adopted a construction which no reasonable person could adopt i.e. if the construction is preverse then it is a case in which "the Court is competent to interfere (vide *The Collector of Customs, Madras Vs. K. Ganga Setty*, ; *V.V. Iyer of Bombay v. Jasjit Singh*, *Collector of Customs AIR 1973 S.C. 1941*),

6. Mr. Sanyal appearing on behalf of the respondents, contended that there was no item as "scrap of confectionery" in the Central Excise Tariff and the scrap confectionery was nothing but part of the main confectionery liable to excise duty. According to Mr. Sanyal, these scraps are nothing but broken parts of the confectionery namely, the boiled sweets.

7. It is the case of the petitioners that in course of manufacture of confectionery small bits and crusts fall out at different stages of production into trays and on the floor. Such fallen bits and crusts are taken from the floor or cleared from trays and are dumped. Such waste products are known as "scraps". The said scraps are unfit for human consumption and its consumption would be detrimental to human health.

8. It is well settled that the Central Excises and Salt Act impose excise duty on manufacture of goods. In *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, , the Supreme Court observed that the word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that new and different article must emerge having a distinctive name, character or use.

9. In *Union of India (UOI) Vs. Delhi Cloth and General Mills*, , the Supreme Court observed that to say that "manufacture" is complete as soon as the application of one or more processes the raw material undergoes some change is to equate "processing to manufacture" and for this there is no warrant in law. The word "manufacture" used as a verb is generally understood to mean as bringing into existence a new substance and does not mean merely to produce some change in a substance, however, minor in consequence the change may be.

10. In the instant case, if these scraps are broken parts of the boiled sweets, certainly, it comes within the definition of "confectionery" and excise duty is liable to be paid. But it is the case of petitioners throughout that the scraps are obtained in course of manufacture and not out of manufacture of confectionery. Appellate Collector's findings that basically these scraps remain as boiled sweets; it is sold as confectionery; these are suitably processed, hygienically

packed and marketable in the same description as mother product, are based on without any evidence. The Collector is required to find out whether these scraps are parts of the product viz. confectionery manufactured by the petitioners. If the raw materials undergone some change in the process of manufacture it cannot be equated with the finished products.

11. In affidavit-in-reply it is stated by the petitioner that for the sake of convenience of handling a small quantity of the said scraps in a collophan bag were shown to the Appellate Collector at the time of hearing of appeal

12. The Appellate Collector is the sole judge of facts and if there be some evidence or materials on which his findings can be based, the adequacy of reliability of that evidence is not a matter which can be permitted to be canvassed in a proceeding under Article 226 of the Constitution. Only in cases where the findings are not based on any evidence or relevant materials or no reasonable person could adopt such a conclusion on the basis of the materials placed before him or the findings are perverse only in such cases this court would be justified in issuing a Writ of Certiorari.

13. It is next contended by Mr. Bhatnagar that two demand notices had been timebarred and the Rule 10A of the Central Excise Rules has got application with respect, to the said demands.

14. At this stage, I think that is not necessary for me to decide that point, as I propose to send back the case to the Appellate Collector of Central Excise for a fresh hearing. I should point out however, that the Collector should consider the impact on Rule 173-J and Rule 10 in deciding the matter.

15. In the result, this rule is made absolute. The impugned order of the Appellate Collector of Central Excise is quashed by a Writ of Certiorari. The case is remitted back to the Appellate Collector of Central Excise as he is directed to rehear the matter in the light of the observations made herein above within two months from date with notice to the petitioners. Petitioner shall have liberty to place all the relevant materials and evidence in support of their contentions before the Appellate Collector of Central Excise. If it is necessary, the Collector should get these scraps chemically examined in order to find out whether these are broken parts of the confectionery or not. After considering all the materials, he will pass the order in accordance with law.

16. There will be no order as to costs.

17. The petitioner has deposited in pursuance of the Order of this court a sum of Rs. 18,000/- with the Registrar, A.S. of this Court. The petitioner shall be at liberty to withdraw that amount on a proper application.