

**CUSTOM EXCISE & SERVICE TAX APPELLAT
TRIBUNAL**

**NEW DELHI
PRINCIPAL BENCH, COURT NO.I**

**(Appeal No. E/3378, 3379, 3548/2010, 1234/2011, 2836- 2840/ 2012-
Ex.DB)**

[Arising out of the common Order-in-Original No.38-42/2012(CE)-
Commissioner dated 22.05.2012 passed by Commissioner, Central Excise,
Jaipur-I).

**Triveni Udyog, Sh SurendraMadhani, Agarwal & Sons,
Govind Boora Bhandar, Mahesh Boora Udyog, Shanker
Products & Rameshwar Udyog** **...Appellant**

Vs

C.C.E. Jaipur-I **... Respondent**

Appearance:

**S/Sh. Amit Jain, Kr Vikram, Ms Rinki Arora, Advocates for the
Appellant
Sh. RK Mishra, DR for the Respondent**

CORAM:

**Hon'ble Mr Justice (Dr) Satish Chandra, President
Hon'ble Mr Ashok K. Arya, Member (Technical)**

Date of Hearing 05.04.2017

Final Order No. 53960-53968/2017

Per Ashok K. Arya

1. M/s Triveni Udyog, Sh Surendra Madhani & others are in
appeal where respective demands along with penalties have
been confirmed vide Order-in-Original No.21/2010 dated

30.07.2010 and Order-in-Original No. 38 to 42/2012 dated 21.05.2012.

2. The brief facts are that:

i) The Appellant assessees are engaged in preparation of *Bura, Batasha, Mishri and Makhana* from duty paid sugar procured by them.

ii) The Appellants did not pay duty on their above products having the belief that their activity does not amount to manufacture .

iii) The assessees claim to have general understanding that their final product is only a mere change in the physical form and shape of sugar. Though manufacturing started with the sugar, after its processing the final product is also a form of sugar.

iv) The appellants were issued respective SCNs proposing classification of *Boora* under Central Excise Tariff heading 1701.99 and *Batasha, Mishri and Makhana* under heading 1704.90.

v) In case of the appellants Triveni Udyog and Surendra Madhani, the demands along with interest and penalties were confirmed vide Order- in- original No. 21/2010

dated 30.07.2010 passed by Commissioner Central Excise, Jaipur-I.

vi) In case of other appellants, namely, Agarwal & Sons, Govind Boora Bhandar, Mahesh Boora Udyog, Rameshwar Udyog and Shankar Products, the Orders-in-Original No. 23 to 27/2010 dated 05..08.2010, 10.08.2010 and 11.08.2010, *inter alia* confirmed the demands and imposed penalties. Therefore, the appellants filed appeals before Tribunal which were disposed of vide final order No.996-1000/2011-Ex dated 3.11.2011 and matters were remanded to the adjudicating authority for de novo decision. The adjudicating authority- Commissioner passed the de novo order No.38 to 42/2012 dated 21.05.2012 again confirming the dues and penalties against the appellant assessees. Hence the present appeals have been again filed by the assessee appellants.

3. The issue being common in all these appeals, so decided together.

4. With above background, we have heard the learned counsels for the appellants S/Sh Amit Jain, Kumar Vikram, Ms Rinki Arora and Sh RK Mishra.

5. The ld Counsels for the appellants mainly submit that:

i) In the present case, input (sugar) as well as (boora, mishri, makhana and batasha) fall under the same chapter heading 1701.39 of C.Ex.Tariff and attract the same rate of duty.

ii) In the present case, no new or different article is emerging; there is change in physical form only; there is no change in the chemical composition of Sugar or its essential character or use.

iii) Hon'ble Delhi High Court in the case of *Nangumal Ram Kishore* (1981) 48 STC 277 holds that conversion of sugar into mishri and patasha is merely sugar made into another shape and that there is no conversion except in the shape.

(iv) Tribunal in the case of *CCE Jaipur-I Vs Nagad Narayan Food Products*, 2012 (284) ELT 628 (Tri.-Del.) holds that making of Prasad and Mishri from sugar does not amount to manufacture of a new product, hence duty cannot be charged by classifying them under headings 1704.90 or under any sub-heading of 1701.

(v) Without prejudice to other submissions if duty is held payable, appellants would be entitled to Cenvat credit of duties paid on sugar used for conversion into the subject products.

vi) Sale price of goods is required to be considered as cum-duty. The denial of cum-duty is not proper.

vii) Extended period of limitation is not invokable; penalty is not invokable and interest also is not payable

6. Ld DR for the department reiterates the findings of the impugning order.

7. After perusal of the facts and submissions of all the parties, it appears that matter concerns mainly with the liability of duty of Central Excise on the subject goods, namely, *boora, mishri, batasha and makhana* for the period prior to issue of Exemption Notification No.57/2008 CE dated 05.12.2008.

8. In respect of classification of the subject goods, the CBEC has issued circular 879/17/2008-Ex.1 dated 05.12.2008 discussing the subject matter in detail. It states that process of making subject goods, namely, *boora*, *batasha*, *mishri*, *makhana* from sugar shall amount to manufacture under section 2(f) of Central Excise Act, 1944 and is liable to duty of Central Excise. It mentions that the said items shall have classification under Heading 17019100. The said Circular dated 05.12.2008 has observed as under:-

“4. The matter has been examined. The above mentioned decisions of Apex Court do not decide the question whether the processes undertaken amount to manufacture or not in terms of the Section 2(f) of Central Excise Act, 1944. From the reading of the decision of the Gujrat High Court and Apex Court in case of Sakarwala Brothers, it would be evident that the courts even at that time agreed to the fact that these goods namely bura, makhana, mishri & patasha are commercially known as products distinct from sugar. As per judicial pronouncements on the issue of ‘manufacture’, a process results into manufacture, if the new product is known commercially different its character and use are different from the materials from which it has been made. When a customer asks for Batasha, no shopkeeper would give him sugar or vice versa. Thus reading this judgment of Apex Court along with the series of judgment starting from DCM case makes it clear that processes undertaken will amount to manufacture.

5. *The next issue is regarding correct classification of these products. Two contending classifications are under Heading 1701 and 1704.*

6. *.From the explanatory notes to HSN it is quite evident that. sugar in all forms, containing more than 90% of sucrose contents will be classified as sugar under Heading Number 1701. The sugar preparations like sweetmeats, confectionery and candies will classifiable under Heading 1704.*

7. *The Apex Court in case of Sakarwala Brothers has held that patasha, hardas, bura sugar and alchidana are forms of sugar. The court stated that it is possible to convert these articles into sugar by dissolving them in water and by subjecting the solution to an appropriate process. Further these articles can be put to the same use to which sugar-candy can be put. It is, therefore, manifest that patasa, harda and alchidana*

are only different forms of refined sugar with the requisite sucrose contents.

8. The classification of these items, has been decided by the Tribunal in the following cases and it has been held that these products are classified under heading 1701.

(a) 1996 (84) [E.L.T.](#) 221 (T) - D.C.M. Shriram Industries v. C CEx, Meerut

(b) 2006 (203) [E.L.T.](#) 232 (T) - C C. EX Aurangabad v. Shrijee Heavy Projects Works Ltd.

(c) 2007 (210) [E.L.T.](#) 681 (T) - Atul Industries v. C C. Ex., Pune

9. However, Tribunal has in case of S.M. Confectionery - 1993 (66) [E.L.T.](#) 469 decided that items like Chironjidana, Mishri, Rewadi, Batasha are more appropriately classifiable as sugar confectionary under tariff heading 1704.90. But the dispute before the Tribunal in this case was whether these sugar items are prasadam falling under Chapter 21 or are sugar confectionary classifiable under Chapter 17. Moreover since this decision failed to consider the implication of chapter notes referred above and the decision of the Apex Court in case of Sakarwala, the decision is per incuriam and cannot be taken as binding precedence.

10. The HSN explanatory notes provide that :

(a) Refined sugar can be produced as crystalline substance in the form of small cube, loaves, slabs or sticks or regularly moulded sawn or cut pieces. [Hardas are moulded products].

(b) Heading 1701 covers items like sugar candy consisting of large crystal produced by slow crystallization of concentrated solutions of sugar. [Mishri is a type of candy manufactured by this process].

11. In view of above discussion, it is evident that these. products namely Ghadi Sakar (Mishri), Batasha (Pattasha), Illichidana (Chironjidana), Makhana etc., are a form of sugar having more than 90% sucrose and therefore correctly classified under Item No. 17019100 under the entry refined sugar. ”

12. Now, therefore, following instructions/ directions are issued:

(a) The process of making bura, makhana, mishri, hardas and battasas from sugar shall amount to manufacture in terms of provisions of Section 2(f) of the Central Excise Act, 1944 and will be liable to pay excise duty.

(b) These products shall be classified under heading No. 17019100, provided that they fulfil the conditions of sub-heading note 1-2.

9. From the contents of the Circular (supra), it becomes clear that the process by which sugar is converted into *boora*, *makhana*, *patasha*, *mishri*, etc. is a manufacturing process under section 2(f) of Central Excise Act, 1944 and these items are to be classified under Central Excise Tariff heading 17019100. The Notification No.57/2008 (supra) also includes these items under Central Excise Tariff sub-heading 171019100 exempting them from duty of Central Excise w.e.f .05.12.2008.

10. In the light of discussions and observations (supra), it is clear that process involved for conversion of sugar into subject goods is 'manufacture' under section 2(f) of Central Excise Act, 1954. On this view, we take support from the decision of Hon'ble Apex Court in the case of *Empire Industries Ltd Vs Union of India*, 1985(20) ELT No.179 (SC). The Hon'ble Supreme Court in the said decision in respect of concept of "manufacturing" has observed as under:

37. It may, however, be pointed out that when Darling J. dealt with the example of a carpenter, the learned judge thought it was right that it could not be said that when 'box' is prepared that the carpenter was manufacturing 'wood' but transforming 'wood' into 'box' would certainly be manufacturing 'boxes'. It is well-settled that one cannot absolutely make a thing by hand in the sense that nobody can create matter by hand, it is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view is a question depending upon the facts and circumstances of the case. Plain wood is certainly different from 'box' made of wood. Rindley J. it may be pointed out,

disagreed with the view and observed at page 362 of the report that where any process of art is used upon some substance, it is “manufactured”. He observed as follows :-

“To say that a person does not ”manufacture” a thing because it has the same name after the process has been passed upon it as it had before seems to me - but I suppose I am wrong - to be simply a question of words. If there had happened to be another word for saccharin of the strength of 550, different from saccharin of the strength of 330, it would almost - I will not say quite - follow from the reasoning of my learned brothers that this would have been a manufacture. I cannot think that that is so. Take the case of the manufacture of steel; and lead it be steel before it goes into works : apply some process to it and it becomes a particular sort of steel. But it is steel both before and after, although steel of different qualities. Is not that the manufacture of steel? I should have thought so. Take the manufacture of wool, it is wool when it is on the sheep’s back; it is wool when it had passed through the process of sorting and picking which it has to go through in the mill. Is not that the manufacture of wool? I should have thought it most certainly was, although the name “wool” is applied to it both before the process begins and after it has ended.”

The learned judge further observed that in that case saccharin was “manufactured” and manufacture of saccharin does cover a process that was done in that case.

The above observations of Hon’ble Supreme Court supports our view that the process of conversion of sugar into *boora*, *patasha*, *mishri* and *makhana* is nothing but ‘manufacturing’ under section 2(f) of Central Excise Act, 1944.

10.1 The Tribunal’s decision in case of *Nagad Narayan Food Products* (supra) is not applicable as during the relevant period pertaining to the facts cited therein Chapter Sub-Heading 17019100 was not there to cover the subject goods.

10.2 When the process undertaken by the appellant’s amounts to manufacture, when the produce/goods are liable to be

classified under Cental Excise Tariff Heading 17019100 and when there is no exemption Notification for such goods for the subject period, the goods are liable to duty for the period prior to 05.12.2008. But the duty is payable for such goods only for the normal period as there were interpretation issues involved during the relevant period. The appellants, therefore, cannot be charged with ‘suppression or misrepresentation of the facts with an intention to evade payment of duty of Central Excise.’

10.3 Therefore, the demand of duty is confirmed only for ‘normal period’. The extended period of limitation is not invokable and penalty also cannot be imposed upon the appellants.

10.4 However, interest is payable as per the provisions of then section 11AB of Central Excise Act, 1944. In this regard, we refer to Tribunal’s decision in case of *Aarti Drugs Ltd Vs Commissioner, Central Excise Thane-II*, 2015 (324) ELT-594 (Tribunal Bombay) whereunder it held that where there is no mis-statement on the part of the assessee duty is payable only for normal period but interest is payable under section 11AB for the amount of duty upheld. The Tribunal in the said case *inter alia* observes as under:-

“7. Therefore, there being no mis-statement, duty is payable only for the normal period of time limitation. For the same reason that extended time period is not applicable, confiscation, fine and penalty are also not sustainable. However, interest would be payable under

section 11AB corresponding to the amount of duty upheld.”

11. Benefit of CENVAT Claim: Once assessee pays duty of Central Excise on the goods manufactured they are entitled to CENVAT claim benefit for the duty paid in respect of inputs.

The claim of CENVAT credit is to be given by the original adjudicating authority as the matter is being remanded for quantification of demand of duty confirmed for ‘normal period’ to the original adjudicating authority.

12. Claim for Cum-Duty Benefit: The appellants have referred to Board circular No.749/65/2003-CX dated 26.09.2003 claiming cum-duty-benefit. For the goods already sold to the customer, it is an accepted principle that the assessee would be entitled to cum-duty-benefit as the duty component now cannot be recovered separately from the customers. In other words, the sale price of the goods is to be treated as inclusive of duty component. The Explanation to Section 4(1) of Central Excise Act makes it clear. We, therefore, hold that the appellants are entitled to cum-duty benefit for the subject goods already sold.

13. It is observed that as there was no clarity on the subject issues during the relevant period, there cannot be any confiscation of the goods and when there cannot be any confiscation, there is no question of imposing any redemption

fine for the subject goods. In the light of aforesaid, all fines and penalties imposed on the appellants are hereby dropped.

14. In the light of above findings, it is required that the liability of duty and interest is quantified in case of the appellants for 'normal period'. Therefore, the appeals are remanded to the original adjudicating authority, who in the light of the above findings shall quantify the liability of duty and interest after giving necessary opportunity of personal hearing to the appellants.

15. In the result, the impugned orders are modified to above effect and appeals allowed in above terms.

(Pronounced in open court on /2017).

(Justice (Dr) Satish Chandra)
President

(Ashok K. Arya)
Member(Technical)

pcs

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