CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH

Custom Appeal No. 849 of 2008

(Arising out of Order-in-Original No. S/10-298(Commr.1-29)/99 Gr. VB dated 01.05.2008 passed by the Commissioner of Customs (Import), Mumbai.)

M/s. Sanjeevan Medical Foundation .... Appellant

Vs.

Commissioner of Customs (Import), Mumbai. .... Respondent

APPEARANCE:

Shri Ravindra Jain, Consultant for the appellant
Ms. Trupti Chavan, AC (AR) for the Respondent

CORAM:

HON'BLE DR. D.M. MISHRA, MEMBER (JUDICIAL)
HON'BLE SHRI P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No: A/85691 / 2020

DATE OF HEARING: 07.01.2020
DATE OF DECISION: 07.01.2020

PER: P. ANJANI KUMAR

Brief issue involved in the case relates to the import of one 9" Image Amplifier TV system for Urological Investigation on 20.12.1988 and assessed under Notification No.64/88-Cus dated 1.3.1989; department issued a show-cause notice dated 5.8.99 alleging that goods imported by them had not subsequently complied with the exemption Notification No.64/88.

Commissioner confirmed the duty of Rs.6,53,200/- along with interest at the rate of 20%; imposed redemption fine of Rs.1,00,000/- and penalty of Rs.20,000/-. On appeal filed by the appellants, CEGAT(WRB) vide order dated 4.6.2000 remanded the case back to the Commissioner to examine the submissions in the reply to the show-cause notice. In the remand proceedings, vide order dated 2.7.2001, Commissioner confirmed the duty and redemption fine, however, increased the penalty to Rs.1,00,000/-. On an appeal made by the appellants, the case was again remanded back to the Commissioner wherein the Commissioner, vide impugned order, imposed a penalty of Rs.2,00,000/- and redemption fine of Rs.1,35,000/-. Hence, this appeal.

2. Learned counsel for the appellants submitted records/data to show that whereas 40% OPD patients were to be treated free, appellants treated 100%; whereas 10% IPD patients were required to be treated free, 50% were treated free and balance patients were treated at concessional charges/reasonable rates; Commissioner has rejected the above compliance figures saying this is secondary data and demanded original records of admission registers, discharge records of IPD, records of treatment given and evidence of family income of patients.

2.1 Learned counsel for the appellants submits that the exemption Notification required only for following conditions:

(i) No distinction of caste, creed, race, religion or language;

(ii) Free service to an average of 40% of all the outdoor patients;

(iii) Free service to all indoor patients belonging to families with a income of less than Rs.500/- per month; and keeping 10% of hospital beds reserved for such patients;

(iv) Installation of imported equipment in the hospital.

2.2 Learned counsel further submits that the following documentary evidence in the form of certificates was provided to the authorities.

i. Statement (with year-wise breakup) of the total number of patients treated in out-patient department as well as Indoor Patients both free of cost and at concessional rates for the period 1.4.1987 to 31.3.1995. The statement *inter alia* indicates that all OPD patients were treated free of charge during the aforesaid period.

ii. Statement further indicating the percentage of indoor patients (with hospital beds) exceeded the requirement of 10% free treatment for the aforesaid period.

iii. Statement indicating the number of indoor patients treated on concessional basis as well as cases of paid patients.

iv. Statement indicating additional percentage of patients treated free/concessionally both in respect of out-door patients and indoor patients.

v. Installation certificate by the Chartered Accountants; and

vi. Even the Rosha Committee Investigation and the DGAE of Ministry of Finance have not questioned this factual position of the actual installation of the 9” Image Amplifier, TV System for Urological Investigation.

2.3. Learned counsel further submits that learned Commissioner’s argument that compliance with Notification No.64/88-Cus. dated 1.3.1988 required such individual medical data is neither prescribed in the said Notification nor by any other Notification / statutory obligation; it is unreasonable and illogical to expect the hospital to keep individual records of patients after 30 years of import; this was not the argument in previous proceedings before the lower authorities earlier either. He further submits that Regulations under Medical Council of India (Code of Ethics Regulations 2002) as amended in Para 1.3 prescribes a period of 3 years for maintenance of records;

hence, requirement of such reports made by the Commissioner more than 25 years of import is neither justified nor logical; no evidence has been produced by the lower authorities to disprove the correctness of the figures submitted in reply to the show-cause notice / appeal memorandum, hence the same should be accepted; the Hospital is in interior Maharashtra catering to rural population which his poor and have complied with the terms of the Notification.

3. Learned AR for the department reiterates the findings of Order-in-Original and Order-in-Appeal and relies upon this Bench's Final Order No. A/87045/2018 dated 27.6.2018 in the case of Marathwada Cancer Hospital and Research Center and Hon'ble Apex Court's decision in the case of Mediwell Hospital & Health Care Pvt. Ltd. vs. Union of India dated 17.12.1996.

4. Heard both sides. Ongoing through the Notification No.64/88-Cus. Dated1.3.1988, we find that the following conditions are enlisted at (2) of the table.

> *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) at reasonable charges, either on the basis of the income of the patients concerned or otherwise, to patients other than those specified in clauses (a) and (b).

3. Any such hospital in respect of which the said Ministry of Health and Family Welfare, may, having regard to the type of medical, surgical or diagnostic treatment available there or the geographical situation thereof, or the class of patients for whom the medical, surgical or diagnostic treatment is being provided, certify either generally or in each case, that the hospital, even though it makes a charge for the said treatment, is nevertheless run on non-profit basis and is deserving of exemption from the payment of duty on the said hospital equipment under this notification.

Provided that the hospital equipment in respect of which the exemption is claimed, is imported by such hospital by way of free gift from donor abroad or has been purchased out of donations received abroad in foreign exchange.

Provided further that where the said hospital equipment has been purchased out of donations received abroad in foreign exchange, the hospital has been permitted to maintain an account abroad by the Reserve Bank of India for the purposes of receiving funds donated overseas.

5. On going through the above table, we find that the Notification does not prescribe any registers to be maintained though it prescribes certain conditions as above. On going through the impugned order, we find that the learned Commissioner's findings stress on the fact that the data submitted by the appellants was the secondary data and that original records of admission registers, discharge records of IPD and OPD, records of treatment given and evidence of income of patients. We find that this is certainly beyond the scope of the Notification. It is also not the case of the Department that the proper authority has prescribed any such condition to maintain the records at the time of import. We find force in the appellant's contention that to maintain the records is not one of the statutory obligations and that even as per Code of Ethics Regulations, 2002 of Medical Council of India records are prescribed to be maintained for only three years. Therefore, it is not proper to call for such records even for the satisfaction of the adjudicating authority after a period 20 years.

6. We also find that vide interim order dated 4.10.2017, this Bench has directed as follows:

> *Both sides are in dispute as to the maintenance of record under Notification No.64/88-Cus. Dated 1.3.1988 to verify compliance to the post import obligation. To resolve the controversy as to whether appropriate records were maintained fulfilling the conditions of the notification, we request learned Chief Commissioner of Customs to depute an officer to examine the same with the assistance of an AR of office of learned Commissioner (AR). Once verification is completed on the above aspect, report thereon shall be provided by the said officer to Tribunal by 29.11.2017 for consideration of the issue since appellant is in third round of litigation before Tribunal. The examining authority shall also provide a coy of his report to the appellant while dispatching the same to Tribunal. Against the finding of the examining authority, appellant shall satisfy the Tribunal on the date fixed for the next hearing.*

In furtherance of above directions, a Visit Note dated 16.01.2018 submitted. Sh. Adit Mahto concludes after visiting the hospital that:

> *On perusal of the documents available with the hospital for the period of 1987-1995, it appears that the records are almost 30 years old and the same have not*

> *been authenticated by any competent authority as instructed by the Custom notification 64/88.*
>
> *The authenticity of the documents could not be verified as the records were prepared by the beneficiary themselves to submit to the Asstt. Charity Commissioner, Sangli and no physical evidence such as the admission register, discharge record etc. were readily available to be verified.*
>
> *As mandated by the said notification, the equipment was physically verified by the officer deputed for the purpose. However, the mandatory installation certificate, duly certified by DGHS, was not available for verification.*
>
> *Under the given circumstances, it appears to be difficult to verify the compliance of the post import conditions of the notification for the imported equipment.*

6.1. On going through the report, the allegations against the appellants appears to be that records have not been authenticated by any competent authority; records were submitted to Assistant Charity Commissioner, Sangli; no physical evidence was readily available and mandatory installation certificate duly certified by DGHS was not available and therefore, it was difficult to verify the compliance of the conditions of the notification. The appellants submit that exemption certificate in terms of 64/88- Customs dated 01.03.1988 was issued on 16.06.1988. The appellants have submitted Sworn Affidavit to the fact that the impugned goods had actually been installed. We find that the verification report simply mentions that the records submitted by the appellant are not authenticated. However, the same report indicates that the report was submitted to Assistant Charity Commissioner. It is not the case of the Department that the said Assistant Charity Commissioner has not accepted the report. It is also not the case of the Department that the machine was not put to use for the purposes it was imported. It was only stated that compliance could not be verified. Under the circumstances, we find that the records being very old, the reports submitted to the other authorities and the Affidavit sworn by the importer/appellant cannot be dismissed. We also find that there are no other conditions imposed at the time of import. The Department has not established that the appellants are not entitled for the benefit of exemption notification. Department has not submitted any proof in this regard. Expression of inability to verify will not take away the benefit granted to the importer at the time of import, particularly looking into the facts of the case, wherein, the Department sought to examine records at a later date which is more than reasonable period of time. Therefore, we find that circumstantial evidence is to be appreciated and the benefit be extended. We also find that subsequent OIOs have progressively increased the penalty imposed on the appellants, which is not in line with the established principles of law. Therefore, we find that the impugned order is not maintainable and hence requires to be set aside.

7. In view of the above, the appeal is allowed with consequential relief, if any, as per law.

(Operative portion of the Order was pronounced in open court on 07.01.2020.)

DR. D.M. MISRA
MEMBER (JUDICIAL)

P. ANJANI KUMAR
MEMBER (TECHNICAL)

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