
(1987) 06 BOM CK 0026

In the Bombay High Court

Case No : Misc. Petition No. 814 of 1979

Mcdowell and Co. Ltd.

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 19-06-1987

Acts Referred:

Customs Act, 1962 — Section 111, 112

Citation : (1988) 19 ECR 49 : (1988) 38 ELT 454

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Judgement

1. The short question that is involved in this petition is as to whether whisky, imported by the petitioners is a "concentrate whisky" or otherwise.

2. The petitioners say that amongst the various brands of whiskies manufactured by the 1st petitioners are the brands known as "No. 1 McDowell's Whisky", "diplomat Whisky" and "Gold Riband Whisky", all having a strength of 75 degrees proof. The said whiskies are made necessarily from alcohol distilled in the factory of the 1st petitioners in India. In the manufacture of the whiskies, it is usual to blend different kinds of whiskies in order to impart the necessary flavour and taste to whiskies and accordingly the 1st petitioners have been blending alcohols distilled by them at their factory with overstrength and over proof. Varieties of scotch whisky made from pure malt and having a high bouquet imported by them from Scotland in the United Kingdom from a supplying firm called Charles Makinlay & Co. Ltd. The over strength and over proof whisky imported by the 1st petitioners from the said suppliers has always been "scotch malt whisky" of a strength of 105 degrees proof or more.

3. Prior to 1st April 1972, the 1st petitioners imported the said over strength and over proof malt scotch whisky from time to time and the same was described in the invoices as well as in the bills of entry filed in respect of the importations as "scotch whisky". Under the Import Trade Control Policy of the Government of India for the period 1.4.1972 to 31.3.1973 import licences were available for

what was described therein as "concentrate whisky". The 1st petitioners secured a licence in that behalf but they wanted to be sure in that what they were importing was "concentrate whisky" as per the said licence. But there was no such entry as "concentrate whisky" and the only product to which the description could be applied was "whisky at over proof strength" similar to what they had been importing, and accordingly they sought advice from the said suppliers. The suppliers informed the petitioners as follows :

"Malt whisky comes off the still at about 30 degrees over proof and is reduced to 11 degrees over proof for filling into casks, at which strength it is matured. When we receive malt whisky after maturation, the whisky has lost some of its strength and is then between 5 degrees to 7 degrees over proof ,which is what we term "Matural Strength" and it is at this strength that we normally ship to you bulk supplies of four years old Vatted Malt".

4. Thereafter the petitioners imported the same under the said licence. When the imported material reached Bombay, the Customs authorities found fault with the same on the ground that what was imported was not "concentrate whisky" but according to them it was "Malt Scotch Whisky" and, therefore, they thought of taking action. Accordingly, a show-cause notice was issued on 20th February 1974 by the Assistant Collector of Customs, and the petitioners and other concerned were also called upon to explain in writing as to why the said "concentrate whisky" imported should not be confiscated under the provisions of Section 111(d) and (m) of the Customs Act read with Section 3, sub-section (2) of the Imports and Exports Control Act, 1947 and also whey penal action should not be taken against them u/s 112 of the said Act for causing unauthorised importation. The 1st petitioners submitted their written explanation. The other petitioner also gave their reply. They were given a personal hearing and several text books and authorities in support of their explanation were cited before the Assistant Collector of Customs. By an order dated 25th July 1974 the Collector of Customs held that the expression "concentrate whisky" means "the most concentrate form of whisky", which, according to him, was "whisky just after distillation and before maturation". It is worthwhile to quote the relevant portion of the order passed by the Collector of Customs in that behalf, inasmuch as it is on the basis of this reasoning that the Customs authorities negatived the appeal by the petitioners as also the revision filed by them thereafter. The relevant portion is as follows :-

"The term concentrate whisky does not also find mention in the Encyclopaedia of Chemical Technology by Kirk Othmer. Since this term is not a well known term in trade parlance we have to interpret the term in its literal meaning in the context of the Import Trade Control policy. The term concentrate whisky appears at page 134 against item G-2. 1 Col. 4 in the Import Trade Control Policy Vol. II A.M. 73. This is the policy applying to registered exporters. Referring to the import policy for registered exporters the same policy books gives the objectives as follows at page 6 : "The object of the import policy for registered exporters is to provide to

the registered exporters by way of replenishment from the most preferred source the imported materials required in the manufacture of the products exported by them". If the intention was to allow the imported whisky in bulk which had only to be diluted and bottled and exported, the policy could have clearly used the terminology "whisky in bulk" instead of concentrate whisky. As stated earlier once whisky has been distilled, matured and blended what remains to be done is essentially only to dilute it to the proper strength and bottle it. In the present case the imported whisky has undergone the process of distillation, maturation and blending. I should therefore think that the only meaning which can be given to the term concentrate whisky in the context of the ITC Policy for registered exporters is that it relates to the most concentrated form of whisky which is just after distillation and before maturation. The parties have tried to argue that concentrate whisky means a beverage spirit of either underproof or over proof .This has very little force. The proof of whisky is determined by different standards in different countries. The standard used in U.K. which is London proof is different from the standard used in the U.S.A. The terms "under proof" and "over proof" as used in the U.K. standard are arbitrary terms. I do not therefore accept the party's argument that whisky means a beverage spirit of either "under proof" or "over proof". Vatted malt whisky which is matured and blended whisky cannot in my view be considered as concentrate whisky."

5. Since the same line of reasoning was adopted right upto the level at which the revision application made by the petitioners came to be disposed of, the petitioners ultimately had to file the present petition to quash the said decision.

6. The Customs had tested the imported material and according to the test results the actual strength of the whisky was 5.0 (O.P.) to 6.4 (O.P.). This should have indicated to the Customs that the whisky imported by the petitioners was approximately 105 to 106 degrees proof, which is far higher than the ordinary 70 degrees to 75 degrees proof required by ordinary whisky. The Customs themselves say in their order that the imported bulk would be diluted and bottled and thereafter it is sold in the market. That itself should indicated that if it was not "concentrate whisky", there would have been no question of diluting and bottling for the purpose of consumption. In fact, there is no evidence or authority for the contention of the Customs authorities that the term "concentrate whisky" relates to "the most concentrated form of whisky, which is just after distillation and before maturation". This is their own line of reasoning without any material whatsoever.

7. I am inclined to agree with the contention of the petitioners that there was no justification whatsoever on the part of the respondents to discard the evidence produced before them with regard to the meaning of "concentrate whisky". According to the petitioners, both in the United Kingdom as well as in India, alcohol after distillation must be matured for certain minimum period of time. The Indian Standards Institution has prescribed a minimum period of one year for the whisky. In the United Kingdom, Section 243(1)(d) of the Customs and

Excise Act, 1952 defines "whisky" to mean inter alia "a whisky matured for a minimum period of three years". Therefore, the distilled alcohol which is not matured for a minimum period cannot be regarded as "whisky" at all and, therefore, it cannot be termed as "concentrate whisky". Therefore, the Customs authorities came to this strange conclusion of their own without any material and without any understanding of the subject.

8. The Customs authorities relied on certain earlier invoices, on the basis of which, the petitioners had imported certain whiskies perhaps under an earlier policy. That cannot be a guiding factor, inasmuch as they had tested the material imported and they have relied on the results of the chemical analysis, which clearly shows that the actual strength of the whisky imported ranged between 105 to 106 degree proof. The ordinary strength of an Indian whisky for that matter is 25 degrees under proof, that is to say, 75 degrees proof. I cannot understand as to why the Customs authorities could have rejected all the material and expert's evidence that came to be placed before them and they came to such a strange conclusion.

9. Mr. Talyarkhan appearing for the petitioners has drawn my attention to a judgment given by Pendse J. in Writ Petition No. 2407 of 1982 Tata Exports Limited v. The Union of India in which the question was relating to "Concentrate Brandy". Here again, the Customs authorities had similar confusion in their mind and tried to suggest that what was imported was "Brandy" and not "Concentrate Brandy". This was expressly negatived by the learned Judge and he had set aside the impugned decision in those proceedings.

10. In the result, the petitioners succeed in the petition. I make the Rule absolute in terms of prayers (a) and (b) of the petition. As regards the refund of the penalty, the respondents shall pay the amount back to the petitioners within a period of two months from today. As regards the bank guarantee given by the petitioners, the same stands discharged. Respondents will also pay costs of this petition to the petitioners.