

Johnson and Johnson Exports (i) Vs. Commr. of Cus.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-04-2000

Reported in : (2000)LC119Tri(Mum.)bai

Appellant : Johnson and Johnson Exports (i)

Respondent : Commr. of Cus.

Judgement :

1. The present appeal has been filed against the decision of Collector of Customs, Bombay made in Order-in-Original CAO No. 20/95 CAC dated 31-1-1995 where the adjudicating authority recovered drawback amount of Rs. 1,07,563/- erroneously paid to the appellants due to misdeclaration of the goods exported under the Shipping Bill No. 126507 dated 11-10-1993. The Collector also denied the drawback to the tune of Rs. 62,055/-.

2. Brief facts of the case are that the appellants filed a Shipping Bill No. 47689 dated 20-4-1994 for export of a consignment declared to be American Poros Plaster (Surgical) under claim for drawback under Heading 1208 of Drawback Schedule 1993-94 at 3% FOB. On examination of the goods, it appeared that they were not surgical dressings as declared by the exporters. It was observed that on the related AR 4 the goods were originally declared as Capsicum plaster but the same was changed to American Poros Plaster. The changed description of the AR 4 and the addition of words "surgical" in the Shipping Bill appeared to have been made to suit their claim of drawbacks under Heading 1208. The matter was referred to the Asstt. Drug Controller who opined that the impugned goods were

not surgical dressings and bandages. Show Cause Notice was issued on 18-7-1994 proposing to deny the same. In the Show Cause Notice it was mentioned that the Shipping Bill No. 126507 dated 11-10-1993 for which a sum of Rs. 1,07,563/- as drawback amount was wrongly paid was also sought to be recovered under Section 142(1) of the Customs Act read with Rule 14 of the Drawback Rules. A reply was filed on 6-9-1994 denying the charges made by the department. In the reply they also referred to the pattern of the sales viz. that the product is sold in the local market as "capsicum plaster" and was exported under brand name "American poros plaster". It was emphasised that AR 4 was computer generated and due to system error both the brand names were appeared in the AR 4 i.e. "capsicum plaster" which is sold in the local market and exported under brand name "American poros plaster". It was denied that word "surgical" was added in order to incorporate the product in the ambit of drawback serial No. 1208. They also referred to "British Pharmaceuticals Codex 1963". The adjudicating authority after hearing the parties denied the drawback claim in respect of Shipping Bill No. 47689 and ordered payment of Rs. 1,07,563/- erroneously paid to the appellants in respect of Shipping Bill No. 126507 dated 11-10-1993. Hence the present appeal.

3. Shri J.R. Cama, Id. Counsel appeared for the appellants and Shri Deepak Kumar appeared for the department.

4. Shri Cama, Id. Counsel described to me that the product is only a surgical item. The product "American Poros Plaster" is a surgical item because it is mentioned in British Pharmacopoeia Codex. He invited my attention to the Exhibit "B" where the adhesive bandages and self adhesives plasters are mentioned in page 1006. In page 1006 it was also mentioned above Capsicum self-adhesive plaster. He read the definition of "Capsicum self-adhesive plaster" found on page 1007 of the book which is at page 27 of the Paper book. Capsicum self adhesive plaster is otherwise known as Belladonna Plaster consists of a suitable cloth spread evenly with a self-adhesive plaster mass containing an extract of belladonna herb or root and capsicum oleoresin. It is used as a counter irritant in the treatment of rheumatism, lumbago, neuralgia and similar conditions. He also invited my attention to the letter dated 19-5-1994 of the Secretariat of British Pharmaceutical

Commission, where it has been mentioned that "Capsicum Adhesive Plaster" the monograph in the BPC 1963 still applies and supersedes that published in BPC 1959. BPC 1963 is still in force. It was emphasised that the monograph should not be provided as necessary communication of the expected quality of the material. The introduction of BPC 1968 on page xvi to xvii gives an indication of the reasons for the omission of monograph for "Capsicum Adhesive Plaster". His thrust of the argument is that what is applicable to the British Pharmaceutical products in terms of Rule 124 of the Drugs and Cosmetics Rules, 1945 it should be treated as a medicament. He further emphasises the fact that in view of what is stated in the letter of Secretariat of British Pharmacopoeia Association the case of the assessee has been proved beyond doubt. Just because BPC 1968 drops the wording "American porous plaster" it does not mean that 1963 BPC has been superseded. He also relied on the affidavit given by Dr. Shashank V. Parulekar to buttress his client's case. As far as the levy of penalty is concerned, Shri Cama argues that it is uncalled for in this case because past practices enable to claim the drawback. There may not be any mens rea in the past and the same have been allowed.

5. As against this, the Id. D.R. adopts the reasoning of the Order-in-Original.

6. I have considered the rival submissions. The matter is a very interesting one. The product is known as "American Poros Plaster". The "Capsicum Plaster", according to the pamphlet given by the appellant it says it acts faster for relief of pain. The directions for use, it says the place should be washed and dried the affected area and apply the plaster and press it down. It says that "Johnson's American Porous Plaster" brings relief from nagging localised muscular pains; warms and soothes muscular backache, stiffness, strains, lumbago, rheumatism, and pains arising from extreme changes in temperature, over-exertion and muscular fatigue. The drawback claim is made under Heading 1208 which is described as "Surgical Dressings and Bandages". The question involved is whether the item cleared is surgical dressings or not. From the product sample given by the assessee, it is very clear that nowhere it is mentioned item as an item which is used in surgery or for healing any wound. In this connection it is useful to refer to the Asst. Drug Controller's views. In the impugned order, in page 12 it is stated that the matter

was referred to the Asst. Drug Controller, who opined that the goods under export could not be considered as surgical dressings and bandage as the goods were merely adhesive plaster containing Capsicum Oleoresin. Nowhere I am able to find that the goods have been used as an item used for treatment of patients after surgery. Surgical plaster, means, according to me is the plaster which is used at the time of surgery. But evidence in this case reveals that it is never used after surgery.

7. The British Pharmaceutical Products 1963 has mentioned surgical dressings as itself adhesive plasters page 1006 and the heading self adhesive plasters Capsicum self-adhesive have been defined. In the uses, it has been mentioned as the product is used only for treatment of Rheumatism, lumbago etc. and nowhere it has been mentioned that the goods is used for surgery. He emphasised the fact that the clarification given by the British Pharmaceutical Commission's Secretariat made on 19th May, 1994. There also it only mentions that the effect of non-mentioning of a particular item in an edition of British Pharmacopoeia Codex. It does not in any way highlight the use of the product on the human body and at what time under what circumstances, the product is used on a patient. It leaves us according to me, nowhere. According to me the letter dated 19th May, 1994 does not help the case of the assessee.

8. It is useful to refer the affidavit of Dr. Shashank Parulekar relied on by the assessee. The affidavit again at paragraph 3 emphasises the fact that the goods used is used for treatment of rheumatism, lumbago and similar conditions. The above 3 conditions do not suggest or whisper that the product is used for surgery. The affidavit of Dr.

Parulekar does not enhance the case of the assessee before me. It may only enhance the use of the product as advertised by the manufacturers themselves which according to me is not enhancing the case of the assessee before me.

9. I am, therefore, of the view that the product is not used for surgery. Mr. Cama tries to emphasizes before me in a very persuasive way that the product need not be used at the time of surgery to claim the benefit under surgical dressings. I am sorry the argument lacks substance. The claim made by the appellants under

1208 is surgical dressings and bandages. The words surgical dressings need not be explained further. According to me it means that they are used at the time of surgery. In fact the Assistant Drug Controller bases his views on the basis of medical dictionary. In fact in the adjudicating order it has been held as follows: "It is observed that the Asst. Drug Controller in his opinion dated 29-4-1994 stated that as defined by Medical Dictionary the surgical dressings are sterile protective covering of guaze or other substance supplied to an operative wound".

This means that the product should be used when treating the wound.

Here the product as referred earlier is used for Rheumatism and lumbago and pains. The words treatment of wounds are nowhere to be found. Hence I am of the view that the appellants has not made out any case.

10. Then the question of levy of penalty comes. I am of the view that the action of the appellant by inserting the word "surgical" in this case clearly goes to show that the intention was to claim the drawback which they knew they are not entitled to it. No doubt past practices enables them to claim the drawback. I am, therefore, of the view that no two wrongs make a thing right. I am of the view that the penalty levied inasmuch as in this case only Rs. 50,000/- has been levied as such and does not call any interference and does not merit any case for reduction or waiver.

11. In view of the foregoing discussions, I am of the view that the appellants' case lacks substance and it is dismissed.

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