

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27.03.2015

CORAM:

The Honourable Mr. Justice S.VAIDYANATHAN

Writ Petition No.672 of 2015

Reserved on 17.03.2015

M/s. Life Cell International (P) Ltd.
16/9, Vijayaraghava Road
T. Nagar, Chennai – 600 017
Rep. by its Chief Financial Officer and
Authorized Signatory Mr. Suresh Ramamurthy ..Petitioner

-Vs-

1. Union of India
Rep. by its Secretary to Government
Ministry of Finance, Department of Revenue
North Block, New Delhi – 110 001
2. Union of India
Rep. by its Secretary to Government
Ministry of Health & Family Welfare
Department of Health, Nirman Bhawan
New Delhi – 110 001
3. Directorate General of Central Excise Intelligence

West Block VIII, Wing No.VI, 2nd Floor
R.K. Puram, New Delhi – 110 066

4. The Commissioner of Service Tax

Newry Towers, No. 2054-I, 2nd Avenue
12th Main Road, Anna Nagar
Chennai – 600 040

..Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Prohibition, to prohibit the 3rd and 4th respondents from collecting the service tax from the petitioner company for the period from 1.7.2012 to 16.2.2014 as the insertion of entry to Sl.No.2A to Notification No.25/2012-ST dated 20.6.2012 vide amending Notification No.4/2014-ST dated 17.2.2014 was only clarificatory in nature and the activities of the petitioner company had always been exempted as health care service and as has been clarified by the second respondent.

For Petitioner : Mr.Aravind P.Datar, SC for
Mr.N.Viswanathan

For Respondents : Mr.V.Sundareswaran

ORDER

This Writ Petition has been filed, praying for the issuance of a writ of Prohibition, to prohibit the 3rd and 4th respondents from collecting the service tax from the petitioner company for the period from 1.7.2012 to 16.2.2014 as the insertion of entry to Sl.No.2A to Notification No.25/2012-ST dated 20.6.2012 vide amending Notification No.4/2014-ST dated 17.2.2014 was only clarificatory in nature and the activities of the petitioner company had always

been exempted as health care service and as has been clarified by the second respondent.

2. According to the petitioner company, it has been promoted for engaging itself in establishing stem cell bank, having sales and marketing centres at various locations in India, for collection, processing, cryo-preservation and release of stored samples for transplantation of umbilical cord blood and tissue stem cells, which are required in treating over 80 adverse medical conditions such as leukemia, lymphoma, myeloma, sickle-cell anemia, thalassemia, etc. The above activity of the petitioner/company involves application of proper technology for the preservation of stem cells for over number of years for use of the baby as well as its near and dear siblings in appropriate clinical treatment. The petitioner claims that the above activities undertaken by it can be termed as "Health Care Services". The services rendered by the petitioner/company among other things involved the collection of the umbilical blood and tissue in a special kit provided by them by sending their paramedics to the concerned hospital, carrying out appropriate process on the said umbilical cord blood by placing them in pilot bags (5 ml) and main bag (20 ml) sealed and stored in cold storage maintained at a particular concentration to make it available in case of necessity to the person for transplantation. For carrying out their above activities, the petitioner established public awareness programmes and collection facilities at different parts of country. The petitioner company will charge a fee either a onetime payment or on yearly basis for the above facility provided by them from their

clients/customers which includes enrollment umbilical cord blood processing fee, umbilical cord tissue processing fee and cryo preservation charges. In order to provide the above facility, the petitioner used to engage various doctors and para medical technicians in the field. The petitioner company claims that the activities undertaken by them is similar to the one provided by a blood bank.

3. According to the petitioner, the above activities are governed by the provisions contained in the Drugs & Cosmetics Act, 1940 and the Rules made thereunder and they have been granted licence in Form 28F to operate as a blood bank under the category "blood bank and blood transfusion services" which is covered under Schedule F of Part XII B. In this regard, the Ministry of Health had issued Notification No. G.S.R. 304(E) dated 09.04.2010 in respect to the process guidelines for collection and preservation of cord blood and upto the stage of release of stem cells for application. The petitioner and others who are engaged in the stem cell banking business are required to comply with the above guidelines.

4. The petitioner company claims that the term storage and warehousing was however defined under section 65(102) of the Finance Act, 1994 to include Storage and Warehousing Services for goods including liquid and gases, but does not include any services provided for storage of agriculture produce or any services provided by a cold storage and since the cold storage services provided by them stood excluded from the levy of service tax in terms of the

above definition under Section 65(102) of the Act they were not being subjected to the levy of service tax, for the cold storage activities involved in the above activities undertaken by them.

5. According to the petitioner company, even though the Finance Act, 2011 provided for the levy of service tax for the health care services, the Government of India, in public interest issued an exemption notification bearing no. 30/2011 ST dated 25.04.2011 exempting the above taxable services provided or to be provided unconditionally. The newly introduced provisions among other things defined the term services for the first time under Sec. 65(44) of the Act, while also notifying certain services under Sec. 66D as Negative List of services on which no service tax was leviable. In addition to the above, a mega exemption Notification No.25/2012-ST dated 20.06.2012 was issued providing for exemption from the payment of service tax on certain taxable services. Even though substantial changes were made to the provisions contained in the Finance Act, 1994 through the above amendments even then the amended provisions in general continued the earlier provisions specifically excluding certain service activities or granting the exemption from the payment of service by specifying it either under the negative list or under the mega exemption notification. The petitioner admits accordingly the health related services which were hitherto enjoying the exemption under Notification No. 30/2011 ST was notified against Sl.No.2 of Notification No.25/2012 ST dated 20.05.12 whereby the exemption was continued to be extended to the health care services.

6. The grievance of the petitioner is that while their activities were kept out of the levy of the service tax, however, in the Finance Act, 2012 brought into force from 01.07.12 it was not declared that the cold storage services either under the negative list of services under the newly introduced Sec. 66D of the Act or by notifying it as an exempted services under the mega exemption Notification No. 25/2012 ST dated 20.06.12. The petitioner claims that the investigating authorities of the respondents conducted various search operations and enquiries under summons to collect various documents and details from them and others apart from forcing them to give posted cheques towards payment of the tax as calculated by them which the petitioner has no other option but to oblige and accordingly, the petitioner made payment of Rs. 3 Crores.

7. It is stated that pursuant to the efforts taken by the petitioner by making number of representations to the second respondent, the Ministry of Health issued a memorandum dated 22.5.2013 to the effect that their department has examined the matter in consultation with the National Aids control Organization, Department of Aids Control to recommend that the services rendered by the stem cell banks are part of health care services and hence they may be considered for service tax exemption. Pursuant to the same, the Ministry of Finance, instead of clarifying that the health care services notified under notification no. 25/2012 ST covers the stem cell banks also as per the clear recommendations of the Ministry of Health, made an amendment

to the said notification by inserting a new entry 2A below to serial no. 2 "Services provided by cord blood Banks by way of preservation of stem cells or any other service in relation to such services" vide amending Notification No. 04/2014 dated 17.02.2014 even when the explanation of the terms "clinical establishment" and "Health care services" appended to the said notification fully covered their services requiring the grant of the exemption from the payment of service tax. Therefore, according to the petitioner, the amending notification has to be considered as only a clarificatory in nature effective and valid from 01.07.2012 in terms of serial no.2 of the notification No.25/2012 ST, dated 20.6.2012. In other words, though the amendment came into force on and from 17.2.2014, since it is only a clarificatory in nature, the petitioner claims exemption on and from 01.7.2012. Hence, the writ petition, seeking to prohibit the respondents 3 and 4 from collecting service tax from the petitioner company from 01.7.2012 to 16.2.2014.

8. Resisting the claim of the petitioner, the respondents 1, 3 and 4 have filed a common counter affidavit, stating that the issue involved in this writ petition is applicability of exemption notification which relates to rate of duty and in terms of Section 35(G)(1) of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, the jurisdiction of the High Court is barred even for statutory appeal arising out of CESTAT orders, relating, among other things, to the determination of any question having a relation to rate of duty, fall within the exclusive domain of Hon'ble Apex Court, hence, the writ petition under Article 226 of the Constitution is not maintainable. It is also stated that considering the representation made by the Association of Stem Cell Banks of

India to the first respondent, the said mega exemption notification dated 20.6.2012 was amended by inserting Entry No.2A which read "Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation". Since a specific entry was inserted to cover the services rendered by the petitioner with effect from 17.2.2014 despite the issue of official memorandum dated 22.5.2013 by the second respondent to the first respondent suggesting that Stem Cell Banks are part of health care services and as it, prima facie, appeared that the activities of the petitioner did not fit into the definition of "health care services" as appearing in the exemption notification under Clause 2(t), a case of tax evasion was registered by the 3rd respondent for the period in question. During the course of investigation, the Managing Director of the petitioner, in his voluntary statement tendered on 9.1.2014 under Section 14 of the Central Excise Act, 1944 made applicable to service tax under Section 83 of the Finance Act, 1994, admitted service tax liability for the services provided by them by way of preservation of stem cells with effect from 1.7.2012. Pursuant to his undertaking, the petitioner deposited one crore each on three different dates. As per Sections 73(3) and 73(4) of the Finance Act, service tax, interest and penalty has to be deposited by the person chargeable to service tax during the course of investigation or before issue of show cause notice to dispense with the issue of show cause notice. It is also stated that the writ petition is premature since scrutiny of documents and investigation is underway and upon completion of investigation, show cause notice will be issued to the petitioner quantifying the proposed liability to tax and on such event, the petitioner will

be at liberty to contest the tax liability by letting in evidence and it is for the adjudicating authority to come to the conclusion whether the activities of the petitioner fall within the purview of "health care services" or not by analyzing the evidence on record. With these averments, the respondents sought for dismissal of the writ petition.

9. Heard the learned senior counsel appearing for the petitioner and the learned standing counsel appearing for the respondents 1, 3 and 4 and perused the entire records.

10. Mr.Arvind P.Datar, learned senior counsel, would contend that the services provided by the petitioner, i.e. preservation of umbilical blood tissue stem cells would fall within the ambit of "health care services" and though such services did not form part of "health care services" in the mega exemption Notification No.25/2012-ST dated 20.06.2012, however, pursuant to the efforts taken by the petitioner and the Association of Stem Cell Banks of India with the Ministry of Health & Family Welfare, which issued a memorandum dated 22.5.2013 to the first respondent recommending that the services rendered by the stem cell banks are part of health care services, the said mega exemption notification dated 20.6.2012 was subsequently amended by inserting Entry No.2A which read "Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation" and thereby the services of the petitioner are recognized as fallen within the ambit of "health care services" and exempted from the whole of the service tax leviable under Section 66 B of the Finance Act. He contended that the above amendment by inserting Entry No.2A immediately

below to Entry 2, i.e. by assigning same number, i.e. 2 adding with an alphabet 'A' in the mega notification, dated 20.6.2012, it has to be treated that such amendment is only a clarificatory in nature and though the amendment is with effect from 17.2.2014, it has to be given with retrospective effect and thereby, exemption for paying service tax for the period from 1.7.2012 to 16.2.2014 has to be extended by the respondents and therefore, the learned senior counsel prayed that that the 3rd and 4th respondents should be restrained by way of writ of prohibition. He would vehemently contend that the amendment by inserting Entry 2A would itself express the intention of the legislature to extend the exemption of service tax in respect of services provided by the Stem Cells Banks and when such intention is plain and unambiguous, it should be presumed that such amendment is only in clarificatory nature and should be given retrospective effect unless the contrary intention is clearly indicated by the legislature. In support of his contentions, the learned senior counsel relied upon the decisions, viz., "**WPIL Ltd., Ghaziabad versus Commissioner of Central Excise, Meerut, U.P.**", reported in (2005) 3 SCC 73; "**Collector of Central Excise, Shillong versus Wood Craft Products Ltd.**" reported in (1995) 3 SCC 454; "**Maharaja Book Depot. Versus State of Gujarat**" reported in AIR 1979 SC 180; and "**Commissioner of Income Tax I versus Gold Coin Health Food Private Limited**" reported in (2008) 9 SCC 622.

11. On the other hand, Mr.V.Sundareswaran, learned standing counsel appearing for the respondents would preliminarily contend that the writ

petition is not maintainable since the issue relating to the determination of rate of duty in terms of Section 35G(1) of the Central Excise Act, 1944 read with Section 83 of the Finance Act, has been involved in this writ petition, which falls within the exclusive domain of the Hon'ble Apex Court and this Court has no jurisdiction to entertain the same. In support of his contentions, the learned counsel relied upon the decision of the Hon'ble Apex Court reported in "**Navin Chemicals Manufacturing and Trading Co.Ltd. versus Collector of Customs**", reported in 1993 (68) ELT 3 (SC); and also the orders of this Court in W.P.No.1276 of 2010, dated 17.11.2014 and CMA No.2424 of 2007.

12. As regards the relief sought for by the petitioner for issuance of writ of prohibition to prohibit the respondents 3 and 4 from collecting service tax from 01.07.2012 onwards by giving retrospective effect to the so-called amendment, the learned counsel for the respondents would contend that assessment proceedings are yet to be finalized and the applicability of the amendment towards the services provided by the petitioner is also yet to be determined and prima facie, it appears that the activities of the petitioner did not fall within the ambit of "health care services" as claimed by the petitioner. He also contended that the writ petition itself is premature as it is for the authorities to determine whether the activities of the petitioner would fall within the meaning "health care services" on scrutiny of documents and thorough investigation, therefore, the self-claim sought for by the petitioner that as if the amendment of Entry 2A is squarely applicable to their services and has to be given effect retrospectively cannot be sustained. He would also contend that even assuming that the amendment would apply to the services

provided by the petitioner, it is settled law that any amendment which brought subsequently, cannot have retrospective since it is not clarificatory nature. With these contentions, the learned counsel sought for dismissal of the writ petition.

13. In reply regarding the maintainability, the learned senior counsel appearing for the petitioner would contend that in this writ petition, it has been specifically sought for issuance of writ of prohibition to restrain the respondents 3 and 4 from collecting the service tax from the petitioner since its services have been brought under the purview of "health care services" and by amendment of entry No.2A, payment of service tax has been exempted and it has been claimed that such exemption should be retrospective and no issue regarding rate of duty in terms of Section 35(G)(1) of the Act is involved in this writ petition for determination. Hence, the learned senior counsel would contend that if the statutory authority acts beyond the jurisdiction, it is settled law that writ under Article 226 is always maintainable. He pointed out that in this case, the respondents 3 and 4 are not empowered to collect service tax from the petitioner company by virtue of amendment brought in the mega notification dated 20.6.2012 with effect from 17.2.2014 in and by which, the services being provided by the petitioner would fall within the category of "health care services". Therefore, the learned senior counsel would contend that the petitioner has only sought for writ of prohibition to restrain the respondents 3 and 4 from collecting the service tax by giving retrospective effect of the amendment with effect from 01.7.2012 onwards. Therefore, the question of the determination of rate of duty in terms of Section 35G(1) of the

Central Excise Act, 1944 read with Section 83 of the Finance Act does not arise in this writ petition and hence, the writ petition is maintainable. In support of his contentions, the learned senior counsel placed reliance on "**Bengal Immunity Co. versus State of Bihar versus State of Bihar**", reported in (2005) 3 SCC 73; "**Himmatlal Harilal Mehta versus State of M.P.**" reported in AIR 1954 SC 403 and "**M/s.East India Commercial Co.Ltd., Calcutta versus Collector of Customs, Calcutta**" reported in AIR 1962 SC 1893.

14. Before going into the merits of the case, it is appropriate to deal with the issue regarding maintainability of the writ petition.

15. On analyzing the entire facts of the case coupled with the averments of the counter and the respective arguments advanced on behalf of either parties, it appears that the issue involved in this writ petition is "whether the so-called amendment i.e. Entry No.2A brought into the exemption Notification, dated 20.6.2012 by Notification No.4/2014-ST dated 17.2.2014 to the effect that "Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation" is only a clarificatory nature and whether it should be given with retrospective effect?" Therefore, as rightly contended by the learned senior counsel, the issue question of the determination of rate of duty in terms of Section 35G(1) of the Central Excise Act, 1944 read with Section 83 of the Finance Act does not arise in this writ petition and hence, the writ petition is maintainable. The specific contention of the learned senior counsel for the petitioner is that the above said amendment is only a clarificatory nature and it should be given with retrospective effect

and thereby, the respondents 3 and 4 should be prohibited from collecting service tax from 01.7.2012 onwards by way of writ of prohibition. Therefore, since this Court is inclined to delve upon the issue involved in this Writ Petition, "whether the so-called amendment i.e. Entry No.2A brought into the exemption Notification, dated 20.6.2012 by Notification No.4/2014-ST dated 17.2.2014 to the effect that "Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation" is only a clarificatory nature and whether it should be given with retrospective effect?", this Court is of the view that the Writ Petition is maintainable.

16. Before deciding the issue involved in this Writ Petition, this Court would make it clear that no finding as regards whether the activities of the petitioner would fall within the ambit of "health care service" and thereby, the so-called amendment would apply to the petitioner organization in order to claim exemption of service tax" is going to be rendered by this Court in this writ petition. In view of the submission made by the learned counsel for the respondents that the assessment proceedings are yet to be finalized and the applicability of the amendment of exemption towards the services provided by the petitioner is also yet to be determined, this Court is of the view that it is for the authorities to determine whether the activities of the petitioner would fall within the meaning of "health care services" on scrutiny of documents and thorough investigation.

17. Empowered under Section 67 of the Finance Act, 1994, the provisions relating to the levy and collection of service tax were brought into

force with effect from 01.07.1994. By Notification No.24/2010-ST, dated 22.6.2010, "taxable service" relating to health care was introduced under Section 65(105)(zzzzz). Subsequently, it was amended by the Finance Act, 2011 (8 of 2011) substituting the provision of Section 65(105) (zzzzz) to cover services provided or to be provided to any person, (i) by a clinical establishment; or (ii) by a doctor, not being an employee of a clinical establishment, who provides service from such premises for diagnosis, treatment or care for illness, disease, injury, deformity, abnormality or pregnancy in any system of medicine. While levying the tax for the above said health care services, the Government of India, issued an exemption notification No.30/2011-ST, dated 25.4.2011 exempting the above taxable services provided or to be provided conditionally. Thereafter, in the year 2012, a new service tax regime has been introduced wherein all services will be taxed unless they are specified under the negative list entry or are otherwise exempted. Under the new system, the services will be taxed comprehensively, except the few ones which have been specified under the negative list. The Central Board of Excise and Customs (CBEC) has further issued "Mega Exemption Notification" vide Notification No. 25/2012-Service Tax dated 20th June, 2012, enlisting the services which shall be exempted from the payment of service tax with effect from 1st July, 2012. With the enforcement of Finance Act 2012, Section 65 relating to the "*definitions*" of the various terms relating to the service tax has been omitted. However, two important sections which have been introduced defining the new service tax code, viz., Section 65B which provides for a whole new set of definitions in context of taxable services

under the head "*Interpretations*" and Section 66D which states the "*Negative list of service*".

18. It is to be noted that the services provided by the petitioner, viz., collection of umbilical blood and tissue and preserving in cold storage, has not been included in the "Negative list of service" to claim exemption of service tax. However, according to the petitioner, pursuant to the efforts taken by the petitioner and the Association of Stem Cell Banks of India, the Ministry of Health & Family Welfare, issued a memorandum dated 22.5.2013 to the first respondent recommending that the services rendered by the stem cell banks are part of health care services and based on which, the said mega exemption notification dated 20.6.2012 was subsequently amended by inserting Entry No.2A which read "Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation" and thereby the services of the petitioner are recognized as fallen within the ambit of "health care services" and exempted from the whole of the service tax leviable under Section 66 B of the Finance Act.

19. Now coming to the issue, i.e. "whether the so-called amendment i.e. Entry No.2A brought into the exemption Notification, dated 20.6.2012 by Notification No.4/2014-ST dated 17.2.2014 to the effect that "Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation" is only a clarificatory nature and whether it should be given with retrospective effect?, this Court is of the view that if the amendment introduced by Notification No.4/2014-ST, dated

17.2.2014, is declaratory or clarificatory in nature, it is no doubt, it will have retrospective effect and if the amendment is remedial in nature it can have only a prospective effect unless specifically expressed to the contrary. Therefore, this Court is inclined to examine whether the so-called amendment, is declaratory/clarificatory or remedial.

20. There is distinction between retrospective and retroactive statute. While the provisions of the legislation may be retroactive, i.e., to cover the transactions which have taken place before the enactment it cannot have a retrospective effect, i.e., it cannot be deemed to have come into force from a backdate.

21. In this regard, it is appropriate to refer the decision of the Hon'ble Supreme Court, reported in "***K.S.Paripoornan versus State of Kerala***", wherein, it has been observed that usually an amendment will take effect only from the date of its enactment and will have no retrospective effect in the absence of an express intent or an intent clearly implied to the contrary. Indeed there is a presumption that an amendment usually operates prospectively. The apex court has also observed that a statute dealing with substantive rights differs from a statute which relates to procedures or evidence or is declaratory in nature inasmuch as while a statute dealing with substantive rights is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute that concerns mainly matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication

that such was not the intention of the Legislature. It has been held by the Hon'ble Apex Court as under in para 64 to 66:

"64. A statute dealing with substantive rights differs from a statute which relates to procedure or evidence or is declaratory in nature inasmuch as while a statute dealing with substantive rights is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature. A statute is regarded as retrospective if it operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. By virtue of the presumption against retrospective applicability of laws dealing with substantive rights transactions are neither invalidated by reason of their failure to comply with formal requirements subsequently imposed, nor open to attack under powers of avoidance subsequently conferred. They are also not rendered valid by subsequent relaxations of the law, whether relating to form or to substance. Similarly, provisions in which a contrary intention does not appear neither impose new liabilities in respect of events taking place before their commencement, nor relieve persons from liabilities then existing, and the view that existing obligations were not intended to be affected has been taken in varying degrees even of provisions expressly prohibiting proceedings. (See *Halsbury's Laws of England*, 4th Edn., Vol. 44, paras 921, 922, 925 and 926.)

"65. These principles are equally applicable to amendatory

statutes. According to Crawford:

"Amendatory statutes are subject to the general principles... relative to retroactive operation. Like original statutes, they will not be given retroactive construction, unless the language clearly makes such construction necessary. In other words, the amendment will usually take effect only from the date of its enactment and will have no application to prior transactions, in the absence of an expressed intent or an intent clearly implied to the contrary. Indeed there is a presumption that an amendment shall operate prospectively."

(See *Crawford's Statutory Construction*, pp. 622-23)

"66. The dictum of Lord Denman, C.J. in *R. v. St. Mary, Whitechapel*¹ that a statute which is in its direct operation prospective cannot properly be called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing, which has received the approval of this Court, does not mean that a statute which is otherwise retrospective in the sense that it takes away or impairs any vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or considerations already past, will not be treated as retrospective. In *Alexander v. Mercouris*¹⁹ Goff, L.J., after referring to the said observations of Lord Denman, C.J., has observed that a statute would not be operating prospectively if it creates new rights and duties arising out of past transactions. The question whether a particular statute operates prospectively only or has retrospective operation also will have to be determined on the basis of the effect it has on existing rights and obligations, whether it creates new obligations or imposes new duties or levies new liabilities in relation to past transactions. For that purpose it is necessary to

ascertain the intention of the legislature as indicated in the statute itself.”

22. From the above decision, it is clear that amendatory statutes, like original statutes, will not be given retroactive construction, unless the language clearly makes such construction necessary. In other words, the amendment will usually take effect only from the date of its enactment and will have no application to prior transactions, in the absence of an expressed intent or an intent clearly implied to the contrary' and that where a statutory provision is in its nature clarificatory, it will be presumed to be retrospective unless the contrary intention is clearly indicated by the Legislature, the reason being that its underlying purpose of explaining or clarifying the existing law will be effectively served only by giving it such a retrospective construction.

23. It is worthwhile to refer the some relevant decisions rendered by the Hon'ble Apex Court, viz.,

In “**Nani Sha v. State of Arunachal Pradesh** reported in **(2007) 15 SCC 406**, at page 413, it has been held as under:

“13. Reverting back to the effect of the proviso, we do not find anywhere any such intention to apply the proviso with retrospective effect. In order to make a provision applicable with retrospective effect, it has to be specifically expressed in the provision. We do not find such an expression in the said proviso. Nothing had stopped the Government before amending the Rule to word it specifically, making it retrospective. That was not done

and we are not prepared to hold that the Rule is retrospective. Secondly, we cannot countenance the argument that the Rule has a clarificatory nature. The Rule, for the first time, creates a quota and thus crystallises the rights of the direct appointees and the promotees which was not there earlier. It, therefore, cannot be viewed as a clarificatory amendment. Again whether the amendment is clarificatory or not would depend upon the language of the provision as also the other Rules. We have examined the Rules which did not suggest that there was any quota existing as such.

In "**Zile Singh v. State of Haryana** reported in **(2004) 8 SCC 1**, the Hon'ble Apex Court has held in para 13 to 15 as under:

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only — "*nova constitutio futuris formam imponere debet non praeteritis*" — a new law ought to regulate what is to follow, not the past. (See *Principles of Statutory Interpretation* by Justice G.P. Singh, 9th Edn., 2004 at p. 438.) It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (*ibid.*, p. 440).

"14. The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (*ibid.*, pp. 468-69).

"15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (*Statute Law*, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

In "***National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India***" reported in **(2003) 5 SCC 23**, wherein, it has been held as under 16 and 17:

"16. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. . "Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. The legislature may follow any one method or all of them... ."⁷

"17. A validating clause coupled with a substantive statutory change is therefore only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent.

24. Reverting to the case on hand, the so-called amendment, admittedly, has been inserted by way of Entry 2A into the exemption Notification, dated 20.6.2012 by Notification No.4/2014-ST dated 17.2.2014 to the effect that "Services provided by cord blood banks by way of preservation of stem cells or

any other service in relation to such preservation". Therefore, the intention of the legislature is clear that bringing the services provided by cord blood banks by way of preservation of stem cells under the exemption Notification in order to give exemption of service tax, however, it has not been specifically mentioned that the said amendment should be with effect from the date of exemption Notification. i.e. 20.6.2012, wherein, originally, Entry No.2 has been inserted, giving exemption towards healthcare services by clinical establishment, an authorised medical practitioner or para-medics. Therefore, by virtue of such amendment, it should be construed that the establishments which provides the above said services will get exemption of service tax with effect from the date of amendment, i.e. 17.2.2014 only and they cannot claim it with retrospective effect. The uncontroverted position is that before the amendment came into force, for the services provided by the cord blood banks were leviable and in fact, the petitioner has also paid Rs.1 Crores each towards service tax with effect from 01.07.2012. Therefore, from 17.2.2014 onwards, by virtue of amendment, the said services were exempted from levy of service tax, which by itself explicit that the said amendment is extending remedial effect to the cord blood banks from being levied with service tax. Therefore, having regard to the same, this Court is of the considered view that the so-called amendment is only a remedial nature and it can have prospective effect only. If at all the legislature thought it fit to extend exemption with retrospective effect, it would have certainly expressed by mentioning specifically to the effect that the amendment would be with effect from 20.6.2012. Since the amendment having been brought into force from a

particular date, i.e. 17.2.2014, no retrospective operation thereof can be contemplated prior thereto.

25. As regards the decisions (cited supra) relied upon by the learned senior counsel for the petitioner are concerned, I am of the view that those decisions will no way helpful to the case of the petitioner. In "**WPIL Ltd., case** (cited supra), the Hon'ble Supreme Court, having considered the fact that already, the Government issued Notification dated 1.3.1994, giving exemption from imposing excise duty on parts of power driven pumps used in the factory premises for manufacture of power driven pumps and to clarify the position, the subsequent notification dated 25.4.1994 was issued giving exemption towards the goods that are used within the factory of production in the manufacture, held that the subsequent notification was not a new one granting exemption for the first time in respect of parts of power driven pumps to be used in the factory and therefore, the subsequent notification is clarificatory nature and it has to be given with retrospective effect. But in the present case, it is not in dispute that the so-called amendment Notification issued by the Government, giving exemption for the first time towards the services provided by cord blood banks by way of preservation of stem cells and hence, it cannot be considered as clarificatory in order to give retrospective effect.

26. In "**Golden Coin** case (cited supra), the expression "income" in the statute appearing in Section 2(24) of the Act has been clarified to mean that it

is an inclusive definition and includes losses, that is, negative profit. This has been held so by the Apex Court on the strength of its earlier judgments in "*CIT v. Harprasad and Co. (P) Ltd.* [(1975) 3 SCC 868 : 1975 SCC (Tax) 158 : (1975) 99 ITR 118] and followed in "*Reliance Jute and Industries Ltd. v. CIT* [(1980) 1 SCC 139 : 1980 SCC (Tax) 67 : (1979) 120 ITR 921] . After an elaborate and detailed discussion, the Apex Court held with reference to the charging provisions of the statute that the expression "income" should be understood to include losses. The expression "profits and gains" refers to positive income whereas "losses" represents negative profit or in other words minus income. Considering this aspect of the matter in greater detail, the Apex Court overruled the view expressed by the two learned Judges in "*Virtual Soft Systems* [(2007) 9 SCC 665 : (2007) 289 ITR 83]. The Apex Court adopted the proposition of law that though retrospectivity is not to be presumed and rather there is presumption against regtrospectivity, it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed and if it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation and in the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. When this ratio is applied to the case on hand, I am of the view that the language used in the so-called amendment is clear that the exemption is given towards

the services provided by cord blood banks by way of preservation of stem cells and it cannot be construed that such exemption shall have retrospective effect.

27. For the foregoing discussion, I am of the considered opinion that the so-called amendment cannot be viewed as a clarificatory one and therefore, this Court is unable to countenance the argument advanced by the learned senior counsel that the so-called amendment is only a clarificatory nature.

Accordingly, the Writ Petition fails and it is dismissed. No costs. Consequently, connected MPs are closed. However, it is once again made clear that this Court has not rendered any finding regarding whether the activities of the petitioner would fall within the ambit of "health care service" and thereby, the so-called amendment would apply in order to claim exemption of service tax. The authorities are at liberty to determine this aspect in accordance with law.

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27-03-2015

Index: Yes/No

Internet: Yes/No

S.VAIDYANATHAN, J.

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