**Per Ms. Sulekha Beevi C.S**

16. The above difference of opinion matter was referred as per the order of the Hon'ble President dated 1.11.2018 for resolving the points of difference which arose between the Members while deciding the above appeal.

17. The matter was heard briefly on 11.12.2018. After hearing briefly and also perusal of the orders referred, I was of the opinion that the matter requires to be relisted. Note order was passed by me seeking directions of the Hon'ble President. The relevant portion of the note order is reproduced as under:-

> *"7. Taking situations discussed above into consideration, I find that there is no difference of opinion between two Members on the issue on the dispute per se. In case, I agree with the Member (Judicial), the issue decided by Member (Technical) would have to be totally left out as untouched and vice versa. A third Member is called upon to agree or disagree with the reason or conclusion made by both Members on a particular point. The point being divergent before me, I am unable to agree or disagree. To me, the right resolution of the present situation would be to relist the matter for rehearing. However, as per Section 129C the third Member does not have power to relist or rehear the appeal but can only agree or disagree. For this reason, I am of the view that the Hon'ble President is to decide whether to relist the matter for hearing of both sides. The ld. counsel for appellant Shri S. Jaikumar has placed before me a decision in Amod Stampings Pvt. Ltd. Vs. Commissioner of Customs – 2013 (289) ELT 421 (Guj.) to argue that when the points of reference framed by the Members is unclear, the matter can be sent back to the same Bench for reformulating the difference. I do not think that the problem is with formulation of the points of difference. In Acmi Industries Vs. Commissioner of Customs, Hyderabad – 2004 (174) ELT 213 (Tri. Bang.) in a similar situation*

*when the third Member was finding it difficult to decide when there was not unanimity of opinion with regard to the issues framed, the third Member had directed for relisting the case.*

*8. In the result, I am of the opinion that this order shall be placed before the Hon'ble President for taking suitable steps and to decide as to whether the appeal has to be relisted or not. The appeal stands posted to 12.2.2018 awaiting the reply of Hon'ble President."*

18. The Hon'ble President vide direction dated nil has directed that there is no need to relist the matter. The relevant portion is reproduced as under:-

*"It is for the learned Member to take a view one way or the other on the difference of opinion expressed by the Division Bench. Of course, if the first difference is decided in the positive, then the question of deciding the second matter would not arise, since the appeal would be allowed in its entirety.*

*In this view of the matter, there is no need to relist the matter for hearing before the Division Bench. The matter may be placed before Ms. Sulekha Beevi, C.S. Hon'ble Member (Judicial) to resolve the difference of opinion expressed by the Bench."*

19. The matter was taken up for hearing on 5.3.2019. the counsel for appellant Shri M. Karthikeyan has filed statement to the effect that the appellant is not pressing the issue of jurisdiction of DRI. Both sides were heard in detail and the matter was adjourned to 7.3.2019 for certain clarification.

20. The ld. AR today has furnished a fresh written submission stating that the Technical Member has observed that after perusal of the order of the Member Judicial, he is not persuaded

to agree with the order and has passed a separate order which is on the issue of jurisdiction of DRI. She therefore prayed that the matter may be referred to the President to nominate a Technical Member and that the matter has to be heard by a Division Bench comprising of Judicial Member as well as Technical Member. She submitted that the appeal on merits has been decided only by a Judicial Member and the same cannot be again decided by a Judicial Member since Technical Member was not persuaded by the order of the Judicial Member.

21. I have taken note of this contention of the ld. AR appearing for the department. However, the Hon'ble President has stated that the matter need not be relisted before a Division Bench. As per the direction of the Hon'ble President I proceed to decide the difference of opinions in this appeal.

22. The points of difference referred are as under:-

(i) Whether the appeal is to be decided on merit and allowed as held by the ld. Member (Judicial)?

Or

(ii) Whether the impugned order is to be set aside and the matter remanded for decision on merit by the adjudicating authority after the availability of the decision of the Hon'ble Supreme Court in the case of Mangli Impex?

23. The issue in the appeal is with regard to the eligibility of concessional rate of duty on the goods imported by the appellant. Though the appellant has imported items such as non-woven fabrics and Skin Barriers Micropore Surgical Tapes, the dispute in this appeal is confined to the concessional rate of duty on Skin Barriers Micropore Surgical Tapes. The liability to pay merit duty on non-woven fabrics has been admitted by the ld. counsel for the appellant. The facts already having been narrated in detail by the Member (Judicial), I do not think it necessary to repeat the same. In para 2 of the order passed by the Member (Judicial), the relevant notification has been already reproduced.

24. The main contention put forward by the appellant is that as per the notification, there is no requirement that the Skin Barriers Micropore Surgical Tapes (impugned goods) are required to be used only for Ostomy procedures. That there are other items mentioned in the Notification under list 37 which are items used for general purpose and not exclusively for Ostomy procedures. The products like adhesives seals or discs or rolls adhesive remover, skin gels etc. are items which are not exclusively used for Ostomy procedures. He submitted that the notification does not impose any condition to produce an end-use certificate so as to establish that the items have been used for Ostomy procedures. The department therefore cannot

contend that the impugned goods have to be exclusively used for Ostomy procedures in order to avail the benefit of notification. Further, that department has not established by sufficient evidence that Skin Barriers Micropore Surgical Tapes are exclusively used in Ostomy procedures. The appellant referred to Note 4(k) of Chapter 30 to argue that ‘adhesive wafers’ or ‘face plates’ referred in this Section Note are interchangeably used in common parlance and such items have a central stoma (hole). The skin barrier is around such stoma. There is a specific mention of ‘face plates’ in the notification. That therefore wafers cannot be misconstrued as Skin Barrier Micropore Surgical Tapes.

25. Against this, the ld. AR Ms. T. Usha Devi argued that ‘wafers’ and ‘Skin Barrier Micropore Surgical Tapes’ are interchangeably used in common parlance. The goods imported by appellants are not the Skin Barrier Micropore Surgical Tapes exclusively used for ostomy procedure purposes. These are used for general purpose. Thus goods which are used for general purposes are not eligible for concessional rate of duty. The statement recorded from the importer as well as the distributors have mentioned that the impugned goods are not exclusively used for ostomy procedures. She contended that the notification implies that only products which are used for Ostomy procedures are eligible for the benefit of concessional rate of

duty. Since the impugned goods are not exclusively used for ostomy procedures, the lower authority has rightly disallowed the eligibility of the notification. She heavily relied upon the medical literature obtained from the website to explain that adhesive Skin Barrier Micropore Surgical Tapes / Wafers which has stoma and can be aligned or attached to pouches alone are the products to which the notification would apply. It is also submitted by her that in the packaging of the impugned goods, it is not mentioned that these are exclusively used for ostomy procedures.

26. Heard both sides.

27. On perusal of the order passed by Ld. Judicial Member, it is seen that all the contentions raised by both sides, as noted above, have been discussed in detail. In page 6 of the said order, the medical literature obtained from website with regard to the Skin Barriers Micropore Surgical Tapes / Wafers used in the ostomy procedures and contentions of Revenue are stated. The ld. AR has emphasized that such products which can protect the skin from direct contact of the discharge from the body would only be covered under the notification. Thus, the main ground on which the benefit of notification is denied by the department is on the view that the Skin Barrier Micropore Surgical Tapes mentioned in the notification are those which are exclusively used in Ostomy procedures.

28. On careful perusal of the notification, I do not find that there is requirement for producing an end-use certificate by the assessee so as to establish that the imported products have been used only for ostomy procedures. Further, a notification has to be literally interpreted. On reading the notification, the language is very clear. I do not find any mention that the products mentioned therein have to be exclusively used for ostomy procedures. Of course, only those items required for ostomy procedures are set out in the list. However, there are other products such as adhesive seals, adhesive remover, skin gels etc. which are items which can be used for ostomy procedures as well as for other general purposes. If such items also fall under the category of Ostomy products, then the impugned goods which can be used for general purpose would also fit into ostomy products when used in relation to ostomy procedure. I have to say that department has not put forward any expert medical evidence to establish that the impugned goods imported by the appellant is not at all necessary in ostomy procedure. The only evidence relied by them is regarding medical literature obtained from website / Wikipedia. This too is with regard to wafer which has a stoma in the centre and a surrounding skin barrier. Although such goods which have a stoma in the centre and surround skin barrier may be

exclusively used for ostomy procedures, the notification does not particularly mention this.

29. The ld. AR has relied upon the decisions in the cases of Eagle Flask Industries Ltd. Vs. Commissioner of Central Excise, Pune – 2004 (171) ELT 296 (SC) and Commissioner of Central Excise, New Delhi Vs. Hari Chand Shri gopal – 2010 (260) ELT 3 (SC) to argue that the notification has to be interpreted strictly. I do not have any quarrel with the proposition of law that conditions in the notifications has to be strictly interpreted. The Hon'be Supreme Court in the case of Commissioner of Customs Vs. Dilip Kumar & Company – 2018 (361) ELT 577 (SC) has held that when words in a statute are clear, plain and unambiguous and when only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. Regard must be given to the clear meaning of words and matter should be governed wholly by the language of notification, equity or intendment having no place interpretation of notification.

30. In List 37, it is not mentioned that the Skin Barrier Micropore Surgical Tapes have to be exclusively used for ostomy procedures. There are other products also which can be used for procedures other than ostomy. None of these products which can be used for general purpose are qualified by stating that the eligibility is available if they are used only for ostomy. At the

cost of repletion, there is no condition attached to the notification to produce end use certificate. Then nothing can be read into the notification to interpret that only goods which are exclusively used for ostomy procedures are eligible for exemption. Although Sl. No. 22 of List 37 in the notification starts with the words "ostomy products (appliances) for managing Colostomy, Illcostomy, Ureterostomy ….", since there are goods such as adhesive remover, skin gel etc. which are not exclusively used for ostomy, the benefit will be eligible to the Skin Barrier Micropore Surgical Tapes imported by the appellants.

31. Therefore, I agree with the ld. Judicial Member in holding that the benefit of notification cannot be denied and the appeal has to be allowed in its entirety.

32. Registry is directed to forward the appeal along with this order to the Regular Bench to formulate the majority order.

(Dictated and pronounced in open Court)

(**Sulekha Beevi C.S.**)
Member (Judicial)

Rex