Supreme Court of India
Johnson & Johnson Ltd. vs Commissioner Of Central Excise, ... on 11 March, 1997
Equivalent citations: 1997 (92) ELT 23 SC, JT 1997 (10) SC 737, (1997) 9 SCC 681
Bench: A Ahmadi, S Kurdukar
ORDER

1. The appellants manufacture highly specialised "Cardio Vascular Sutures" and "Atraumatic Needled Sutures", the first used in Cardio Vascular Surgery and the latter used in Ophthalmic Surgery. By Notification No. 339/86-C.E., dated 11th June, 1986 issued under Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, (hereinafter called the 'Rules') certain life saving equipments were exempt from the whole of the duty of excise leviable thereon. The exact text of the notification may be reproduced at this stage.

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 Excise Rules, 1944, 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 the said Schedule.

2. It may be mentioned that Cardio Vascular Sutures have been shown at Serial No. 4 in the Schedule appended to the said Notification.

3. By another Notification No. 69/93-C.E., dated 28th February, 1993 certain sight saving equipments specified in the table thereto [and] falling within Chapter 90 of the Schedule to the Central Excise Tariff Act, 1985 case to be exempted from the whole of the duty of excise leviable thereon. The exact text of that Notification may also be produced for ready reference. It reads as under :

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 the public interest so to do, hereby exempts goods of the description specified in the Table 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 the said Schedule.

4. By this Notification goods of the description in the table and falling within Chapter 90 of the Schedule of the Tariff Act case to be exempted from the whole of the duty of excise leviable on the said items. In the table appended to the Notification Atraumatic Needles and Sutures have been mentioned at Serial No. 24 of the said table.

5. In the present case the relevant period with which we are concerned is the period from May 1991 to February 1995. In other words the point at issue has to be determined in the light of the aforesaid two Exemption Notifications issued on the respective dates. There is, however, one development to

which our attention was drawn and that is the issuance of the Notification 60/95-C.E., dated 16th March, 1995 by which certain special medical, surgical instruments and apparatus came to be exempted from the payment of duty. That Notification may also be extracted at this stage.

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.

6. It may at this stage be mentioned that Section 5A came to be inserted in the Central Excises and Salt Act, 1944 (hereinafter called the 'Act') with effect from 1st July, 1988. By this Section the Central Government was empowered, i satisfied that it was necessary in the public interest so to do, to issue a Notification exempting either absolutely or subject to such conditions to be fulfilled before or after removal as may be specified in the Notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon. The proviso, however, states that unless specifically provided in such Notification, no exemption therein shall apply to excisable goods which are produced or manufactured in a free trade zone brought to any other place in India or by 100% export-oriented undertaking allowed to be sold in India. It is nobody's case that the proviso is attracted in the instant case. After the insertion of Section 5A in the Act, Rule 8 of the Rules came to be omitted. However, Sub-section (4) of Section 5A states that every Notification issued under Sub-rule (1) and every order made under Sub-rule (2) of Rule 8 of the Rules and in force immediately before the commencement of the Amendment Act, 1988 shall be deemed to have been issued or made under the provisions of this Section and shall continue to have the same force and effect after such commencement, until it is amended, verified, rescinded or superseded under the provisions of the said Section. Therefore, the Notification issued under Rule 8(1) and in force on 1st July, 1988 has to be deemed to have been issued under the provisions of Section 5A of the Act.

7. It may now be proper to refer to Chapter 30 of the C.E. Tariff entitled 'Pharmaceutical Products'. Note 3 says that Heading No. 30.05 applies to the items enumerated in Clauses 'a' to 'h' thereof which are to be classified in that heading and in no other heading of this Schedule - Item 'a' refers to sterile surgical catgut, similar sterile suture materials and sterile tissue adhesives for surgical wound closure and Item 'h' refers to chemical contraceptive preparations based on hormones or spermicides. Now if we turn to Item 30.05 which refers to pharmaceutical goods not elsewhere specified, we find a specific mention of chemical contraceptives and dental cements and other dental fillings but there is no specific mention of sterile suture catgut or material. However, Counsel for the Revenue contends that since there is no specific mention of the said item it would stand covered under Item 3005.90 entitled 'others'. So also our attention was drawn to Chapter 90 Note 2 which is made subject to Note 1 and refers to parts and accessories for machines, apparatus, instruments or articles to be classified according to the specified rules. Item 90.18 refers to instruments and appliances used in medical, surgical, dental or veterinary sciences, including scientiographic apparatus, other electro medical apparatus and sight testing instruments. The learned Counsel for the Revenue contends that the items in question manufactured by the appellant-company fall within Item 3005.90 - 'others' - and not under Chapter 90 of the Schedule to the Central Excise Tariff and,

therefore, the second part of the Notification beginning with the words "falling within Chapter 90 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) was not satisfied for the purpose of earning the exemption claimed under the Notifications of 11th June, 1986 and 28th February, 1993." On the other hand learned Counsel for the appellant-company made a two-fold submission, namely, (i) that the items produced by the appellant-company comprises a hook type needle with suture material fixed to it and, therefore, it fell within Item 90.18 of Chapter 90 of the Schedule to the Tariff Act and hence the exemption Notifications squarely applied to them; alternatively he contended that since exemption was being refused by certain tax officials, the Company had raised the matter with the Central Excise and Customs Authorities and the matter was referred to the Central Board of Excise and Customs as is evident from the letter of the Assistant Collector - F. No. VCH56 (4) 143/TE/92 Aurangabad, dated 5-8-1994. That letter also shows that the Collectorate had not received any clarification from the Board in this behalf and the matter was pending with the Board when this letter was written on 5-8-1994. Subsequently, the Notification No. 60/95, dated 16th March, 1995 came to be issued which has been extracted earlier and another Notification No. 61/95-C.E., dated 16-3-1995 was issued under Section 5A of the Act, exempting goods of the description specified in the table annexed thereto and falling within the Schedule to the Tariff Act from the whole of the duty of excise leviable thereon. Serial No. 24 in the table mentions Atraumatic Needles and Sutures which is one of the items in question produced by the appellants. The submission of the learned Counsel for the appellants is that these two Notifications are clarificatory in nature, in that, instead of the Central Board issuing a clarification, these two Notifications were issued which did away with the words 'falling within Chapter 90 of the Schedule to the Central Excise Tariff Act, 1985' to clarify the position. In this connection, our attention was also drawn to a Circular issued by the Central Board dated 13th February, 1996 which in terms makes a mention about the representations having been received by the Board complaining that the benefit under certain exemption Notifications was being denied on the ground that the goods, while being covered by the description specified under the Notification, do not fall in the Chapters/heading numbers /sub-heading numbers mentioned in the Notification. It is stated in the Circular that exemption Notifications where Tariff References and the description of goods do not entirely match, can be broadly grouped into two categories, namely (i) Notifications in which the goods described are such as can never fall under the corresponding Tariff References specified therein and (ii) goods classifiable under more than one Chapter etc. etc. and only one or some and not all the Tariff References have been mentioned. In respect of the Notifications falling under category (i) above if the goods are squarely covered by the description though not by the Chapter/heading/sub-heading in the specified Tariff References, that should not be a basis of the denial of exemption. Referring to this Court's decision in Jain Engineering v. Collector of Customs , it was clarified in the said circular that the concessional rate of Custom Duty was available to ovaprim even though it was classifiable in a Chapter other than that mentioned in the Notification. It is further stated that the clarification is equally applicable in all such cases and it is reiterated that the benefit of exemption will be available even though the articles mentioned in the Notification are not covered by the Chapters/headings/sub-headings mentioned in the Notifications. This briefly is the compass on which the question needs to be determined.

8. There is no dispute that Cardio Vascular Sutures and Atraumatic Needled Sutures are respectively life saving and sight saving equipments manufactured by the Appellant-Company. There is also no

dispute that these are excisable goods. The only question is whether the appellants are entitled to exemption under Notifications Nos. 339/86-C.E., dated 11th June, 1986 and 69/93-C.E., dated 28th February, 1993 respectively. The Customs, Excise and Gold Control Appellate Tribunal (Mumbai Branch) has negatived the contention of the appellants. The Tribunal held that the decision of this Court in Jain Engineering case (supra) had no application as in that case the question was whether manufacturers of parts of combustion piston engines were entitled to that benefit or not. Distinguishing the case on that premise the Tribunal refused to place reliance thereon. It then quoted from the order of the Appellate Authority and held that the Appellate Authority and rightly held that the views of the experts could not be relied upon and so holding it concluded that the goods did not come within the purview of Heading 90 and, therefore, the demand of the appellants for exemption was baseless. It observed that since the goods in question are a combination of both items, the ratio of this Court in the decision cited above had no application. As far as the Circular is concerned, it was held that it would not be applicable and accordingly dismissed the appeals. The appellants have approached this Court by way of these appeals.

9. In the context of what we have stated hereinbefore the short question is whether the goods in question fall within Entry 3005.90 or they fall within th scope of Entry 90.18 within the meaning of the respective terms "others" an instruments and appliances used in surgical sciences. As stated earlier th submission of Mr. K. Parasaran, the learned senior counsel for the appellants, was that since each item in question was an integrated product comprising th needled suturing material, it fell within the meaning of the term appliance used in surgical operations and attracted Item 90.18 of Chapter 90 whereas Mr. Subba Rao, the learned Counsel for the Revenue contended that it fell with in the expression "others" in Item 3005.90. Mr. Parasaran further contended tha if there was any doubt whatsoever it stood resolved by the subsequent tw Notifications issued under Section 5A, being Notifications Nos. 60/95, date 16th March, 1995 and 61/95, dated 16th March, 1995, respectively. Lastly, h relied on the Circular No. 9/96-Cus., dated 13th February, 1996 to state that th matter stood clarified in favour of the assessee by the said Circular.

10. Mr. Subba Rao contended that needle by itself could have fallen within Item 90.18 as an appliance but the needle along with the suturing material could not be said to be a surgical appliance and would not be attracted by the said item because suturing material stood specifically covered by Not 3 of Chapter 30 and would, therefore, fall within Entry 30.05, namely, pharmaceutical goods not elsewhere specified and would be attracted by the residuary clause in Item 3005.90. We find it difficult to accept the contention urged on behalf of the Revenue. If the needle by itself fell within Entry 90.18 a a surgical appliance we find it difficult to conclude that if suturing material is affixed thereto, it ceases to be a surgical appliance and would fall within th term suturing material in Note 3 of Chapter 30. Suturing material by itself ma have attracted that item but the composite item comprising the needle as well as the suturing material appended thereto could not fall within the expression suturing material and would not be outside the expression surgical appliances. At the relevant point of time these two were separately dealt with, needle simplicitor falling within the expression 90.18 and suturing material simplicitor falling within Clause 'a' of Note 3 of Chapter 30 and consequently under Item 3005.90. But when the suturing material and the needle form a integrated single item used for surgical purposes it would not be proper t adopt a narrow construction to place it under the heading of suturing material removing it

from the broader terminology of surgical appliance under Item 90.18. It was possibly for this reason that by the subsequent Notifications the position was made clear and the ambiguity was removed. We are, therefore, of the opinion that the items produced by the appellant-company would fall within Entry 90.18 as the terminology surgical appliances has a broader compass than the terminology suturing appliances of Chapter 30 of the Excise Tariff. As far as the decision in Jain Engineering (supra) is concerned, the facts show that the Notification provided that the article specified in the table annexed to the Notification and falling under Heading 84.06 were exempt from payment of certain portion of customs duty. The table not only mentions internal combustion piston engines forming the subject matter of Heading 84.06 but also mentions 'parts thereof. It was construed that the Notification intended to grant exemption to the parts also. The Court, therefore, turned down the Revenue's contention that the Notification was inapplicable to parts of the excisable item manufactured by the appellant. The Tribunal extracted Paragraph 7 of the judgment but merely stated that in the facts of the case the ratio was not applicable. We are afraid that the Tribunal failed to come to grips with the question. The submission was that the Notification not only intended to grant exemption to internal combustion piston engines but also to parts thereof and once this intention was clear it was unreasonable to take a narrow view of the Notification and to refuse to extend the benefit to the manufacturer. In the instant case also, we are of the opinion that the intention of the authorities was to grant exemption to certain life saving and sight saving articles manufactured in the country and once this intention is clear from the subsequent Notifications issued under Section 5A of the Act in 1995, we do not see any reason why we should take a narrow view to confine the two items produced by the appellants to Entry 3005.90 rather than place them in the wider connotation of surgical appliances in Entry 90.18 of Chapter 90.

11. In this view of the matter we allow these appeals, set aside the orders of the authorities below and hold that the appellants were entitled to exemption from the whole of the duty payable on the said two items. In this view of the matter, the stay granted earlier is made absolute. No order as to costs.