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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-13-2003

Judge : S T Gowri, G Srinivasan

Appellant : Johnson and Johnson Ltd. and ors.

Respondent : Commissioner of Central Excise

Judgement :

1. The common question which we are required to consider in these appeals by Nestle India Ltd. and Johnson & Johnson Ltd. is whether the activities undertaken by each of these companies on the goods imported by them amounted to manufacture within the meaning of note 3 to Chapter 18, note 3 to Chapter 19 and note 5 to Chapter 30 of the Central Excise Tariff Act.

2. Nestle India Ltd. imported chocolates. As required by the Standards of Weight & Measures (Packaged Commodity) Rules, 1977 and the Prevention of Food Adulteration Act, 1954, it affixed on the retail packs of chocolates the name and address of the importer, maximum retail price, net weight, month and year of manufacture, whether vegetarian or not, and month of importation.

3. Johnson & Johnson Ltd. imported, among other goods, two products, Topomac and Eprex. Both are life saving medicaments. The medicaments when shipped by the supplier abroad were packs intended for retail sale. Several such packs were placed in bulk packing with shippers for transportation. In compliance with the provisions of Rule 32 of the Drugs & Cosmetics Rules, and Rule 33 of the

Standards of Weights & Measures (Packaged Commodities) Rules, 1977, the importer, after obtaining permission from the Customs authorities, removed the medicaments to its warehouse at Vakola and there affixed on each retail pack a sticker containing information relating to the goods. The sticker in the case of Topomac mentioned the maximum retail price. Such information as the name of the supplier, quantity, manufacturing date etc. were placed by means of stickers on cardboard boxes into which it was repacked, each box containing 20 packets of 10 tablets each. In the case of the other commodity, the sticker contained details of the name and address of the manufacturer, number of syringes in each pack, the name of the product with the potency and name and address of the marketing company. In each case a hologram was also affixed on the retail pack in order to authenticate its genuineness. The Eprex was also placed in thermocole boxes of different sizes, depending upon the quantity of the contents. The goods were thereafter cleared from the Customs.

4. The notice issued to each of these appellants and their employees alleged that these activities constituted manufacture within the meaning of note 3 to Chapters 18 and note 3 to Chapter 19 of the Central Excise tariff in which the goods imported by Nestle were classifiable, and note 5 to Chapter 30 of the tariff in the case of Johnson & Johnson Ltd. Each of the assessees replied in detail resisting the contentions in the notice and was heard by the Commissioner. Thereafter the Commissioner, in separate orders passed by him, has held the process undertaken by each of the importers to be manufacture, demanded duty on the goods, and imposed penalty on the importing companies; some of its employees, and on a forwarding agent of Johnson & Johnson Ltd. Hence these appeals.

5. Note 3 to Chapter 18 and Note 3 to Chapter 19, identically worded, read as follows: "In relation to products of this chapter, labeling or relabelling of containers intended for consumers, repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to manufacture." "In relation to the products of heading 30.03, conversion of powder into tablets or capsules, labeling or relabelling of containers intended for consumer and repacking from bulk packs to retail packs or the adoption of any other treatment rendering the product marketable to consumer, shall amount to

manufacture." 7. It will be seen that, except for the part of note 5 to Chapter 30 relating to conversion of powder into tablets or capsules, the three notes are identically worded. We are not concerned here with conversion of powder into tablets or capsules. What is therefore to be seen is whether the activities of nestle India Ltd. and Johnson & Johnson Ltd. would fall within the scope of any of these notes, without considering the first part of the note to Chapter 30, relating to conversion of powder into tablets or capsules.

8. Among the arguments advanced by the counsel for the appellants are these. The notes to the chapters contain artificial definition of manufacture and are therefore to be strictly construed in accordance with the language employed in the provisions and the courts cannot help the draftsman by favourable construction. By applying this principle, labelling by itself would not amount to manufacture. For the note to be attracted, labelling and relabelling of container should be accompanied either by repacking from bulk pack to retail back or by any other treatment to render the product marketable. Labelling or relabelling cannot by itself amount to manufacture, assuming that the process carried out by the importers is labelling. There is in fact no labelling. The packages in which the goods were packed when they arrived themselves contained prominently the information relating to details of the goods, quantity, date or year of manufacture etc. All that was done was to put a sticker on the wrapper of the chocolates imported by Nestle India Ltd. or on the medicaments imported by Johnson & Johnson Ltd. bearing the name and address of the importer and maximum retail price as required by Rule 33 of the 1997 rules. This does not amount to labeling. In any event, it is not any and all labeling that is deemed by the notes to be manufacture, but only that labelling which renders the product marketable to the consumer. Since the gods, in any event, were marketable without the labelling that was undertaken (assuming it to be so), such labelling did not render them marketable.

9. The Departmental Representative replies as follows: The goods are clearly labelled since the label is affixed on the retail pack and that label contains information necessary to meet the requirements of the Standards of Weights & Measurers (Packaged Commodities) Rules, 1977, and in addition, the Prevention of Food & Adulteration Act 1954 in the case of Nestle India Ltd., and the Drugs &

Cosmetics Rules in the case of Johnson & Johnson Ltd. providing that the goods cannot be marketed without such information. Therefore the process of labeling the goods renders them marketable. The goods that these appellants imported bore upon them a label that contained information as to the date of manufacture, name and address of importer and maximum retail price.

They were not permitted to be sold without such a label. The notes to the chapters are clear that labeling of goods itself shall amount to manufacture. If it is held that the process is not labelling, it would be covered by the term, "any other treatment to render the goods marketable to the consumer".

10. Rule 33 of the Standards of Weights & Measures (Packaged Commodities) Rules, 1977 requires all pre-packaged commodities imported into India to carry the following declarations: "Name and address of the importer, generic or common name of the commodity packed, net quantity in terms of standard unit of weights and measures, month and year in which the commodities manufactured, packed or imported and retail sale price. It provides that the declaration may be printed on a label clearly affixed to the package or made on an additional wrapper and imported package kept inside a wrapper or the declaration may be printed on a package itself or made on a card or tape fixed firmly to the package or container bearing the required information. Section 32 of the Prevention of the Food Adulteration Act, 1954 provides that every package of food shall carry a label and, unless otherwise provided, the label shall contain he trade name or description of food contained on the package and the names of ingredients used in the product in descending order of composition, the name and complete address of the manufacturer or importer or vendor or packer, net weight and number of measure, volume of content, distinctive batch and code number, the month and year of manufacture and packing. Explanation 1 to the Rule says that the term "label" means "a display, marked graphic, printed, perforated, stencilled, embossed, stamped matter upon the container, cover, lid or crown of any food package." 11. Explanation 1 is a fairly precise definition of the term "label", and, in the absence of a definition in the Excise tariff, we think it appropriate to adopt this definition, to the chocolates under consideration by us. The importer affixed to the chocolates a sticker containing considerable information that was not present on tem when they

were imported. In our view, the sticker that was put on tem was, clearly, a label. The product, thus, had fixed on it a label in addition to whatever it contained on importation. Therefore, this activity that was undertaken was either labelling, if the chocolates did not earlier have a label, or relabelling, if what they contained is to be considered a label. The same position would apply in the case of the other goods. The information that was contained in the stickers that were affixed to the drugs that were imported in order to comply with the provisions of Rule 33 of the Standards of Weights & Measures (Packaged Commodities) Rules, 1977 was such that they constituted a label.

12. It cannot also be denied that such labeling or relabelling has been undertaken so as to render marketable goods which would not otherwise be marketable. It is clear that in the absence of the information contained on the labels that were affixed on the goods by the importer, their sale in India would be in contravention of the provisions of the Standards of Weight & Measures (Packaged Commodities) Rules, 1977 and of the rules under the Prevention of Food Adulteration Act, 1954 in the case of chocolates, or of the Drugs & Cosmetics Rules in the case of the medicaments. The judgment of the Delhi High Court in Delhi Cloth Mills and Anr. v. Joint Secretary, Government of India, 1978 ELT 121, holding as unmarketable calcium carbide which was not in conformity with the requirements prescribed in the Carbide of Calcium Rules is authority for the view that, without the treatment that the goods received at the hands of their importers, they were not marketable. The treatment that was undertaken to ensure compliance wit the requirement of the rules as a result of which they could be sold hence rendered the goods marketable. Therefore the contention of these appellants that the goods were earlier marketable cannot be accepted.

13. But is simply labelling or relabelling the goods enough to attract the provisions of the notes? In Ammonia Supply Co. v. CCE, 2001 (44), RLT 271, a bench of this Tribunal interpreted the scope of Note 10 to Chapter 28, which is identically worded as the notes with which we are concerned. It held that for the note to be attracted, one of three conditions is required to be satisfied - labeling of containers while repacking from bulk to retail packs; relabelling while repacking from bulk to retail packs; the adoption of any other treatment to render the product marketable

to the consumer. In other words, labeling or relabelling must be accompanied either by repacking from bulk packs to retail packs, or the adoption of any other treatment to render the goods marketable. The decision is clearly based upon the terminology employed in the note and its grammatical structure. As has been emphasized, the notes are a deeming provision, and must be strictly construed. This is what has been done in Ammonia Supply Co., the ratio of which has been applied in a number of other decisions of this Tribunal. We have therefore to see whether the labelling undertaken by either of these appellants was accompanied by repacking from bulk pack to retail packs. The notices that were issued to the appellants did not allege that the goods were repacked from bulk packs to retail packs, but sought to apply the notes solely on the ground of labeling. In the orders, too, there is no attempt to say that the goods were repacked from bulk to retail. That alone should be sufficient to allow the appeals. However, the Departmental Representative raises this issue.

The chocolates imported by Nestle India Ltd. were not repacked by their supplier. They were kept in large cartons, referred to as shippers, for the transportation. On their arrival in India, they were removed from the shippers. There was, clearly, no packing by their supplier from retail to bulk; equally clearly, it follows that there could not have been repacking from bulk to retail by this appellant.

14. The goods imported by Johnson & Johnson Ltd. consisted of Eprex injections and Topomac Tablets. Eprex injection requires being stored between temperatures of 2^oC to 8^oC and was imported in refrigerator containers. After the pallets containing the goods were removed from the container, boxes containing 120 packs having 6 vials of injections (syringes ready for use containing the required quantity of medicament) in each pack removed and kept in walk-in coolers. A single unit containing 6 vials was taken out and a sticker put on it, containing the details that we have already considered. Based on the order received, smaller packets containing 6 vials were delivered to dealers' depots or individual patients, being placed in thermocole boxes of different sizes, which contained coolant packs to ensure storage at the prescribed temperature.

15. The Topomac tablets came in pallets containing 4 to 8 shippers, each shipper containing up to 138 packets of 10 tablets each. After the shippers were unloaded from the pallet, the packets wee removed from them and stickers put on tem containing various details. They were packed in small cardboard packets containing 20 packets of 10 tablets each.

16. it is significant to note that the notes do not refer to repacking from wholesale pack to retail pack, but refer to repacking from bulk pack to retail pack. There is, clearly, a distinction between a bulk pack and the wholesale pack. To our minds, the expressions "wholesale pack" and "retail pack" denote the kind of packing to which goods are subjected to render them suitable for sale at a particular commercial level. Wholesale packing would consist of a number of retail packs put together for ease of transportation and distribution. The wholesale packing generally denotes the quantities in which goods are sent for a particular industry are sold to wholesalers, being made up of a number of packs and the quantity in which goods are generally sold in retail.

Thus, a wholesale pack of cigarettes may consist of a pack containing say 10 packs of 20 cigarettes each, the retail pack means a pack of cigarettes containing 20. A bulk pack, on the other hand, would denote goods kept in bulk, not for purposes of sale at a particular commercial lavel, but to be utilized either for repacking into retail packs or fro sale directly. Conversion from wholesale pack to retail pack would not involve repacking. All that is required to be done is to take the retail pack out of the wholesale pack in which it has been put.

Conversion from bulk pack to retail pack would however require such repacking. The quantities of the commodity which are in the bulk pack would not be in any kind of packing suitable for sale at any commercial level and thus would have to be either repacked before sale or sold without an packing.

17. Both Eprex and Topomac are already packed in retail packs. The carton containing the refill syringes of 0.5 ml, appears to us, is a retail packing as is the packs containing 25 tablets of Topomac. If the vials of Eprex injection were to be removed from the retail packing of six in which they were placed before manufacture, and each time put into a bulk pack, which was sent to the appellant,

what it received would be a bulk pack. If this appellant thereafter took out the vials and repacked them into boxes of six or any other number, it would have repacked them. This appellant received goods which were in retail packing and continued to retain them in such retail packing. Clearly, keeping the cartons containing Eprex injections in a shipper for the purpose of transporting tem would not be converting retail packing into bulk packing. Therefore, removing the individual boxes from the shippers would not also amount to packing from bulk to retail. We also do not find it possible to consider that placing the injectables in a thermocol box for transport to the premises of the chemists, dealers or individuals, who buy these goods, amounts to repacking. The contention that the goods were placed in thermocole boxes only because they are to be insulated from heat, in the thermocole box contain coolants is eminently reasonable. As for Topomac, it too comes in boxes of 25 tablets each being put in shippers for convenience of transport. That would therefore not be bulk packing. The removal from the larger boxes to smaller boxes of the retail sale packs also would not amount to packing from bulk to retail packing. Thus, repacking of Topomac tablets from drums containing, say, 1000 tablets each into packs or strips containing 20 tablets each, and filling vials of Eprex taken from a large container in which they are kept would be covered by the terms of the note. The activity of removing the goods from the larger containers and put for packing would not. Therefore, there has been no manufacture.

18. The Departmental Representative's contention that the processes that these appellants undertook would be covered by the term, "any other treatment to render the product marketable" is an unsuccessful attempt to salvage the situation. The notice issued to both the importers alleged only labelling. In the orders, the Commissioner has found the activity undertaken by Nestle to be any other treatment. The word "other" in each of the notes clearly refers to a process other than those earlier specified in them. Such other treatment cannot, therefore be one of the modes of treatment already specified, but must be some other treatment that is not specified. The Departmental Representative has no other ground to question the ratio of Ammonia Supply Co., or its applicability to the facts before us. By applying that ratio it would have to be held that the labeling or relabelling undertaken by each of the appellants did not amount to manufacture.

Duty could not have been demanded form it or penalty imposed on it or on its employees.

19. Since we have found that the judgment in Ammonia Supply Co. is applicable to the facts before us, we have not considered the other elaborate arguments which were raised by both the appellants, including those on limitation, and attempted to be rebutted by the Department, summarized in the written submissions filed by both sides.