

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

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

SooperKanoon Citation : sooperkanoon.com/9982

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-06-1996

Reported in : (1997)(89)ELT155Tri(Mum.)bai

Appellant : Johnson and Johnson Ltd.

Respondent : Commr. of C. Ex.

Judgement :

1. These two Appeals E-667-R/95-Bom. and E/668-R/95-Bom. have been filed against the Orders-in-Appeal No. A/386/95, dated 30-8-1995 and have been heard together.

2. The appellants carry on the business of manufacturing, inter alia, a wide variety of sutures and needled sutures at their factory at Waluj, Aurangabad, for the use by surgeons for surgeries. In these two appeals, relate to the following two types of needled sutures : 3. The appellants state that in case of ordinary sutures, separate needles are used. Such ordinary needles have an eye hole, through which the separate suture material is passed for the purpose of closing an incision or wound. This requires a knot or double passing of suture strands and the bulge thereby necessitated causes tissues trauma/pain.

4. Needled sutures, comprise of specialised eyeless needle and the swagedon suture form one continuous integral piece. The sutures are also specifically manufactured so that the diameter of sutures material is either the same or less than the diameter of eyeless than the diameter of eyeless needles. This

prevents/minimises tissue trauma/pain making the needle atraumatic. The Atraumatic cardio vascular sutures are used for cardiac surgery and are considered as Life Saving Equipment. Atraumatic needled sutures are used for ophthalmic surgery and are considered 'sight saving equipment'. These needled sutures are distinguished by their code numbers.

5. Chapter 30 of the CET covers "Pharmaceutical Products" and Heading 30.05 covers "Pharmaceutical Goods not elsewhere specified". Chapter 90 of the CET inter alia covers "Medical or Surgical instrument and Apparatus". Heading 90.18 covers "Instruments & Appliances used in medical, surgical, dental or veterinary sciences,...." 6. At this point it is relevant to mention about exemption notifications relevant for the purpose of these cases. They are as follows : By these notifications 339/86 and 69/93 the Central Government exempted various life saving equipments and sight saving equipment respectively falling under Chapter 90 of the Central Excise Tariff. One of the items is "Cardio Vascular Sutures" in Notification No. 339/86 whilst one of the items in Notification No. 69/93 is "Atraumatic needles and sutures". The appellants classified these products under Chapter 90 and claimed the benefit of the above-mentioned notifications.

7. The adjudicating authority confirmed the demands of Rs. 3,04,34,79,851.00 and Rs. 78,24,638.80 respectively on the ground that the products were sutures and therefore classifiable under Chapter 30 and not under Chapter 90, even though the products were specifically named in the aforesaid notifications. The appellate authority by the impugned orders confirmed the orders of the adjudicating authority.

Hence the appeals.

8. Shri Atul Setalvad, Senior Counsel with Shri D.B. Shroff, explained the above matter in detail. They also invited our attention to the fact that how the appellants paid the duty on these goods from 1991 onwards.

It was strenuously argued by the learned Senior Counsel that the goods under consideration could only be classified under Item 90 and not under Item 30. He further argued that when notification describes specific goods and it satisfies fully

the description, then notification must be given effect to and applied to these goods even if goods described in notification falls under different chapter. He relied on the judgments reported in 1987 (32) E.L.T. 3 SC and 1993 (68) E.L.T. 583. In any event it is strenuously argued further that the two notifications of 1995 must be read as explaining and clarifying earlier notification, so that, requirements falling under Chapter 90 must be disregarded. He also invited our attention to the fact that the Board has clarified the whole matter in its Circular No. 9/96, dated 13-2-1996 which clearly mentions the case of Jain Engineering 1987 (32) E.L.T. 3 disregarding Eskayef case 1990 (49) E.L.T. 649 relied on by the lower appellate authority. In fact, he argued that the Board did not consider that Eskayef s case 1990 (49) E.L.T. 649 had overruled Jain Engineering case supra. It was further contended by the appellant that to satisfy with the conditions viz. goods to satisfy the description and by classification would be impossible of performance.

He also relied on the observation of the Supreme Court in the case of State of Bihar v. S.K. Roy - AIR 1966 SC 1995 @1998 paragraph 6. Lastly he argued that exemption could not be denied if goods were specified in the notification though classified under different heading.

9. Let us see the four Notification No. 339/86, dated 11-6-1986, No.69/93, dated 28-2-1993, No. 60/95, dated 16-3-1995 and No. 61/95, dated 16-3-1995.

"Exemption to specified sight saving equipments. - In exercise of the powers conferred by Sub-section (1) of Section 5A of the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in "J the public interest so to do, hereby exempts goods of the description specified in the Table hereto annexed and falling within Chapter 90 to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon which is specified in the said schedule.

24. Microsurgiscal needles, cannulas, blades, trophine blades, membrane peelers, diathermy probes, vitruous cutters, atraumatic needles and sutures intra ocular scissors and forceps.

Exemption to Medical and Surgical Instruments and Apparatus etc. - In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Government hereby exempts medical and surgical instruments and apparatus and parts and accessories thereof of the description specified in the schedule hereto annexed and falling within Chapter 90 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon which is specified in said schedule.

Exemption to certain special medical, surgical instruments and apparatus. - In exercise of the powers conferred by Sub-section (1) of Section 5A of the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the Schedule below and falling within the schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon under Section 3 of the said Central Excises and Salt Act.

Exemptions to specified sight saving equipments. - In exercise of the powers conferred by Sub-section (1) of Section 5A of the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods of the description specified in the Table hereto annexed and falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon which is specified in the said schedule.

24. Micro surgical needles, cannulas, blades, trophine blades, membrane peelers, diathermy probes, vitreous cutters, atraumatic needles and sutures, intra occuldr scissors and forceps.

10. We have considered the arguments of the learned senior counsel for the appellants with reference to the notifications mentioned above.

During the arguments he stated that wordings of the Notification No.69/93, dated 28-2-1993 and No. 61/95, dated 16-3-1995 in respect of paragraph 24 are identical. Similarly wordings in Notifications Nos.

339/86, dated 11-6-1986 and No. 60/95, dated 16-3-1995 in respect of paragraph 4 thereof are identical. Jain Engineering Co. v. Collector of Customs -1987 (32) E.L.T. 3 (SC). In that case question arose whether the import of rod bushes and cam shaft bushes were entitled to be granted part exemption under Notification No. 281/76-Cus., dated 2-8-1976. Headings 84.06 and 84.63 read as under: 84.63 Transmission shafts, cranks, bearing, housing, plan shaft bearings, gears and gearing (including friction gears and gear boxes and other variable speed geared fly wheels, pulleys and pulley blocks, clutches and shaft couplings.

Notification No. 281/76-Cus., dated 2-8-1976 read inter alia as follows : No articles specified in column (2) of the Table annexed and falling under Heading 84.06...

On the facts the Supreme Court at para 7 of the judgment held as follows : "7. The notification provides that the articles specified in column (2) of the Table and falling under Heading No. 84.06 are exempt from payment of a certain portion of the Customs duty. Paragraph 2 of Column (2) of the Table not only mentions internal combustion piston engines, undoubtedly forming the only subject matter of Heading 84.06, but it also mentions the 'parts thereof, that is to say, parts of such engines. Heading No. 84.06 does not refers to 'parts' of such engines. Non-mention of 'parts' in Heading No. 84.06 has given rise to a controversy between the parties. It may be that the Notification has been inartistically drafted. It is, however, clear that the Notification not only intends to grant exemption to internal combustion piston engines, but also to 'parts thereof.

When, therefore, the intention is clear and manifest, it will be unreasonable to take a narrow view of the Notification and not to extend its benefit to the parts of the engines referred to in Heading No. 84.06. To accept the contention made on behalf of the respondents that as Heading No. 84.06 does not mention 'the parts', the Notification is inapplicable to the parts, will be to amend the Notification, which the court will not do. In our opinion, therefore, the Notification will apply to parts of the engines mentioned under Heading No. 84.06." The above observation of the Supreme Court has been very highly relied upon by the learned senior counsel. To stress his argument he also relied on the Circular No. 9/96, dated 13-2-1996. From the reading of the circular it will be clear that benefit of the exemption is applicable

only if goods are classifiable under more than one heading and they have referred to Jain Engineering Company case supra. In the instant case the facts are entirely different. In Jain Engineering Company case question was whether parts of combustion engine is entitled to the benefit i.e. goods falling under the heading viz.

84.63. Hence the goods fall under only in one category or heading.

Either it falls under heading chapter 30 or 90. Moreover, clarification from the Board by its communication dated 22-5-1996 clarified that if specified goods are capable of being classified under more than one heading/sub-heading then the benefits should be restricted only to those items which are classifiable under the heading subheading specified in the notification. Before amendment of the notification, it is being clarified by the Board in the said letter that the benefit was available only to those items which were squarely covered by description mentioned in the notification. In the HSN notes on para No.1487 upto 1493 the Heading 90.18 covers the needle and not a suture.

Instruments and appliances used in medical, surgical dental or veterinary sciences including sciences including scientigraphic apparatus other electro medical apparatus and sight testing apparatus.

The goods in question are needle with a strand attached to it to prevent bulging at the point of swaging and it minimises tissue trauma/pain.

The appellate authority in paragraphs 9.2, 10.1 and 12 of its order had held as follows: "9.2 It is, therefore, apparent from the Chapter Note 3(a) that sterile surgical materials would be classifiable under only Heading 30.05 and in no other heading of the schedule. For understanding 30.05 and in no other heading of the schedule. For understanding the Chapter Heading, reference is required to be made to the HSN Explanatory Notes. It may be mentioned here that it has been held by the Supreme Court in Collector of Central Excise, Shillong v. Woodkraft Products Ltd. - 1995 (57) ECR 417 (SC) that the "structure of the Central Excise Tariff is based on the internationally accepted nomenclature in the HSN and therefore any dispute relating to tariff classification must, as far as possible, be resolved with reference to the nomenclature indicated by the HSN unless there be

an express different intention indicated by the Central Excise Tariff Act, 1985 itself". It is seen from HSN Explanatory Notes that Chapter Note 3(a) also finds place in Chapter 30 of HSN. The relevant heading in the HSN is Heading 30.06 which deals with pharmaceutical goods specified in Note 3 to this Chapter. Under this heading, there is a sub-heading 3006.10 which reads as under: "Sterile surgical catgut, similar sterile suture materials and sterile tissue adhesives for surgical wound closure; sterile laminaria and sterile laminaria tents; sterile absorbable surgical or dental haemostatics." "10.1 The Explanatory Notes provides that "this item covers all kinds of ligatures for surgical sutures provided they are sterile.

These ligatures are usually put up in antiseptic solution or in steel sterile containers. This heading only excludes non-sterile suture material." It is clear from the HSN Explanatory Notes that all kinds of ligatures for surgical sutures would be covered by this sub-heading provided they are sterile. The learned advocate at the time of hearing has given a few samples of sutures in dispute. It is observed that the It means that the product is a combination of two things, i.e. needle and the suture. Therefore, for the classification of such products, help of Rule 3(b) of the Rules for Interpretation has to be taken. Rule 3(b) provides that mixtures, composite goods consisting of different materials, or made up " of different components, and goods put up in sets shall be classified as if they consisted of the materials or components which give them their essential character. The essential character to the needled suture is given by suture as it is used for surgical wound closure and, therefore, they will be classifiable under 3005.90".

As held rightly by the appellate authority the views of experts cannot be relied as it will be bolstering the case of the appellants which has been deprecated by the Supreme Court in Novopan's case 1994 (73) E.L.T.769. When we consider the findings of the appellate authority that the goods in question is a combination of both then it has to be classified as a residuary item like 3005.90 and not under Heading 90. Since we are of the view that the goods does not come within Heading 90 the claim of the appellants that the goods are exempted under the various notifications are rejected. Since the goods in question is a combination of both items the ratio of the Supreme Court decision may not be applicable to the

facts of the case. In consequence of this the Circular No. 9/96 will not be applicable to the facts of this case. We are not referring to DR's arguments as we are dismissing the appeals.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com