Commissioner of C. Ex. Vs. Johnson and Johnson Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-20-1996

Reported in : (1996)(88)ELT274Tri(Mum.)bai

Appellant : Commissioner of C. Ex.

Respondent : Johnson and Johnson Ltd.

Judgement :

1. This appeal by the department is directed against the Order-in-Appeal No. KW/329/B-III/92, dated 30-12-1992 of the Collector of Central Excise (Appeals), Mumbai, setting aside the Order-in-Original No. 102/92-93, dated 2-9-1992 of the Assistant Collector of Central Excise, Mulund Division, Bombay.

2. The Respondents, engaged in manufacture, inter alia, of Band Aid brand adhesive dressing, availed of Modvat credit on 'paper and paper Board' between August, 1990 to December, 1990. The department however felt that the Modvat credit availed of was in excess of Rs. 800/- per M.T. as permissible under Notification No. 257/87, dated 8-12-1987, and such excess credit availed of amounted to Rs. 18,323.23. Show Cause Notice dated 4-3-1991 was therefore issued. The respondents however contended that vide Notification No. 177/86, as it stood amended amongst others, by Notification No. 257/87, Modvat credit was restricted to Rs. 800/- per M.T. only so far as it related to duty under Central Excises and Salt Act, 1944 and special duty of Excise under Finance Act, 1988, but did not include Additional Duty of Customs imposed under Section 3 of the Customs Tariff Act, 1975, and so far as such Additional Duty of Customs was

concerned, they were eligible to avail of Modvat credit for the actual amount so paid as duty. They pleaded that 'Paper and Paper Board' for which Modvat credit was taken, were imported and had suffered Additional duty of Customs as levied vide Section 3 of the Customs Tariff Act, 1975. The Adjudicating Authority however held that Proviso to Notification No. 177/86 as it stood amended by Notification No. 257/87, applied to all types of duties, and while rejecting the contentions, confirmed the demand for Rs. 18,323/- and also imposed penalty of Rs. 500/- vide Rule 173Q of the Central Excise Rules, 1944.

3. In the appeal before Collect or of Central Excise (Appeals) the said authority however accepted the interpretation of Notification No.177/86 as amended vide Notification No. 257/87 and held that Modvat credit for the full amount paid as Additional Duty of Customs was available and hence set aside the demand.

4. Mr. K.M. Mondal, the ld. SDR, has submitted that here the main issue is due interpretation of Notification No. 177/86 as it stood amended by Notification No. 257/87, and more particularly of Second Proviso to Paragraph 2 of the said Notification, and consideration as to whether the said proviso, also covers up Additional Duty of Customs, collected vide Section 3 of the Customs Tariff Act, 1975. Referring to the said Section, the ld. SDR has submitted that Additional Duty of Customs is levied in lieu of and equal to the Excise duty leviable on the goods manufactured domestically and is nothing but the excise duty for the goods manufactured abroad and brought into domestic market and as such the words "duty of Excise under the Central Excises 'and Salt Act" used in the Second proviso would automatically include the Additional Customs Duty levied under Section 3 of the Customs Tariff Act, 1975. He has also pleaded that for the purpose of Modvat credit if there is a limit prescribed under the subject notification for the Central Excise Duty, and as such the goods produced domestically have a limited benefit in that regards, even by harmonious construction, the imported goods could not be put at more advantageous position, as the consistent policy of the Government is to encourage the domestic production and reading the said provision as is done by the Collector (Appeals), that would go contrary to the basic concept indicated above. In his submission, the approach of the Collector (Appeals) has been contrary to the same and hence, the order" passed by him be

set aside and the Order-in-Original be restored.

5. Mr. J.R. Cama, the ld. Advocate has however referred to Notification No. 177/86-C.E., dated 1-3-1986, as amended till the date of raising the demand, and has submitted that in Para 1 of the said Notification, different types of duties have been identified, and it is mentioned that, those duties would, for the purpose of other provisions of that Notification, be referred to as "specified duty". In this submission in first and third proviso to Para 2 of the said Notification the word "specified duty" has been used, whereas for the second proviso, which is under scrutiny here, two types of duties, which are at Numbers (i) and (ii) in the list of "Specified Duties" have been individually specified, which, in his submission, means that the said proviso is not intended to cover all the "Specified Duties" but the only two of them.

As is pleaded, the specified phraseology has to be held as intentionally used and it is not open to go behind the actual words and examine from the angle as to what must have been intended. He has referred to the Supreme Court Judgment in Hemraj Gordhandas v. H.H.Dave - 1978 (2) E.L.T. J-350. The ld. Advocate has also referred to the minutes of the Second meeting of the Regional Advisory Committee of Bombay-III Collectorate held on 19-6-1990, and has referred to Point No. 9 where this specific issue was raised, and the clarification given by the Departmental Authority. He has submitted that the subject demand is also raised by Central Excise Collectorate of Bombay-III, and the clarification so given is binding to them.

6. Considering the submissions, second proviso, requiring due interpretation as it stood, at the relevant time read thus : "Provided also that the credit of the duty of excise under the Central Excises and Salt Act, 1944 (1 of 1944) and the special duty of excise under the Finance Act, 1988 (26 of 1988) or under the Finance Act, 1989 (13 of 1989) paid on the inputs, namely paper and paperboard other than paper and paperboard falling under Heading Nos. 48.03,48.06,48.09,48.10,4811.30 or sub-heading Nos. 4802.91 or 4802.91 (sic) or 4811.40 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) or the paper and paperboard produced or manufactured in a Free Trade Zone or by a

hundred per cent Export Oriented Undertaking falling within Chapter 48 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and used in the manufacture of final products in any place in India, shall be restricted to the extent of Rs. 800/- per tonne or the actual duty paid, whichever is less." In Para 1 of the said Notification, certain types of duties have been identified for being covered under the said Notification, and amongst others they are (i) the duty of excise under the Central Excises and Salt Act, 1944, (ii) the special duty of excise under the Finance Act, and (iii) the Additional duty under Section 3 of the Customs Tariff Act, 1975 and after due listing them, it is mentioned that "hereinafter referred to as Specified Duty".

7. It thus appears, that the Notification does intend to cover up within its purview, the Additional Duty under Section 3 of the Customs Tariff Act, but further clarifies that, as and when the reference thereafter is made to all those various duties duly identified, they are referred to as "Specified Duties", and the same would also indicate that wherever the word "Specified Duties" is not used, that particular provision where such word is not used, is not intended to cover all or each one of the Duties so identified.

8. Re-reading the Second Proviso, particularly along with the First Proviso, of Para 2 of the Notification, where the phrase "Specified Duties" has been used, the said word "Specified Duty" is not used in the Second Proviso, and instead, two duties separately identified as (i) and (ii) in the first paragraph, have been mentioned. This therefore clearly indicates that, for the purpose of Second Proviso, only those two identified duties are meant to be covered and not the Additional Duty under Section 3 of the Customs Tariff Act, 1975.

Reading of the Notification in its entirety thus, leads to only this unescapable conclusion.

9. Section 3 of the Customs Tariff Act, 1975 as is read by the ld. SDR, may tend to agreeing with the submission of the ld. SDR, that, the Additional Duty under the said Act, is nothing but the Excise Duty, and it might have resulted in holding that the words "the duty of excise under the Central Excises and Salt Act, 1944" used in the Notification No. 177/86 also included Additional Duty under Section 3 of the

Customs Tariff Act, 1975, but for the fact that the said duty has been specifically and separately identified, so as to fall within the major clubbing under "Specified Duty".

10. The issue also appears to have come up for discussion and due interpretation in the meeting of Regional Advisory Committee of Bombay-III, Collectorate held on 19-6-1991. Where it is reported to have been clarified that "while the Modvat credit available on indigenous input was to be limited to Rs. 800/- per M.T. full credit of C.V. Duty could be availed". This clarification has come from the same Collectorate, from whom the subject Show Cause Notice was issued.

11. Taking all these aspects into consideration, the approach adopted by the Collector of Central Excise (Appeals) appears to be correct and hence no interference is called for.

12 Before parting it may be observed that the plea of discriminatory treatment to domestic manufacture and the importers, may appears to be thought provoking, but as is held by the Supreme Court in Re : M/s.

Hemraj Gordhandas (supra) the Notification as it exists, has to be interpreted.