CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 1027 OF 2010

[Arising out of Orders-in-Appeal No: YDB/157/M-III/2010 dated 12th March 2010 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – II.]

Johnson & Johnson Ltd
30 Forjett Street, Post Box 9301, Mumbai – 400 036 … ***Appellant***

versus

Commissioner of Central Excise
Mumbai – III
Vardan Trade Centre. 4th Floor, MIDC
Wagle Industrial Estate, Thane West – 400 604 ***…Respondent***

WITH

(i) Excise Appeal No: 1030 of 2010 (Johnson & Johnson Limited); (ii) Excise Appeal No: 260 of 2012 (Johnson & Johnson Limited; and (iii) Excise Appeal No: 261 of 2012 (Johnson & Johnson Limited

[Arising out of Order-in-Appeal No: YDB/156/M-III/2010 dated 12th March 2010 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – II and Order-in-Appeal No: YDB/1 & 2/LTU/MUM/2011 dated 25th November 2011 passed by the Commissioner of Central Excise & Service Tax (Appeals), Large Tax Payer Unit, Mumbai.]

APPEARANCE:

Shri JH Motwani, Ms Rinky Jessuja, Advocates for the appellant

Shri AB Kulgod, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/87537-87540 / 2019

DATE OF HEARING: 15/01/2019
DATE OF DECISION: 15/01/2019

PER: C J MATHEW

Four appeals are disposed off by this common order on the plea of the appellant, M/s Johnson & Johnson Pvt Ltd, that the issue therein stands settled in their favour. Two of the appeals, arising from order-in-appeal no. YDB/157/M-III.2010 dated 12th March 2010 of Commissioner of Central Excise (Appeals), Mumbai-III, for the period from September 2003 to September 2007 disposing off twelve demand notices, and order-in-appeal no. YBD/1&2/LTU/MUM/2011 dated 25th November 2011 of Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai, disposing off demand for the period from October 2007 to September 2008, challenges the fastening of duty liability of ₹77,18,762 and ₹ 14,00, 255 on shredded ‘Band Aid’ while the other two appeals arising from order-in-appeal no. YDB/156/M-III/2010 dated 12th March 2010 of Commissioner of Central Excise (Appeals), Mumbai-II, for the period from September 2001 to March 2006 and order-in-appeal no. YBD/1&2/LTU/MUM/2011 dated 25th November 2011 of Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai, disposing off demand for the period from April 2006 to September 2008, challenges the fastening of duty liability of ₹ 19, 83,666 and ₹ 6,57,432 on shredded packing material intended for 'Band Aid' and other products.

2. In the appeals on the first of the issues, it is alleged that the 'Band Aid', manufactured at Mulund plant and sent to M/s Pharma Packaging, their job-worker, for inspection and packing, that were found to be defective/sub-standard and returned after shredding were, during the period of dispute, not subjected to the remission procedure prescribed in rule 21 of Central Excise Rules, 2002. The duty liability of the impugned goods was computed on the assessable value of the goods cleared from the factory. It was brought to our notice that an identical dispute, for an earlier period, decided by the Tribunal in *Johnson & Johnson Ltd v. Commissioner of Central Excise, Mumbai [final order no. 90559/16/EB dated 25th August 2016 disposing off appeal no. E/1740/05]* had been accepted by the competent authority. To evidence this, order-in-original no. AC(SIU)/33-40/CX/J&J/2016-17 dated 30th December 2016 of Assistant Commissioner (CEX & Service Tax), LTU, Mumbai, which haves relied upon the decision of the Tribunal *supra*, is placed before us.

3. The case against the appellant, in so far as the latter two are concerned, is the failure to reverse credit availed on, and attributable to, the waste and scrap of packing material that upon return by their job-workers whose contracted obligation was to pack 'Band Aid' using materials supplied to them, were destroyed without following the

remission route prescribed in rule 21 of Central Excise Rules, 2002 owing to which duty liability should have been discharged on the shredded waste. The impugned order has placed reliance on

> *'Explanation – For the purposes of this clause "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed as marketable'*

below section 2(d) of Central Excise Act, 1994 defining 'excisable goods' read with rule 2(h) of CENVAT Credit Rules, 2004 defining 'final products' by which the 'inputs' used thereof are eligible for CENVAT credit.

4. Reliance is placed by Learned Counsel on order-in-appeal no. SK/84-85/LTU/MUM/2016-17 dated 9th January 2017 of Commissioner of Central Excise (Appeals), LTU, Mumbai and order-in-appeal no. MKK/293/RGD-APP/2018 dated 12th October 2018 of Commissioner of Central Tax, Central Excise & Service Tax (Appeals), Raigad issued for subsequent periods as, not only following the decision of Tribunal in the matter of shredded 'Band Aid' but also having been accepted without further challenge, by the competent authority, as sufficing to set aside the impugned orders pertaining to shredded 'packaging material' returned by the job-worker.

5. We have heard Learned Authorized Representative at length.

6. On the issue of shredded 'Band Aid', the issue is no longer *res integra* and we find from the observations of the Tribunal that

> *'8.1 Firstly, in our view, the finished products Band-Aid can be considered finished product only when they packed and certified as fit for dispatch to the market, on approval of the quality control section of the appellant. In the case in hand the quality control has given approval only to the packed quantity received from the job worker. It is in the fitness of the things that the appellant had shredded the unmarketable Band-Aid in order to avoid the misuse of the same and cleared the same for incineration. In our view, shredded Band-Aid may not become an excisable product as it is not a manufactured item and is a waste that gets generated during the course of manufacturing and packing of final product "Band-Aid" as the shredded Band-Aid has no market and the product is not marketable.*
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> *8.2 Secondly, final product Band-Aid falls under Chapter 30, hence any scrap that arises during the course of manufacturing of final product needs to be classified which in the case in hand, should be under Chapter 30; there is no tariff heading for classifying the scrap arising during the course of Manufacture of [goods of] Chapter 30, hence in the absence of any classification of the product, demand of the duty is unsustainable. We find that the case laws cited by the learned Counsel on the topics are relevant and the ratio cover the issue in hand.'*

that the basis on which the demand was sustained, *viz*., that the goods become 'excisable' on manufacture, with all legal consequences to follow unless in compliance with rule 21 of Central Excise Rules, 2002, stands negated.

7. Likewise, the other issue of shredded 'packing material' was, for the subsequent periods, set aside in orders of the first appellate authority by following the decision of the Tribunal in *re Johnson & Johnson Ltd*. Furthermore, those orders pertaining to subsequent periods have relied on the decision of the Hon'ble Supreme Court in *Elphinstone Metal Rolling Mills Ltd v. Collector of Central Excise, Bombay [2004 (167) ELT 481 (SC)]*, holding that 'waste and scrap' cannot be separated from the excisability of manufacture of goods in the course of which such emerges, as also that of the Tribunal in *International Tobacco Co Ltd v. Commissioner of Central Excise, Ghaziabad [2004 (165) ELT 314 (Tri-Delhi)]*. Therefore, in accordance with the decision of the Hon'ble Supreme Court in *Jayaswal Neco Ltd v. Commissioner of Central Excise, Nagpur [2006 (195) ELT 142 (SC)]*, a contrary position cannot be taken by tax authorities.

8. For the above reasons, we set aside the impugned orders and allow the appeals.

(Pronounced in open court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*