
(1979) 12 MAD CK 0011

In the Madras High Court

Case No : Writ Petition No. 2572 of 1977

Parrys Confectionery Ltd.

APPELLANT

Vs

The Government of India (C.E. Revision)

RESPONDENT

Date of Decision : 05-12-1979

Acts Referred:

Central Excise Rules, 1944 — Rule 173(6)

Citation : (1980) CENCUS 226

Hon'ble Judges : V. Ramaswami, J

Bench : Single Bench

Final Decision : Allowed

Judgement

V. Ramaswami, J.—The petitioners are, among other things, manufacturers of confectionery items in their factory situated at Nellikuppam

South Arcot District, Tamil Nadu. They held a Central Excise Licence for the manufacture of general confectionery items dutied under item 1-A of

the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as the "Act"). In their application for Central Excise Licence

made under Rule 173(6) of the Central Excise Rules, they have mentioned "Lozenges" as one of the items manufactured by the petitioners. These

"Lozenges" prepared by the petitioners were being assessed to the Central Excise duty as if they fall under item 1-A of the Schedule to the Act.

The petitioners state that they have wrongly included in their application and were also paying mistakenly duty on Lozenges as if these Lozenges

are also covered under item 1-A (1) of the Schedule. When the mistake was detected, they filed a petition on 20-10-1973 to the Assistant

Collector of Central Excise, Pondicherry to delete Lozenges from the list of excisable items mentioned in their application filed under Rule 173-B

of the Central Excise Rules, and also prayed that they may be permitted not to pay Central Excise duty thereafter. They have further prayed that

the duty collected in the past may also be refunded to them. In this petition, they have detailed the items that might come under item 1-A (1) and

contended that Lozenges do not fall within the tariff description of any one of these various specified items mentioned in that entry. In support of

their contention, the petitioners furnished the views expressed by certain standard books on confectionery and also the description and the

specifications given for some of the items by the Indian Standards Institution. By a one line order dated 8-1-1974, the Assistant Collector held that

Lozenges"" manufactured by the petitioners will fall under the category of ""Candy"", which is to be assessed as confectionery under tariff item 1-A

(1). This was confirmed by the appellate and revisional authorities. It may also be mentioned that both the appellate and revisional authorities also

did not give any reason for coming to this conclusion except to state that "Lozenges" is included in the word ""Candy"" and is assessable to excise

duty. It is against these orders, the petitioners have filed the present writ petition praying for a writ of certiorari to quash the orders of the assessing

authorities holding that "Lozenges" are excisable under item 1-A (1) and for a mandamus directing the respondents to dispose of the refund

application afresh on the basis that "Lozenges" are not excisable goods. It may be mentioned at this stage that with effect from 1-3-1975, as stated

by the learned Counsel for the petitioners, a residuary entry in 68 was introduced so that even if "Lozenges" do not come under the description

mentioned in item-1 (A) (1), it will be now excisable under entry 68 with effect from 1-3-1975. There appears to have been a further amendment

sometime in 1978, by which item 1-A (1) itself was deleted but these do not concern us and, therefore, we need not state anything more than to

note the amendments.

2. The learned Counsel for the petitioners contended that though the heading of excisable products in item 1-A of the Schedule is "Confectionery",

the description given in 1-A(1) shows that the products itemised in that item are exhaustive and that therefore, in order to attract excise duty, the

product will have to fall under any one or other of the categories mentioned in item 1-A (1). It was then contended by the learned Counsel for the

petitioners that the products mentioned in item 1-A(1) show that they could all be brought under one category of confectionery items produced by

the process of heating and cooking. In other words, heating and cooking are common elements in the process of manufacture of everyone of these

items. Therefore, in order to bring any particular commodity within those items, the heating and cooking elements also should be available. Thus,

the products in item 1-A (1) should be understood and interpreted in the context in which the groups of articles having some important common

process of manufacture are brought together. So understood, lozenges will not come under any one of the items much less under the item "Candy

which is the only item in which it is stated to be included according to the orders of the assessing authorities. On the other hand, the learned

Counsel for the respondents contended that emphasis should not be made on the ingredients used in the manufacture or the process of manufacture

but the words will have to be understood in the popular or common man's understanding and so understood, there could be no doubt that

lozenges could be treated as either sweets or candies. In this connection, the learned Counsel for the respondents also relied on the label affixed by

the petitioners in marketing the product "lozenges" wherein it is stated Extra Strong Mint Lozenges, below the words "Parry Sweets".

3. Section 3 of the Act imposes a duty on all excisable goods set forth in the First Schedule to the Act. There are a number of major headings

under which a number of sub-items are also mentioned in the First Schedule. The first heading is "Food". Under that, we find a number of items

viz. Item 1, 1-A, 1-B, 1-C, 1-D, 1-E and 1-F. Each of the items give a description of the goods and the rate of duty leviable in respect of the

same. Item 1-A of the First Schedule reads as follows:

1-A Confectionery, Cocoa powder and Chocolates in or in relation to the manufacture of which any process in ordinarily carried on with the aid of

power, namely -

1. Boiled sweets, toffees, ten per cent

caramels, candies, nuts ad valorem

(including almonds) and

fruit kernels coated with

sweetening agent and
chewing gums.

2. Cocoa powder -do-

3. Drinking chocolates, cho - -do-
colates in the form
of granules or powder.

4. Chocolates in the form of -do-
blocks, slabs, tablets,
bars, pastilles or
croquettes or in any other
form not otherwise specified,
whether or not containing
nuts, fruits, kernels or fruits.

It can be seen from this item that whatever confectionery items excisable under this entry are those mentioned in item 1-A (1). Cocoa powder

comes under 1-A (2) and Chocolates under 1-A (3) and (4). If we split up the items, we may read ""confectionery"" namely:

Boiled sweets, toffees, caramels, candies nuts (including almonds) and fruit kernel, coated with sweetening agent and chewing gums"" are dutiable at

10% ad valorem.

4. The learned Counsel for the petitioner is well founded in his contentions that by use of the word "namely", it is intended to be an exhaustive

definition of confectionery and therefore, there is no use in looking into the meaning of the word ""confectionery"" in the general sense but one will

have to understand whether a particular commodity manufactured will come under anyone of the items mentioned in 1-A (1). Unless it can be

brought under anyone of those categories, it will not be dutiable under that entry. As already stated the assessing authority and the appellate and

revisional authorities have held that lozenges are included in the item Candies. It is, therefore, necessary for me only to see whether the view

expressed by these authorities is correct and it is not necessary to find out whether it will come under any other category mentioned in item 1-A or

under general heading "confectionery" as that was not the contention of the

respondents either. When the matter was pending before the appellate authority, the authorised representative of the petitioner-company applied to the Indian Standard Institute for a technical opinion as to the meaning of the word "Candy" and "Lozenges". The Indian Standard Institute in their letter dated 11th October, 1974 replied as follows:

(i) Candy is a light, bright and glossy confection made by pulling sugar syrup boiled to a thick consistency. In other words, candy is crystallised sugar made by repeated boiling and slow evaporation. A lozenge on the other hand is entirely different. Its process of manufacture involves a cold process without any boiling being done, unlike confectionery or candy. The lozenge is made out of finely pulverised sugar or Icing Sugar with certain binding materials, suitable flavours and colours added, worked up to dough consistency without the aid of heat, rolled flat and then stamped into separate lozenges by cutting.

(ii) Usually candy is defined as light, and brilliant confection made by pulling sugar syrup, boiled to a thick consistency. Lozenges are made of sugar, flavoured with essences and coloured to taste. Usually for the preparation of lozenges finely pulverised sugar, glucose, syrup and a binder, such a Gum Tragacanth or Liquid Gelatine is worked up to a dough consistency without the aid of heat, which is rolled flat and then stamped into separate lozenges by cutting. The only difference we see between candy and lozenges is application of heat. Also probably in the case of Candy, the ratio of sucrose to glucose may be higher than in Lozenges.

(iii) In India, candy is understood to be the crystallised sugar made by repeated boiling and slow operation. The trade name for such a product is "mishri," which is marketed in the form of "slabs and bowls".

(iv) The term candy connotes different meaning in different countries. In English speaking countries with the former British background, Candy

means highly purified form of sugar made by slow evaporation of sugar syrup and is obtained in the form of large crystals, characteristic to sucrose,

a disaccharide. In the new world, i.e. primarily America, Candy means virtually any Confectionery be it hard boiled sweets, confectionery goods,

toffees, caramels, boiled marshmallows, jujubs, lozenges, chocolate bars and coated chocolate confectionery etc. Therefore, the term candy should

not be interpreted in the American sense of the term as most of our rules and

regulations as well as terms of common usage are on the British pattern. The term candy, therefore, should connote only candy sugar and not confectionery.

5. As regards Lozenges, this product unlike all the other classes of sugar confectionery is not cooked at all. Further, this product, except minor quantities of binding material, colour and flavouring is almost exclusively sugar and therefore must be regarded as distinctly different.

6. In the Indian Standard Institute's specifications relating to IS : 1668-1975, which product relates to Lozenges, it is stated:

0.2 Losenges (as different from medicated lozenges or others with special claims) are confections mainly made out of pulverized sugar or Icing

sugar with certain binding materials and lubricants with the addition of suitable flavours and colours. Powdered spices or extracts of spices are also

added in the preparation of some varieties of lazenges. These are generally made from cold mixing which means that no preliminary boiling or

cooking of the ingredients is required. These confections are produced either as cut goods from a sheet of dough and air-dried or they might be

held under pressure so as to form a hard cohesive confection. The compressed lozenges are produced by cold mixing and wet granulation or

slugging procedure.

7. The petitioners had also obtained the views of the Central Food Technological Research Institute. Mysore who in their letter dated 6th

February, 1974 have stated.

Usually candy is defined as light and brilliant confection made by pulling sugar syrup, boiled to a thick consistency. Lozenges are made of sugar,

flavoured with essences and coloured to taste. Usually for the preparation of lozenges finely pulverised sugar, glucose syrup and a binder such as

gum Tragacath or liquid gelatin is worked up to a dough consistency without the aid of heat which is rolled flat and then stamped into separate

lozenges by cutting. The only difference we see between candy and lozenges is application of heat. Also probably in the case of candy the ratio of

sucrose to glucose may be higher than in lozenges.

8. As may be seen from the informations, specifications, descriptions and the manufacturing process in relation to lozenges, no preliminary boiling

or cooking of the ingredients is required in the manufacture of lozenges, whereas

candies are made only with the aid of heat and cooking is

involved in the process. Even though, the learned Counsel for the respondents is not in a position to deny that there is such a difference in the

manufacture of candies and lozenges, he contended that this difference is of no consequence; It is in respect of this argument that the contention of

the learned Counsel for the petitioners that for making everyone of the commodities mentioned in item 1-A (1), cooking and boiling by use of heat

are essential elements and the selection of the commodities among the confectionery items and listing it under item 1-A (1) is relevant. Toffees are

defined in the Indian Standard Institute's specifications IS : 1667-1971 as ""Boiled sugar confectioneries made out of sugar, edible fat, water and

other ingredients.

9. In the book, Chocolate, Cocoa and Confectionery : Science and Technology by Bernard W. Minifie, we find the following passage relating to

the manufacture of caramels, toffees, butterscotch:

These confections owe their character mainly to the presence of milk, butter and certain vegetable fats... Brown sugars are also used to contribute

flavour. Milk when heated in the presence of sugar, is subject to partial decomposition known as caramelisation and this gives the characteristic

flavour associated with caramels and toffee. Caramelisation of a different type also occurs in sugar, glucose, and invert sugar when syrups are

boiled to temperatures of 149½ - 157½ (300½ - 315½ F). A stronger type of caramelisation with yet another type of flavour is obtained by

alkaline treatment, for example, by the decomposition of sodium bicarbonate with boiling syrup at about 300½ F.

10. In the same book relating to the manufacture of gums, we find that in the process of manufacture sugar and glucose are dissolved in water and

boiled upto 124½C. The first commodity mentioned in item 1-A is boiled sweets. In the process of manufacture of those sweets, therefore,

cooking is involved, coated nuts and fruit kernels are coated candies (vide Encyclopaedia Britannica), Thus, in everyone of these commodities

mentioned under item 1-A(1), boiling and cooking are essential elements in the process of manufacture. Having regard to the context in which

Candies are used in this entry, in order to bring a product within the meaning of ""candies"", it should be one in the manufacture of which the process

of boiling and cooking are also involved. We have already noticed that in the process of manufacture of Lozenges, boiling and cooking are not done. Necessarily, therefore, Lozenges cannot be included in the item ""candy"". The description, specification and the process referred to in the Indian Standard Institute's specifications and the view expressed by the Indian Standard Institute in their letter dated 11th October 1974, also clearly show that lozenges cannot be brought under the category of ""Candies"". It may also be mentioned that in the opinion given by the Indian Standard Institute in their letter dated 11th October, 1974, they have also referred to the understanding of the word ""Candies"" in England and America. In this connection, we may refer to a decision of the Supreme Court reported in Union of India (UOI) Vs. Delhi Cloth and General Mills, wherein the Supreme Court observed that in technical matters like this, the views expressed by the Indian Standard Institution must be preferred. I see from some of the specifications of the Indian Standard Institution produced that the Sectional Committee which decides these matters are composed of eminent persons in trade, industry and Government as also consumers and other experts. Their views therefore deserve acceptance by Court except where there are other strong considerations to the contrary. Having regard to all these facts, I am of the opinion that the view expressed by the respondent that lozenges will be included in the description of ""candy"" cannot be accepted and therefore lozenges are not excisable under entry I-A(1) of the First Schedule to the Act.

11. The learned Counsel for the respondents then contended that even so, no refund could be ordered. First of all, in this petition no refund is asked for and the petitioners have prayed only for a writ of mandamus directing the respondents to consider their application for refund on merits. But I do not want to leave the matter in doubt relating to the entitlement of the petitioners for refund. So far as the period subsequent to 20.10.1973, when the petitioners contended that they are not liable to pay any excise duty and were paying excise duty under protest is concerned, there could be no doubt that they are entitled to get a refund of the same. So far as the period earlier than 20.10.1973 is concerned, the learned Counsel for the respondents contended that the duty had been collected and it would have been appreciated for the common good and

there is justifiable reason for directing a refund of the same. Generally, the Supreme Court is of the view that a suit to recover monies paid under a mistake of law is maintainable within a period of three years from the date of knowledge of the mistake. In this case, there could be no doubt that the payment of excise duty was on a mistake of law and not on a mistake of fact. The question whether lozenges will be included or not in candies cannot be taken as so obvious as to make any payment without protest as a payment under a mistake of fact. In fact, so many authorities will have to be looked into and verified before one could come to a conclusion that lozenges are not included in candies. Therefore, if the petitioners had to file a suit, they could have done so and claim refund for a period of three years prior to the date on which they had entertained the doubt and filed application for refund. But, they had not filed a suit and if any suit were to be filed to-day, it would have been barred by limitation. As held by the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, if the relief for refund could be asked for in a suit, it could be asked for in a suit, it could be asked for in a writ petition also. Since the relief related to a period beyond three years prior to the filing of the writ petition, I could not grant any relief for refund relating to the period prior to 20.10.1973. What the learned Counsel for the petitioners wants to contend is that Rule 11 of the Central Excise Rules enables the petitioners to file an application for refund and such an application will have to be filed only with the Assistant Collector and they need not file any suit. Therefore, to the extent the petitioners could be given relief under Rule 11 the excise authorities should have given them the relief. That rule reads:

No duties or charges which have been adjusted in an account current maintained with the Collector under Rule 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be refunded (unless the claimant makes an application for such refund under his signature and lodges it with the proper officer) within three months from the date of such payment or adjustment as the case may be.

It is manifest that the petitioners having filed an application for refund on 20.10.1973 will be entitled to a refund of the excise duty mistakenly paid for a period of three months prior to that date. No question of limitation arises

because the application itself is dated 20.10.1973 and the pendency of the application will not bar the relief itself. The petitioners will accordingly be entitled to a refund of the money paid for a period of three months prior to 20.10.1973 and also for the period subsequent to 20.10.1973, which they paid under protest.

12. Accordingly, the writ petition is allowed. The Rule Nisi is made absolute. There will be a writ of mandamus directing the 3rd respondent to take up the refund application on file and dispose of the same in light of the observations made above. There will be no order as to costs.