**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL**
**WEST ZONAL BENCH, MUMBAI**

**Appeal No.C/502/2010**

**Arising out of Order-in- Original No: 36/2010/CAC/CC(I)/SHH Dated: 30.3.2010**
**Passed by the Commissioner of Customs (Import), Mumbai**

**Date of Hearing: 25.5.2018**
**Date of Decision: 14.8.2018**

**KESHLATA CANCER HOSPITAL PVT LTD**

**Vs**

**COMMISSIONER OF CUSTOMS (IMPORT)**
**MUMBAI**

**Appellant Rep by: Shri S Suriyanarayanan, Adv.**
**Respondent Rep by: Shri C Singh, Assistant Commissioner (AR)**

**CORAM: C J Mathew, Member (T)**
**Dr. Suvendu Kumar Pati, Member (J)**

**Cus - Notification 64/88-Cus - Recovery of Customs duty ordered in addition to confiscation of the impugned goods with option to redeem the same on payment of redemption fine besides imposition of penalty u/s 112 of Customs Act, 1962 - appeal to CESTAT.**

**Held: Finding of the adjudicating authority that the compliance is in conformity only when the beds so earmarked are relatable to treatment with the imported equipment is clearly executive overreach in the absence of any such delineation in the conditions appended to the privilege of exemption - pre-requisites laid down by the apex court in the case of *Mediwell Hospital and Health Care Pvt. Ltd.*- *2002-TIOL-69-SC-CUS* are not set forth in the impugned order and the detriment determined, therefore, fails in consequence - Technical objections such as non-submission of installation certificate is not sufficient ground for denial of exemption when non-installation is not alleged - communication from the Director General of Health Services being a post-importation withdrawal of a certificate relevant to importation and devoid of consequential impact, cannot be relied upon, in the absence of any scrutiny of relevant information, as a substitute for a finding on facts of post-importation compliance - subsequent withdrawal of a validly issued 'duty exemption certificate' has no consequence on the impugned proceedings - appellant has produced records of radiotherapy treatment provided between 1991 and 1998 but these have not been controverted with any counter-evidence and a casual handling of this record with a vague dismissal on grounds of non-segregation of indoor or outdoor patients in this record, without any substantive finding, is not a diligent discharge of power of adjudication - data of patients furnished indicates that 40% of the patients have been**

**accorded free treatment and, in the absence of contrary evidence, Bench concludes that there is no ground to hold that the appellant had failed to fulfill this condition - in view of the absence of evidence of non-compliance on the part of the appellant who had furnished claims of compliance, confiscation of goods, imposition of penalty and recovery of duty is without authority of law - impugned order set aside and appeal allowed: CESTAT [para 10, 12, 15, 16 to 18]**

**Appeal allowed**

**Case laws cited:**

***Mediwell Hospital & Health Care Pvt Ltd v. Union of India and others - 2002-TIOL-69-SC-CUS* ...Para 2, 16**

***Commissioner of Customs (Import), Mumbai v. Jagdish Cancer and Research Centre - 2002-TIOL-119-SC-CUS-LB* ...Para 2, 12**

***Bombay Hospital Trust v. Commissioner of Customs (ACC), Mumbai - 2006-TIOL-170-HC-MUM-CUS* ...Para 8**

***Fortis Hospital Ltd v. Commissioner of Customs, Import - 2015-TIOL-57-SC-CUS* ...Para 8**

***Shah Diagnostic Institute Pvt Ltd v. Union of India - 2006-TIOL-73-HC-MUM-CUS* ...Para 17**

**FINAL ORDER NO. A/87090/2018**

**Per: C J Mathew:**

**The brief facts in the appeal of M/s Keshlata Cancer Hospital Pvt Ltd against order-in-original no. 36/2010/CAC/CC(I)/SHH dated 30th March 2010 of Commissioner of Customs (Import), New Customs House, Mumbai are that the dispute pertains to import of 'Theratron-Phoenix Cobalt-60 (electro therapeutic apparatus)' valued at Rs.42,51,006 imported vide bill of entry no. 9082/26.2.1991 by availment of exemption under notification no. 64/88-Cus dated 1st March 1988 and on which, in consequence of notice dated 20th May 1999, recovery of duties of customs amounting to Rs.61,49,020.08 was ordered under section 125(2) of Customs Act, 1962 read with section 12 of Customs Act, 1962 in addition to confiscation of the impugned goods under section 111(o) of Customs Act, 1962 with option to redeem the same on payment of fine of Rs.15,00,000 besides imposition of penalty of Rs.15,00,000 under section 112 of Customs Act, 1962 on the importer.**

**2. A brief background to the contours of the dispute is essential to a clearer appreciation of the proceedings. The imports were effected in 1991 and, while confiscation of goods may be proceeded with under section 111 without reference to elapse of time, recovery of duty is constrained by the limits that bind statutory authorities in section 28 of Customs Act, 1962. Furthermore, the exemption notification did not prescribe any time frame**

**to determine compliance with the conditions prescribed therein. This conundrum was resolved judicially, particularly in the imports of medical equipment against conditional exemption, and sustained by the principle of continuing obligation enunciated in *Mediwell Hospital & Health Care Pvt Ltd v. Union of India and others [1997 (89) ELT 425 (SC)]* = *2002-TIOL-69-SC-CUS* and the alternative empowerment for recovery under section 125 (2) when goods are confiscated enunciated in *Commissioner of Customs (Import), Mumbai v. Jagdish Cancer and Research Centre [2001 (132) ELT 257 (SC)]* = *2002-TIOL-119-SC-CUS-LB*. In view of this, the challenge of limitation to recovery of duty in cases of open-ended conditional exemptions where goods are confiscated for non-compliance with postimportation conditions is not required to be gone into.**

**3. We are compelled, owing to the reasons adduced in the impugned order of confiscation, to also consider the nature and extent of the exemption availed by the appellant. The scheme of duty exemption is contingent upon a 'duty exemption' certificate issued by Director General of Health Services, Government of India to eligible hospitals for import of equipment that are not manufactured in India. It is also prescribed that the said equipment should be evinced as having been installed in the importing hospital. Eligible hospitals are such that offer free treatment to 40% of outdoor patients and to all indoor patients with income less than Rs.500 per month towards which end at least 10% of the beds would be earmarked and to others at rates which are commensurate with the paying capacity of the patients. No specific documentation requirements or monitorial system was prescribed in the said notification. This scheme was withdrawn subsequently vide notification no. 99/94-Cus dated 1st March 1994 which rescinded the exemption notification.**

**4. Undoubtedly, the recovery has been ordered under section 125(2) of Customs Act, 1962 in conjunction with the confiscation of goods under section 111(o) of Customs Act, 1962; the reference to section 12 of Customs Act, 1962 is, therefore, a superfluity that would have been contestable as empowering recovery of duty when it is patently a charging section hyphenating machinery provisions for assessment, valuation and recovery of unpaid duties in the statute with Article 265 of the Constitution of India. It breather life into Customs Act, 1962 and not to the actions of officers of customs which must, necessarily, draw empowerment from machinery provisions of the Act, which section 12 of Customs Act, 1962 is not. Being a superfluity on the part of the adjudicating authority, we do not dwell any further on it.**

**5. The impugned order proceeds from the finding that the conditions of the exemption notification have been observed to have been transgressed in divers manners. These are: failure to submit the installation certificate, failure to provide free treatment to each and every patient with income less than Rs 500 per month, failure to furnish evidence that 10% of the beds were allotted to patients for treatment with the imported equipment,**

**failure to evince, with acceptable records, that those accorded free radiotherapy were indoor patients or outdoor patients and failure to produce evidence of reasonableness of charges collected from other patients.**

**6. Learned Counsel for appellant seeks relief primarily on the ground that the conditions in the notification had been complied with. Though Learned Authorised Representative, while reiterating the findings of the original authority, has relied upon a number of decisions, all of these do not have to be dealt with in view of the accepted premises on which proceedings were initiated. In the context of factual submissions, these are not of much relevance and, to the extent that they are, we shall, at the appropriate places, refer to them.**

**7. The first issue to be considered is the correctness on the part of the adjudicating authority to disentitle the appellant from the privilege of notification no 64/88-Cus dated 1st March 1988. This, in our opinion, is an incorrect finding. The appellant had, at the time of import in February 1991, cleared the said equipment upon presentation of all documents that qualified them to the benefit of the exemption; alleged subsequent failure to comply with postimportation conditions may lead to confiscation for non-compliance without calling into question the eligibility at the time of import. Indeed, there is no allegation of non-eligibility at the point of import and this finding is without sustenance.**

**8. It has been contended by Learned Counsel that the appellant is not interested in the usage of the imported equipment sans the privileges of the notification and, in the absence of any inclination for redemption of the confiscated goods, the duty liability shall not devolve on them. Learned Authorised Representative countered this plea for absence of liability to be subjected to recovery by drawing attention to the decision of the Hon'ble High Court of Bombay in *Bombay Hospital Trust v. Commissioner of Customs (ACC), Mumbai [2006 (201) ELT 555 (Bom)]* = *2006-TIOL-170-HC-MUM-CUS* to the effect that duty is liable to be recovered under section 125(2) of Customs Act, 1962 on imposition of fine in lieu of confiscation and not on payment of said redemption fine. That interpretation has since been overruled by the Hon'ble Supreme Court in *Fortis Hospital Ltd v. Commissioner of Customs, Import [2015 (318) ELT 551 (SC)]*= *2015-TIOL-57-SC-CUS* by holding that**

***'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 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.***

***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.***

***xxxx***

***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 law dictionary (Tenth edition), 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. As already mentioned above, Section 124 deals with confiscation of goods and penalty and does not deal with payment of import duty. No doubt, such a payment of import duty becomes payable by virtue of sub-section (2) of Section 125 but only when condition stipulated in the said provision is fulfilled, namely, fine is paid in lieu of confiscation of goods. When the Department chose to take action under Section 124 of the Act, it should have been alive of the situation that the Noticee may not exercise the option and in such case, duty would not be payable automatically.***

***19. It is not that the Department is without any remedy. We have gone through the provisions of Notification No. 64/88, 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; de hors 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 show cause notice to the effect that the Institute had violated the terms of exemption notification and therefore, was liable to pay duty.'***

**9. In doing so, the Hon'ble Supreme Court, though not dealing with appeal against the decision cited by Learned Authorized Representative, has, nevertheless, rendered the finding on the submission made on behalf of Revenue that**

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

**which is the pith and substance of the decision of the Hon'ble High Court of Bombay. Indeed, the goods, if available, upon confiscation vests with the Central Government in the possession of the adjudicating authority and it is only upon release by the Central Government, on redemption, that the goods returns to the possession from whom they were confiscated. Thus, unless redemption is taken recourse to, goods stand absolutely confiscated and the limitation on recovery posited in re Bombay Hospital Trust subsists.**

**10. The next ground that the adjudicating authority justifies the confiscation with is the failure to produce the installation certificate. Learned Counsel submits that substantive compliance cannot be disputed; according to him, the equipment, utilising cobalt, required the supervision and control of Bhabha Atomic Research Centre as prescribed in the regulatory regime pertaining to radioactive materials which is available on record. We find that to be an undisputed fact. Moreover, the impugned order has placed reliance on the letter no. Z- 37035/7/90-MG dated 17th**

**September 1999 of Director General of Health Services cancelling the duty exemption certificate issued by them which does not even suggest that such installation has not taken place. Technical objections such as non-submission of installation certificate is not sufficient ground for denial of exemption when noninstallation is not alleged.**

**11. We find that paragraph 4(b) and (c) of the said notification, referred to by the adjudicating authority, do not specify any time limit within which the installation certificate was to be furnished. In paragraph 4(b), the importer is required, at the time of import, to undertake to produce the prescribed certificate within such time as specified by the Assistant Collector of Customs and in paragraph 4(c) it is enjoined that the importer shall furnish the same. In view of the conspicuous silence in the show cause notice on the deadline within which this was to be complied with, it would appear that such period had not been specified at the time of import. It was only in the show cause notice issued more than eight years after the import that this certificate was called for. The appellant did plead before the original authority that it would be well nigh impossible to secure such a certificate after this lapse of time. Moreover, with the Director General of Health Service having withdrawn the 'duty exemption certificate', there was a disclaimer of being obliged to issue such a certificate.**

**12. In this circumstance, the consequence of such withdrawal is an aspect that is moot to the eligibility for import with the privileges under the notification. We have found supra that eligibility at the time of import is clearly distinguishable from the obligation to fulfil postimportation condition with the attendant detriment of confiscation. That is the clear thread in the decision of the Hon'ble Supreme Court in re Jagdish Cancer & Research Centre, the 'duty exemption certificate', being relevant to determine eligibility for import, is not material to action under section 111(o) of Customs Act, 1962 which is contingent upon non-conformity with germane post-importation conditions. Had the impugned order chosen, under section 28 of Customs Act, 1962 to recover duty that had not been collected at the time of import, owing to non-eligibility, this may have been sufficient cause. That is now an academic issue with the demand having been made under other provisions and the application of limitation of five years from date of import. Therefore, the subsequent withdrawal of a validly issued 'duty exemption certificate', has no consequence on the impugned proceedings.**

**13. We take note of another aspect that appears to have been overlooked by the adjudicating authority. The universal qualification to be eligible for exemption does not extend beyond paragraph 2 of the said notification. From a plain reading of paragraph 3 and paragraph 4, it would appear that these are special provisions to cater to special contingencies, viz., in the event of not providing free treatment and by hospitals that are yet to be commissioned. It would appear from the cited portions of paragraph 4 that these relate to undertakings made in those special contingencies. No other**

**construction can be placed on a harmonious reading of the notification. It is not alleged that the appellant fell in one of these special categories. The certification sought for by the adjudicating authority is clearly not applicable to importer and the non-production thereof is no ground for confiscation or denial of privileges of exemption.**

**14. The only question that remains is whether appellant was derelict in extending free treatment as prescribed or was charging unreasonable rates. The rates for paying patients are not prescribed in the exemption notification. As to that which is reasonable, there is no finding in the impugned order, nor are these decisions that are binding precedent. No effort has been made by the adjudicating authority towards ascertainment of compliance of this condition and the rates charged by the appellant were not only not subjected to the test of reasonableness but, more importantly, are entirely unknown. There is no onus on the appellant to negate that which is not alleged in the notice and failure to establish reasonableness of rates cannot be held against the appellant.**

**15. The appellant has produced records of radiotherapy treatment provided between 1991 and 1998. These have not been controverted with any counter-evidence and a casual handling of this record with a vague dismissal on grounds of non-segregation of indoor or outdoor patients in this record, without any substantive finding, is not a diligent discharge of power of adjudication. We must confess to inadequacy of knowledge on medical matters but, even to us, it is apparent that discarding of record must not be based on supposition but on hard facts. The data of patients furnished indicates that 40% of the patients have been accorded free treatment and, in the absence of contrary evidence, we conclude that there is no ground to hold that appellant had failed to fulfil this condition.**

**16. The condition of free treatment to indoor patients with income below the prescribed threshold stands on two limbs and the conjunction 'and' makes it indubitably clear that these have be to viewed for compliance in terms of complementing each other. Accordingly, to conform to the condition, not less than a tenth of the beds must be earmarked for patients in this category and whose treatment must be effected without any charge. That a tenth of the beds had been so earmarked is clear from the data furnished to the adjudicating authority and has not been controverted. The charging of patients who occupied beds in excess of that so earmarked is not, therefore, a transgression from the stipulations prescribed for continual conformity. The finding of the adjudicating authority that the compliance is in conformity only when the beds so earmarked are relatable to treatment with the imported equipment is clearly executive overreach in the absence of any such delineation in the conditions appended to the privilege of exemption. The pre-requisites laid down by the Hon'ble Supreme Court in re *Mediwell Hospital and in Health Care Pvt Ltd v. Union of India [1997 (89) ELT 425 (SC)]* = *2002-TIOL-69-SC-CUS* are not**

**set forth in the impugned order and the detriment determined, thereof, fails in consequence.**

**17. We may also mention in passing that the decision of the Hon'ble High Court of Bombay in *Shah Diagnostic Institute Pvt Ltd v. Union of India [2008 (222) ELT 12 (Bom)]* = *2006-TIOL-73-HC-MUM-CUS* may not find relevance here. In the impugned proceedings, the notice was issued in 1999 long after the rescinding of the exemption notification, with its attendant conditions, in 1994 and including alleged contraventions after the exempting notification ceased to exist. The decision in re Shah Diagnostics was rendered in a dispute pertaining to the period when the notifications subsisted but decided upon after the rescinding of the notification. The relevance of section 159A arises from these facts. The communication from Director General of Health Services, being a post-importation withdrawal of a certificate relevant to importation and devoid of consequential impact, cannot be relied upon, in the absence of any scrutiny of relevant information, as a substitute for a finding on facts of post-importation compliance.**

**18. Considering our findings above on the absence of evidence of non-compliance on the part of the appellant who had furnished claims of compliance, we hold that the confiscation of goods, imposition of penalty and recovery of duty is without authority of law. Appeal is allowed.**

**(Pronounced in Court on 14.8.2018)**