IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2017

Coram

The Honourable Mr. JUSTICE RAJIV SHAKDHER,
And
The Honourable Mr.JUSTICE R.SURESH KUMAR

C.M.A. No.432 of 2011
and M.P.No.1 of 2011

M/s. Arogya Scan and Research Centre P.Ltd.,
West Fort, Trissur,
Kerala - 680 004. ... Appellant

-Vs-

1. Customs, Excise and Service Tax Appellate Tribunal,
South Regional Bench,
Shastri Bhavan Annexe,
Haddows Road,
Chennai.

2. The Commissioner of Customs,
Custom House,
Chennai. ... Respondents

Prayer : Appeal filed under Section 35 G of the Central Excise Act, 1944, to answer the "substantial questions of law" raised in the appeal in favour of the appellant and consequently set aside the final order No.955/2010 dated 08.09.2010 in Appeal No.C/1/2004.

For Appellant : Mr.K.Jayachandran for
M/S.Sivanandh & Associates

For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel
for Customs

JUDGMENT

(Judgment of the Court was made by Rajiv Shakdher, J.)

1. This appeal is directed against the judgment and order of the Customs, Excise and Service Tax Appellate Tribunal (in short 'the Tribunal') dated 08.09.2010.

1.1. The Appellant, being aggrieved, has preferred the instant action before this Court.

2. The appeal was admitted by this Court on 25.02.2011, when the following questions of law were framed, for consideration, by this Court :

> "1. Whether in the facts and in the circumstances of the case, the Tribunal is right in rejecting the appeal ?
>
> 2. Whether in the facts and in the circumstances of the case, the entire proceedings and demand are barred by limitation ?
>
> 3. Whether the Tribunal and the 2nd respondent can decide the applicability of the Notification after repeal of the said Notification on 1.3.1994 ?
>
> 4. Whether in the facts and in the circumstances of the case, the Tribunal can confirm the penalty imposed by the second respondent in his order after remand by the Tribunal, which was not imposed by the first adjudicating authority in his first order and against non-imposition of penalty, the Department had not filed any appeal ?
>
> 5. Whether in the facts and in the circumstances of the case, the Tribunal is right in confirming the order of the second respondent which was beyond the scope of remand by earlier order of Tribunal ?
>
> 6. Whether in the facts and circumstances of the case, with the cancellation of import bond by which finality reached on 16.4.1992 and with the repeal of Notification No.64/88-Cus. on 1.3.1994, the matter cannot be reopened ?
>
> 7. Whether in the facts and in the circumstances of the case, the second respondent can initiate proceedings by issue of show cause notice on 24.3.1998 to decide any issue under Notification No.64/88-Cus., which was repealed on 1.3.1994?"

3. In order to adjudicate upon the instant appeal, the following brief facts are required to be noticed:

3.1. The appellant, which is, admittedly, a Diagnostics Centre, imported a machine described as "Toshiba, Whole Body CT Scanner TCT 300S" (hereinafter referred to as "the subject goods") along with accessories and spare parts. The value of the machinery was Rs.79,66,197/-.

3.2. The clearance of the said goods was sought without payment of customs duty, by seeking to take recourse to Customs Notification No.64/88, dated 01.03.1988. (hereinafter referred to as '1988 Notification').

3.3. Concededly, the goods were cleared, albeit, provisionally, under the 1988 Notification, on execution of a bond by the appellant pending issuance of a Customs Duty Exemption Certificate (in short 'CDEC') from the concerned authority i.e., Director General of Health Services (in short 'DGHS'). The issuance of CDEC was necessary for the purpose of the appellant, as it was one of the conditions incorporated in the 1988 Notification. CDEC was issued to the appellant on 03.04.1992. Upon issuance of a CDEC by DGHS, the Customs authority made a final assessment qua the subject goods.

3.4. The record further shows that the Assistant Director General of Health Services, on 08.07.1997, issued a notice to the appellant, whereby, it was proposed to withdraw the CDEC issued to it.

3.5. We are informed by the learned counsel for the appellant that a reply was filed to the said notice.

3.6. The record further shows that Assistant Director General of Health Services cancelled the CDEC vide order dated 25.11.1997. The reason for cancellation, apparently, was that the appellant's Diagnostics Centre, did not render free medical services to the indoor patients.

3.7. Apparently, against the order dated 25.11.1997, the appellant preferred an appeal with the DGHS. The statement of facts, as filed before the Tribunal by the appellant, are indicative of the fact that the said appeal was filed with the DGHS on 27.01.1998. In the very same statement of facts, it is asserted that the said appeal had not been heard; at least, not till at that point in time.

3.8. The learned counsel for the appellant has not been able to inform us as to the outcome of the appeal preferred before the DGHS.

3.9. It appears that, thereafter, the Commissioner of Customs (Sea), Chennai (in short 'the Commissioner') issued a show cause notice, dated 24.03.1998. We must point out, though, that inadvertently, at certain places in the record, the date of show cause notice has been set out as 12.02.2001. The counsel for the parties affirms that the correct date of show cause notice is 24.03.1998.

4. Continuing with the narrative, the notice dated 24.03.1998, called upon the appellant to show cause as to why the following proposed action ought not to be taken against it : (a) the subject goods ought not be confiscated under Section 111 (o) of the Customs Act, 1962 (in short "the Act"); and (b) why penalty should not be imposed under Section 112 (a) and 114A of the Act.

4.1. The appellant, in response thereto, filed a reply on 31.03.1998.

4.2. The Commissioner, however, was not impressed with the stand taken by the appellant in the reply, and therefore, proceeded to pass the Order-in-Original dated 13.08.1998.

4.3. By virtue of said order, the Commissioner came to the conclusion that the subject goods were liable for confiscation under Section 111(o) of the Act. Accordingly, the Commissioner directed confiscation of the goods with liberty to the appellant to redeem the same, on payment of a fine equivalent to duty liability. The sum, thus, quantified towards fine was an amount equivalent to Rs.31,86,479/-.

4.4. Notably, the Commissioner observed in the very same order that given the peculiar circumstances of the case, he did not propose to impose penalty.

4.5. The appellant, being aggrieved by the order of the Commissioner, preferred an appeal to the Tribunal. The Tribunal, after giving due opportunity to the parties before it, vide order dated 04.12.2002, remanded the matter for fresh consideration on the lines of the order passed by it, in another case, being: Final order No.1548 of 2001, dated 05.10.2001.

4.6. Notably, the Tribunal observed in the said order that the demand raised qua duty in such like cases was not time barred, and that, the only issue, which required consideration was, whether or not the importer was eligible to claim exemption under the 1988 Notification.

4.7. In sum, the Tribunal, directed the Commissioner to undertake an exercise to ascertain as to whether or not the appellant, in the given facts and circumstances, was eligible for claiming exemption under the 1988 Notification.

5. It appears that in the interregnum via Notification No.99/94, dated 01.03.1994 (in short "1994 Notification"), the 1988 Notification was rescinded.

5.1. The record further shows that, upon remand, the Commissioner passed a fresh order dated 15.10.2003. By virtue of the said order, the Commissioner came to the following conclusion:-

(i).That the exemption granted under the 1988 Notification was not available to the Diagnostics Centre. The Notification, when, construed properly would apply only to a Hospital.

(ii).Assuming that the exemption under the 1988 Notification was available to the appellant (i.e. a Diagnostics Centre), the conditions, as prescribed in the Notification, had not been fulfilled. The discussion with regard to non-fulfillment of the conditions was captured in paragraph 17 (a) to 21 of the order passed by the Commissioner. Based on these, broad findings, the Commissioner passed the following operative order:-

> "(a) I confiscate the Toshiba Whole Body Scanner TCT 300 valued at Rs.79,66,197/- under Section 111(o) of the Customs Act, 1962. However, I allow the goods to be redeemed by the importer on payment of a fine of Rs.16,00,000/- (Rupees Sixteen lakhs only)

under Section 125(1) of the Customs Act, 1962, and order discharge of duty liabilities on these goods by the importer under Section 125 (2) of the above Act.

(b) I impose a penalty of Rs.4,00,000/- (Rupees Four lakh only) on M/s.Arogya Scan & Research Centre (P) Ltd., Trissur, under Section 112(a) of the Customs Act, 1962.

6. Being aggrieved, the appellant approached the Tribunal, once again by way of an appeal.

6.1. The Tribunal, however, vide the judgment and order dated 08.09.2010, dismissed the appeal, and thereby, sustained the order of the Commissioner.

7. It is, in these circumstances, the present appeal has been preferred before us by the appellant.

8. Submissions in support of the appeal have been advanced by Mr.K.Jayachandran, while, the case of the contesting respondent, i.e. respondent No.2, has been put before us by Mr.A.P.Srinivas.

9. The submissions made by Mr.Jayachandran on behalf of the appellant can be, broadly, paraphrased as follows:-

(i). The Tribunal failed to appreciate that the order passed by the Commissioner was contrary to its very own order passed in the first round, i.e., dated 04.12.2002. In other words, it is contended that the Commissioner, in passing the order dated 05.10.2003, had exceeded the scope of the remand order.

(ii). The Tribunal fell in error in coming to the conclusion, via the impugned judgment and order, that the appellant was not eligible to avail of the benefit of exemption from customs duty under the 1988 Notification, as it was not a Hospital.

(iii).The appellant had, in fact, fulfilled the conditions contained in the 1988 Notification. In this connection, it was submitted that the appellant has placed on record an affidavit giving an year-wise date, albeit, in percentage terms with respect to treatment given to out-patients as well as total number of patients, between August, 1991, i.e., the year of the import, and up till April, 1999. It was emphasised that the average percentage of patients, who were treated was, in fact, 41.63, which was above the requirement of 40% provided in the 1988 Notification.

(iv).That in so far as the treatment of indoor-patients was concerned, the appellant had entered into an agreement with a hospital, by the name, West Fort Hospital and, thus, the necessary eligible conditions stipulated, in that behalf, had also been satisfied.

(v).That the Tribunal failed to consider the fact that duty could not have been levied, as there was no proposal to levy duty in the show cause notice dated 24.03.1998.

(vi).That the demand for duty cannot be sustained, as it is well beyond the time prescribed under Section 28 of the Act. In support of his submissions, learned counsel relied upon the judgment of the Supreme Court in the case of : Bharat Diagnostics Centre Vs. Commissioner of Customs, 2014 (307) E.L.T. 632 (S.C.), and Fortis Hospital V. Commissioner of Customs, AIR 2015 SC (Supp) 1036.

(vii).That since, the 1988 Notification stood rescinded by the 1994 Notification, the obligations contained in the earlier exemption Notification i.e. 1988 Notification, did not subsist, and therefore, no liability would accrue to the appellant. For this proposition, the learned counsel relied upon the judgment of Division Bench of this Court rendered in Union of India V. Seahorse Hospitals Ltd., 2016 (338) E.L.T. 661 (Mad.).

10. On the other hand, Mr.A.P.Srinivas, who appears for the Revenue, submitted that findings of fact had been returned by the Commissioner in its order dated 15.10.2003. It was the learned counsel's submission that the findings of fact would willy nilly establish that the conditions provided in the 1988 Notification, in order to claim exemption, had not be fulfilled. It was, thus, the submission of the learned counsel that de hors the fact whether or not the 1988 Notification was applicable to Diagnostics Centre, the fact that the conditions contained for grant of exemption stood breached, it would entitle the customs authority to initiate the action for confiscation of goods, levy of penalty and duty.

10.1. Furthermore, Mr.Srinivas, submitted that the contention advanced on behalf of the appellant that the show cause notice dated 24.03.1998, was barred by limitation, in view of the prescription qua time provided for, in Section 28 of the Act was misconceived, as in the instant case, the show cause notice was issued under Section 124 of the Act.

10.2. The learned counsel went on to submit that, since, the show cause notice was issued under Section 124 of the Act, upon passing the order for confiscation and penalty, the customs authority could proceed, immediately, thereafter to levy duty.

10.3. Furthermore, the learned counsel submitted that the non-fulfillment of the conditions prescribed for seeking exemption provided continuing cause of action, and therefore, in any event, the time limit provided under Section 28 of the Act had not been breached. In support of his submissions, learned counsel relied upon the judgment of Supreme Court in Mediwell Hospital and Health Care Pvt. Ltd., Vs. Union of India and others, AIR 1997 SC 1623.

10.4. In addition to the above, learned counsel submitted that the judgment of this Court in the case of: Union of India Vs. Seahorse Hospitals Ltd., 2016 (338) E.L.T. 661 (Mad.), had no application to the instant appeal, as, on facts, the said judgment was distinguishable.

11. We heard the learned counsel for the parties and perused the record.

12. According to us, what emerges from the record, qua which, there is no dispute is as follows:

(i).The subject goods were imported by the appellant on 27.08.1991.

(ii).While, importing the goods the appellant had sought exemption from payment of customs duty, by taking recourse to the 1988 Notification.

(iii).The appellant had installed the goods in a Hospital by the name West Fort Hospital; with which, it had entered into an agreement.

(iii)(a).To be noted, the copy of the agreement has not been placed before us, for perusal, though, as per the appellant, the requirement of treating, at least, 10% of in-patients, was met, by virtue of the agreement executed with West Fort Hospital.

(iv).Upon notice being issued by the Assistant Director General of Health Services, an order was passed by him, after considering the reply of the appellant, canceling CDEC. The cancellation order was passed by the Assistant Director General of Health Services, on 25.11.1997.

(v).Against this order, an appeal was, apparently, preferred by the appellant with the DGHS, the fate of which, the appellant has not indicated in the appeal filed before us. The learned counsel for the appellant has also not been able to inform us as to what was the fate of the appeal filed with the DGHS.

(vi).A notice dated 24.03.1998, was issued to the appellant, calling upon him to show cause as to why the subject goods ought not to be confiscated and penalty levied thereto.

(vii).The appellant filed a reply to the same, dated 31.03.1998, whereupon, the order of adjudication was passed, in the first round, by the Commissioner on 13.08.1998. By this order, the Commissioner directed confiscation of the goods under Section 111(o) of the Act. Accordingly, the appellant was given liberty to seek redemption of the subject goods, upon payment of fine amounting to Rs.31,86,479/-. Pertinently, the Commissioner chose not to impose any penalty, given the peculiar circumstances of the case.

(viii).The matter was carried in appeal, whereby, the Tribunal, in the first round, vide order dated 04.12.2002, remanded the matter to the Commissioner. In the order of remand, a limited direction was issued, that is, as to whether or not, the appellant had fulfilled the eligibility conditions prescribed in the 1988 Notification.

(ix).Thereafter, a fresh order was passed by the Commissioner, dated 15.10.2003. By this order, the Commissioner not only directed confiscation of the subject goods, but also afforded opportunity to the appellant to redeem the same, upon payment of fine of Rs.16,00,000/-. Furthermore, the Commissioner also indicated that duty will stand imposed on the appellant, in terms of Section 125(2) of the Act. In addition thereto, penalty in the sum of Rs.4,00,000/- was imposed on the appellant under Section 112(a) of the Act.

(x).In the appeal preferred to the Tribunal; via the impugned judgment and order dated 08.09.2010, the order of the Commissioner, in the second round, i.e., order dated 15.10.2003, was confirmed in its entirety.

13. Therefore the first question, which arises for consideration before us, is, as to whether the conclusion reached by the Tribunal that the 1988 Notification would apply only to Hospitals and not to Diagnostics Centres, was correct.

13.1. According to us, this aspect of the matter stands concluded by the judgment of the Supreme Court in Mediwell Hospital case; a view, which was affirmed in the subsequent judgment of the Supreme Court in the matter of Bharat Diagnostic Center case. The Supreme Court, in sum, held, in so far as this issue was concerned, that the benefit of the Notification would stand extended to Diagnostic Centres, because of the inclusive definition of the word "hospital", given in the 1988 Notification. The Court held that only, if, a Diagnostic Centre was operating on purely commercial basis, would, the benefit of the Notification, not extend to such a Diagnostic Centre. For the sake of convenience, the relevant observations made in paragraph 10 of Mediwell Hospital case, are extracted hereafter:

> "..... 10. But when the second question is examined we find sufficient force in the arguments of learned senior counsel appearing for the appellant which has been specifically averred in the application for Special Leave and not denied by the respondents that several such individual Diagnostic Centres not attached to any hospital have been granted the exemption certificates by respondent no.2 enabling such Diagnostic Centres to import equipments without payment of customs duty. In course of hearing of this application on 30th September, 1996, faced with the averments made by the appellant the counsel for the respondent sought for three weeks' time to file affidavit of the competent official explaining

whether exemption to the similar institute has been granted, and if so, under what circumstances and as to why the same would not be granted to the appellant. Though the time granted to the respondents was again extended by further two weeks' by order dated 28.10.1996 on the request of the counsel appearing for the respondents but ultimately no affidavit came to be filed on behalf of the respondents nor in course of hearing the counsel appearing for the respondents was able to advance any argument on that score. In this view of the matter when other Diagnostic Centres have been already granted the certificate enabling them to import equipments without paying customs duty in terms of the notification issued by the Central Government under Section 25(1) of the Customs Act we see no reason to deny the said exemption certificate to the appellant. On facts alleged it cannot be disputed that the appellant intended to import latest equipment for Cardio Vascular Imaging System. When respondent no.2 has already granted certificates in favour of several such Diagnostic Centres, as alleged in the Special Leave Application, refusal on his part to grant such certificate to the appellant without any justifiable reason tantamounts to a discriminatory treatment meted out to the appellant which on the face of it is violative of Article 14 of the Constitution of India. In view of our conclusion, as aforesaid, we have no doubt in our mind that the order of respondent no.2 refusing to grant certificate to the appellant is liable to be struck down and the High Court also committed serious error in rejecting the Writ Petition filed by the appellant. .....”

13.2. The Supreme Court in Bharat Diagnostic Centre case affirmed this view, as indicated above. This aspect is discernible from the following observations made in paragraphs 15 and 16 of the said judgment. The said observations, for the sake of convenience, are also extracted hereafter :

“..... 15. As we understand from the observations made in Mediwell's case (supra), the Court was trying to observe that if an individual is running a diagnostic centre purely on a commercial basis, that is without providing treatment free of cost to at least 40 percent of all their outdoor patients and free to all indoor patients belonging to families with an income of less than Rs.500/- per month, the same would not be entitled for exemption under the notification. Therefore, we cannot take exception to the observations made in Mediwell's case (supra).

16. However, to make things clear, we observe that the notification has an explanation which we have already extracted. It explains the meaning of the expression "Hospital" to include an institution, a centre, a trust etc., including a diagnostic centre. We have also taken note of the principle that the word 'includes' in a definition or explanation clause would extend the meaning of the word as declared by the said clause, even if the same may go beyond its natural meaning. If that is so, in our opinion, we are of the considered view that the diagnostic centre is also eligible for claiming exemption under notification dated, 01.03.1988, provided it fulfills all the conditions envisaged under the said notification. ....."

13.3. Therefore, as rightly argued by the learned counsel for the appellant, the Tribunal, in our view, wrongly held that the benefit of the 1988 Notification would not extend to the appellant, as it was operating as a Diagnostic Centre.

13.4. Having said so, as was also noted by the Commissioner in its order dated 15.10.2003, what is required to be looked at, is as to whether the appellant had fulfilled, in entirety, the conditions stipulated therein, for grant of the exemption from the customs duty.

13.5. The Commissioner, in the aforementioned order, in paragraphs 17(a) to 21, has made the following observations, on facts:

"..... 17(a) From a perusal of the affidavit, I find that the medical equipment had been imported duty free in terms of the subject notification in October 1991. The affidavit gives year-wise percentage of treatment given to out patients as well as the total percentage of treatment provided during all the years upto April 1999 which is found to be 41.63%.

17(b) It is pertinent to note here that the treatment, which the written submissions and the affidavit refer to, is only the diagnostic scanning facility made available to the patients, whereby patients are scanned using the scanning machine and medical diagnosis made regarding the condition of the patient. The actual treatment of the patients is to be carried out by other hospitals based on the diagnosis made. Thus, no medical treatment is provided to the patients by M/s.Arogya Scan & Research Centre. This being the case, I am of the view that what is being offered by M/s.Arogya Scan is only a medical diagnosis and no 'treatment' is made available to the patients as mandated in the notification conditions. The Centre would be ineligible to avail the notification benefit on this count itself as no treatment is provided to patients at the centre, but only a medical diagnosis is made. Even assuming that diagnosis is also a part of patient treatment, I find from the yearwise percentage of treatment provided to patients that the 40% mark has not been achieved during each and every year. During the year 1996-97, the hospital has not achieved the 40% free treatment as prescribed by the notification which does not satisfy the notification condition (a), which is atleast to be 40%.

17(c) Hon'ble Supreme Court in an identical case in the Jagdish Cancer & Research Centre, reported in 2001 (132) E.L.T. 257 (S.C.), has held in para 13 of the order that "it would, not at all, be necessary to prescribe any period to achieve the given percentage of patients treated free. It should generally be achieved all through the period. It being 'atleast 40%' there is hardly any occasion to say that, in case, there is more than 40% in a given period, that may make good the deficiency in the previous or the following year". In other words, the judgement says that the prescribed minimum of 40% free treatment should be achieved during each and every year and the excess in one year cannot be counted for making good the deficiency during another year or vice-versa. This being the settled position, I find that the hospital has not fulfilled the condition (a) as set out in the notification. Thereby, the hospital is not eligible to avail the notification benefit.

18(a). Coming to condition (b) of the aforesaid notification, it has been accepted by the center in their submissions before the adjudicating authority and to DGHS that they do not have any facility to treat inpatients. In fact, DGHS had cancelled the CEDC issued to the Hospital on this particular ground. It appears that the centre had deliberately made false representations to DGHS as regards provision of inpatient treatment facility at the center to fraudulently obtain CDEC and had imported the subject machines duty free. The Centre had produced an 'agreement' it had entered into with West Fort Hospital as regards providing inpatient treatment facility on behalf of the Centre. But no evidence had been provided by the Center to prove that free inpatient treatment had been provided by

West Fort Hospital on behalf of the Centre. The affidavit is also totally silent on this matter. Thereby, it has to be held that the Centre had not fulfilled condition (b) of the notification.

18(b) Moreover, in their written submissions, M/s.Arogya Scan had stated that 'no indoor treatment is required for those patients approaching the Center. They require only scan report by which further treatments are being done by other hospitals' thereby, admitting that they do not provide any medical treatment to any patient but only provide them with the scan report, based on which treatment is to be provided by other hospitals.

19. As per condition (c) of the notification, apart from the free treatment provided to outpatients and inpatients as prescribed by conditions (a) and (b) of the notification, the hospital should also provide treatment at reasonable charges to patients depending on their financial status or any other parameter. This shows that apart from providing treatment at normal charges to its patients and providing free treatment to outpatients and inpatients as prescribed by conditions (a) and (b) of the subject notification, the notification further stipulates that the hospital should also provide, on reasonable charges, treatment to patients based on their financial status or otherwise. I find that the written submissions as well as the affidavit is silent on this matter. Thereby, I find that the hospital has not satisfied condition (c) of the subject notification.

20. As per the notification, all the above three post-importation conditions should be scrupulously followed by the hospital, it being a beneficiary of the subject customs duty exemption notification. Even if one of the conditions of the notification is not followed, it then naturally follows that the importing hospital becomes ineligible to avail the duty exemption benefit.

21. Though for the purposes of this notification, M/s Arogya Scan & Research Centre is considered to be a 'Hospital', it cannot automatically lay claim to the benefit of duty exemption under Notification No.64/88-Cus., as argued by the importing hospital, unless and until the Hospital satisfies all the conditions specified in the notification. In the instant case, the DGHS has not certified the hospital

as eligible to avail the notification benefit by withdrawing the CDEC. As it stands, the hospital does not have a valid CDEC which is as essential qualification for the hospital to avail the notification benefit. Without the acquisition of a CEDC issued by DGHS, I find that the hospital has disqualified itself from availing the benefit of duty exemption in terms of the subject notification. ..... ”

13.6. A perusal of the said observations would show that, clearly, the appellant, if, nothing else, has not been able to meet the third condition, which required the appellant to provide treatment, which could only be Diagnostic facility, on reasonable charges to patients, based on their financial status or otherwise. As noted by the Commissioner, the affidavit filed by the appellant was, clearly, silent on this aspect of the matter. To our minds, the conditions stipulated in the Notification for grant of exemption, as is well settled, have to be strictly adhered to, and if, any of the conditions are not fulfilled, the person seeking exemption from customs duty cannot be extended that benefit, as such like Notifications are issued by the Central Government in exercise of the powers under Section 25 of the Act, which vest authority to grant exemption only in public weal.

13.7. The findings returned by the Commissioner in its order dated 15.10.2003, have not been disturbed by the Tribunal. Furthermore, nothing has been placed on record, which would have us come to a different conclusion. Therefore, the plea advanced in this behalf by the learned counsel for the appellant that he had fulfilled all the conditions set out in the 1988 Notification cannot be sustained and is, accordingly, rejected.

14. This brings us to the other plea advanced on behalf of the appellant, which is, that, the Tribunal failed to recognize the fact that the Commissioner had gone beyond the scope of the remand directions.

14.1. In our view, the appellant has correctly argued before us that the remand direction issued by the Tribunal required the Commissioner only to examine as to whether or not the appellant was eligible for grant of exemption as per the provisions of the 1988 Notification. There was no direction to examine as to whether or not duty should be imposed on the appellant. This direction, the Tribunal, it appears, quite correctly issued vide its order dated 04.12.2002, as the show cause notice dated 24.03.1998, confined the matter, at that stage, to only two aspects, viz., confiscation of goods and imposition of penalty.

In the said show cause notice, there was no proposal to levy any duty.

14.2. As rightly contended by the learned counsel for the appellant, this aspect of the matter has been dealt with by the Supreme Court in the judgment rendered in Fortis Hospital Ltd case. The observations made by the Supreme Court, in this behalf, are extracted hereafter, for the sake of convenience :

> "..... 13. It is not in dispute that show-cause notice in the instant case was issued under Section 124 of the Act. Once such a show-cause notice was issued and as can be seen from the proposed action which was contemplated in this provision (as has been taken note of above), it was also confined to confiscation of the imported machinery and imposition of penalty. Nothing was stated about the payment of duty. However, in spite of the fact that the show-cause notice was limited to confiscation of the goods and imposition of penalty, the final order which was passed included the direction to pay the customs duty as well. It is clear that when such an action was not contemplated, which even otherwise could not be done while exercising the powers under Section 124 of the Act, in the final order there could not have been direction to pay the duty.
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> 14. Notwithstanding the aforesaid position, as pointed out above, the Department is taking shelter under the provisions of sub-section (2) of Section 125 of the Act. However, on a plain reading of the said provision, we are of the view that such a provision would not apply in case where option to pay fine in lieu of confiscation is not exercised by the importer. Trigger point is the exercise of a positive option to pay the fine and redeem the confiscated goods. Only when this contingency is met, the duty becomes payable. In the present case, admittedly, such an option was not exercised and the confiscated machinery was not redeemed by the Institute. As a matter of fact, thus, no fine has been paid.
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> 15. Mr K. Radhakrishnan, learned Senior Counsel appearing for the Department, argued that even if an option was not exercised, the moment it was stated in the order of the Commissioner that fine is being "imposed", sub-section (2) would get attracted. We do not agree with the aforesaid submission of Mr Radhakrishnan. The order confiscating the goods has already been reproduced above. Insofar as the payment of fine is concerned, only option was given (and that was only course of action which could be visualised

under Section 125). The order categorically states that "the importer 'may' redeem the confiscated goods on payment of fine of Rs 1,00,000 (Rupees one lakh only)".

16. Indubitably, unless an option is exercised, fine does not become payable. Sub-section (2) of Section 125 uses the expression "imposed" by stating "where any fine in lieu of confiscation of goods is imposed". In Black's Law Dictionary (10th Edn.), the word "impose" is defined as "to levy or exact (a tax or duty)". Thus, it has to be a levy or exact which is become payable and has to be paid. Likewise, the word "impose" is defined by Oxford English Dictionary, as relevant for the purpose of the present case, as "Lay or inflict (a tax, duty, charge, obligation, etc.) (on or upon), esp. forcibly; compel compliance with; force (oneself) on or upon the attention, etc. of".

17. In view of the above, we cannot agree with the submission of Mr Radhakrishnan that fine been "imposed" in the present case. The stipulation contained in the adjudicating order was only contingent in nature which contingency would have arisen only on exercising the option by the importer to pay fine in lieu of confiscation and to redeem the goods.

18. .....

19. It is not that the Department is without any remedy. We have gone through the provisions of Notification No. 64 of 1988 dated 1-3-1988. As pointed out above, importer would be exempted from payment of import duty on hospital equipment only when the conditions contained in the said notification are satisfied. Some of the conditions, as pointed out above, are to be fulfilled in future. If that is not done and the importer is found to have violated those conditions, show-cause notice could always be given under the said notification on payment of duty, independent of the action which is permissible under Section 124 and Section 125 of the Act. It is also important to mention that under certain circumstances mentioned in the notification, the importer can be asked to execute a bond as well. In those cases, action can be taken under the said bond when the conditions contained therein are violated. Therefore, if the Department wanted the Institute to pay the duty, which may have become payable, it could have taken independent action; dehors Section 124 of the

Act, for payment of duty, simultaneously with the notice under Section 124 of the Act or by issuing composite notice for such an action. No doubt, it could have waited for option to be exercised by the Institute under Section 125(1) of the Act as well and in that eventuality, duty would have automatically become payable under Section 125(2) of the Act. But when such an option was not exercised, it could have taken separate and independent action by issuing a show-cause notice to the effect that the Institute had violated the terms of exemption notification and therefore, was liable to pay duty.

20. What is emphasised is that when in the show-cause notice issued under Section 124, nothing was stated about the payment of import duty, there could not have been direction to that effect in the final order. Further, insofar as Section 125(2) is concerned, the contingency contained therein did not occur in the present procedure for want of exercise of option to pay fine. We, thus, are of the opinion that the view taken by CESTAT is correct and the contrary view taken by the High Court in the impugned judgment is not warranted on the interpretation of Section 125 (2) of the Act. ...."

(Emphasis is ours)

14.3. Given this state of the law, according to us, duty could not have been imposed by the Commissioner, as it did not form part of the show cause notice. Having said so, the argument of Mr.Jayachandran that proceedings, in their entirety, were barred by time, is untenable for the simple reason that the show cause notice was issued under Section 124 and not under Section 28 of the Act. Therefore, duty, if, at all, which the Department can levy, could be under Section 125(2) of the Act, only, if, option is exercised by the appellant to seek redemption of goods, on payment of fine, as indicated by the Supreme Court in the Judgment rendered in Fortis Hospital Ltd. case.

15. This brings us to the other argument of the Appellant, which is, that, since, the 1988 Notification was rescinded by virtue of 1994 Notification, and therefore, no liability would befall on the appellant, according to us, this is an argument, which is misconceived.

15.1. As noticed hereinabove, this submission was predicted on the judgment of the Division Bench of this Court rendered in Seahorse Hospitals Ltd. case. A close perusal of the said judgment would show that the matter related to cancellation of the CDEC by the DGHS. The writ petitioner, in that case, being aggrieved by the fact that the cancellation of the CDEC had been brought about without being given a proper opportunity for production of documents, assailed it, by filing a writ petition in this Court. A Single Judge of this Court, allowed the writ petition by judgment dated 05.12.2006. Being aggrieved, the Union of India preferred an appeal. The Division Bench, inter alia relying upon the judgment of this Court in Apollo Hospital Enterprises Vs. Union of India, 2001 (133) E.L.T. 58 (Mad.), came to the conclusion that, once, the 1988 Notification had been withdrawn by the 1994 Notification, the concerned authority, i.e., DGHS, could not cancel the CDEC on the ground that the writ petitioner had not complied with the conditions for the subsequent period, i.e., 1994 to 1998. This is clear, upon pursuing the following observations made in paragraph 18 of the judgement :

> "18. In this case, notification was rescinded on 01.03.1994. The authorities are not correct in cancelling the Customs Duty Exemption Certificates issued under Notification No.64/88, dated 1-3-1988, saying that the respondent/petitioner had not complied with the conditions for the subsequent period, namely, 1994 to 1998."

15.2. In the instant case, the challenge is to the order of adjudication, whereby, the customs authorities, independent of the factum of cancellation of CDEC by the concerned authority, has proceeded to pass orders in exercise of the powers under the Act. As is indicated while narrating the facts above, the appellant, in fact, did not obtain any orders from DGHS qua cancellation of CDEC, though it says an appeal was filed. Therefore, in our view, the said judgment will not help the cause of the appellant.

16. In view of the foregoing discussion, the answers to the questions, therefore, are as follows :

16.1. Question No.2 is answered in favour of the Revenue, and against the Assessee. The proceedings are not barred by limitation, as they were carried out under Section 124 of the Act.

16.2. Question No.3 is also answered against the Assessee, and in favour of the Revenue. In view of the discussion above, we are of the view that, since, the exemption conditions operated post the import, the Revenue was well within its right to ascertain whether the appellant continued to comply with the conditions stipulated therein, which, broadly, required it to treat patients falling in different categories, as stipulated in the 1988 Notification. Therefore, the mere rescission of 1988 Notification did not emasculate the authorities of their power to determine as to whether or not the conditions contained therein were fulfilled. Having said so, the period of determination, in this behalf, will be restricted between 1988 and 1994. The findings returned by the Commissioner, clearly, indicate that the third condition was never fulfilled by the appellant - whereby, it was required to accord diagnostic facilities to persons in need of the same on reasonable charges depending on their financial status.

16.3. In so far as Question No.4 is concerned, the question is answered in favour of the Revenue and against the Assessee. The reason for the same is that, even though, in the first round, the Commissioner vide order dated 13.08.1998, had stated that in the peculiar facts and circumstances of the case, he proposed not to levy penalty, that order got effaced, by virtue of the order passed by the Tribunal dated 04.12.2002. Thereafter, the Commissioner passed the fresh adjudication order dated 15.10.2003. Since, according to the Commissioner, the conditions stipulated in the 1988 Notification, were not fulfilled, penalty was rightly imposed by him, in exercise of powers under Section 125 of the Act.

16.4. In so far as Question No.5 is concerned, Mr.K.Jayachandran, says that out of the scope of this question, is as to whether duty could have been imposed, as it was not the subject matter of the remand order passed by the Tribunal. As already indicated above, since, there was no proposal in the show cause notice dated 24.03.1998 qua duty, the Commissioner could not have imposed duty on the appellant. We must note, though, that, since, it is a pure question of law, we answered it, given facts and circumstances arising in the instant case. As a matter of fact, the appellant has not raised a specific ground in this behalf in appeal filed, before the Tribunal or that which is filed before us. The appellant has merely stated that the second respondent acted beyond the scope of remand order passed by the Tribunal in the first round.

16.5. In so far as Question No.6 is concerned, learned counsel for the appellant says that he does not wish to press the same, and therefore, the same need not be answered by us.

16.6. In so far as Question No.7 is concerned, this question is also answered against the appellant/Assessee and in favour of the Revenue. The Revenue, in our opinion, could have issued a show cause notice as long as, the period of determination, qua the issue as to whether or not the conditions prescribed in 1988 Notification were fulfilled was confined to the period spanning between 1988 and 1994.

16.7. This bring us to the Question No.1, which is, given the discussion above, is partly answered in favour of the appellant/Assessee. The reason for the same is that we have agreed with the contention advanced by Mr.K.Jayachandran that the Tribunal could not have affirmed the order of the Commissioner dated 15.10.2003 to the extent it imposed duty on the appellant. The reasons for the same has already been furnished by us in our discussion above. We make it clear that this would not fetter the Revenue from issuing a fresh show cause notice for imposition of duty, albeit, in accordance with law. Furthermore, in this behalf, the Revenue would do well to go through the observations made hereinabove and those made in Fortis Hospital.

17. Accordingly, we rule that the appeal is partially allowed. The order of the Commissioner dated 15.10.2003, is confirmed to the extent it orders confiscation of the subject goods and direction qua imposition of penalty. However, that part of the order, whereby, duty is imposed, the same is excised, in view of the foregoing reasons.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

asi/sli/gg

To

1. The Registrar Customs, Excise and Service Tax Appellate Tribunal,
South Regional Bench,
Shastri Bhavan Annexe,
Haddows Road, Chennai.

2. The Commissioner of Customs,
Custom House,
Chennai.

+1cc to Mr.A.P.Srinivas, Advocate Sr. 22411

C.M.A. No.432 of 2011

MSM(CO)
VR(27/06/2017)