CASE NO.:
Appeal (civil) 919 of 2007

PETITIONER:
SHARE MEDICAL CARE

RESPONDENT:
UNION OF INDIA & ORS

DATE OF JUDGMENT: 23/02/2007

BENCH:
C.K. THAKKER & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising out of SPECIAL LEAVE PETITION (C) NOs.10429 to 10431 OF 2005)

C.K. THAKKER, J.

Leave granted.

This appeal has been filed against a common judgment and order passed by the High Court of Andhra Pradesh, Hyderabad on December 31, 2004 in Writ Petition Nos. 22734 & 22735 of 1996 and 3355 of 2001.

Few facts which are necessary for understanding the controversy are that the appellant\027Share Medical Care is a Society registered under the Andhra Pradesh (Telengana Area) Public Societies Act, 1350 Fasli (Act 1 of 1350 F) ('Society' for short) and owes its origin to the desire of Non Resident Indian (NRI) Scientists and Doctors based in the United States of America (USA). The aim of the Society is to share the advanced technology with the citizens of India. The appellant-Society was established with the intention to construct and run hospitals, medical and diagnostic centers, etc. It is a charitable hospital and is run on 'no-profit' basis. It is located at village Ghanapur, about 40-50 kms away from the city of Hyderabad. It started its activities in the year 1993. It has specialized in treatment of heart and related ailments having the latest equipments and specialist doctors.

In the year 1992-93, the appellant-Society imported certain medical equipments for the use in its charitable hospital. According to the appellant, under Notification No. 64/88-Cus dated March 1, 1988, exemptions were granted to hospital equipments imported by specified category of hospitals (charitable) subject to certification by Directorate General of Health Services (DGHS). The table in the notification classified hospitals in four categories. According to the appellant, it falls under Para No.3 of the table of notification.

The appellant, however, along with several other hospitals, had applied for the benefit of exemption notification not under para 3 but para 2 of the table. The benefit of exemption was granted. Since the Society was also entitled to exemption under para 3 of the table, an application was made to DGHS highlighting the fact that the appellant is a non-profit organization and had been permitted to import medical equipments by DGHS by certification. It has been registered as an institution to receive donations in foreign exchange and since the area of operations of the main hospital at Ghanapur and the Rural Health Hospital are in rural areas, it would be entitled to invoke para 3 of the table of notification of

exemption. The Deputy Director General (Medical), DGHS, by an order dated January 25, 2000 rejected the application of the appellant observing therein that initially the request was made by the appellant for exemption under para 2 of the notification and accordingly, the institution was granted such exemption. It was, therefore, not open to apply for exemption under para 3 of the table of the exemption notification and the application was liable to be rejected.

Being aggrieved by the above order passed by the Deputy Director General (Medical), the appellant-Society filed the above petitions in the High Court of Andhra Pradesh. The High Court also dismissed the petitions observing that it was not in dispute that the appellant (petitioner) claimed exemption in respect of import of hospital equipments and was allowed on the basis of its prayer under category para 2 of the table. The High Court noted that the learned counsel for the appellant-petitioner relied upon certain decisions in support of the contention that a categorization could be changed but it held that the exemption was granted in category 2 of the table, certain information was sought which was not supplied by the Society and the exemption was withdrawn. Regarding category 3, however, the High Court observed that when the appellant did not fulfill conditions relatable to category 2 institution, its claim for conversion of categorization under category 3 was untenable. Accordingly, all petitions were dismissed.

We have heard learned counsel for the parties.

Learned counsel for the appellant submitted that it is settled law that even if exemption is granted for one category or under one notification and the applicant is entitled to claim more or greater benefit under other category or other notification, the authority is duty bound to consider the case of the applicant in the other category or other notification and there is no question of any estoppel or bar to such plea. It was, therefore, incumbent upon the Deputy Director General (Medical), DGHS to consider the application of the appellant on merits and rejection of application only on the ground that the appellant had earlier applied under category 2 and, therefore, it was not open to it to apply under category 3 and the application was not tenable was illegal and contrary to law. The learned counsel for the appellant further submitted that it was only because of rejection of application on the ground of maintainability that it made a limited prayer before the High Court to direct the Deputy Director General (Medical), DGHS to consider and decide the application of the appellant on merits. By not doing so, the error of law committed by the Deputy Director General (Medical), DGHS had been repeated by the High Court and hence both the orders are liable to be set aside. It was submitted that the Deputy Director General (Medical), DGHS may be asked to consider the matter of the appellant on merits as to whether it would be entitled to exemption under category 3.

The learned counsel for the respondents, on the other hand, supported the order of the authority relying on an affidavit in reply filed by the Assistant Director General (M) who stated that the representation of the appellant was examined carefully by the authorities and it was decided that when the appellant had voluntarily applied under category 2 of the exemption notification, he

could not change it to category 3. Category 2 exemption was not 'thrust upon' the appellant. The appellant-hospital never objected the categorization of its hospital in the past. When the said exemption benefits were withdrawn for non-fulfillment of free treatment obligations, the appellant represented its case as an 'afterthought' to category under para 3 of the table of exemption notification which was rejected. It, therefore, cannot be said that any illegality had been committed and the appeal deserves to be dismissed.

Having heard learned counsel for the parties, in our opinion, the appeal deserves to be allowed. It is, no doubt, true that initially the appellant claimed exemption under category 2 of exemption notification which was granted. That, however, does not mean that the appellant could not claim exemption under category 3. So far as cancellation of exemption under category 2 is concerned, we are not called upon to decide legality or otherwise of the said decision as it has not been challenged before us in the present proceedings. The short question which we have to answer is whether the appellant could claim exemption under category 3 and non-consideration of the said application by the Deputy Director General (Medical) is in consonance with law. Our reply is in the negative. And we are supported in our view by the decisions of this Court.

In this connection, attention of the Court has been invited to certain decisions by the learned counsel for the appellant.

In Collector of Central Excise, Baroda v. Indian Petro Chemicals, (1997) 11 SCC 318, this Court held that if two exemption notifications are applicable in a given case, the assessee may claim benefit of the more beneficial one. Similarly, in H.C.L. Limited v. Collector of Customs, New Delhi, (2001) 130 E.L.T. 405 (SC), this Court relying upon Indian Petro Chemicals, held that where there are two exemption notifications that cover the case in question, the assessee is entitled to the benefit of that exemption notification which may give him greater or larger relief. In Unichem Laboratories Ltd. v. Collector of Central Excise, Bombay, (2002) 7 SCC 145 : JT 2002 (6) SC 547, the appellant was a manufacturer of bulk drugs. Exemption was granted to him under one item. He, thereafter, filed a revised classification list categorizing its bulk drugs under the other Head claiming more benefit. The claim was rejected on the ground that the appellant had not claimed the benefit of exemption at the time of filing the classification list and subsequently it could not be done. The appellant approached this Court.

Allowing the appeal and setting aside the order, this Court held that if no time is fixed for the purpose of getting benefit under the exemption notification, it could be claimed at any time. If the notification applies, the benefit thereunder must be extended to the appellant. The Court held that the authorities as well as the Tribunal were not right in holding that the appellant ought to have claimed the benefit of the notification at the time of filing of classification lists and not at a subsequent stage.

The Court then stated;

"\005There can be no doubt that the authorities functioning under the Act must, as are in duty bound, protect the interest of the Revenue by levying and collecting the duty in accordance with law - no less and also no more. It is no part of their duty to deprive an assessee of the benefit

available to him in law with a view to augment the quantum of duty for the benefit of the Revenue. They must act reasonably and fairly".

(emphasis supplied)

In Kerala State Cooperative Marketing Federation Ltd. & Ors. v. Commissioner of Income Tax, (1998) 5 SCC 48 : JT 1998 (4) SC 145, interpreting Section 80-P(2)(a) of the Income Tax Act, 1961, this Court said;

"We may notice that the provision is introduced with a view to encouraging and promoting growth of co-operative sector in the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to whether any particular category of an income of a co-operative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption. The expression "marketing" is an expression of wide import. It involves exchange functions such as buying and selling, physical functions such as storage, transportation, processing and other commercial activities such as standardisation, financing, marketing intelligence etc. Such activities can be carried on by an Apex Society rather than a primary society". (emphasis supplied)

From the above decisions, it is clear that even if an applicant does not claim benefit under a particular notification at the initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage.

In the instant case, the ground which weighed with the Deputy Director General (Medical), DGHS for non-considering the prayer of the appellant was that earlier, exemption was sought under category 2 of exemption notification, not under category 3 of exemption notification and exemption under category 2 was withdrawn. This is hardly a ground sustainable in law. On the contrary, well settled law is that in case the applicant is entitled to benefit under two different Notifications or under two different Heads, he can claim more benefit and it is the duty of the authorities to grant such benefits if the applicant is otherwise entitled to such benefit. Therefore, non-consideration on the part of the Deputy Director General (Medical), DGHS to the prayer of the appellant in claiming exemption under category 3 of the notification is illegal and improper. The prayer ought to have been considered and decided on merits. Grant of exemption under category 2 of the notification or withdrawal of the said benefit cannot come in the way of the applicant in claiming exemption under category 3 if the conditions laid down thereunder have been fulfilled.

The High Court also committed the same error and hence the order of the High Court also suffers from the same infirmity and is liable to be set aside.

Strong reliance was placed by the respondents on a decision of this Court in Mediwell Hospital & Health Care Pvt. Ltd. v. Union of India & Ors., (1997) 1 SCC 759 : JT 1997 (1) SC 270. In Mediwell Hospital, the Court was considering the very same notification 64/88 and grant of exemption to hospital equipments imported by specified category of hospitals. The Court held that an Individual Diagnostic Centre if covered by the notification, could claim import of equipments without paying customs duty. But in case of failure on the part of the persons availing the benefit to satisfy conditions laid down in the notification, it is incumbent on the authorities to recover such duty.

The Court stated;

The competent authority, therefore, should continue to be vigilant and check whether the undertakings given by the applicants are being duly complied with after getting the benefit of the exemption notification and importing the equipment without payment of customs duty and if on such enquiry the authorities are satisfied that the continuing obligation are not being carried out then it would be fully open to the authority to ask the person who have availed of the benefit of exemption to pay the duty payable in respect of the equipments which have been imported without payment of customs duty. Needless to mention the government has granted exemption from payment of customs duty with the sole object that 40% of all outdoor patients and entire indoor patients of the low income group whose income is less than Rs.500/- p.m. would be able to receive free treatment in the Institute. That objective must be achieved at any cost, and the very authority who have granted such certificate of exemption would ensure that the obligation imposed on the persons availing of the exemption notification are being duly carried out and on being satisfied that the said obligations have not been discharged they can enforce realisation of the customs duty from them.

In the counter-affidavit, it has been asserted that in the light of the observations in Mediwell Hospital, the Director General of Health Services and Department of Health decided to review cases of all (396) beneficent institutions who had availed of benefits under notification 64/88, and the appellant was one of them. Since it was found that the appellant was not fulfilling the conditions set out in para 2 of the Table, the benefit was withdrawn.

In our opinion, the decision in Mediwell Hospital would not take away the right of the appellant to claim benefit under para 3 of the Table of exemption notification. If the appellant is not entitled to exemption under para 2, it cannot make grievance against denial of exemption. But if it is otherwise entitled to such benefit under para 3, it cannot be denied either. The contention of the authorities, therefore, has no force and must be rejected.

For the foregoing reasons, the appeal deserves to be allowed and is accordingly allowed. The respondent-authorities are directed to re-consider the case of the appellant as to exemption in category 3 of the exemption notification strictly in accordance with law, on its own merits and without being inhibited by the observations made by us hereinabove. The appeal is allowed with costs.