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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-09-2003

Judge : A Wadhwa, S T S.S.

Appellant : Johnson and Johnson Ltd.

Respondent : The Commissioner of Customs and

Judgement :

1. The appellants have placed on records a written submission and have prayed for decision on merits. Accordingly, we have heard Ld. JCDR. The dispute in the present appeal is as to whether the consignment of Clear view HEC Elisa begin Elisa Diagnostic Tests for pregnancy detection would be eligible for exemption under Notification No. 208/8-Cus.

2. The said exemption had been denied to the appellant on the ground that the benefit of the notification restricted to Enzyme linked immuno assay kits i.e. these kits have to be enzyme based and inasmuch as the imported kits have no enzyme present in them, the same cannot be treated as Elisa Kits, eligible for duty free benefit.

3. The appellants have relied upon the Tribunal's decision in the case of Collector of Customs, New Delhi v. Ethnor Ltd., reported in 1996 (86) ELT 558 (Tri) wherein it was held that absence of enzyme is the new technique for carrying out pregnancy tests and that will not take away the item from the ambit of the description in the notification viz., "Elisa Diagnostic Tests". Accordingly, the

Tribunal has held that the clearview HCG are eligible for exemption in terms of notification No. 208/81-Cus.

4. Though the said decision in Ethnor Ltd., case (supra) was cited before the Commissioner of Customs (Appeals), he has not followed the same and instead has observed that the factual test of granting the concession under this notification seems to have been over looked in the decision of the CEGAT and has further observed that the order passed by the lower authority is legally and factually sustainable. We do not appreciate the observations made by the appellate authority about the correctness or otherwise of the Tribunal's decision as if he was sitting in appeal over the Tribunal's decision.

5. The fact remains that the above decision of the Tribunal in Ethnor Ltd., was upheld by the Supreme Court vide its order dated 09/05/97, when the appeal filed by Collector of Customs, New Delhi was dismissed on the ground of delay as well as on merit. The larger Bench of the Tribunal in the case of S. Kumars Ltd. v. CCE, Indore reported in 2003 (153) ELT 217 has held that the dismissal of appeal has the effect of a binding precedence In the present case, we find that it is not a simple dismissal of the appeal by the Hon'ble Supreme Court on some technical grounds but the appeal filed by the Revenue has been dismissed "on merits". As such, the Tribunal's decision in the case of Ethnor Ltd., has the seal of approval by the Hon'ble Supreme Court. In this view of the matter we set aside the impugned order and allow the appeal with consequential relief to the appellants.