

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 2485 of 2001 & CMs 4301/2001 & 12962/2007

Reserved on: 27th August 2010

Decision on: 24th September 2010

M/s. R.G. STONE UROLOGICAL RESEARCH
INSTITUTE

..... Petitioner

Through: Mr. Jeevan Prakash with
Mr. Jyotinder Kumar, Advocate.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Ms. Maneesha Dhir, Ms. Geeta Sharma,
and Ms. Preeti Dalal, Advocates for R-1 to 3 & 5.
Mr. Amiet K. Andley with
Mr. Arun K. Sharma, Advocate for R-4/GNCTD.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether Reporters of local papers may be
allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGMENT
24.09.2010

1. The challenge in this writ petition is to an order dated 20th November 2000 passed by the Directorate General of Health Services ('DGHS') (MG Section) withdrawing the Customs Duty Exemption Certificate ('CDEC') issued to the Petitioner for the import of medical equipments and spare parts in terms of a Notification No. 64/88 dated 1st March 1988 issued by the Ministry of Finance, Government of India.

Facts

2. The Petitioner, which is a unit of R.G. Stone Enterprises Pvt. Ltd., is a hospital with indoor patient facilities and total bed strength of 17 beds. On

20th January 1987, the Petitioner's predecessor-in-interest, i.e. the Delhi Urological Institute and Research Centre (DUIRC) was issued an import licence for importing one Lithostar Universal Urological Workstation for therapy and diagnostics and one Ultrasound Sonolines. On 19th April 1987, DUIRC applied for a CDEC for import of two equipments, i.e., one Lithotripter and one ultrasound equipment. On 27th June 1988, the DGHS issued a CDEC in respect of the Lithostar Universal Urological Workstation in favour of DUIRC. On 3rd January 1989, CDEC was granted to DUIRC for the spare parts with respect to the above equipments.

3. On 6th/11th July 1989, the DUIRC informed the Joint Secretary (Medical), Delhi Administration of the fact that it had installed the Lithostar equipment and enclosed a copy of the installation certificate from the suppliers. The address of DUIRC was shown as Bansal Nursing Home Complex - 3590, Sita Ram Bazar, Delhi-110006 and its Centre at F-12, East of Kailash, New Delhi- 110065. On 7th August 1989, in reply to the above letter the Directorate of Health Services, Delhi Administration called for an explanation of the circumstances under which the installation of the equipment had taken place on a site other than that mentioned in the undertaking given by DUIRC. In other words, an explanation was sought as to why the equipment was installed at F-12, East of Kailash, New Delhi instead of 3590, Sita Ram Bazar, Delhi.

4. On 12th June 1990, the DUIRC replied to the above letter explaining that on account of the inadequate space and the congested area, it was not possible to install the equipment at the Sita Ram Bazar address. Moreover,

no ambulance could enter or exit the area. The site at East of Kailash had the capacity for 40 beds whereas the one at Sita Ram Bazar had only 10-12 beds. Also, it explained that getting the equipments released from the customs had delayed the commissioning of the project. However, DUIRC expressed regret for installing the equipment in a site other than the one approved by the DGHS. It further informed the DGHS that DUIRC was popularly known as “R.G. Stone Clinic”. Meanwhile, on 24th April 1990, yet another CDEC was issued by the DGHS to DUIRC for further spare parts.

5. On 30th April 1992, the Directorate of Health Services (DHS) of the Delhi Administration wrote to the DUIRC asking for the quarterly returns. Pursuant thereto, the DUIRC submitted detailed information in the form of a report dated 24th July 1992. The details in brief for the period from 1st January 1992 to 30th June 1992 were set out. As far as the Out-Patient Department (OPD) patients, the total number was 929, of which 563 were paid patients and 366 were free patients. Further it was informed that during this period the DUIRC had treated 383 patients by lithotripsy and of these it had “given generous concession to 72 financially needy patients.” The DUIRC added that: “We have also treated free 5 patients who were not having income of more than Rs. 500/- per month. We are also keeping 10% of our beds for this category of patients.” It further pointed out that it had sent a written communication to the DGHS expressing its desire to treat more poor free patients as recommended by any government medical institution. Several press releases and advertisements inviting poor persons for concessional and free treatment at the institute had already been issued.

6. In response to the above return filed by the DUIRC, the DHS, Delhi Administration wrote to the DUIRC a letter dated 7th August 1992 stating as under:

“Sir,

This is in reference to your letter dated 24th July 1992, on the subject of submission of your quarterly reports.

i) Your quarterly statement have been inspected and found in order till dated 30th June 1992.

ii) You are also requested to intimate the Directorate regarding the change in premises from Bazar Sita Ram to F-12, East of Kailash, New Delhi. Vide paras 4 (B) of N.N. 64/88 as to why it was deemed necessary to change the premises.

Yours faithfully,
-Sd-
(Dr. S.C. Mahajan)
Medical Superintendent Nursing
Homes (II)”

7. The DUIRC, by a separate letter dated 15th September 1992, again furnished the reasons for the change in the place of installation of the equipment. According to the Petitioner, nothing was heard in response thereto. The DUIRC also submitted a Proforma in compliance with Notification No. 64/88 dated 1st March 1988 in terms of which the CDEC had been granted. The figures of total number of patients treated in OPD, the number of patients treated free for the years 1992, 1993 and 1994, and the details of indoor treatment provided during these three years were given. As regards indoor patients under the column “No. of admissions given to patients with less than Rs.500/- pm”, the DUIRC indicated ‘Nil’. However,

under the column “No. of admissions given to the patient & treated free/with concession” for years 1992, 1993 and 1994, the figures indicated were 78, 88 and 208 respectively. The number of beds specialty wise was shown to be seventeen. A note was further added to the Proforma stating that “No patient with income less than Rs.500/- p.m. has come to our Institute for Indoor Treatment. However, we have treated with free/concession to personnel of DWS only.”

8. The above report was furnished to the DHS on 15th July 1999. In response thereto, on 23rd August 1999 the DHS wrote to the DUIRC stating:

“With reference to your statement as per proforma for the calendar years 1992, 1993 & 1994, we confirm that the report has been examined and found in order.”

9. On 14th January 2000, the DGHS wrote to the DUIRC asking it to furnish further information as required under the exemption Notification No. 64/88. On 24th January 2000, R.G. Stone Urological Research Institute (the Petitioner herein) *inter alia* pointed out that the details for the years 1992, 1993 and 1994 had already been submitted to the DHS of the Delhi Administration and that a certificate had already been received from the DHS stating that those details were found in order. As regards the details for the years 1995, 1996, 1997, 1998 and 1999, it was stated that it would be submitted in due course.

10. Another reminder was sent by the DGHS on 8th March 2000 to the Petitioner, asking it to furnish the necessary information within ten days. In

reply, on 11th March 2000 the Petitioner informed the DGHS that “A satisfactory report of period from 1995 onwards could not be inspected by State Government’s concerned authority because of their busy schedule. As soon as, the inspection is over we will complete the formalities.” On 15th November 2000, the Petitioner enclosed the report for the period 1995 to 30th October 2000. A photocopy of the said letter bearing the receipt of acknowledgement dated 25th November 2000, presumably of the DGHS, has been enclosed. In the Proforma, details were given up to year 1999 as regards the OPD patients. The detailed lists of concessions extended for the entire period with the names of the patients was also enclosed. On 18th November 2000, the Petitioner wrote to the DGHS stating that report as regards the period 1995 till 30th October 2000 had already been submitted to the Director, Lok Nayak Hospital, New Delhi. The postal proof of the above letter having been dispatched to the Deputy Director, DGHS is also enclosed.

11. Thereafter on 20th November 2000, the impugned order came to be passed by the DGHS without referring to the Petitioner’s letters dated 15th November 2000 and 18th November 2000. The DGHS observed that since the Petitioner had failed to furnish any information “to substantiate continuous discharge of the post import obligations, it has been concluded that your institution is not eligible to retain the benefits of customs duty exemption availed under the said notification. Therefore, the CDEC referred to in annexure are, hereby withdrawn as cancelled.”

12. The Petitioner states that in the impugned order dated 20th November
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2000, a reference was made to a report prepared by the State Government. However, copy of the said report was not furnished to the Petitioner. On 25th November 2000, the Director (Administration), Lok Nayak Hospital asked the Petitioner to furnish information as regards Columns G & H of point 3 of the Proforma. On 28th November 2000, the Petitioner wrote to the DGHS requesting revocation of the impugned order dated 20th November 2000. On 30th December 2000, the Petitioner furnished the details asked for by the Director (Administration), Lok Nayak Hospital by the letter dated 25th November 2000.

13. The Petitioner states that on 3rd January 2001 the Director (Administration), Lok Nayak Hospital submitted a report to the State Health Secretary of the GNCTD to the effect that there was nothing adverse against the Petitioner.

14. Consequent upon the impugned order dated 20th November 2000 having been marked by the DGHS to the Commissioner of Customs, the Petitioner received a notice dated 7th March 2001 from the latter and proceedings commenced under the Customs Act, 1962 as well.

15. In the above background, the Petitioner filed the present petition on 18th April 2001 challenging the order dated 20th November 2000.

16. On 18th January 2002, this Court directed that till the next date no final order will be passed pursuant to the impugned order by the Respondents.

That interim order was continued till 29th January 2004 when it was

modified to the extent that “the final order, if any, passed by the respondent authorities shall not be given effect to till the next date.”

17. The Petitioner was permitted to amend the writ petition by an order dated 18th January 2005 whereby the Petitioner was allowed to incorporate certain facts arising as a consequence of the impugned order.

The amended writ petition

18. To complete this narration, it may be mentioned that by the amendment the Petitioner brought on record the following facts:

(i) The original import licence was in the name of DUIRC. An amendment was applied for to incorporate the words (“a unit of R.G. Stone Enterprises Pvt. Ltd.”) under the name of the said Centre in the import licence.

(ii) All correspondence between the DUIRC and the Petitioner and the DGHS and the DHS was only at the East of Kailash address and that both authorities were aware of the installation of the equipment at that address.

(iii) On 6th/11th July 1989 the DUIRC informed the Joint Secretary (Medical) Delhi Administration that its Centre had started functioning and that an installation certificate in terms of Para 4(b) of the Notification No. 64/88 should be issued to it. The letter head on which the above letter was typed out indicated that the Petitioner’s unit was located at East of Kailash.

(iv) The DUIRC and later the Petitioner continued to provide free concessional treatment to poor patients between 1992 and 1999. It also organised free camps at several places outside Delhi.

(v) The impugned order of 20th November 2000 was issued by the DHS despite being aware of the fact that the investigations by the Delhi Government were in progress and that the details were to be submitted after the conclusion of such investigations. The reasons given in the impugned order were also assailed.

19. In the amended writ petition, additional grounds of challenge were also raised. The Petitioner, on 26th August 2002, filed a photocopy of the inspection report dated 3rd January 2001 of the Director (Administration), Lok Nayak Hospital.

Reply of the Respondents

20. A counter affidavit was filed to the amended writ petition by Respondents 1 to 3. While it was not denied that the State Government had given a report dated 3rd January 2001, it was stated that such report was received belatedly “i.e. much after the impugned order, which included the information for the years 1995 to 1999.” It was pointed out that the said inspection report “has also not stated that the institution is giving entire services free in OPD and has not treated any indoor patient with income less than ₹500/- per month, free of cost.” The Respondents maintained that despite repeated reminders by the DGHS, no reply had been received from the Petitioner.

21. A reference was made by the Respondents 1 to 3 to Writ Petition (Civil) No. 409 of 1996 (*PUCL v. Union of India*) filed in this Court as a public interest litigation seeking the quashing of suspected illegal CDECs issued by the DGHS. This Court constituted a one man committee of Mr. S.D. Mohile, Member (CBEC) for taking action for recovery of customs duty and for initiating other proceedings under the Customs Act, 1962 against the defaulting parties. Another committee called the Rosha Committee under the Chairmanship of Shri Padam Rosha, comprising of senior officers drawn from the Revenue Intelligence, Central Excise, DGHS and CBI was constituted under the orders of this Court. It was stated that the Rosha Committee was also examining the Petitioner's case.

22. A reference was also made in the reply to the judgment of the Supreme Court in *Mediwell Hospital & Health Care (P) Ltd. v. Union of India AIR 1997 SC 1623* (hereafter 'the *Mediwell Hospital* case') in which it is held that the Notification No. 64/88 granting exemption should be construed as casting a continuing obligation on the part of all those who had obtained certificate from the appropriate authority. It was held that the objective of giving free treatment to at least 40 per cent of the outdoor patients as well as free treatment to all the indoor patients belonging to families with an income of less than ₹ 500/- per month must be achieved at all costs and if the said obligation was not discharged, then steps could be taken for realisation of the customs duty from such of those entities who had availed the CDECs.

23. The Respondents state that the case of the Petitioner was considered at the CDEC meeting held on 7th September 2000 and despite opportunities

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given to the Petitioner, it had failed to give information for the period from 1995 onwards. As regards the report of the GNCTD, it is stated that the information provided by the Petitioner had not been verified and cross-checked with the registers. It was stated that MG Section of the DGHS had not received the Petitioner's letters dated 11th March 2000, 15th November 2000 and 18th November 2000. Although it is not denied that the report of the Delhi Government of 3rd January 2001 was received by the DGHS only on 15th January 2001, it was not in dispute that no patient with the income of less than ₹ 500/- per month came to the Petitioner for indoor treatment. It was submitted that the voluminous documents submitted and the various concessions given to patients was not information sought for "in terms of the notification requirement."

Submissions of Counsel

24. Apart from reiterating the facts narrated hereinbefore, Mr. Jeevan Prakash learned counsel appearing for the Petitioner referred to the fact that by a Notification No. 98/94 dated 1st March 1994, the Notification no. 64/88 dated 1st March 1988 had been rescinded. He, therefore, submitted that in any event after 1st March 1994 there was no obligation on the Petitioner to continue to comply with the obligation under Notification No. 64/88. He referred to the decision of the Supreme Court in ***Faridabad CT Scan Centre v. D.G. Health Services (1997) 7 SCC 752*** which overruled a certain operative portion of the decision in the ***Mediwell Hospital***. He also referred to the decision in ***Sri Sathya Sai Institute High Medical Sciences v. Union of India 2003 (158) ELT 675 (SC)***, which overruled certain other operative portions of the decision in ***Mediwell Hospital*** case. He also placed reliance

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upon the judgments of the different High Courts in *Apollo Hospitals Enterprises Ltd. v. Union of India* 2001 (133) ELT 58 (Mad); *J.J.M. Medical College v. Director General of Health Services* 2006 (193) ELT 401 (Kar); *Core Healthcare Ltd. v. Union of India* 2006 (198) ELT 21 (Guj) and *Dr. Balabhai Nanavati Hospital & Nanavati Hospital Medical Research Centre v. Union of India* 2009 (233) ELT 442 (Bom.). In order to buttress the submission that the decision in the *Mediwell Hospital* case no longer holds good, learned counsel for the Petitioner relied upon the decisions in *State of Haryana v. Ranbir* (2006) 5 SCC 167 and *Divisional Controller, KSRTC v. Mahadeva Shetty* (2003) 7 SCC 197.

25. Appearing for the Respondents Ms. Preeti Dalal, learned Advocate referred to the decisions in *Bharath Diagnostic Centre v. Commissioner of Customs, Air Cargo (I & G), New Delhi* 2007 (207) ELT 113 (Tri. – Bang.) and the Division Bench of the Bombay High Court in *Shah Diagnostic Institute Private Ltd. v. Union of India* 2008 (222) ELT 12 (Bom). It was submitted that once a CDEC had been obtained, the obligation thereunder had to be continuously met notwithstanding the fact that the notification stood withdrawn in 1994. In the instant case, as far as the DGHS is concerned, it had no information from the Petitioner that it had complied with its obligations for the years 1995 to 1999 and, therefore, it was justified in withdrawing the CDEC.

Scope of Notification No. 64/88: Applicability of Para 2 to the Petitioner

26. The first issue to be considered is about the scope of the Notification No. 64/88 issued under the Customs Act, 1962. The Table appended to the

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notification sets out the conditions subject to which the CDEC is granted to hospitals. Para 2(a) of the Table requires a hospital certified by the Ministry of Health and Family Welfare, Government of India to comply with the following requirements of free treatment:

- “(a) free, on an average, to at least 40 per cent of all their outdoor patients; and
- (b) free to all indoor patients belonging to families with an income of less than rupees five hundred per month, and keeping for this purpose at least 10 per cent of all the hospital beds reserved for such patients; and
- (c) at reasonable charges, either on the basis of the income of the patients concerned or otherwise, to patients other than those specified in clauses (a) and (b).”

27. Para 4 of the Table to the said notification, which is relevant for the present purposes, reads as under:

“4. Any such hospital which is in the process of being established and in respect of which the said Ministry of Health and Family Welfare is of opinion-

- (i) that there is an appropriate programme for establishment of the hospital,
- (ii) that there are sufficient funds and other resources required for such establishment of the hospital,
- (iii) that such hospital would be in a position to start functioning within a period of two years, and
- (iv) that such hospital, when it starts functioning would be relatable to a hospital specified in paragraph 1, 2 or 3 of this Table.

and the said Ministry of Health and Family Welfare certifies to that effect:

Provided that-

- (a) in the case of a hospital relatable to paragraph 3 of this Table, the importer produces evidence to the Assistant Collector of Customs at the time of clearance of the said hospital equipment that the same is being imported in accordance with the conditions specified in proviso to that paragraph:
- (b) the importer shall give an undertaking in writing to the Assistant Collector at the time of clearance of the said hospital equipment that the importer shall furnish certificates from the said Ministry of Health and Family Welfare or from the Directorate General of Health Services, Government of India, within such period as the Assistant Collector of Customs may specify in this behalf or within such extended period as the Assistant Collector of Customs, on sufficient cause being shown, may allow in each case, to the effect-
 - (i) that such hospital equipment has been installed in the hospital; and
 - (ii) that such hospital has started functioning;
- (c) the importer shall furnish, at the appropriate time, the certificates referred to in (b);
- (d) the importer executes a bond in such form and for such sum as may be specified by the Assistant Collector of Customs binding himself to pay, on demand, an amount equal to the duty leviable on the said hospital equipment—
 - (i) if such hospital starts functioning within the period specified therefor, as is not proved to the satisfaction of the Assistant Collector of Customs to have been installed in such hospital, or
 - (ii) if such hospital does not start functioning within the period specified therefor.

Explanation.—For the purposes of this notification, the expression “Hospital” includes any Institution, Centre, Trust, Society, Association, Laboratory, Clinic and Maternity Home which renders medical, surgical or diagnostic treatment.”

28. Although it is sought to be contended by the learned counsel for the Petitioner that the requirement under Para 2 was applicable only to the existing hospitals, this court is unable to accept the said submission. Para 4 relates to hospitals which are in the process of being established. This clause certainly applies to the Petitioner since at the time it obtained the CDEC, it was in the process of being established. Nevertheless under Para 4(iv), such hospitals which start functioning “would be relatable to a hospital specified in paragraph 1, 2 or 3 of this Table.” Therefore, once the Petitioner Hospital commenced its functioning, it had to comply with the requirement of Para 2.

No objection by Respondents to explanation given by Petitioner for shifting the site of installation of equipment

29. An analysis of the above narrative reveals that the Petitioner, on its part, had given a satisfactory explanation why it had to shift the place of installation of the equipment from Sita Ram Bazar to East of Kailash. There is no denial by the Respondents that it gave such an explanation. There is also no denial of the fact that at no point in time was the Petitioner informed that its explanation was unacceptable. Therefore, any objection raised about the Petitioner having shifted the place of installation without seeking prior permission is not a tenable one. At no point in time, till the passing of the impugned order dated 20th November 2000, was the Petitioner informed either by the DHS or the DGHS that its explanation was unacceptable.

Compliance with Notification No. 64/88

30. The crucial aspect of the matter is about the compliance by the Petitioner with the conditionalities in Para 2 of the Table to the Notification No. 64/88.

The submission here is two- fold. One is that the Custom Notification was valid only till 1994, after which there was no requirement of complying with the said Notification. It is further submitted that till 1994, the Petitioner's statistics of providing free treatment for the years 1992, 1993 and 1994 were furnished to the DGHS as well as the DHS and found by the latter to be in order. It is accordingly submitted that the requirement of Para 2 of the Table to the Notification No. 64/88 was satisfied.

Analysis of Mediwell Hospital and the later Supreme Court decisions

31. This brings us to the decisions of the Supreme Court, beginning with the ***Mediwell Hospital*** case, on whether the obligation under Notification No. 64/88 continues indefinitely and, in any event, even after the repeal of the said notification.

32. The facts in the ***Mediwell Hospital*** case, a judgment delivered by a Bench of two learned Judges of the Supreme Court, were that the Mediwell Hospital & Health Care Pvt. Ltd established a Modern Heart Institute and Research Centre. It obtained a CDEC from the DGHS in respect of certain sophisticated hospital equipments. When it applied for amendment in the CDEC on the ground that it was granted the CDEC for equipments other than what was imported by it, the DGHS refused to grant CDEC for Marquette Case 15 (the equipment imported in that case). In the meanwhile, the equipment was imported and was allowed to be cleared by the Customs Authority upon the Mediwell furnishing a bank guarantee. The High Court of Punjab and Haryana held that Mediwell was merely running a Diagnostic Centre and not a hospital and, therefore, was not covered by the Notification

No. 64/88. In allowing Mediwell's appeal, the three issues were addressed by the Supreme Court as is apparent from para 7 of the judgment (SCC@ p. 762):

“7. In view of the rival submission the questions which arose for our consideration are:

1. Whether a diagnostic centre is entitled to seek for issuance of a certificate to enable it to import equipments without payment of customs duty?
2. Whether in the facts and circumstances of the present case, more particularly in the absence of any denial of the allegations made by the appellant it is possible for the Court to come to the conclusion that there has been a discriminatory treatment between appellant and persons similarly situated, and if so, whether there is any nexus for the same.
3. Whether the appellant had complied with all the pre-conditions stipulated in the exemption notification for being entitled to the issuance of a certificate by the Respondent No. 2 for import of the equipment in question without payment of customs duty.”

33. What is relevant, as far as the present case is concerned, is the answer to Question No. 3. The Supreme Court observed that while Mediwell was entitled to get the CDEC from the DGHS, “the very notification granting exemption must be construed to cast continuing obligation on the part of all those who have obtained the certificate from the appropriate authority and on the basis of that have imported equipments without payment of customs duty to give free treatment at least to 40 per cent of the outdoor patients as

well as give free treatment to all the indoor patients belonging to the families with an income of less than Rs. 500 per month.” The Supreme Court required the competent authority to “continue to be vigilant and check whether the undertakings given by the applicants are being duly complied with after getting the benefit of the exemption notification and importing the equipment without payment of customs duty.” It was consequently held that if upon enquiry the authority was satisfied that the said obligation was not being carried out “then it would be fully open to the authority to ask the persons who have availed of the benefit of exemption to pay the duty payable in respect of the equipments which have been imported without payment of customs duty.” All the above observations were made in para 13 of the judgment (SCC@ p.766). In para 14, a direction was given that all the persons, including Mediwell, who had the benefit of the CDECs “should notify in the local newspaper every month the total number of patients they have treated and whether 40% of them are the indigent persons below stipulated income of ₹ 500/- per month full particulars and address thereof which would ensure that the condition to treat 40% of the patients free of cost would continuously be fulfilled.” In the event of default, it was directed that coercive official action should be undertaken, and that the above condition should become part of the CDEC itself. Subject to the fulfillment of the above conditions, as set out in paras 13 and 14 of the judgment (SCC@ p.766-767), the judgment of the High Court was set aside and the DGHS was directed to reconsider the case of Mediwell and issue the necessary CDECs within a period of three months.

and a detailed order was passed on 2nd May 2003 by a Division Bench of this Court. After examining the report of the Member (Customs), Central Board of Excise and Customs ('CBEC') it was noted that so far as the DGHS was concerned, "396 cases were examined. In respect of 386 institutions/hospitals CDEC has either been withdrawn or cancelled."

35. In the meanwhile, within nine months of the decision in *Mediwell Hospital* case, the issue was again examined by a three Judge Bench of the Supreme Court in *Faridabad CT. Scan Centre v. D.G. Health Services*. The Petitioner was aggrieved by the denial of the CDEC and cited the cases of certain others similarly placed who had been granted such CDECs. Reliance was placed on the observations made in para 10 of the *Mediwell Hospital* case that a diagnostic centre run by a private individual purely on commercial basis may not be entitled to exemption under the notification issued by the Central Government. It was noticed in *Faridabad CT. Scan Centre* that despite the above observations made in the *Mediwell Hospital* case, Mediwell had been granted on the ground that several other individual diagnostic centres not attached to any hospital had been granted the exemption and that denial of such CDEC to Mediwell would be violative of Article 14 of the Constitution. The three-Judge Bench disagreed with the above view expressed in the *Mediwell Hospital* case. It explained that the principle of equality under Article 14 did not apply when the order relied upon was unsustainable in law and illegal. It was held that "the decision in *Mediwell Hospital* does not lay down the correct law **on this point.**" (emphasis supplied)

36. It is clear from the decision in *Faridabad CT. Scan Centre* that only insofar as the two-Judge Bench in the *Mediwell Hospital* case held that even a diagnostic centre not attached to any hospital could be granted the CDEC, such decision was held to be no longer good law. By no means can this be construed as an overruling by the larger bench in *Faridabad CT. Scan Centre* of the entire decision of the smaller bench in the *Mediwell Hospital* case.

37. Again, another three-Judge Bench of the Supreme Court had occasion to deal with the other part of the *Mediwell Hospital* case in *Sri Sathya Sai Institute High. Medical Sciences v. Union of India*. As noted in the decision itself, the petition came to be placed before the larger Bench in view of the directions in *Mediwell Hospital* that in order to avail benefit of the exemption under Notification No. 64/88, the applicant had to issue an advertisement on a monthly basis in a local newspaper that the total number of indigent patients treated free was at least 40% with full particulars and addresses of each of such indigent patient. The three Judge Bench in *Sri Sathya Sai Institute* observed that it was the prerogative of the Government to grant exemption and, therefore, it was for them to impose appropriate conditions. It was not open to the Court to impose such conditions. Consequently, it was held that “directions issued in Para 14 of the *Mediwell’s* case shall stand overruled.”

38. The resultant position is that after the judgment in *Sri Sathya Sai Institute High. Medical Sciences v. Union of India*, the directions in para

14 of the decision in the *Mediwell Hospital* case, which imposed a condition of the holder of a CDEC having to issue advertisement in newspapers regarding the provision of free treatment, were held to be no longer good law.

39. Consequently, only the directions contained in para 13 of the *Mediwell Hospital* case that declared that the obligation under Notification No. 64/88 was a continuing one, which was required to be monitored by the authorities, survived.

Effect of repeal of Notification No. 64/88

40. What is significant is that none of the above three judgments noticed an important fact that the Notification no. 64/88 stood withdrawn with effect from 1st March 1994 itself. Consequently, there was no occasion for the Supreme Court to consider whether the obligation to fulfill the conditions attached to the said Notification continued even beyond that date. That question arose before the Madras High Court in *Apollo Hospitals Enterprises Ltd. v. Union of India*. In that case, the Petitioner had imported certain life saving medical equipments for installation in its hospital and obtained a CDEC under the Notification No. 64/88. The Petitioner's application was rejected on the ground that the DGHS had relied upon a certain report, a copy of which had not been given to the Petitioner. Secondly, the DGHS had failed to consider whether non-compliance of the requirement of Clause 2 of the Notification No. 64/88 was wilful. It had also not considered whether the compliance was required to be made only till such time the Notification No. 64/88 survived.

41. The learned Single Judge of the Madras High Court in *Apollo Hospitals* held that the requirement of complying with the condition under Clause 2 of the table to the Notification No. 64/88 would continue till such time the said notification was operational. It was further held that such liability cannot be enforced after the repeal of the notification. It was held in para 43 (ELT @ p. 75):

“43. Having derived such exemption whether it is open to the petitioners to contend that after the rescinding of Notification No. 64/88, it is not open to the authorities to enforce the liability. The answer is simple, in view of the judgments of the Supreme Court referred to above. The petitioners those who benefited the tax exemption are bound to discharge the liability during the period when the said Notification 64/88 was in force. Hence it is always open to the authorities to enforce such obligation only during that period when the Notification No. 64/88 was in force and not for the subsequent period. So it is for the authorities to establish that the petitioners had violated the conditions imposed under Notification No. 64/88 subsequent to their availing the benefit of the exemption of Duty and before the end of February, 1994, since Notification 99/94, rescinding the Notification 64/88 came into force on 1-3-94.”

42. In *Dr. Balabhai Nanavati Hospital & Nanavati Hospital Medical Research Centre v. Union of India*, a Division Bench of the Bombay High Court explained that an order cancelling the CDEC passed by the DGHS had to be preceded by a show cause notice. Likewise in *J.J.M. Medical College v. Director General of Health Services*, a learned Single Judge of the Karnataka High Court held that an order cancelling the CDEC without issuing a show cause notice would be violative of the principles of natural

justice. These principles also weighed with the Supreme Court in Civil Appeal Nos. 7282-7283 of 2005 (*Sir Ganga Ram Trust Society v. Union of India*) in which, by an order dated 24th October 2007, the Supreme Court had remanded the matter to the DGHS for giving the appellant therein an opportunity of being heard before withdrawal of the CDECs. In *Core Healthcare Ltd. v. Union of India*, a Division Bench of the Gujarat High Court held that if the departmental authorities failed to establish jurisdictional facts, no show cause notice could be issued to cancel the CDEC.

43. The resultant position from the above discussion would be that as far as the Customs Notification No. 64/88 is concerned, the requirement under Para 2 of the Table to provide free treatment to at least 40% of all their outdoor patients and provide free treatment to all indoor patients belonging to families with an income of less than ₹ 500/- per month, would be a continuing obligation but that such obligation would continue till the time the Notification No. 64/88 continued to exist. Such obligation could not be enforced even after the repeal of the said notification, i.e., even after 1st March 1994.

44. It is in the above background that this Court proceeds to examine the judgment of the Division Bench of the Bombay High Court in *Shah Diagnostic Institute Private Ltd. v. Union of India*. The facts in that case were that the Petitioner was granted a CDEC on 17th December 1985 for import of an MRI machine. The MRI machine was allowed clearance in part shipments. The show cause notices were issued on 14th December 1992, 5th

June 1993 and 10th November 1993 calling upon the Petitioners therein to show cause as to why the duty amount of ₹3,82,47,105/- should not be levied and recovered and the MRI machine not be confiscated. After considering the reply of the Petitioners, an order was passed on 28th August 1994 withdrawing the CDEC ordering the recovery of the duty amount together with the penalty of ₹10,00,000/-. This was challenged before the Bombay High Court. The facts in the connected writ petition were that some spare parts of the MRI machine were sought to be cleared by invoking Notification No. 64/88.

45. The Bombay High Court negated the challenge to the reasonableness of the conditions imposed by Notification No. 64/88. It was held that one of the essential conditions in Para 2(b) of the said notification was that the beneficiary of the CDEC must be a hospital, which can provide both free medical and diagnostic treatment to all indoor patients belonging to the families with an income of less than ₹ 500/- per month and at least 10 per cent of the hospital beds should be reserved for such patients. Since the first Petitioner did not have the facility of inpatients, it could not have complied with the said conditions and, therefore, was ineligible for the benefit of exemption. It was then held that the attempt by the Petitioners therein to have the machines installed in the premises of the Breach Candy Hospital and Research Centre and not in their own units was dishonest and constituted the practice of a fraud on the revenue authorities. Consequently, it was held that the CDEC was rightly withdrawn. It was further held that the judgment in *Apollo Hospitals Enterprises Ltd.* did not help the case of the Petitioners at all. The contention that the Notification No. 64/88 was

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repealed on 1st March 1994 and, therefore, the conditions imposed thereunder ceased to be effective, was rejected by the Bombay High Court by referring to Section 159A of the Customs Act, 1962. It was held that the rescission of the Notification No. 64/88 did not affect the liability acquired, accrued or incurred by the Petitioners with regard to the fulfillment of Para 2(b) of the said Notification.

46. The above view of the Division Bench of the Bombay High Court in *Shah Diagnostic* appears to have been relied upon by a three-member Bench of the CESTAT in *Bharath Diagnostic Centre v. Commissioner of Customs, Air Cargo (I&G), New Delhi* where while discussing the very same notification, it was held that even if the notification was rescinded, action could be taken for violation of the conditions under which the benefit of the said notification had been obtained during the period the said notification was in force. Referring to paras 42 and 43 of the Madras High Court ruling in *Apollo Hospitals*, the CESTAT also held that a careful reading of the said paras would reveal that the authorities can enforce the obligations only during the period when the Notification No. 64/88 was in force and not for the subsequent period.

47. The resultant position on a collective reading of the judgment of the Bombay High Court in *Shah Diagnostic* and the order of the CESTAT in *Bharath Diagnostics Centre* is that with the repeal of the Customs Notification No. 64/88 with effect from 1st March 1994, the Petitioner in the instant case would have to satisfy the Respondents that it duly complied with the conditionalities in Para 2 of the Table to the Notification during the time

the said Notification was in force. While all the judgments referred hereinbefore talk of the validity of action taken by the Respondents after the repeal of the Notification for the non-compliance during the period the said notification was in force, none of the judgments state that the obligation to comply with the conditions under Notification No. 64/88 continued after the said notification was repealed.

Consequences for the Petitioner

48. There are two rival contentions on the scope and enforceability of the obligations under Notification 64/88. The first, as advocated by the Petitioner, is that the obligation of the Petitioner to comply with the Notification No. 64/88 continued up to 1st March 1994, and could be enforced only till the time the said notification was in force. This, in the considered view of this Court, is indeed placing a highly restrictive interpretation of the said exemption notification. In other words, the obligation under Notification No. 64/88 could be enforced even after the repeal of such notification. The issue really is about the extent of the obligation under Notification 64/88.

49. The contention advanced by the Respondents is that in terms of the decision in the *Mediwell Hospital* case, the obligation under the Notification No. 64/88 continued indefinitely, i.e. even beyond the date of repeal of the Notification No. 64/88. The contention is that the DGHS would, in such event, be empowered to enforce the obligation of the Petitioner under Notification No. 64/88, which continued indefinitely, even after the said notification ceased to exist.

50. In the considered view of the Court, there is no scope indeed for accepting the contention as put forth by the Respondents. None of the decisions of the Supreme Court discussed hereinbefore or of the Division Bench of the Bombay High Court or the order of the CESTAT held the obligation under the Notification No. 64/88 to continue indefinitely i.e. even beyond the date on which such notification stood repealed and further such obligation was also enforceable beyond the date of repeal. In those cases, what was sought to be enforced was an obligation arising during the period when the said notification was in force.

51. Consequently, as far as the present case is concerned, by its impugned action initiated pursuant to the Notification No. 64/88, DGHS at best could seek enforcement of the Petitioner's obligation under Notification No. 64/88 up to 1st March 1994 and not beyond that date.

52. Factually, however, not only have the Petitioner's returns filed up to 1st March 1994 been accepted by the DHS, but also no action was taken by the DGHS till 2000. Further the Petitioner continued with its obligations under Notification No. 64/88 and furnished to the DGHS the figures of compliance even up to 31st October 2000.

53. Without going into the factual controversy whether such details were in fact received by the DGHS, the fact remains that as far as the Delhi Government was concerned, its special inspection report of 3rd January 2001 clearly indicated that the Petitioner had complied with the conditions of Notification No. 64/88 even as on that date. As far as the Petitioner is

concerned, it was entitled to presume that with no objection having been raised to the figures submitted by it up to 1st March 1994 it had complied with the requirements of Notification No. 64/88. The action taken by the DGHS by way of the impugned order in seeking to withdraw the CDEC for non-compliance of the conditionalities attached to the Notification No. 64/88 was, therefore, unsustainable in law.

54. As regards the obligations for the period subsequent to 1st March 1994, as already held by this Court, there is no such obligation arising from the Notification No. 64/88 after the date of its repeal. Even otherwise, the Petitioner is entitled to take benefit of the certificate given to it by the Delhi Government on 3rd January 2001 that it continued to fulfill its obligations under the Notification No. 64/88 even up to 31st October 2000. Nothing has been shown to this court to discard the earlier approval by the DHS of the Delhi government of the returns filed by the Petitioner of its compliance of the Notification No. 64/88 up to 1st March 1994. In any event up to the time of the impugned order in November 2000, the correctness or the adequacy of the data furnished by the Petitioner was never questioned. Again as regards the Petitioner's performance of its obligations under Notification No. 64/88, up to 31st October 2000, i.e. beyond the date of its repeal, there is no reason shown why the report dated 3rd January 2001 of the Director (Administration), Lok Nayak Hospital of the GNCTD should not be accepted.

Conclusion

55. For the aforementioned reasons, this Court holds that the impugned order

dated 20th November 2000 passed by the DGHS withdrawing the CDEC granted to the Petitioner is unsustainable in law and accordingly sets it aside. The writ petition is allowed with costs of ₹5,000/-, which will be paid by the Respondents to the Petitioner within a period of four weeks.

S. MURALIDHAR, J.

SEPTEMBER 24, 2010

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