$~J-1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on **18.05.2021**
Judgement pronounced on **21.05.2021**

\+ **W.P.(C) 5149/2021, CM No. 16554/2021**

GURCHARAN SINGH .....Petitioner

Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Siddharth Bambha, Mr. Shyam D Nandan and Mr. Chirag Ahluwalia, Advocates.

versus

MINISTRY OF FINANCE (DEPARTMENT OF REVENUE), GOVERNMENT OF INDIA .....Respondent

Through: Mr. Zoheb Hossain, Sr. Standing Counsel for the respondent.

Mr. Arvind Datar, Senior Advocate as Amicus Curiae with Mr. Rahul Unnikrishnan, Advocate.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J :

TABLE OF CONTENTS

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

Prologue: -

1. This is a George Floyd moment for the citizens of this country. The refrain is "I can't breathe", *albeit*, in a somewhat different context and setting; although in circumstances, some would say, vastly more horrifying and ghastlier. Chased and riven by the merciless novel Coronavirus, the citizenry has been driven to desperation and despair.

2. Scarcity of liquid medical oxygen [in short "LMO"], medicines, oxygen concentrators, hospital beds, ventilators, and other medical equipment, crucial for battling against the infection caused by the virus, has brought out the best and worst in people. We have messiahs. We have charlatans. We have hoarders. We have seen kind and caring hand being struck out by strangers when they could have remained cocooned in the safety of their houses. Brave hearts, there are many; doctors, nurses, and personnel manning public institutions. These are people who are at the forefront of this battle, staking their lives, so that the common man could live; beating this adversary, i.e., the virus is their only goal. There is, thus, in this litigation, no adversary other than the virus.

3. On 04.05.2021, the captioned petition was moved before us. Despite the respondent [hereafter referred to as the "State"] being served with an advance copy of the petition, there was no representation on its behalf. The matter was posted on the next date, i.e., 05.05.2021 when, the State was represented by Mr. Chetan Sharma, Additional Solicitor General and Mr. Zoheb Hossain, Senior Standing Counsel. We, at that stage, carried the impression, that because of the prevailing chaos and confusion caused by the raging pandemic, the State had due to an oversight, not granted an exemption from imposition of Integrated Goods and Services Tax [in short "IGST"] on oxygen concentrators imported into the country, as a gift, for personal use. We had, in this belief, on 05.05.2021, observed as follows.

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

> "1. Via the captioned writ petition, a challenge has been laid to the notification bearing no. 30/2021-Customs, dated 01.05.2021, issued by the respondent.
> 2. This writ petition represents one of those rare writ actions, whereby, a notification issued in the realm of a tax statute has been, inter alia, assailed under Article 21 of the Constitution.
> 2.1. That tax is an exaction by the State is well known. That its levy and collection, ordinarily, does not encompass equity, is also, well known. But, presently, we are living in difficult times and, therefore, perhaps, the petitioner has invoked Article 21 of the Constitution.
> 3. Yesterday, i.e., 04.05.2021, we had requested the learned Additional Solicitor General of India [in short "ASG"] to join the proceedings.
> 3.1. Today, Mr. Chetan Sharma, learned ASG along with Mr. Zoheb Hossain has joined the proceedings. Yesterday, i.e., on 04.05.2021 we had also noticed [a fact brought to our attention by Mr. Sudhir Nandrajog, learned senior counsel, who appears on behalf of the petitioner], that the respondent had issued a notification bearing no. 4/2021 - Customs dated 03.05.2021.
> 4. We are informed by the learned ASG that this notification has exempted imposition of IGST on oxygen concentrators imported by the State Government, or via any entity, relief agency or statutory body, authorised by the State Government. This exemption, according to the learned ASG, is, presently, available till 30.06.2021.
> 5. We are of the view that since the respondent has gone this far, it could move further, and extend the exemption, to even individuals, to enable them to obtain imported oxygen concentrators by way of a gift, albeit, without having to pay IGST.
> 6. Both the learned ASG and Mr. Zoheb Hossain have stated before us that they will revert with instructions.
> 7. Accordingly, list the matter on 06.05.2021.
> 8. Learned ASG is requested to place the order passed by us today before the Hon'ble Finance Minister, Government of India."

4. Thereafter, the matter was taken up by us on 06.05.2021. Even at that stage, we issued a notice in the petition, with the hope that course correction would follow. Since we had received, up until then, no concrete response from the State, concerning amelioration of the difficulty faced by the petitioner, we issued interim directions for clearance of the oxygen concentrator imported by him upon deposit of an amount equivalent to the IGST [presently payable by the petitioner] with the Registry of this Court within three days from the date of passing of the said order. We also made it clear that the petitioner would fulfil all other requisite formalities necessary for the import of the oxygen concentrator.

4.1. Pertinently, to assist the Court, we had via our order dated 06.05.2021, also appointed Mr. Arvind Datar, Senior Advocate, as Amicus Curiae in the

Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

matter. The matter was, thus, posted for 18.05.2021. The State, since then, has filed a counter-affidavit in the matter.

5. The matter thus, raises certain seminal questions concerning constitutional law. The petitioner has sought to assail the notification bearing no. 30/2021-Customs, dated 01.05.2021, and subsequent actions of the State by invoking the provisions of Article 21 of the Constitution of India, 1950 [in short the "Constitution"]. The petitioner's broad assertion is that the right to life encompasses several second-generation rights including the right to health, which stands compromised, because of the impugned notification. We must, however, clarify at this stage itself, that the writ action is not confined to the invocation of Article 21 only. The petitioner has invoked, and to our minds rightly, [something that we will discuss hereafter] Article 14 of the Constitution as well.

The Context: -

6. The petitioner is 85 years old. He has approached this Court against the imposition of IGST on the import of the oxygen concentrator which has been gifted to him by his nephew. The petitioner, as alluded to above, asserts that the imposition of tax is discriminatory, unfair, and unreasonable and that it impinges upon his right to life and health. The clearance of the oxygen concentrator from the customs barrier required payment of IGST at the rate of 12%. It is relevant to note that before 01.05.2021, an individual importer would have had to pay IGST at the rate of 28% *qua* oxygen concentrator gifted to him for personal use. This stood in contrast to oxygen concentrators which were imported for commercial use. The IGST on oxygen concentrator, which was imported for commercial use, was and continues to be leviable at the rate of 12%.

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

6.1. The State claims that to remove this dissonance, it issued the impugned notification dated 01.05.2021, whereby, IGST on oxygen concentrators imported by individuals for personal use, that are supplied free of cost, was scaled down to 12%. The State avers that it went a step further by issuing yet another notification, i.e., notification no. 4/2021-Customs, dated 03.05.2021, whereby, it exempted, completely, oxygen concentrators imported for the purpose of COVID relief from the imposition of IGST in cases, where the importer was the "State Government or, any entity, relief agency or statutory body, authorised in this regard by any State Government" [hereafter collectively referred to as the "canalising agency']. The exemption, though, is available only till 30.06.2021. It is for this reason that we had observed on 05.05.2021 that, since the State has come so far, it could go a little further and exempt even individual importers who had been supplied oxygen concentrators free of cost from bearing the burden of IGST.

6.2. However, our attempt at nudging the State to take, what we thought was a reasonable stand, [and we dare say, a morally right position] has come a cropper.

Submissions made on behalf of the Amicus and the petitioner: -

7. Mr. Datar, the learned amicus curiae, broadly, made the following submissions.

i. There is an interplay between the provisions of The Customs Act, 1962 [in short the "Customs Act"]; The Customs Tariff Act, 1975 [in short the "CTA"]; The Goods and Services Tax Act, 2017 [in short the "GST Act"]; and The Integrated Goods and Services Tax Act, 2017 [in short the "IGST Act"].

ii. The interplay of the aforementioned statutes allows for the imposition of Basic Customs Duty [in short "BCD"] and IGST on goods imported into

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

the country at the rates stipulated in the CTA. Section 2 of the CTA, read along with First and Second Schedules, provides for rates at which BCD is levied. Likewise, Section 3 of the CTA read with the first proviso to Section 5 of the IGST Act allows for levy of IGST on goods imported into India at the values determined under the CTA *albeit* at the point when duties of customs are levied on the said goods under Section 12 of the Customs Act.

iii. The source of power to levy and collect IGST on imports is rooted in the explanation appended to Article 269A (1) of the Constitution.

iv. IGST has replaced countervailing duty [in short "CVD"] which was leviable under Section 3 of the CTA. CVD was traditionally levied on imported goods to ensure that a level playing field was available to domestic manufacturers. Thus, CVD levied on imported goods was equivalent to the basic excise duty on a like product produced or manufactured in India. With the enactment of the GST Act, it is now possible to levy simultaneously both Central GST as well as State GST. Excluding 6 items, Central Sales Tax Act, 1956 [in short "CST Act"] stands substituted by the IGST Act. Article 246A(2) gives Parliament the exclusive power to levy GST on the supply of goods and services that takes place in the course of inter-state trade and commerce. As indicated above, the explanation appended to Article 269A(1) creates a deeming fiction *qua* imported goods and services by treating such transaction as those having taken place in the course of inter-state trade or commerce. Therefore, as alluded to above, IGST is imposable on imported goods.

v. Section 3(7) of the CTA which allows for levy of IGST on imported goods pegs the ceiling rate at 40%. The provision for valuation is provided under Section 3(8) and 3(8A) of the CTA. Section 3(12) contains the power for exempting, *inter alia*, the levy of IGST.

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

vi. Thus, in effect, from 01.07.2017, BCD is levied on imported goods under the Customs Act and IGST is leviable under Section 3(7) of the CTA read with Section 5 of the IGST Act.

vii. A perusal of the Mega Exemption Notification no. 50/2017, dated 30.06.2017, (which superseded notification 12/2012 dated 17.03.2012) [hereafter referred as "General Exemption no. 190"] would show that *qua* several items where BCD is exempt or reduced, the IGST is nil. This has been a longstanding practice even prior to the issuance of Mega Exemption Notification.

viii. However, after notification No. 4/2015-2020, dated 30.04.2021, was issued by the Directorate General of Foreign Trade, Department of Commerce, Ministry of Commerce and Industry [in short "DGFT"], whereby oxygen concentrators were exempted from customs duty/BCD, IGST, *via* a separate notification, i.e., notification no. 30/2021 dated 01.05.2021 was reduced from 28% to 12% *qua* imports made for personal use. An exception was, however, made insofar as oxygen concentrators imported by a canalising agency was concerned. In such cases, vide notification no. 4/2021 dated 03.05.2021, complete exemption from IGST was granted, *albeit*, subject to certain conditions.

ix. It is seen that, in most cases, where BCD is nil, exemption from imposition of IGST is also given. The imposition of IGST at the rate of 12% on oxygen concentrators imported for personal use even while the imposition of BCD on them is exempted, places such cases in the excepted category; which is, contrary to the prevailing practice.

x. Furthermore, a perusal of entry no. 607A[1] of General Exemption no. 190 would show that complete exemption from BCD and IGST is granted for

[1] Entry no. 607A was inserted in Mega Exemption notification no. 50/2017-Customs, dated 30.06.2017, via notification no. 85/2017-Customs, dated 14.11.2017.

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

life-saving drugs/medicines imported for personal use which are supplied free of cost by overseas supplier. The exemption, however, is subject to the condition i.e. obtaining a certificate from the named officials that, the goods in issue are life-saving drugs/medicines. Although the Mega Notification no. 12/2012 dated 17.03.2012 [in short "2012 Mega Notification"] *qua* life-saving medicines provided for the imposition of BCD at the rate of 5% and CVD at the rate of 6% with effect from 01.07.2017, as noticed above, both bear nil rate of duty.

xi. Oxygen concentrators would fall within the ambit of Entry no. 607A, Tariff Item no. 9804 of the General Exemption no. 190, as the definition of drugs as provided in Section 3(b) of the Drugs and Cosmetics Act, 1940 [in short "Drugs and Cosmetics Act"] would include medical equipment used for treating and preventing human disease. Furthermore, since an oxygen concentrator is, undoubtedly, a piece of life-saving equipment, it should not be subjected to the rigour of certification by officials, named in condition no. 104 stipulated against entry no. 607A.

xii. The Government of India amended paragraph 2.25 of its Foreign Trade Policy, 2015-2020 [in short "FTP"] to permit import of life-saving drugs/medicines, oxygen concentrators, and *Rakhi* received as gifts (but not gifts related to *Rakhi*), as indicated above, via notification no. 4/2015-2020, dated 30.04.2021, issued by DGFT, which, in turn, resulted in exemption from BCD [vide notification no. 28/2021-Customs dated 24.04.2021]; and therefore, the same principle should apply to IGST. Under the said notification, oxygen concentrator is allowed to be imported as a gift for personal use till 31.07.2021- keeping in mind this approach, there is no good reason for not exempting oxygen concentrators from the imposition of IGST at least till 31.07.2021.

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

xiii. Although, the notification no. 4/2021-Customs, dated 03.05.2021, while granting exemption from IGST *qua* import of oxygen concentrators via a canalising agency invokes the "exceptional circumstances" provision as adverted to in sub-section (2) of Section 25 of the Customs Act, [i.e., the prevalence of COVID-19 pandemic], there is no discernible rationale as to why the exemption from levy of IGST is not extended *qua* oxygen concentrators imported by individuals for personal use. While exemption from tax is not a matter of right, but an aspect, which requires policymakers to take into account several factors before granting an exemption- the distinction drawn, between two classes of importers is clearly unreasonable and hence, violative of Article 14 of the Constitution.

xiv. The Central Board of Excise and Customs [in short "CBEC"] had issued Circular no. 9/2014-Customs, dated 19.08.2014, setting forth guidelines for issuance of exemption notifications under Section 25(2) of the Customs Act in respect of goods imported for relief and rehabilitation of people affected by natural disasters and epidemics. Amongst others, the following guideline is relevant:

> "Cases of import required for treatment of individuals, who are suffering from life-threatening diseases, could be considered on [a] case-to-case basis. Such cases will be examined from the point of view of the nature of the medical condition and financial circumstances of the applicant".

xv. While there is no right in law to claim exemption from taxes, however, once the State invokes the provisions of Section 25 of the Customs Act such delegated legislation can be judicially reviewed. The impugned notification is manifestly arbitrary, and hence, is violative of Article 14 of the Constitution. The impugned notification is irrational as there is no intelligible differentia in classifying the import of oxygen concentrators into two categories. One, by the State and its agencies; and the other, by

the individual, for personal use, by way of gift. There is, thus, an absence of "ade*qua*te determining principle". In support of these submissions, reliance is placed on the following judgements.

a) ***Union of India vs. N.S. Rathnam & Sons***, (2015) 10 SCC 681[2].

b) ***Shayara Bano vs. Union of India***, (2017) 9 SCC 1[3].

xvi. The right to life encompasses within it, the right to health. The right to health includes within it, the right to affordable treatment. The State has not only a duty but a positive obligation is cast upon it to ensure that the health of its citizens is duly protected. [See: ***Navtej Singh Johar vs. Union of India***, (2018) 10 SCC 1[4]] Given the circumstances obtaining in this case, the threshold for assailing the impugned notification, [unlike in ordinary circumstances, involving a challenge to a taxing statue], is low. It would be sufficient for the petitioner to demonstrate that there is a "distinct and noticeable burdensomeness" that is clearly and directly attributable to the impugned tax. The principle articulated in ***Indian Express Newspapers (Bombay) Private Limited vs. Union of India***, (1985) 1 SCC 641[5] in the context of Article 19(1)(a) would equally apply to a challenge laid under Article 21 of the Constitution.

xvii. The validity of the impugned notification and the actions of the State has to be tested on the anvil of how they impact the right to health. With the prevalence of lockdown in most parts of the country, the beneficiaries of imported oxygen concentrators would perhaps be senior citizens who would not have the necessary wherewithal, to cough up money to pay either the Custom House Clearing Agents or even to find funds to pay

[2] [In short "***N.S. Rathnam & Sons*** Case"]
[3] [In short "***Shayara Bano*** Case"]
[4] [In short "***Navtej Singh Johar*** Case"]
[5] [In short "***Indian Express Newspapers*** Case"]

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

IGST. This would result in depriving the beneficiaries of a life-saving device that is not available, domestically, in sufficient quantities. The oxygen generators that are available in the domestic market are of poor quality. Thus, the impact of the unreasonable actions of the State has led to insurmountable pressure being put on hospitals. Therefore, the levy of IGST on oxygen concentrators has a direct and immediate impact on the right to health of a citizen. The validity of both the impugned notification and the action of a State is required to be examined not by the stated objective of the notification or its action or even its form but by the direct impact it has on the citizens' rights. Reliance, in this behalf, was placed on the judgement of the Supreme Court in ***R.C. Cooper vs. Union of India***, (1970) 1 SCC 248[6] at paragraph 49; and ***Federation of Hotel & Restaurant Association of India vs. Union of India***, (1989) 3 SCC 634[7] at paragraph 46. Besides this, reliance is also placed on the order of the Supreme Court dated 18.12.2020, passed in Suo Motu Writ Petition (Civil) No.7/2020, to buttress the plea that the right to health includes the right to affordable treatment.

xviii. The impugned notification violates not only the right to health but also the right to human dignity which is interwoven in Article 21 of the Constitution. In support of this plea, reliance is placed on the judgement of the Supreme Court in ***Jeeja Ghosh vs. Union of India***, (2016) 7 SCC 761[8].

8. Mr. Sudhir Nandrajog, learned senior counsel, who appears on behalf of the petitioner, has adopted the arguments of Mr. Datar. Mr. Nandrajog submitted that the facts obtaining, in this case, would clearly show that the

[6] [In short "***R.C. Cooper*** Case"]
[7] [In short "***Federation of Hotel*** Case"]
[8] [In short "***Jeeja Ghosh*** Case"]

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

impugned notification and the actions of the State are violative of both Article 14 and 21 of the Constitution.

Submissions advanced on behalf of the State: -

9. The defence that the State takes is as follows:-

i. The State has been responsive and has taken various steps in quick succession to mitigate the difficulties faced by the citizens having regard to the ground realities, the availability of drugs and medical equipment, domestically and their anticipated demand as well as the need to import such material to bridge the gap. In this context, several measures have been taken which include exemption from customs duty and extension of concessions *qua* IGST in respect of specified goods imported into the country. These steps have been taken after consultation with experts and various ministries. [With regard to the measures taken, our attention is drawn to averments made in paragraph 5 (i) to (x) of the counter-affidavit filed by the State.]

ii. Since GST rates and general exemptions are notified based on the recommendations of the GST Council, the request received by the Government of India for extending GST exemptions *qua* COVID-19 related supplies shall be placed before the GST Council. The GST Council will consider the same and take steps having regard to the relevant factors and the situation prevalent in the country. The Government of India will also, thus, place the plea made by the petitioner [and the persons similarly circumstanced] that IGST on imported oxygen concentrators, which have been received as a gift for personal use, should be exempted, before the GST Council.

iii. The Government of India has provided considerable relief insofar as oxygen concentrators imported for personal use are concerned- BCD has

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

been reduced from 38.5% to nil while IGST has been scaled down from 28% to 12%. The reduction in the rate of IGST from 28% to 12% has been brought about for bringing about parity between oxygen concentrators imported for commercial purpose as against those imported for personal use. It has been a "conscious policy" of the State to impose a higher duty on goods imported for personal use and gifts. The duty incidence on the aforementioned goods imported for personal use has come down from 77% to 12%. It is felt that any person importing oxygen concentrator for personal use as also those finding resources to receive gifts would be in a position to afford payment IGST at the nominal rate of 12% as opposed to others who source it through commercial channels. Therefore, consciously, parity has been brought about between the oxygen concentrators imported for commercial purposes and those imported for personal use.

iv. The decision to impose a tax and/or the fixation of the rate at which tax is to be imposed cannot be subjected to judicial review. [See ***S. Kodar vs. State of Kerala***, (1974) 4 SCC 422[9], at paragraph 10].

v. The courts have refrained from exercising the power of judicial review over matters concerning economic issues. [See ***R.K. Garg vs. Union of India & Ors.***, (1981) 4 SCC 675[10] (paragraph 8 and 19); ***Hoechst Pharmaceuticals Ltd. & Ors. vs. State of Bihar & Ors.***, (1983) 4 SCC 45[11] (paragraph 82); ***Federation of Hotel*** Case; ***CIT vs. Vatika Township Pvt. Ltd.***, (2015) 1 SCC 1[12]; and ***Partington vs. Attorney General***, (1869) LR 4 HL 100[13]].

[9] [In short "***S.Kodar*** Case"]
[10] [In short "***R.K. Garg*** Case"]
[11] [In short "***Hoechst Pharmaceuticals*** Case"]
[12] [In short "***Vatika Township*** Case"]
[13] [In short "***Partington*** Case"]

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

vi. The imposition of IGST on imported oxygen concentrators, which are gifted, and are for personal use, does not violate Article 21 of the Constitution. If this argument of the petitioner is accepted, it will lead to absurd consequences in as much citizens will attempt to seek exemption from property tax, and food items since both housing and food items have been considered as a facet of the right to life as encapsulated in Article 21 of the Constitution. [See ***Shanti Star Builders vs. Narayan Khimlal Totame & Ors.***, (1990) 1 SCC 520[14]; and ***People's Union for Civil Liberties (PDS Matters) vs. Union of India & Ors.***, (2013) 2 SCC 688].

vii. The submission of the petitioner that the imposition of IGST on oxygen concentrators imported for personal use cannot be at the same rate as that which concerns the import of oxygen concentrators for commercial purposes – is misconceived, as the fixation of rate of duty is a legislative function, which is, often delegated to the executive. [See ***R.K. Garg*** Case; and ***Small Scale Industrial Manufactures Association (Regd.) vs. Union of India***, 2021 SCC OnLine SC 246[15]].

viii. It is pertinent to mention that the directions issued by the Kerala High Court, in the wake of the pandemic, via its judgement dated 19.03.2020, passed in W.P. (C) 8231/2020, titled ***P.D. Sunny vs Shiram Housing Finance Ltd.***[16] were stayed by the Supreme Court by an *ex parte* order dated 20.03.2020, in SLP (C) Diary No. 10669/2020. Furthermore, the Supreme Court in its order dated 26.10.2020, in W.P. (C) 725/2017 had granted liberty to the petitioner, in that case, to make a representation to the GST Council to seek exemption from levy of GST on products meant to assist differently-abled persons.

---

[14] [In short "***Shanti Star*** Case"]
[15] [In short "***Small Scale Industrial Manufactures Association*** Case"]
[16] [In short "***P.D. Sunny*** Case"]

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

ix. Given the aforesaid submissions, the writ petition should be dismissed, leaving it to the wisdom of the executive to take appropriate measures under the extant provisions of the law and prescribed procedures.

Analysis and Reasons: -

Some immutable ground rules to examine challenge laid to tax legislations:-

i. Tax and Equity are like two twins who are separated at birth having diametrically opposite attributes.

ii. Tax is an exaction. It is a facet of the State's sovereignty.

iii. Imposition of tax by the State is ordinarily sustained unless it falls foul of legislative competence and/or is violative of and/or ultra vires the Constitution.

iv. Taxing statutes are amenable to judicial review under Article 14 of the Constitution. [See ***Kunnathat Thatehunni Moopil Nair vs. State of Kerala and Another***, (1961) 3 SCR 77[17]; and ***Deputy Commissioner of Income Tax and Another vs. Pepsi Foods Ltd.***, 2021 SCC OnLine SC 283[18]]

---

[17] [In short "***Moopil Nair*** Case"]

[18] [In short "***Pepsi Foods*** Case"]

> "19. Instances of taxation statutes being struck down on substantive grounds which had alleged discrimination can be found in the 5-Judge decision of this Court in Kunnathat Thatehunni Moopil Nair v. State of Kerala (1961) 3 SCR 77, in which a uniform tax called "basic tax" levied under the provisions of the Travancore Cochin Land Tax Act, 1955 was held to be discriminatory as it treated unequals equally. The Court held:
>
> > "Ordinarily, a tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be taxed. In other words, the tax has reference to the income actually made, or which could have been made, with due diligence, and, therefore, is levied with due regard to the incidence of the taxation. Under the Act in question we shall take a hypothetical case of a number of persons owning and possessing the same area of land. One makes nothing out of the land, because it is arid desert. The second one does not make any income, but could raise some crop after a disproportionately large investment of labour and capital. A third one, in due course of husbandry, is making the land yield just enough to pay for the incidental expenses and

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

v. The State is entitled to tax one class of persons as against the other as long as the classification made is not arbitrary and artificial or evasive. There must be a reasonable, natural, substantial difference in the nature of class(es) on which the law operates. Thus, differential treatment does not ipso facto constitute violation of Article 14. The charge of denial of equal protection can get sustained only when there is no reasonable basis found for differentiation. [See ***Ameerunnissa Begum vs. Mahboob Begum***, 1953 SCR 404[19] at 414 and ***Ashoka Smokeless Coal India (P) Ltd. vs. Union of India***, (2007) 2 SCC 640[20]]

vi. While differential treatment by forming different classes is permissible; what is not permissible is the distinctions made that are unjust and unreasonable when correlated with the object sought to be achieved by the State.

vii. The State, in order to tax something, does not have to tax everything. It is allowed the leeway to pick and choose.

viii. Tax being one, amongst an array of instruments available to the State, to further its economic policy, it requires a "play in the joints".

---

labour charges besides land tax or revenue. The fourth is making large profits, because the land is very fertile and capable of yielding good crops. Under the Act, it is manifest that the fourth category, in our illustration, would easily be able to bear the burden of the tax. The third one may be able to bear the tax. The first and the second one will have to pay from their own pockets, if they could afford the tax. If they cannot afford the tax, the property is liable to be sold, in due process of law, for realisation of the public demand. It is clear, therefore, that inequality is writ large on the Act and is inherent in the very provisions of the taxing section. It is also clear that there is no attempt at classification in the provisions of the Act. Hence, no more need be said as to what could have been the basis for a valid classification. It is one of those cases where the lack of classification creates inequality. It is, therefore, clearly hit by the prohibition to deny equality before the law contained in Article 14 of the Constitution."

[at page 91-92]"

[19] [In short "***Amerunnissa Begum*** Case"]
[20] [In short "***Ashoka Smokeless*** Case"]

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

ix. Although fixation of the rate of tax falls within the domain of the legislature, it can be interdicted, if it loses its character and attains a confiscatory hue.

Levy of tax in extraordinary times: -

10. Instances of extraordinary times are, to name a few, war, famine, epidemic, pandemic, floods, and other acts of god/nature.

10.1. Tax, which is an exaction, is ordinarily sustained, because the Courts presume [unless established otherwise] that it serves, inter alia, a higher purpose such as redistribution of wealth, providing a level playing field to local enterprises/manufacturers, generation of revenue for funding projects and causes, which are undertaken in public weal and for disincentivizing activities which degrade the environment and health of the public at large. The examples of the last two categories are environmental tax and tax on tobacco products.

10.2. Thus, the policymakers, while deciding on the imposition of a tax or even determining rates at which tax should be imposed, keep these, amongst other factors, in mind. The policymakers often give exemptions or rebates to incentivize economic activity or for securing better health and hygiene for its citizens. It is also not unknown that at times the State, to strengthen its efforts, in dealing with calamities caused by the aforesaid events, enhances tax rates, to garner funds. Usually, this happens when the State is short of resources. Therefore, citizens are called upon to lend their shoulder to the problem. The State has, in the instant matter, set up no such case, in its counter-affidavit, filed before us. As a matter of fact, in the course of the hearing, we were told that GST collection has remained at a figure in excess of Rs. 1 lakh crores since October 2020, and in April 2021 alone, Rs. 1.41 lakh crores was collected on this account. We can take judicial notice of the fact that in the budget of 2021-

2022, the State has allocated nearly Rs. 74602 crores[21] towards health initiatives.

11. Thus, in a nutshell, the issues which come to fore, in this matter, are:

i. Whether the State's action, of imposing IGST on oxygen concentrators, which were directly imported by individuals, *albeit* free of cost, without the aid of a canalising agency runs afoul of Article 14 of the Constitution?

ii. Whether Article 21 of the Constitution, which includes the right to health and affordable treatment, would require the State to demonstrate that levy and collection of the impugned tax in times of pandemic, war, famine, floods, and such like conditions would subserve public interest?

iii. Whether Article 21 of the Constitution, imposes on the State, a positive obligation to provide adequate resources for protecting and preserving the health and well-being of persons residing within its jurisdiction?

iv. What relief, if any, can be granted to the petitioner?

Issue No. (i): -

12. Insofar as the first issue is concerned, what is required to be taken judicial notice of is that LMO is in short supply not only in Delhi but in all parts of the country which has resulted in people scrambling for oxygen cylinders, oxygen concentrators, and in cases where a person has suffered severe infection, for hospital beds, so that the concerned person could be put on a ventilator. The situation became particularly critical, in and about 07.05.2021. The official data, provided by the Ministry of Health and Family Welfare, Government of India [in short "MoHFW"], for that date, revealed that 4,14,188 persons per day were

[21] See https://www.indiabudget.gov.in/doc/Budget_at_Glance/budget_at_a_glance.pdf; last accessed on 20.05.2021 at 1400 hours.

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

detected as having been afflicted with coronavirus. The per-day death rate, on that date, as reported, was 3915.

12.1. The absence of adequate medical resources forced persons infected with coronavirus, their relatives and friends, to fend for themselves and thus, find necessary means for survival. The fact that enough beds were not available in hospitals which, understandably, were required for critically patients, forced other patients to look for sources for supply which provide a viable alternative to LMO. Oxygen concentrators appeared to be that alternative. It is in this context that one would have to take judicial notice of the fact that since the production and supply of the oxygen concentrators did not commensurate with its demand, people looked for resources beyond our borders for supply of oxygen concentrators.

12.2. The petitioner, who is an 85-year-old man [and has a spouse who is a cancer survivor], was put in a similar predicament once he tested positive for coronavirus on 21.04.2021.

12.3. The State recognizing that if it was to stave off the pressure on public and private hospitals - it would have to take steps to provide necessary medical equipment to persons suffering from mild and moderate symptoms of coronavirus, so that they could be managed at home.

12.4. The State took a series of ameliorative steps.

12.5. One such step that the State took involved issuance of the notification bearing no. 28/2021-Customs, dated 24.04.2021, in the exercise of its powers under Section 25(1)[22] of the Customs Act and Section 141 of the Finance Act,

[22] SECTION 25. Power to grant exemption from duty. - (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

2020. Via this notification, the State exempted wholly, the imposition of BCD, and the health cess on several goods including oxygen concentrators.

12.6. The State followed this with a notification bearing no. 4/2015-2020, dated 30.04.2021, issued through DGFT, whereby, it proceeded to amend paragraph 2.25 of the FTP which, *inter alia*, enabled the import of certain goods that were received as gifts. These goods being, "***life-saving drugs/ medicines/ oxygen concentrators and Rakhi (but not gifts related to Rakhi)***".

12.7. Pertinently, the exemption *qua* oxygen concentrators that are received as gifts for personal use is presently available only till 31.07.2021 under FTP.

12.8. This was followed by yet another notification bearing no. 30/2021-Customs, dated 01.05.2021, issued by the State, in the exercise of its powers under Section 25(1) of the Customs Act, whereby, the State exempted oxygen concentrators imported into India for personal use, from the imposition of IGST at a rate in excess of 12% as leviable in accordance with the provisions of Section 3(7) of the CTA read with Section 5 of the IGST Act.

12.9. On the day, when the instant petition was served on the Standing Counsel for the State, i.e., 03.052021, yet another notification bearing no. 4/2021-Customs, dated 03.05.2021, was issued by the State; this time, by exercising powers under Section 25(2)[23] of the Customs Act. Through this notification, the State, *inter alia,* exempted the imposition of IGST on oxygen concentrators subject to the conditions provided in the annexure appended to the said

---

fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

[23] SECTION 25. Power to grant exemption from duty. (2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

notification. The conditions prescribed; which applied to the import of oxygen concentrators as well, read as follows.

> "1. The said goods are imported free of cost for the purpose of Covid relief by a State Government or, any entity, relief agency or statutory body, authorised in this regard by any State Government.
>
> 2. The said goods are received from abroad for free distribution in India for the purpose of Covid relief.
>
> 3. Before clearance of the goods, the importer produces to the Deputy or Assistant Commissioner of Customs, as the case may be, a certificate from a nodal authority, appointed by a State Government, that the imported goods are meant for free distribution for Covid relief, by the State Government, or the entity, relief agency or statutory body, as specified in such certificate.
>
> 4. The importer produces before the Deputy or Assistant Commissioner of Customs, as the case may be, at the port of import within a period of six months from the date of importation, or within such extended period not exceeding nine months from the said date as that Deputy or Assistant Commissioner of Customs may allow, a statement containing details of goods distributed free of cost duly certified by the said nodal authority of the State Government."

13. The conditions prescribed in the notification dated 03.05.2021, prevent the petitioner from claiming exemption from imposition of IGST, although, the oxygen concentrator imported by him is gifted [i.e., has been received free of cost] and is for personal use. Condition no. 1, which exempts from the imposition of IGST only those oxygen concentrators that are imported, for COVID relief through a canalizing agency creates, to our minds, a manifestly arbitrary and unreasonable distinction between two identically circumstanced users depending on how the oxygen concentrator has been imported. Imposition of IGST is, thus, as per notification dated 03.05.2021, completely waived, i.e., exempted, if the oxygen concentrator is imported through a canalizing agency.

14. The exclusion of individuals, such as the petitioner, from the benefits of the 03.05.2021 notification only because they chose to receive the oxygen concentrators as a gift, *albeit* directly, without going through a canalizing agency is, in our opinion, violative of Article 14 of the Constitution. While it is

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

permissible for the State to identify a class of persons, to whom tax exemption would be extended, it is not permissible for the State to exclude a set of persons who would ordinarily fall within the exempted class by creating an artificial, unreasonable, and substantially unsustainable distinction.

14.1. There is, in our opinion, no justification whatsoever in excluding individuals from the purview of notification dated 03.05.2021 only on the ground that they received oxygen concentrators directly as gifts from their friends and/or relatives located outside the country. It is the petitioner's case that the oxygen concentrator was shipped to him by his nephew who is located in New York, United States of America.

14.2. What makes the discrimination egregious is the fact that when notification dated 24.04.2021 was issued exempting imposition of BCD on oxygen concentrators; there was recognition by the State that "public interest" required it to take such a step. As noted above, this notification was issued under Section 25(1) of the Customs Act. The said provision enables the State to exercise its powers of granting exemption from customs duty in the "public interest". Likewise, the notification dated 03.05.2021, which was issued by the State, in the exercise of powers under Section 25(2) of the Customs Act, notes that the said step is taken on account of "exceptional circumstances prevailing due to the COVID-19 pandemic …". Given the fact that both notifications were issued in the wake of the pandemic, raging across the country, it makes little sense as to why individuals such as petitioner, are sought to be excluded from the beneficence which is bestowed on persons who fall within the sway of the notification dated 03.05.2021.

14.3. The State's stand that a substantial reduction in duties and taxes has been brought about with the issuance of the notification dated 24.04.2021 and 01.05.2021 has no relevance to the matter in issue. The petitioner, to begin with,

assailed the notification dated 01.05.2021, on the ground that the import of oxygen concentrator by him, which was a gift, *albeit* for personal use, could not be placed at par with the import of oxygen concentrators for commercial use; for the purposes of taking a decision as to the rate at which GST should be imposed on him. The discrimination, according to the petitioner, got exacerbated with the issuance of the notification dated 03.05.2021, which wholly exempted the imposition of IGST on oxygen concentrators that were imported through a canalising agency.

14.4. Therefore, what is, to be borne in mind, is not the benefits the State has granted up until now. What is instead, required to be judicially reviewed is the action of the State, in not treating, even-handedly, persons, who ordinarily should fall in the same class users. The distinction, drawn, as noted above, is manifestly arbitrary, unreasonable, unfair and wholly unsustainable.

Issue No. (ii) and (iii): -

15. While there is recognition of the fact that right to health, amongst others, is a second-generation right that flows from the right to life as encapsulated in Article 21 of the Constitution, the right requires to be tempered as the State does not have inexhaustible resources. This principle, enunciated by the Courts, in our opinion, acquires a different dimension and hue in times of an overwhelming calamity (whether natural or man-made) which affects a whole host of persons, debilitating their ability to contribute to the State's resources in the form of duties, taxes, cess and rates. As indicated by us, right at the outset, tax is an exaction that does not, ordinarily, recognize equity. It must, however, in our view, bend to the will of equity in times of calamity which causes wholesale degradation in the human ability to contribute to the coffers of the State.

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

15.1. This, in our view, would humanize the law and give it a societal perspective. Exaction by the State, in the form of tax, in good and normal times, is, ordinarily, sustained by the Courts as they defer to the legislative wisdom- that the imposition of the tax is for the greater good of the public; unless proved to the contrary. However, in times of peril, the Courts must examine the stand taken by the State to defend an action instituted to lay challenge to a tax - on anvil of Article 21 of the Constitution; as it is not the form but the impact of the tax which will determine its tenability.

15.2. The Courts and the State have to adopt a humanistic approach, which, in our view, is a facet of Article 21 of the Constitution. The failure to do so both, by the Court and by the State, would lead to an unbridgeable chasm between law and justice, resulting in, disruption of social order.

15.3. Therefore, if the State expected its action to be sustained, in the instant case, it ought to have demonstrated, that the revenue, it would possibly garner, as IGST, in respect of oxygen concentrators which are imported in the circumstances, in which, the petitioner is put, would be appreciably more than the cost incurred to administer the collection of IGST on such transactions. These details need not have borne mathematical precision; a broad-brush approach would have sufficed-so that we could be persuaded to hold that denying relief to the petitioner and persons similarly circumstanced would be in public weal. The counter-affidavit filed by the State gives us no clue whatsoever concerning this vital issue.

15.4. We are, therefore, also of the view, that the petitioner has demonstrated, by adverting to his circumstances, that IGST involves “distinct and noticeable burdensomeness”, which is, directly attributable to its imposition. The State, in our opinion, could have discharged its onus, by adverting to such facts and figures, which would have persuaded us to hold that levy and collection of

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

IGST, on individuals, who are similarly circumstanced as the petitioner, would enure to the good of the public at large in the battle against coronavirus.

15.5. In this context, it must be said that there is a positive obligation on the State to take ameliorative measures so that adequate resources are available to protect and preserve the health of persons residing within its jurisdiction. In this context, the following observations made by the Supreme Court in ***Navtej Singh Johar*** Case, being apposite, are extracted hereafter.

> "495. The jurisprudence of this Court, in recognising the right to health and access to medical care, demonstrates the crucial distinction between negative and positive obligations. Article 21 does not impose upon the State only negative obligations not to act in such a way as to interfere with the right to health. This Court also has the power to impose positive obligations upon the State to take measures to provide adequate resources or access to treatment facilities to secure effective enjoyment of the right to health. [Jayna Kothari, "Social Rights and the Indian Constitution", Law, Social Justice and Global Development Journal (2004).]"

15.6. It is important to remind ourselves that no respectable man would want to turn himself into a "charity case". It is trite to state that if one aspires for a civilized society, then those who are obligated by law should pay their taxes. Likewise, the State should relent, or at least lessen the burden of exactions which take the form of taxes, duties, rates and cess, in the very least, in times of war, famine, floods, epidemics and pandemics since such an approach allows a person to live a life of dignity which is, a facet of Article 21 of the Constitution.

15.7. The State could blunt the force of exaction by adopting one or more measures such as delaying its collections, granting rebates, or, as in this case, permitting, import of vital medical equipment, drugs, medicines, for a defined period, till such time, normalcy is restored. As alluded to above, the notification dated 24.04.2021, allows import of oxygen concentrators at nil rate of BCD while notification dated 30.04.2021, *inter alia*, allows import of life-saving drugs/oxygen concentrators which are received as gifts. Both these notifications, for the moment, extend benefits and/or grant leeway only till

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

31.07.2021. In the same vein, the notification dated 03.05.2021 exempts imposition of IGST on oxygen concentrators which are imported free of cost, *albeit*, via canalizing agency up until 30.06.2021. The State could have, if it intended to treat, persons who are similarly circumstanced as the petitioner, at par with those who fall within the sway of the notification dated 03.05.2021- extended the exemption to them as well and withdrawn the same once normalcy was restored.

15.8. To begin with, the period of exemption could have been so configured, that the date of expiration of exemption, was common in the aforementioned notifications. This is essential as these notifications are interlinked.

16. Before we discuss the relief that may be accorded to the petitioner, it would be important to deal with an argument advanced on behalf of the State that the issue raised in the writ petition should be best dealt with by the GST Council. In this context, reference was made by Mr. Hossain to Section 6(1) of the IGST Act.

16.1. A bare perusal of the IGST Act would show that the Government can exempt, generally, either absolutely or subject to such conditions as it may specify, *inter alia*, goods or services or both of any specified description from whole or any part of tax leviable thereof with effect from such date as it may indicate provided that it is satisfied that it is necessary in the public interest to do so based on a recommendation received from the GST Council in that behalf.

16.2. The said provision does not bind the Government to issue an exemption notification even if a recommendation in that regard is made by the GST Council. Furthermore, a perusal of the notification dated 01.05.2021 and 03.05.2021, would show that the State has exercised its powers for grant of exemption by relying upon Section 25(1) and 25(2) of the Customs Act in respect of so much of IGST that was leviable under Section 3(7) of the CTA

Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

read with Section 5 of the IGST Act. There is no reference in these two notifications to Section 6(1) of the IGST Act. Therefore, this argument advanced on behalf of the State cannot be accepted, as, in the past, it has issued notifications by relying upon the powers conferred upon it under Section 25 of the Customs Act.

16.3. Besides this, there is weight in Mr. Datar's argument that the power to grant exemption from IGST is relatable to Section 3(12) of the CTA.

Issue No. (iv) [Relief]: -

17. This takes us to a critical point in the matter, as to the manner in which, relief can be given to the petitioner. On behalf of the State, the argument advanced is that no mandamus can be issued by the Court to grant exemption or waiver from tax. In this context, it is also contended, that aspects concerning grant of exemption or the rate at which the tax is to be imposed lie completely within the exclusive domain of the legislature or its delegatee. The Courts, it is submitted, on these issues have deferred to the view of the executive, as these are matters concerning complex policy issues.

17.1. One cannot quibble with the submissions made hereinabove on behalf of the State, as these are substance, in the nature of principles enunciated, time and again by the Courts. The exceptions to these principles have already been alluded to. To reiterate very briefly, a taxing statute can be tested on the anvil of Article 14, *inter alia*, on the ground that the justification for classification proffered by the State is artificial and unreasonable. [See ***N. Venugopala Ravi Varma Rajah vs. Union of India and Another***, 1969 (1) SCC 681[24]]

[24] [In short "***N. Venugopala*** Case"]

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

17.2. Having found so, in our view, a declaratory relief can be accorded, to the effect, that imposition of IGST on oxygen concentrators, imported as gifts, i.e., free of cost, for personal use, is violative of Article 14 of the Constitution on the ground that an artificial, unfair and unreasonable distinction has been drawn between persons, who are similarly circumstanced as the petitioner and those who import oxygen concentrators through a canalizing agency.

17.3. The logical sequitur of this would be that persons who are similarly circumstanced as the petitioner, i.e., those who obtain imported oxygen concentrators as gifts, for personal use, cannot also be equated with those who import oxygen concentrators for commercial use. Therefore, notification bearing no. 30/2021-Customs, dated 01.05.2021, will also have to be quashed.

17.4. That being said, it is, perhaps, rightly argued, on behalf of the State, that the Court cannot issue a writ of mandamus directing the State to issue an exemption notification in favour of the petitioner or persons similarly circumstanced. The power to issue an exemption notification under Section 25 of the Customs Act is vested in the State. Having said so, the Court, to our minds, is not prevented from judicially reviewing an exemption notification once it is issued by the State. The State has issued the notification, dated 03.05.2021, granting exemption from imposition of IGST on import of oxygen concentrators that are routed through a canalising agency. This notification can and, in our view, must be saved, as it subserves a greater good, although partially, by interpreting and thus holding that entry no. 607A, Tariff Item no. 9804 of the General Exemption No. 190, issued under Section 25(1) of the Customs Act, which stipulates, NIL rate of IGST for "***lifesaving drugs/medicines for personal use***", supplied free of cost by the overseas supplier - would include medical equipment such as an oxygen concentrator being a "substance" used in the treatment, mitigation, prevention of infection

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

caused by the coronavirus. The fact that oxygen concentrators are, in present times, placed at par with life-saving drugs and medicines, is evident upon a perusal of the notification dated 30.04.2021 [to which we have made a reference hereinabove] whereby paragraph 2.25 of the FTP was revised[25].

17.5. Mr. Datar has rightly argued, in this context, that the definition of drugs given in Section 3(b)[26] of the Drugs and Cosmetics Act would include medical equipment such as an oxygen concentrator which is used *inter alia* in the treatment, mitigation, and/or prevention of the disease [i.e. coronavirus]. The expression substance found in Section 3(b) of the Drugs and Cosmetics Act would bring within its ambit, oxygen concentrator. We are fortified in this view by the observations of the Supreme Court in ***State of Andhra Pradesh vs. Linde***

---

[25] "Revised Para 2.25 of FTP, 2015-2020
Import of goods, including those purchased from e-commerce portals, through post or courier, where Customs clearance is sought as gifts, is prohibited except for life saving drugs / medicines/ **oxygen concentrators** and Rakhi (but not gifts related to Rakhi).
The exemption for oxygen concentrators is allowed only for a period till 31 July 2021 for personal use.
Explanation:
1 .Rakhi (but not gifts related to Rakhi) will be covered under Section 25(6) of Customs Act. 1962 that reads " no duty shall be collected if the amount of duty leviable is equal to or less than Rs.100/-"
2. Import of goods as gifts with payment of full applicable duties is allowed"

[26] 3. **Definitions**. —In this Act, unless there is anything repugnant in the subject or context, —

xxx **xxx** **xxx**

[(b) "drug" includes—
[(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;]
(ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of 10[vermin] or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;]
[(iii) all substances intended for use as components of a drug including empty gelatin capsules; and
(iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board;]

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

India Limited, (2020) 16 SCC 335[27]. Besides this, it requires to be noticed that in the wake of coronavirus, raging through the country, the State has issued several notifications, such as notifications dated 20.04.2021[28], 24.04.2021, 30.04.2021, 01.05.2021, and 03.05.2021 as also the press release dated

---

[27] [In short "**Linde** Case"]"

> "15. The learned counsel for the appellants urged that the phrase "intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder" in Section 3(b)(i) is only applicable to "substances" and not "medicines". In Ishwar Singh Bindra v. State of U.P. [Ishwar Singh Bindra v. State of U.P., (1969) 1 SCR 219 : AIR 1968 SC 1450 : 1969 Cri LJ 19] the central question before a three-Judge Bench of this Court was the interpretation of Section 3(b)(i) of the 1940 Act. This Court held: (AIR p. 1454, para 11)
>
> > "11. Now if the expression "substances" is to be taken to mean something other than "medicine" as has been held in our previous decision it becomes difficult to understand how the word "and" as used in the definition of drug in Section 3(b)(i) between "medicines" and "substances" could have been intended to have been used conjunctively. It would be much more appropriate in the context to read it disjunctively. In Stroud's Judicial Dictionary, 3rd Edn. it is stated at p. 135 that "and" has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of or. Sometimes, however, even in such a connection, it is, by force of a contexts, read as "or". Similarly, in Maxwell on Interpretation of Statutes, 11th Edn., it has been accepted that "to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions "or" and "and" one for the other".
>
> This Court held that as the word "substances" in the clause is used to mean something other than "medicine", it was not the intention of the legislature that the word "and" was meant to be read conjunctively. Accordingly, this Court held that the two parts of the definitional clause must be read disjunctively.
>
> 16. In the above view, Section 3(b)(i) stipulates that medicines or substances used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings, or animals shall be included within the ambit of the definition. It is significant to note the use of the phrase "for or in" in the definitional clause. Section 3(b)(i) includes both medicines or substances used for the diagnosis, treatment, mitigation or prevention of any disease or disorder or in the diagnosis, treatment, mitigation or prevention of any disease or disorder. Where the former highlights the direct use of the product in question in diagnosing, treating, mitigating or preventing a disease or disorder, the latter highlights its instrumental use as a facilitative agent in the diagnosis, treatment, mitigation or prevention of any disease or disorder. The relevant enquiry for this Court is whether Medical Oxygen IP and Nitrous Oxide IP are used in or for any of the purposes specified therein."

[28] Notification o. 27/2021-Customs, issued by the State.

Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

03.05.2021 – which only buttresses the view taken by us that oxygen concentrators are to be treated as drugs in terms of General Exemption Notification No. 190. This approach, in our opinion, would serve two purposes.

i. First, it would preserve the notification dated 03.05.2021.

ii. Second, it would not require the State to issue a separate notification for grant of exemption to individuals who are similarly circumstanced as the petitioner.

17.6. This brings us to the other aspect, as to whether condition no. 104, which is appended to entry no. 607A, of the General Exemption No. 190 should apply in this case. To our minds, given the fact that each day counts for the person who requires an oxygen concentrator, the cumbersome certification procedure, provided under condition no. 104 is both impractical and inefficacious. We are also of the view that a plain reading of the said condition would show, certification is required, in a situation, where it could be a matter of debate as to whether the imported drug or medicine is a life-saving drug. An oxygen concentrator is, on the face of it, concededly, a piece of medical equipment that is required for treatment, mitigation, and/or prevention of the disease [i.e. coronavirus] or disorder in human beings.

17.7. Therefore, the compliance of clause (a) of condition no. 104 appended to entry no. 607A of the General Exemption No. 190, should suffice, in our opinion. Thus, it would be sufficient if the persons, who are similarly circumstanced as the petitioner, furnish a letter of undertaking, to the officer designated by the State which would, *inter alia*, state that the oxygen concentrator would not be put to commercial use. Till such time an officer is designated by the State, it would be in order, if the importer were to address the

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

letter of undertaking to the Joint Secretary, Customs and/or his/her nominee and handover the same to the officer detailed at the customs barrier.

18. Before we conclude, we may note that one cannot quibble with the principles enunciated in the judgements cited, on behalf of the State. We have adverted to the principles embedded in those judgments, insofar as they are applicable to an action laying challenge to a tax legislation and/or the delegated legislation framed thereunder. However, what set's the present case apart, is, the context and the unique circumstances in which the challenge has arisen.

18.1. The order, dated 20.03.2020, passed in SLP (C) Diary No. 10669/2020, shows the importance placed by the Supreme Court on having the difficulties faced by the citizens, on account of the pandemic, being addressed. We are not informed as to whether any final judgement was passed by the Supreme Court qua the said matter. Likewise, the Supreme Court, in the judgement rendered in ***Small Scale Industrial Manufactures Association*** Case, having regard to the fact that the challenge raised before it, pertained to a policy issue, granted limited relief [as is evident from the observations made in paragraph 166[29]] which has also been our endeavour in the present case.

Conclusion: -

19. Accordingly, we hold that imposition of IGST on oxygen concentrators which are imported by individuals and are received by them as gifts [i.e. free of cost] for personal use, is unconstitutional.

---

[29] "**166.** However, it is directed that there shall not be any charge of interest on interest/compound interest/penal interest for the period during the moratorium and any amount already recovered under the same head, namely, interest on interest/penal interest/compound interest shall be refunded to the concerned borrowers and to be given credit/adjusted in the next instalment of the loan account. All these petitions are partly allowed to the aforesaid extent only and as observed for the reliefs, the petitions are dismissed. Interim relief granted earlier not to declare the accounts of respective borrowers as NPA stands vacated. However, there shall be no order as to costs."

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24

19.1. Given the declaration made hereinabove, notification no. 30/2021 dated 01.05.2021 is quashed.

19.2. To obviate misuse of the oxygen concentrators, by the petitioner and/or persons similarly circumstanced, she/he/they would have to furnish a letter of undertaking to the officer designated by the State that the same would not be put to commercial use. The petitioner would thus submit a letter of undertaking with seven days of the State intimating/notifying the particulars of the officer designated for this purpose. Till such time an officer is designated by the State, the direction set forth in paragraph 17.7 above will operate.

20. The writ petition is disposed of in the aforesaid terms. The pending application shall also stand closed.

21. The Registry is directed to release the money, deposited with it, by the petitioner, along with interest, if any accrued, at the earliest.

22. Before we part with the judgement, we must place on record our appreciation for the invaluable assistance rendered by Mr. Arvind Datar, Mr. Zoheb Hossain, Mr. Sudhir Nandrajog as also Mr. Siddharth Bambha. Their assistance helped us to traverse over what was, somewhat, new and uneven terrain.

RAJIV SHAKDHER, J.

TALWANT SINGH, J.

MAY 21, 2021 *Click here to check the corrigendum, if any*

Signature Not Verified
Digitally Signed
By:VIPIN KUMAR RAI
Signing Date:21.05.2021
20:12:24