
(1986) 08 BOM CK 0017

In the Bombay High Court

Case No : Writ Petition No. 2407 of 1982

Tata Exports Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 07-08-1986

Acts Referred:

Customs Act, 1962 — Section 111, 112, 130, 131

Citation : (1989) 24 ECC 272 : (1989) 39 ELT 49

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. Petitioner is a Company registered under the provisions of the Companies Act and engaged in the business of imports and exports. The petitioner is a registered export house and in that capacity obtained import licences pertaining to the licensing period April 1, 1972 to March 31, 1973. The licences were endorsed for the import of concentrates of rum, gin, whisky, brandy and vodka. The petitioner Company used to sell the imported concentrates of these beverages to McDowell and Company Ltd. In the year 1974 the petitioner Company imported 50 futs of Brandy concentrate and before that consignment was shipped by the French suppliers, a certificate of Analysis was obtained from the French Customs. In April 1974 bill of entry was filed in respect of the consignment and the Customs Authorities detained the consignment and examined the samples. The Appraiser of the Special Investigation and Intelligence Branch issued a show cause notice to the petitioner on August 1, 1974 to explain why goods unauthorisedly imported should not be confiscated under the provisions of Section 111(d) and (m) of the Customs Act, 1962 read with Section 3(2) of the Imports and Exports (Control) Act, 1947 and Import Control Order No. 17/55 dated December 7, 1955, and why penal action should not be taken u/s 112 of the Customs Act for causing unauthorised importation. The show cause notice was issued on the basis that the goods imported are high bouquet brandy and not brandy concentrate. A supplementary show cause notice was issued on April 25, 1975 and thereafter the Collector passed an order

adverse to the petitioner. The order was set aside in appeal and the proceedings were remitted back for rehearing Collector had violated principles of natural justice.

2. The Collector thereafter issued do novo show cause notice on December 10, 1976 and the contents of this notice were identical to the earlier show cause notice. The petitioner filed reply pointing out that the import was only of brandy concentrate and the show cause notice was misconceived. The Collector did not accept the claim of the petitioner and by order dated March 18, 1977 the goods were confiscated, but the petitioner Company was allowed to redeem the same on payment of fine of Rs. 7 lakhs. The order was confirmed by Central Board of Excise in appeal preferred by the petitioner and thereupon the petitioner preferred a revision application to the Central Government. Shri V. B. Iswaran, Secretary to the Government of India, dismissed the revision application by order dated August 7, 1982, and that has given rise to filing of the present petition.

3. Shri Talyarkhan, learned counsel appearing on behalf of the petitioner, submitted that the orders passed by the three authorities below are entirely unsustainable as on the established facts it is impossible to suggest that the goods imported were not brandy concentrate. The learned counsel also urged that the revisional authority ignored the earlier order dated May 5, 1981 passed by the Government and where an identical question came for decision and the claim of the petitioner was accepted. The submission of the learned counsel on both counts deserves acceptance.

The contention that Shri Ishwaran, Secretary to the Government of India, was wrong in brushing aside the earlier order dated May 5, 1981 passed by the Central Government in exercise of revisional powers in the case of the petitioner and in respect of the import of identical goods is correct. The petitioner Company had imported brandy concentrate and the two consignments were cleared for home consumption against the import licence issued. Subsequently, on receipt of the information that what was imported and cleared through Customs was brandy and not brandy concentrate, the goods were seized on October 5, 1974. Show cause notices were issued and adverse orders were passed against the petitioner and that gave rise filing of the revision application before the Central Government. The Revision Application was heard by three Secretaries consisting of Shri G. Ramachandran, Finance Secretary, Shri D. N. Mehta and Shri M. V. N. Rao, Additional Secretaries, and the decision of the Revisional Authorities is reported in 1981 E.L.T. 375 (M/s. Tata Exports Ltd. & Anr.) The Central Government took the view that if the goods contain alcohol in the higher ranges i.e. 104.3 proof and also contain Caramel, with a very high percentage of solid content amounting to more than 5% which by maturation cannot be brought down, then it must be held that the goods are concentrate brandy. The Revisional Authority also held that mere proof strength alone could not be decisive factor in determining whether the brandy imported was concentrate or not, but since the petitioner had produced a licence from the suppliers indicating high percentage

of solid content in the goods, the petitioners are entitled to benefit of doubt and the show cause notices and adverse orders could not be sustained. Shri Talyarkhan submits, and in my judgment with considerable merit, that the facts of the present case are identical and the reasons given by the Secretary for ignoring the earlier decision is unsustainable. The Secretary tried to distinguish the earlier decision on the ground that the proceedings in the earlier case were drawn u/s 130 of the Customs Act, and therefore, in such proceedings the onus to prove that the goods were prohibited were on the Department, while in the present case the onus is heavily on the petitioner. The distinction tried to be suggested by the revisional authority is really a non-existing one. It is unfortunate that the revisional authority should have ignored the earlier decision recorded by the three Secretaries and especially where the parties were the same and the consignments were imported under the identical licences. The revisional authority should have accepted the decision reached in the earlier proceedings and ought to have given relief in favour of the petitioner.

4. Apart from this consideration, on merits I find that the order of the revisional authority is wholly unsustainable. All the three authorities came to the conclusion that the imported goods were over- proof brandy and though the invoice stated the strength of the goods to be 5 OP it was actually found to be 2.1 OP to 2.4 OP when the samples were tested in the Customs House Laboratory. The minor difference in recording the strength of the goods in the invoice do not make any difference to the decision, because even accepting the sample report of the laboratory, it was not in dispute that the goods were over proof brandy. The three authorities also recorded a finding that the goods contain solid matter more than 1%, which is prescribed by ISI for the purpose of brandy. It was also held by the three authorities that the imported goods were to be blended by M/s. McDowell Company with indigenously made alcohol and were to be marked thereafter. In face of these findings it is difficult to imagine how the revisional authority could have held that what was imported was not brandy concentrate but only brandy. It hardly requires to be stated that it is impossible to consume brandy containing alcohol in ranges above 100%. Even if a drop of such concentrate is consumed, the throat and the body of the person would be burnt down. The revisional authority instead of taking a practical view of the matter, proceeded to take into consideration imaginary factors by observing that the expression "brandy concentrate" is not defined and therefore the explanatory note under Heading 22.09 of the Brussel's Tariff Nomenclature should be imported as aid to determine the ticklish questions of classification. The order of the revisional authority is clearly erroneous as it is now well settled that the reliance on the Brussel's Tariff Nomenclature for classifying the goods is not permissible. The revisional authority also held that the petitioner ought to have proved that the goods imported are made up of a complex mixture of distillates, tincture, alcoholates and natural or synthetic essence. The revisional authority was conscious that the petitioner had produced certificate of the supplier to establish that fact, but found out an easy way to ignore this certificate by

observing that the certificate cannot be accepted at its face value in the absence of percentage composition. In my judgment, the approach was entirely faulty and one sided and it appears that the revisional authority was bent upon to hold against the petitioner Company somehow or the other. By perusal of the material brought on record by the petitioner it is impossible to hold that the goods imported were not brandy concentrate. In my judgment, apart from the earlier decision taken by the Central Government, even on merits the order of the three authorities below could not be sustained.

5. Accordingly, petition succeeds and the rule is made absolute in terms of prayer (a). The bond furnished by the petitioner in pursuance of the interim order to stand discharged.

6. In the circumstance of the case, there will be order as to costs.