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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Appeal No. : C/319/2007-CU[DB]

Dated: **26/06/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
C.C. NEW DELHI (IMPORT & GENERAL)
New Custom House, Near I.G.I. Airport,
New Delhi 110037.

C.C. NEW DELHI (IMPORT & GENERAL) (Appellant)

VS

BHAT BIO TECH INDIA (P) LTD. (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **C/A/173/2012-CU[DB]** dated **08/06/2012** passed by the Tribunal under section

Assistant Registrar
CUSTOMS Appeal Branch

Copy To,
1. Respondent
BHAT BIO TECH INDIA (P) LTD.
NO. 11A, CROSS, VEERASANDRA
INDL. AREA, ELECTRONIC CITY,
BANGALORE 560100.

2. Advocate(s) / Consultant(s):

3. C.D.R
4. Bar Association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

10. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt. Ltd., Unit No. 1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

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Assistant Registrar
CUSTOMS Appeal Branch

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III

C/Appeal No.319/2007

(Arising out of order in appeal No. CCA/60/Air/DI/06 dated 28.12.06 passed by the Commissioner of Customs, New Delhi))

Date of Hearing: 8.6.2012

For Approval and signature:

Hon'ble Mrs. Archana Wadhwa, Member Judicial
Hon'ble Mr.Mathew John, Technical Member

1.	Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

CC, New Delhi — Appellant

Vs

M/s Bhat Biotech India Pvt Ltd — Respondent

Appeared for the Appellant: Shri K.P. Singh, DR
Appeared for the Respondent: Shri C.S. Prasad, Rep.

Coram: **Hon'ble Mrs. Archana Wadhwa, Member(Judicial)**
Hon'ble Shri Mathew John, Member (Technical)

Final ORDER No C/A/ 173/12-Cus.

Per Mathew John:

The Respondent imported 700 pieces of goods declared to be "HIV ½ uncut sheet for device raw material for making HIV Kits" and filed Bill of entry No. 185581 dated 22-11-05 at Air Cargo Complex, New Delhi. They claimed classification under Customs Tariff Item 30021099 and claimed exemption under Notification

21/2002-Cus dated 01-03-2002 (S. No. 83). This exemption was available for the following goods:

> *"Life saving drugs/medicines including their salts and esters and diagnostic test kits specified in List 4"*

2. Item 32 of List 4 of the notification covered "Diagnostic Kits for detection of HIV anti bodies". The adjudicating authority denied the exemption on the ground that the goods imported are not complete kits but only a raw material for making such kits. Aggrieved by this decision, the respondent filed appeal with Commissioner (Appeal). The Commissioner (Appeal) allowed the appeal on the ground that the goods are to be considered as parts of such diagnostic kits and should be eligible for the exemption for kits. He took into account the fact that Revenue has been routinely extending the exemption to such goods at other locations like Bangalore and he did not find good enough reason to take a different view and allowed the appeal. Aggrieved by the order of Commissioner (Appeal), Revenue has filed this appeal.

3. Revenue makes the following submissions:

(i) The imported goods are just sheets of paper which has to be cut into pieces and then placed in a motoring device for actual use. Such items cannot be considered as diagnostic kits;

(ii) The imported item can not be having agglutinating Cera needed for test because such cera would get destroyed/ denatured by exposure and such active ingredients required for testing are always imported separately;

(iii) The Apex Court in the case of Faridabad C. T. Scan Centre 1997 (95) ELT 161 (SC) has held that Revenue is not stopped from correcting a mistake of the past and that a mistake need not be maintained in perpetuity;

(iv) In the case of ELISA kit separate exemption for parts of kits has been provided at S. No. 95 of Notification

21/2002-Cus and no such exemption has been provided to parts like the one imported.

(v) The Commissioner (Appeal) relied on a decision of Commissioner (Appeal) dealing with classification of items like HCG Kits/ Pregnancy Test Kits, Hepatitis Virus test kits in Customs Tariff Heading for dealing with the present case which is in the matter of applicability of exemption notification. Such approach is not correct because the burden to prove eligibility is on the person claiming exemption.

4. The Counsel for Respondent submits that the item imported is used as an essential item for making the diagnostic kit for HIV work. Since without this item the kit cannot work the exemption given for kit should be extended to the item as was being done hitherto. He relies on the following decisions of the Tribunal:

(i) J. Mitra and Co. -2002 (140) ELT 524 (Tri-Del)

(ii) Intercare Ltd. Vs. CCE -1997 (89) ELT 545 (Tribunal)

5. We have considered arguments on both sides.

6. On a careful scrutiny of the decisions relied upon by the Commissioner (Appeal) and the Counsel for Respondent we find that the decisions are not applicable to the facts of the case. However we are in agreement with the outcome of the order passed by the Commissioner (Appeal) for the reason being given in next paragraph.

7. The short issue is whether an exemption available for "HIV Diagnostic Kit" can be extended to an essential item used to make the kit work. What we notice is that the exemption notification uses broad description rather than specific descriptions supported by Section Notes and Chapter Notes of the Tariff. The exemption is available to goods classifiable under Chapters 28, 29, 30 or 38. Items specified in Items 31 and 32 of List 4 are reproduced below:

"(31) Diagnostic Agent for Detection of Hepatitis B Antigen

(32) Diagnostic kits for detection of HIV antibodies"

Item 31 mentions "Diagnostic Agent" only. Item 32 mentions "Diagnostic kits". That implies that the exemption was meant also for something like the item imported which is not the reactive agent. The question is whether the exemption is to be given only when the entire kit is imported together. This does not stand to reason because this is a beneficial notification for providing exemption to Life Saving Diagnostic Kits as seen from the description given in the Table to Notification. Revenue has nothing to prove that this item is not used in diagnostic kits for HIV. To argue that the exemption will be extended when the equipment is imported and exemption will be denied when consumable is imported does not make sense in the case of a notification like the one being interpreted. That is to say that we agree with the main argument raised by the Respondent though we are not in agreement with the other arguments canvassed.

8. So we hold that the exemption is to be extended to the impugned goods. Consequently appeal filed by Revenue is rejected.

(Pronounced in Court)

(Archana Wadhwa)
Member(Judicial)

(Mathew John,
Member (Technical)

MPS*