SUPREME COURT OF INDIA

Commissioner of Customs (Import), Mumbai

Vs.

M/S. Jagdish Cancer & Research Centre

C.A.No.2680 of 2000

(S.P. Bharucha, Y.K. Sabharwal and Brijesh Kumar JJ.)

02.08.2001

JUDGMENT

Brijesh Kumar, J.

1. This appeal has been preferred by the Commissioner of Customs (Import), Mumbai, against the order dated 14.12.1999 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench, Mumbai, in appeal, setting aside the order of confiscation of the imported equipment as well as the penalty imposed. The liability of customs duty was however upheld, though found to be unforceable, as the show cause notice issued was not a valid notice.

2. M/s Jagdish Cancer and Research Centre, Hyderabad (to be referred as `Centre) applied for duty free clearance of a consignment importing Teletherapy Unit (Theratron780-C) for its use under Notification No.64/88 Cus Dated 1.3.1988, issued under Section 25(1) of the *Customs Act, 1962*. The Central Government under the aforesaid notification exempted all apparatus and appliances etc. as hospital equipments essential for use in any hospital on being satisfied that it would be necessary in the public interest to do so. It is however subject to certain conditions which have been specified in the said notification as under:-

> "2. All such hospitals which may be certified by the said Ministry of Health and Family Welfare, in each case, to be run for providing medical, surgical or diagnostic treatment not only without any distinction of caste, creed, race, religion or language but also,-
>
> (a) free, on an average, to at least 40 per cent of all their outdoor patients; and
>
> (b) free to all indoor patients belonging to families with an income of less than rupees five hundred per month, and keeping for this purpose at least 10 per cent of all the hospital beds reserved for such patients; and
>
> (c)

Condition No. 4(iii) reads as under:-

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

(i)

(ii)

(iii) that such hospital would be in a position to start functioning within a period of two years, and

(iv)

The request of the Centre was accepted and the consignment was cleared on 23.8.1989 free of duty."

3. The Department found that the Centre had failed to produce the installation certificate in terms of Condition No. 4(iii) of the Notification and had also failed to observe other conditions, so the imported goods were liable to confiscation. Consequently the imported equipment was seized by the Department on 22.1.1998. The Assistant Commissioner of Customs issued a notice to the Centre to show cause to the Adjudicating Authority, as to why customs duty amounting to Rs.64,93,598/- be not demanded and the Teletherapy Unit be confiscated under Section 111(o) and for imposition of penalty under Section 112 of the Customs Act. The Centre showed cause raising an objection that notice was not issued by the competent officer and was also beyond time in terms of Section 28(1) of the Customs Act. It was also pleaded that the Centre was not required to furnish any certificate in terms of condition No.4(iii) of the Notification since it was a running hospital. Insofar it relates to free treatment to all patients whose income was below Rs.500 per month and reservation of 10% beds in the hospital for them as indoor patients, and for providing free treatment to 40% of outdoor patients, their case is that the Centre had been providing free treatment accordingly and the shortfall was only marginal over the years. Therefore, no condition of the Notification was violated.

4. The Adjudicating Authority held that installation certificate in terms of Clause 4(iii) was not required to be submitted by the Centre but it failed to comply with other two conditions about providing free treatment as required and reservation of 10% beds in the hospital. It was also found that the Centre did not have inpatient facility at all . Placing reliance upon a decision of this Court in *M/s Mediwell Hospital and Healths Care Pvt. Ltd. Vs. Union of India*[1] it has been found that providing free treatment in terms of the Notification is a continuing obligation, therefore, limitation as provided under Section 28(1) of the Customs Act would not come into play. By order of the Adjudicating Authority the goods imported were confiscated under Section 111(o) of the Customs Act with an option to the Centre to redeem the same under Section 125(2) of the Customs Act on payment of fine of Rs.50,000/-

5. A penalty of Rs.5,000/- was also imposed on taking a lenient view, since it was found that full duty had become payable by the importer.

6. The Centre preferred an appeal against the order passed by the Commissioner of Customs (Import). The CEGAT in appeal, also held that conditions of the Notification relating to providing free treatment were violated. Regarding Condition No.4(iii), it has been found that its compliance by Centre was not required. It has, however, been found that Section 28(1) of the Customs Act was involved and Assistant Commissioner (Customs) was not the proper officer to issue show cause notice. The contention of the Centre was accepted.

7. The CEGAT further found that Para 3 of the notice relates to confiscation of the imported goods only on the ground of non-submission of certificate under condition No.4(iii) of the Notification. Non-compliance of the other conditions relating to free treatment, finds mention in Para 5 of notice saying, it appeared that the importer had no intention to fulfil the provisions laid down in the Notification and resorted to willful mis- statement and suppression of facts with a sole intention of evading customs duty. The Tribunal found that a new case was made out for confiscation of the imported goods on the ground of not providing free treatment, which was not the ground for confiscation in Para 3 of the notice. It was also held that providing free treatment to patients according to conditions of notification is a continuing obligation in view of Mediwell case (supra). The CEGAT allowed the appeal holding that confiscation was not valid, the Centre however was liable to pay the duty but that could not be enforced for want of legal and valid show cause notice.

8. On behalf of the appellant, it has been vehemently urged that the show cause notice has not been issued under Section 28(1) of the Customs Act. Therefore question of notice having not been issued by a proper officer does not arises nor the question of limitation. It is submitted that the copy of the notice, as annexed, does not mention Section 28(1) of the Customs Act, in any case if it is taken to be there, as contended, that would make no difference. The submission is that Sub-section (2) of Section 125 of the Customs Act provides that where any fine in lieu of confiscation of goods is imposed, the importer shall also, in addition, be liable to any duty and charges payable in respect of such goods.

9. Learned counsel for the Centre draws our attention to Chapter XIV of the Customs Act and submits that it relates to confiscation of goods and conveyances and imposition of fines. It does not relate to imposition or demand of customs duty. Section 124 and 125 also fall in Chapter XIV. Section 124 provides for issue of show cause notice before confiscation of goods and Section 125 relates to payment of fine in lieu of confiscation. Section 28 of the Act which falls in Chapter V provides for notice for payment of duties which has been demanded by the notice in this case. Therefore, it is submitted on behalf of the Centre that demand of customs duty and the order for payment of the same is relatable to only Section 28(1) of the Customs Act, as also found by the CEGAT. That being the position, the notice was beyond time and not by a competent officer authorised to issue the same. The argument, as advanced, though seems to be attractive but on scrutiny, we find no merit in it. Section 124 reads thus:-

"124. Issue of show cause notice before confiscation of goods, etc.- No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person-

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may at the request of the person concerned be oral.

It provides that an order for confiscation of the imported goods may be made after giving a show cause notice to the importer of the goods. It also provides for imposition of fine.
Section 125 reads as under:-

125. Option to pay fine in lieu of confiscation.-(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:
Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods."

10. Whenever an order confiscating the imported goods is passed, an option, as provided under Sub-section (1) of Section 125 of the Customs Act, is to be given to the person to pay fine in lieu of the confiscation and on such an order being passed according to Sub-section (2) of Section 125, the person shall in addition be liable to any duty and charges payable in respect of such goods. A reading of Sub-section (1) and (2) of Section 125 together makes it clear that liability to pay duty arises under Sub-section (2) in addition to the fine under Sub-section(1). Therefore, where an order is passed for payment of customs duty along with an order of imposition of fine in lieu of confiscation of goods, it shall only be referable to Sub-section (2) of Section 125 of the Customs Act. It would not attract Section 28(1) of the

Customs Act which covers the cases of duty not levied, short levied or erroneously refunded etc.. The order for payment of duty under Section 125 (2) would be an integral part of proceedings relating to confiscation and consequential orders thereon, on the ground as in this case that the importer had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of the Customs Act. A reference may beneficially be made to a decision of this Court reported in *Mohan Meakins Ltd.Versus Commissioner of Central Excise, Kochi*[1] wherein it has been observed in Para 6 Therefore there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or charge payable on such goods apart from the redemption fine that he intends to levy under sub-section (1) of that section. In this view of the matter the objection raised by the Centre that Section 28 of the Customs Act would be attracted is not sustainable. The next question which falls for consideration is, as to whether or not a new ground or case for confiscation has been carved out as found by the CEGAT. According to the CEGAT, Para 3 of the notice relates to confiscation of goods under Section 111(o) of the Customs Act on the ground of non-submission of certificate under Condition 4(iii) of the Notification. Therefore, confiscation could be ordered only on the ground of non-submission of certificate and on no other ground. It is further pointed out by the CEGAT that Para 5 of the notice relates to payment of customs duty only, on the ground of violation of conditions relating to providing free treatment as well as on account of non-submission of certificate under condition No.4(iii) of the Notification. In connection with the above argument, it would be relevant to refer to para 7 of notice, a perusal of which would indicate that confiscation of the subject goods was intended for violation of various conditions of Notification No.64/88 dated 1.3.1988. We find, that various conditions which were violated are indicated earlier in paragraphs 3 and 5 of the notice. Para 3 contained only one condition not various conditions. We, therefore, feel that reading the notice parawise and confining it watertight within each paragraph, would not be a correct way of construing a notice. It is to be read as a whole to find out as to whether the person concerned is made aware of the various grounds on the basis of which action is proposed to be taken as well as nature of the action. The view taken by the CEGAT on the point indicated above is erroneous and cannot be upheld.

11. Learned counsel for the respondent has next urged that looking to the total picture of the free treatment provided by the Centre, it is to be noticed that shortfall in providing free treatment is marginal. The percentage of persons provided free treatment cannot be precise. During certain period, it may be a little less or a little higher. He has also drawn our attention to a chart prepared by the respondent and filed with an affidavit before the CEGAT, showing that the treatment provided to outdoor patients is 39.8 per cent and instead of 10 per cent indoor patients it is 8.9 per cent. In connection with this submission, it may be observed that this aspect of the matter has been considered by the Commissioner as well as CEGAT in some details and ultimately it has been found that there was a shortfall which is also not disputed by the respondent. A perusal of the condition in the Notification indicates that on an average, at least 40 per cent of all outdoor patients should be provided free treatment. It is, thus, at least 40 per cent or may be above. It is submitted that condition nowhere indicates that within what period, the prescribed percentage is to be achieved. It is submitted that it

should be during the life of the equipment imported. Thus, shortfall of particular year may be made good in the following year. We are not impressed by this argument. It would, not at all, be necessary to prescribe any period to achieve the given percentage of patients treated free. It should generally be all through the period. It being at least 40 per cent, there is hardly any occasion to say that in case there is more than 40 per cent in a given period, that may make good the deficiency in the previous or the following year. In any case, over and above all, it has not been in dispute that the Centre did not have inpatient facility. According to the condition of notification 10% of total beds in hospital, are to be kept reserved for patients of the families having an income of less than Rs.500/- per month. The case of the Centre, in this connection, is that they had an arrangement with another hospital in the proximity which is a sister concern of the Centre, with whom the Centre had entered into an agreement for reserving 10 per cent beds. Payments in respect of these inpatients is to be made by the Centre. We feel that the 10 per cent of the total number of beds are supposed to be reserved for patients of such families in the hospital where the equipment is installed. The purpose of the Notification for grant of exemption from payment of customs duty would not be served by making payment of expenditure incurred on some inpatients in some other hospital as alleged. It has also not been shown that alleged arrangements had the approval of the concerned authority or that it was brought to their notice at all.

12. The pleas raised by M/s.Jagdish Cancer & Research Centre, fail to convince us that it had been able to fulfil the conditions of the notification for providing free treatment to the patients as required therein. We find that the findings of the CEGAT on other points and the order passed are not sustainable. In the result, the appeal is allowed and the order passed by the CEGAT is set aside and the order passed by the Commissioner of Customs (Import), Mumbai is restored. There would, however, be no order as to costs.

[1]*(1997) 1 SCC 759*
[2]*(2000) 1 SCC 462*