



भारत सरकार

वित्त मंत्रालय/ राजस्व विभाग

केंद्रीय अप्रत्यक्ष कर एवं सीमाशुल्क बोर्ड – मुंबई अंचल-I, भारतीय सीमाशुल्क

आयुक्त सीमाशुल्क (आयात-I) का कार्यालय

द्वितीय मंजिल, नवीन सीमा शुल्क भवन, शूरजी वल्लभदास मार्ग, बेलार्ड एस्टेट,
मुंबई-400001.

दूरध्वनि-22757401 फैक्स-22757402

ई-मेल: adjn-commr-imp1nch@gov.in

फा. सं. : F. No. S/26-MISC-31(XVIII)98-Gr.V(B)

के द्वारा जारी किया गया : विवेक पाण्डेय
आयुक्त सीमाशुल्क (आयात-I)

आदेश दिनांक: 05.01.2024
जारी दिनांक: 05.01.2024

सी.ए.ओ. क्रमांक : 61/2023-24/CAC/CC(IMPORT-I)/VP/ADJ(IMP-I)
DIN No. - 20240177000000999CBC

मूल आदेश

- 1- यह प्रति उस व्यक्ति के प्रयोग के लिए निः शुल्क है, जिसके लिए यह पारित किया है।
- 2- इस आदेश के विरुद्ध क्षेत्रीय पीठ, सीमाशुल्क, उत्पाद एवं सेवाकर अपीलीय अधिकरण, जय सेन्टर, चौथा एवं पांचवा तल, 34 पी. डी. मेलो रोड, पूना स्ट्रीट, मस्जिद बन्दर (पूर्व) मुंबई 400 009 को अपील की जा सकती है।
- 3- सीमाशुल्क (अपील) नियमों 1982 के नियम 6 के आधार पर अपील फॉर्म सी ए-3 में जैसा कि उक्त नियम में संलग्न है के आधार पर की जानी चाहिए। अपील चार प्रतियों में की जानी चाहिए एवं 90 दिनों के अन्दर दायर की जानी चाहिए एवं उसके साथ उस आदेश की चार प्रतियां संलग्न होनी चाहिए जिसके विरुद्ध अपील की गई हो (इन प्रतियों में कम से कम एक प्रति अभिप्रमाणित प्रति होनी चाहिए)। अपील के साथ सीमाशुल्क अधिनियम 1962 की धारा 129A की उपधारा (6) के अन्तर्गत लागू रु.1,000/-, रु.5,000/- अथवा रु.10,000/- का, क्रास किया हुआ बैंक ड्रॉफ्ट अधिकरण की पीठ के सहायक रजिस्ट्रार के नाम जारी किया होना चाहिए। यह बैंक ड्राफ्ट ऐसे राष्ट्रीय बैंक का होना चाहिए जिसकी शाखा उस जगह स्थित हो जहां अधिकरण पीठ स्थित है।
- 4- अपील अधिकरण पीठ के सहायक रजिस्ट्रार अथवा इस संबंध में उनके द्वारा अधिकृत किसी भी अधिकारी के कार्यालय में प्रस्तुत की जानी चाहिए अथवा सहायक रजिस्ट्रार या ऐसे अधिकारी के नाम पंजीकृत डाक द्वारा भेजी जानी चाहिए।
- 5- जो व्यक्ति इस आदेश के विरुद्ध अपील करना चाहता है वह इस अपील के लंबित रहने तक दंडराशि या अपेक्षित शुल्क की साढ़े सात प्रतिशत धनराशि को जमा करे और ऐसे भुगतान का साक्ष्य प्रस्तुत करे। ऐसा न करने पर यह अपील सीमा शुल्क अधिनियम, 1962 की धारा 129E के प्रावधानों के अनुपालन न करने के आधार पर निरस्त मानी जाएगी।



GOVERNMENT OF INDIA
MINISTRY OF FINANCE/ DEPARTMENT OF REVENUE
CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS, INDIAN CUSTOMS - MUMBAI ZONE - I
OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORT-I)
2nd FLOOR, NEW CUSTOM HOUSE, SHOORJI VALLABHDAS ROAD, BALLARD ESTATE,
MUMBAI - 400001.

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F. No. : F. No. S/26-MISC-31(XVIII)98-Gr.V(B)

Passed by: VIVEK PANDEY
COMMISSIONER OF CUSTOMS (IMPORT-I)

Date of Order: 05.01.2024
Date of Issue: 05.01.2024

C.A.O. No. : 61/2023-24/CAC/CC(IMPORT-I)/VP/ADJ(IMP-I)
DIN No. - 20240177000000999CBC

ORDER-IN-ORIGINAL

1. This copy is granted free of charge for the use of the person to whom it is issued.
2. An appeal against this order lies to the Regional Bench, Customs, Excise and Service Tax Appellate Tribunal, Jai Centre, 4th & 5th Floor, 34 P. D'Mello Road, Poona Street Masjid Bunder (East), Mumbai 400 009.
3. The appeal is required to be filed as provided in Rule 6 of the Customs (Appeals) Rules, 1982 in form C.A.3 appended to said rules. The appeal should be in quadruplicate and needs to be filed within 90 days and shall be accompanied by Four copies of the order appealed against (at least one of which should be certified copy). A crossed bank draft drawn in favour of the Asstt. Registrar of the Bench of the Tribunal on a branch of any nationalized bank located at a place where the bench is situated for Rs. 1,000/-, Rs. 5,000/- or Rs. 10,000/- as applicable under Sub Section (6) of the Section 129A of the Customs Act, 1962.
4. The appeal shall be presented in person to the Asstt. Registrar of the bench or an Officer authorized in this behalf by him or sent by registered post addressed to the Asstt. Registrar or such Officer.
5. Any person desirous of appealing against this decision or order shall pending the appeal deposit seven and a half per cent of the duty demanded or the penalty levied therein and produce proof of such payment along with the appeal failing which the appeal is liable to be rejected for non-compliance with the provisions of Section 129E of the Customs Act, 1962.

Subject : Adjudication of **Show Cause Notice issued vide F. No. S/26-Misc-31 (XXViii)/98 Gr. VB dated 29.03.2004¹** under section 124 of the **Customs Act, 1962²** against M/s. M. P. Cancer Chikitsa Evam Seva Samiti for recovery of customs duty of Rs. 1,13,18,954/- with interest subsequent to withdrawal of **Customs Duty Exemption Certificate³** and rejection of request for issuance of installation certificate by the Directorate General of Health Service vide Order No. C-18018/3/2002-MG dated 27.11.2004.

Brief Facts of the Case

M/s. **M. P. Cancer Chikitsa Evam Seva Samiti⁴**, Bhopal had imported a medical equipment viz, **Cobalt-60 Teletherapy Source for Theretron 780c Unit⁵** valued at Rs. 1,00,38,983/- vide Bill of Entry No. 06161 dated 17.01.1994 and claimed duty benefit as provided under the **Notification No. 64/88 dated 01.03.1988⁶**. The goods were allowed clearance after extending the benefit of the aforesaid notification as the importer at the time of clearance had furnished a Customs Duty Exemption Certificate No. Z-37023/2/93-MG dated 10.01.1994 issued by the **Directorate General of Health Services⁷** stating the hospital falls under category 4 of the Table of the notification. No Objection Certificate for import of the above medical equipment was also issued by M/s. Bhabha Atomic Research Centre, Mumbai.

2. The aforesaid Notification No. 64/88 dated 01.03.1988 had also inter-alia laid down certain conditions under para 2 of the Table annexed to the said notification which is reproduced below:

“ 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 atleast 40% 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 percent of all the Hospitals Beds reserved for such Patients; and

¹Also referred to as SCN

² Also referred to the Act

³ Also referred to CDEC

⁴ Also referred to the importer/ noticee

⁵ Also referred to the goods /The Cobalt-60 machine

⁶ the said notification

⁷ Also referred to DGHS



(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) & (b)."

3. Aforesaid conditions under para-2 (a), (b) & (c), as observed by Hon'ble Supreme Court in case of **Mediwell Hospital and Health Care Pvt Ltd**⁸, must be construed to cast continuing obligation on the part of all those who have obtained Certificate from the Appropriate Authority and on the basis of that, to have imported equipment without payment of customs duty to give free treatment at least to 40% of the outdoor patients as well as would give free treatment to all the indoor patients belonging to the families with an income of less than Rs. 500/- per month.

Hon'ble Supreme Court in the aforesaid judgment also held that the competent authority, therefore, should continue to be vigilant and check whether, that undertakings given by the applicants are being duly complied with after getting the benefits of the exemption notification and importing the equipment without payment of customs duty and it 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 payment in respect of the equipments which have been imported without payment of customs duty.

4. Further, it was noticed that M/s. M. P. Cancer Chikitsa Evam Seva Samiti, has its **Jawaharlal Nehru Cancer Hospital and Research Centre**⁹ at Bhopal. The hospital was established in 1995. The imported equipment viz. Cobalt Teletherapy Unit was stated to be installed at the Centre/Hospital in the year 1994 prior to its inauguration on 11.01.1995.

5. When the equipment had been imported, the hospital was in the process of being established, as such this hospital fell under category 4 of the Table annexed to the Notification No. 64/88 dated 01.03.88. Accordingly, the hospital was in a position to start functioning within a period of two years as per clause 4 (iii) of the Table annexed to the said notification. Further, the clearance was allowed subject to submission of installation certificate, aforesaid to clause 4 (b) of the Table annexed to the said notification, to the satisfaction of the Assistant Commissioner of Customs in terms of clause 4 (c).

6. Since the noticee failed to submit the installation certificate and fulfill the continuing obligation, the show cause notice No. S/26-Misc-31(xxviii)/98 VB dated 12.11.1998 was issued to the noticee to show cause as to why :

⁸Mediwell Hospital and Health Care Pvt. Ltd. V/s. Union of India, 1997 (89) ELT 425 (SC)

⁹ Also referred to the hospital

- i. *customs duty of Rs.1,13,18,954/- calculated @ 85% p.a. BCD plus 15% CVD on the assessable value of Rs.1,00,38,983/- should not be demanded from them under Section 28 of the Customs Act, 1962 read with Hon'ble Supreme Court judgment in case of M/s. Mediwell Hospital and Health Care Pvt Ltd supra, wherein it has been held that the conditions of the Notification No. 64/88-Cus. is one of the continuing obligations on the importer.*
- ii. *The imported equipment, Cobalt-60 Teletherapy Source valued at Rs.1,00,38,983/- should not be confiscated under Section 111 (o) of the Customs Act, 1962.*
- iii. *Penalty should not be imposed on the importer under Section 112 (a) of the Customs Act, 1962.*
- iv. *Interest @ 20% p.a. should not be demanded for the deferred payment of duty under Section 28AA of the Customs Act, 1962.*

7. Subsequently, the Directorate General Health Service vide Order No. Z-37003/2/93-MG dated 03.02.1999 rejected the application of the noticee for issuance of installation certificate and thereby withdrew the customs duty exemption certificate.

8. Aggrieved by above said Show Cause Notice No. S/26-Misc-31(Xxvii)/98 VB dated 12.11.1998 and DGHS Order No. Z-37003/2/93-MG dated 03.02.1999, the noticee filed Writ Petition No. 1012 of 1999 in the Hon'ble High Court, Jabalpur. Hon'ble High Court passed an Interim-Order dated 31.03.1999, relevant part of the Interim-Order is reproduced below:

“The effect and operation of the order/letter dated 03.02.1999 (Annexure P-14) shall remain stayed until further orders from the Court. The respondent No. 2 is also restrained from taking any coercive action against the petitioners.

Meanwhile the petitioners are required to publish in one news-paper every month that they would provide free medical facility to the persons whose income is below Rs. 500/- per month. This should be done in terms of the notification of the Government.”

9. Hon'ble High Court at Jabalpur disposed of the aforesaid Writ Petition No. 1012 of 1999 filed by the noticee on 24.07.2000 with the directions which are reproduced as below:

“(a) In case petitioner satisfied the terms and condition for grant of installation certificate and promises to satisfy in future, respondents No.

I shall consider the prayer made by the petitioner for grant of Installation Certificate expeditiously.

(b) In case the petitioner produces before respondent No. 2, the installation certificate, respondent No. 2 shall take consequential action in accordance with law expeditiously.

It is made clear that I have not expressed any opinion on the merits of the case of the parties.”

10. In compliance with the Hon'ble High Court's direction, Directorate General of Health Services sent a team of officers for inspection of the Jawaharlal Nehru Cancer Hospital and Research Centre (M.P. Cancer Chikitsa Evam Samiti), Bhopal, M.P. On the basis of the report submitted by the team, DGHS found that the hospital was not fulfilling the free treatment facility in terms of the conditions laid down in the Notification No. 64/88 dated 01.03.1988. The DGHS vide order No. C-18018/6/99-MG dated 12.02.2001 stated that the noticee's application dated 10.12.1988 for issue of installation certificate for Theratron 780 C Cobalt 60 Unit was rejected and CDEC issued to the installation for above equipment under Notification No. 64/88-Cus dated 01.03.1988 was withdrawn.

11. The noticee challenged the aforesaid DGHS Order dated 12.02.2001 and filed Writ Petition No. 6067 of 2001 in the Hon'ble High Court at Jabalpur. Hon'ble High Court, Jabalpur in its Order dated 03.02.2003 quashed the DGHS order dated 12.02.2001 and SCN dated 12.11.1998 issued by the Department. Relevant part of the Hon'ble High Court Order dated 03.02.2003 is reproduced as below :

“Without any meaning to make any comment on the inspection made in the circumstances, as there is as serious dispute with regard to the facility of free treatment extended by the petitioner/Hospital, it is considered proper so as to settle disputed question of fact to issue direction that let fresh inspection be made by team of two persons. One is to be appointed by respondent No. 1 and 2 and another be appointed by respondent No. 3 let the team jointly make the inspection and conduct factual enquiry and look into record.

As a consequence of the aforesaid discussion, it is held that P/16 (order dated 12.02.2001 passed by DGHS) is violative of principles of natural justice and is quashed. Consequently, Show Cause Notice issued by the respondent No. 3 (Commissioner of Customs –Import), Mumbai falls down, let inspection be made within two months from today and fresh decision be

taken by Director General of Health Service on the basis of fresh inspection report.”

12. After conducting inspection, as per Hon'ble High Court, Jabalpur directions, by a two member team nominated by the Custom Authorities and Directorate General Health Services, the DGHS had passed the Order No. C-18018/3/2002-MG dated 27.01.2004, which reads as under:

*“ On view of the facts referred to above, the DGHS/DOH is of the view that M/s. Jawaharlal Cancer Hospital and Research Centre, M.P Cancer Chikitsa Evam Seva Samiti, Bhopal is not fulfilling the post import conditions of the notification and not eligible for exemption benefit under 64/88 Notification. Hence, the CDEC for import of Theratron Cobalt Therapy Unit issued to M/s. M.P. Cancer Chikitsa Evam Seva Samiti, Bhopal under 64/88 Cus Notification is **withdrawn as cancelled**. As such the request of M/s. M.P. Cancer Chikitsa Evam Seva Samiti, Bhopal for issuance of and installation certificate dated 28.11.2003 for the said equipment stands rejected.”*

13. Consequent to DGHS Order dated 27.01.2004, the noticee failed to submit the installation certificate from the DGHS as required in terms of the conditions laid down in the Notification No. 64/88-Cus dated 01.03.1988 and also failed to fulfill the continuing obligation or post-import conditions specified under the Para 2 (a), (b) and (c) of the said Notification 64/88.

14. Since the imported goods were allowed clearance without payment of duty subject to observance/fulfillment of post-importation conditions laid down in the aforesaid Notification, the non-observance of the post-import conditions rendered the impugned medical equipment liable to confiscation under Section 111 (o) of the Customs Act, 1962. However, goods were not physically available for confiscation. Thus, the import by not fulfilling the post-import conditions and for non-submission of the installation certificate violated the conditions as laid down under Notification No. 64/88 and rendered the goods liable to confiscation under Section 111(o) of the customs Act, 1962, and the commission or omission on the part of the noticee also attracted penal action/penalty under Section 112(a), *ibid*.

15. In view of the above facts, the importer was called upon to show cause vide Show Cause Notice No. S/26-Misc-31 (xxviii) 98 Gr. VB dated 29.03.2004 to the Commissioner of Customs (Import), New Custom House, Ballard Estate, Mumbai as to why:

- i. the imported medical equipment, namely the Cobalt-60 Teletherapy Source for Theratron 780 C Unit and valued at Rs. 1,00,38,983/- should not be confiscated under Section 111(a) of the Customs Act, 1962;
- ii. the penalty under Section 112(a) of the customs Act, 1962 should not be imposed;
- iii. the customs duty of Rs. 1,13,18,954/- with the interest accrued thereon should not be recovered in addition to fine under sub section (2) of the Section 125 of the Customs Act, 1962.

16. The noticee challenged the aforesaid DGHS Order No. C-18018/3/2002-MG dated 27.01.2004 and filed Writ Petition No. 1344 of 2004 in the Hon'ble High Court at Jabalpur. Hon'ble High Court, Jabalpur in its Interim Order dated 18.03.2005.

“Considering the objection raised by the learned counsel for respondents no. 1 and 2, suffice it to say that if aforesaid machinery is confiscated in compliance of the show cause notice P/19, public at large shall suffer irreparably and after confiscation of the aforesaid machinery, the hospital shall become inoperational. In these circumstances, till the filing of the reply, it is directed that the Commissioner of Customs (Import), New Custom House, Ballard Estate, Mumbai shall not take any coercive action against the petitioner in continuation of the notice Annexure P/19. However, the petitioner shall not shift aforesaid Cobalt Unit at any other place without prior permission of this court.”

17.1 The noticee vide its letter dated 19.01.2009 informed that the matter has been stayed by the Hon'ble High Court vide its Order dated 18.03.2005 and the proceedings were still pending in the High Court. The matter was transferred to the call book by the competent authority on 03.03.2009.

17.2 Hon'ble High Court, Jabalpur on 23.11.2022 dismissed the Writ Petition No. 1344 of 2004 for want of prosecution. Thereafter, the case was taken out of call book .

18.1 The noticee has also claimed that the said writ petition has been restored by the Hon'ble High Court. But when the status of the Writ Petition No. 1344/2004 was checked from the website of Madhya Pradesh High Court ([www.https://mphc.gov.in](https://mphc.gov.in)), the status was shown as *disposed as withdrawn (Disposal Date: 20-07-2023, Month: 7, Year: 2023, JUD: 117)*. Relevant part of the Hon'ble High Court Order dated 20.07.2023 is reproduced below :

“ ORDER

I.A. No.10835/2023, which is an application for withdrawal of petition is taken up.

Considering the averments made in the application, I.A. No.10835/2023 is allowed.

*Accordingly, the petition filed by the petitioner stands **dismissed as withdrawn.***

18.2 In view of the order above, there appears no legal bar on adjudication and recovery in the case.

Record of Personal Hearings and Written Submissions

19. The case is more than 25 years old. There has been a series of litigation due to repeated writ petitions filed one after another by the noticee, stays on SCN, quashing and re-issuance of DGHS Order and SCN; case remaining in call book from 2009 to 2022 due to writ petition pendency; all contributing to the extended duration of the case.

19.1 Personal hearing was granted on 21.12.1998 vide SCN dated 21.12.1998. The noticee gave letter dated 21.12.1998 and sought 3 weeks time for reply. PH was held on 22.12.1998 wherein the representative of the noticee requested for 45 days extension to submit reply. After rejection of the CDEC by the DGHS vide letter dated 03.02.1999, PH Memo dated 16.03.1999 was issued for PH on 07.04.1999. The noticee vide its letter dated 05.04.1999 requested for postponement of PH. Hon'ble High Court of Jabalpur vide its Order dated 31.03.1999 in W.P. No. 1012 of 1999 put a stay on the SCN. Hon'ble High Court disposed of the said W.P. vide Order dated 24.07.2000 directing the noticee for compliance on submission of Installation Certificate.

19.2 DGHS vide order No. C-18018/6/99-MG dated 12.02.2001 stated that the noticee's application dated 10.12.1988 and CDEC issued to the installation for imported equipment under No. 64/88-Cus dated 01.03.88 was withdrawn. PH Memo dated 21.01.2002 was issued for PH on 28.01.2002. The noticee vide its letter dated 25.01.2002 informed that they have filed WP No. 6067 of 2001 in the Hon'ble High Court, Jabalpur on rejection of CDEC by DGHS. Hon'ble High Court in its Order dated 03.02.2003 quashed the DGHS Order dated 12.02.2001 and SCN dated 12.11.1998 and directed for fresh inspection be made by a team of DGHS and Customs.

19.3 DGHS vide Order No. C-18018/3/2002-MG dated 27.01.2004 rejected the noticee's request for issuance of installation certificate for the imported equipment. Accordingly, SCN No. S/26-Misc-31(XXViii)/98 Gr. VB dated 29.03.2004 was issued by the Asstt. Commissioner under Section 124 of the Customs Act, 1962 on rejection of

issuance of installation certificate by DGHS. The noticee vide its letter dated 13.04.2004 informed that they have filed WP No. 1344 of 2004 in the Hon'ble High Court, Jabalpur on rejection of issuance of installation certificate by DGHS in its order dated 27.01.2004. Hon'ble High Court vide its Order dated 18.03.2005 directed not to take any coercive action against the petitioner till the filing of reply by DGHS. PH Memo dated 27.12.2005 was issued for PH on 12.01.2006 or 13.01.2006. The noticee vide its letter dated 09.01.2006 informed that the Hon'ble High Court vide its Order dated 18.03.2005 has put stay on the SCN till the W.P. is disposed. PH Memo dated 06.01.2009 was issued for PH on 21.01.2009. The noticee vide its letter dated 19.01.2009 informed that the matter has been stayed by the Hon'ble High Court vide its Order dated 18.03.2005 and the proceedings were still pending in the High Court. The matter was transferred to the call book on 03.03.2009. Periodical reviews of the call book cases continued its pendency in the call book till the issue was pending in the Hon'ble High Court, Jabalpur.

19.4 Hon'ble High Court, Jabalpur vide its Order dated 23.11.2022 in the WP No. 1344 of 2004 dismissed the petition of the noticee for want of prosecution. Thereafter, the case was taken out of the call book. PH Memo dated 16.05.2023 was issued for PH on 25.05.2023. The noticee did not attend the personal hearing on 25.05.2023. PH Memo dated 25.05.2023 was issued for PH on 05.06.2023. Shri Kislay Sharma, General Manager, JNCH & RC and Shri Krishnendra Kochar, C.A. attended the personal hearing on 05.06.2023 and submitted an interim reply dated 05.06.2023 requesting 30 days time to file final reply and requested to temporarily suspend the proceedings related to the above mentioned case, until the court's final judgment is rendered. Accordingly the next personal hearing date was fixed on 05.07.2023. The noticee did not appear for personal hearing and vide its letter dated 05.07.2023 requested for postponement of the personal hearing. PH Memo dated 10.07.2023 was issued for PH on 17.07.2023. The noticee did not appear for personal hearing on 17.07.2023. PH Memo dated 17.07.2023 was issued for PH on 26.07.2023. Shri Rajesh Kumar Singh, Liaisoning Officer, JNCH & RC attended the personal hearing on 26.07.2023 and informed that they had deposited Rs. 1.13 Cr as duty involved vide TR-6 Challan No. 236 dated 26.07.2023. Since the noticee did not bring the final defense brief, the noticee was given the last opportunity to submit their final defense brief by email by 02.08.2023. PH Memo dated 12.10.2023 was issued for PH on 20.10.2023. Next hearing was fixed on 20.10.2023, as the noticee did not attend the personal hearing and requested to adjourn the hearing on 02.11.2023. Consequently, personal hearing was granted on 02.11.2023, wherein, the noticee informed that the points made in his defense submissions dated 08.09.2023 was their final defense reply.

Written Submissions of the noticees

20.1 During the course of adjudication, the noticee submitted replies intimating the Department about the filing and pendency of writ petitions at multiple incidences. The noticee gave written submission dated 14.02.2005 for the Show Cause Notice No. S/26-Misc-31(xxviii)/98 VB dated 29.03.2004. In the written submission, the noticee submitted that the said case was filed before the Hon'ble High Court of Madhya Pradesh vide W.P. No. 1344/2004 and the notices have been issued on 02-04-2004 to the respondents, that the case was listed for hearing on 21/07/2004, that as per that notification, the DGHS has only to see that the equipment in question has been installed in the Hospital and that such hospital has become functional within the stipulated time (see para 4 proviso (b) (i) & (ii) of the said Notification). In case the DGHS is satisfied that the equipment has been installed and the hospital has become functional, the DGHS has to issue an installation certification to that effect. Upon production of the installation certificate, compliance with the other conditions contained in para 2 of the said notification, concerning with the free treatment, has to be looked into by the Customs Department, that the DGHS had not responded to the notices so far as such the matter had come to a stand still for the time being, that the DGHS has inspected the hospital premises once 24.10.2000 and again on 01 & 02.04.2003. On both the occasions the DGHS wrote in the inspection report in unequivocal terms that the "equipment in question was found installed and functional", But, rather than simply issuing an installation certificate, the DGHS had, however, erred in the interpretation of the said Notification and trespassed into the jurisdiction of the Customs Department by concerning itself with the matter of free treatment being provided by the Hospital.

20.2 The noticee in its written submission dated 05.06.2023 submitted that the matter of importing the Cobalt-60 Machine is under judicial consideration in case no-MISC.CIVIL CASE NO. 3131 OF 2022 at the Hon'ble High Court of Madhya Pradesh. Therefore, due to the ongoing legal proceedings, the noticee requested a temporary suspension of all actions related to the case until the Hon'ble Court reaches a final verdict to maintain the integrity of the process and uphold the principles of natural justice.

20.3 The importer in its written submission dated 01.08.2023 submitted that they have diligently fulfilled their obligation by making the principal amount payment of Rs. 1,13,18,954/- for the customs duties. Relevant part of the submission is reproduced below:

"We hope this letter finds you well. We are writing to bring to your attention that we have received your letter dated 25th June 2023 with ref No-CUS/AG/MISC/1291/2022-Gr. V(AB) in which the good-self have asked

for personal hearing with respect to letter dated 13th Nov 1998 with serial no S/26-Misc-3(xxvii)98VB(Annexure-I)

The letter dated 13th Nov 1998 mentioned above stated that we have imported the Cobalt-60 teletherapy machine under Exemption notification no 64/88 dated 01/03/1998 but we are not eligible to claim the exemption and thus we already paid the Custom duty of Rs. 1,13,18,954/-. We have accepted the payment of said custom duty and have forwarded you the said amount through cheque no-" 350925" of State bank of India.

Thus, we have diligently fulfilled our obligation by making the principal amount payment for the import duties, but unfortunately, due to unforeseen circumstances, we were unable to meet the payment deadline, resulting in the imposition of penalties and interest.

We deeply regret the delay in payment and understand the importance of adhering to customs regulations. We assure you that this delay was unintentional and does not reflect any disregard for the customs procedures

In view of the above it is and requested to pass the order with minimum fine and penalty and interest as per the Law for the sake of Madhya Pradesh Cancer Chikitsa Evam Seva Samiti. “

20.4 The noticee in its written submission dated 08.09.2023 opposed the confiscation of the imported machine under Section 111(a) of the Customs Act, 1962. They submitted that the goods were cleared by filing bill of entry. The said bill of entry is duly assessed by proper officer under Section 17 of the Customs Act, 1962 and released by officers of Customs by virtue of giving out of charge under Section 47 of the Customs Act, 1962. The goods were imported by sea and landed at Bombay port which was not only an authorized port for import of the goods but was the biggest port in India in terms of handling containerised cargo, during the period. That is the reason why the officers of Customs allowed the clearance of the goods therefore, there is absolutely no question of unloading the goods at any place other than the customs port. Therefore, the goods are not liable for confiscation under section 111(a) of the Customs Act, 1962.

20.5 They further submitted that the Show Cause Notice under para 14 (iii) says that customs duty of Rs. 1,13,18,954/- with the interest accrued thereon should not be recovered in addition to fine under sub-section (2) of the Section 125 of the Customs Act, 1962. The said charging para does not disclose under which section of Customs Act, 1962, the duty or interest recoverable. The charging para fails to highlight what is the basis for demand of the duty. The Customs Act, 1962 empowers to collect and levy duty,

demand the duty and recovery of duty. Any demand or recovery cannot be made in isolation. A demand or recovery has to be backed with the relevant provision of law and that has to be categorically mentioned in the charging para of the demand. A complete absence of such provisions keeps the noticee in dilemma and the noticee doesn't know as to what is the exact violation and whether there is any demand/chargeability of duty. The noticee submits that such vague show cause notices and the demand thereof are not maintainable as per the law and therefore, they are liable to be dropped.

20.6 The importer relied upon the case laws **Super Spinning Mills Ltd¹⁰**, **Balaji Enterprises¹¹** and **Federation of India Chamber of Commerce & Industry¹²** cited in the submission.

20.7 The noticee has also argued that section 28 is inapplicable in the present case as the maximum time limit provided in this section is five years from the relevant date and the show cause notice is issued much beyond this stipulated time, therefore no recovery within the framework of Section 28 can be made. Further, the provision for levy of duties of Customs is provided only under chapter V of Customs Act, 1962. Section 142 is out of ambit of chapter V and also the procedure under 142 is prescribed for recovery for sums post confirmation of such sums, the demand made under present show cause notice is yet to get confirmed therefore Section 142 is also inapplicable in the present case. Thus, there is not provision in Law to make any recovery and thus recovery as proposed in the show cause notice is liable to be dropped.

20.8 The noticee has also challenged the imposition of penalty under Section 112(a) of Customs Act on the ground that the noticee has not violated any law. A penalty under Section 112(a) can only be imposed if goods are liable for confiscation under Section 111 of Customs Act, 1962. As submitted in earlier para the goods are not at all liable for confiscation under Section 111(a) of Customs Act, 1962, no such penalty can be imposed.

DISCUSSION AND FINDINGS

21. The case involves only one noticee i.e. M/s M. P. Cancer Chikitsa Evam Seva Samiti.

22. I have gone through the facts of the case, material on record and submissions made by the importer during personal hearings as well as their written submissions dated 01.08.2023 and 08.09.2023. I find that the DGHS vide its Order No. C-18018/3/2002-MG dated 27.01.2004 rejected the noticee's application for issuance of

¹⁰Commissioner of C.Ex. Tiruchirappalli Vs Super Spinning Mills Ltd 2015(324) E.L.T, 552 (Mad)

¹¹Balaji Enterprises Vs Commissioner of C.Ex & S.T., Jaipur 2020 (33) G.S.T.L. 97 (Tri-Del)

¹²Federation of India Chamber of Commerce & Industry Vs C.S.T. Delhi 2015 (38) S.T.R. 529 (Tri-Del)

the Installation Certificate and the CDEC for import of Theratron Cobalt Therapy Unit issued to M/s. M.P. Cancer Chikitsa Evam Seva Samiti, Bhopal under Notification No. 64/88-Cus was withdrawn as cancelled. Consequently, I find that the Show Cause Notice No. S/26-Misc-31 (xxviii) /98 Gr. VB dated 29.03.2004 was issued which proposes confiscation of the goods valued at Rs.1,00,38,983/-, under Section 111(o) [mis- typed as 111(a) as entire discussion in SCN is on 111(o)], penalty on the noticee under Section 112(a) and demand of customs duty of Rs. 1,13,18,954/- with the interest accrued thereon under Section 125(2) of the Customs Act, 1962.

23. In view of the above, I find that the issue to be decided is as under:

- i. Whether the subject goods having value of Rs. 1,00,38,983/- is liable for confiscation under Section 111(o) of the Customs Act, 1962.
- ii. Whether the demand is time-barred ?
- iii. Whether the demand of customs duty and accrued interest is not as per law.
- iv. Whether penalty should be imposed on the noticee under section 112(a) of the Customs Act, 1962.

24. Whether the subject goods having value of Rs. 1,00,38,983/- is liable for confiscation under Section 111(o) of the Customs Act, 1962.

24.1 I find that the noticee had imported a medical equipment viz, Cobalt-60 Teletherapy Source for Theratron 780c Unit valued at Rs. 1,00,38,983/- vide Bill of Entry No. 06161 dated 17.01.94 and claimed duty exemption as provided under the Notification No. 64/88 dated 01.03.1988 producing Customs Duty Exemption Certificate No. Z-37023/2/93-MG dated 10.01.1994 issued by the Directorate General of Health Service stating that the hospital falls under category 4 of the table annexed to the notification.

24.2 I find that the SCN in Para 12 states that the importer has not submitted the installation certificate from the DGHS as required in terms of the conditions laid down in the Notification No.64/88- Cus dated 01.03.1988 and also failed to fulfill the continuing obligation or post-import conditions specified under the Para 2(a), (b), (c) of the Table annexed to said Notification No. 64/88. Further, in the Para 12, the SCN states as under

“Since the imported goods were allowed clearance without payment of duty subject to observance / fulfillment of post-importation conditions laid down in the aforesaid Notification. dtd 01.03.1988, the non-observance of the post- import conditions would render the impugned medical

equipment liable to confiscation under Section 111 (o) of the Customs Act, 1962. However, goods are not physically available for confiscation.”

24.3 For better understanding, the full text of the Notification No. 64/88-Cus dated 01.03.1988 is reproduced as below :

“Exemption to hospital equipments imported by specified category of hospitals (charitable) subject to certification from DGHS etc.

Notification No. 64/88-Cus

Dated 1-3-1988

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962). the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all equipment, apparatus and appliances, including spare parts and accessories thereof, but excluding consumable items (hereinafter referred to as the "hospital equipment"), the import of which is approved either generally or in each case by the Government of India in the Ministry of Health and Family Welfare, or by the Directorate General of Health Services to the Government of India, as essential for use in any hospital specified in the Table below, from -

(i) the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975); and

(i) the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act,

2. In approving the import of any hospital equipment under paragraph, 1, regard shall be had to the following factors namely :-

(i) that the hospital equipment in respect of which the exemption is claimed under this notification is not manufactured in India; and

(ii) that the hospital equipment in respect of which the exemption is claimed is necessary for running or maintenance of the hospital.

3. Provided that in the case of import of spare parts, no approval as specified in paragraph 1 will be required subject to the conditions that

(i) the spare parts are imported by the hospital;

(ii) the hospital will, at the time of importation, produce a certificate from the Ministry of Health and Famil Welfare or the Directorate General of

Health Services that the said hospital falls in one of the categories hospitals specified in the said Table;

(iii) the Head of the hospital certifies that the spare parts in question are required for the maintenance of imported equipment in use with the hospital and such parts will not be used for any other purpose.

TABLE

1. All such hospitals as may be certified by the said Ministry of Health and Family Welfare, to be run or substantially aided by such charitable organisation as may be approved, from time to time, by the said Ministry of Health and Family Welfare

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 atleast 40% 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 percent of all the Hospitals 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) & (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

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

- i. that there is an appropriate programme for establishment of the hospital,*
- ii. that there are sufficient funds and other resources required for such establishment of the hospital.*
- iii. that such hospital, would be in a position to start functioning within a period of two years, and*
- iv. that such hospital, when starts functioning would be relatable to a hospital specified in paragraph 1,2 or 3 of this Table, and the said Ministry of Health and Family Welfare certifies to that effect :*

Provided that -

(a) in the case of a hospital relatable to paragraph 3 of this able, the Assistant importer produces evidence to the Collector of Customs at the time of clearance of the said hospital equipment that the same is being imported in accordance with the conditions specified in proviso to that paragraph

*(b) the importer shall give an undertaking in writing to the Assistant Collector at the time of clearance of the said hospital equipment that **the importer shall furnish certificates from the said Ministry of Health and Family Welfare or from of the Directorate General of Health Services, Government of India, within such period as the Assistant Collector of Customs may specify in this behalf or within such extended period as the Assistant Collector of Customs, on sufficient cause being shown, may allow in each case to the effect :***

(i) that such hospital equipment has been installed in the hospital; and

(ii) that such hospital has started functioning;

(c) the importer shall furnish, at the appropriate time, the certificates referred to in (b);

(d) the importer executes a bond in such form and for such sum as may be specified by the Assistant Collector of Customs binding himself to pay, on

demand, an amount equal to the duty leviable on the said hospital equal to the duty leviable on the said hospital equipment -

(i) if such hospital starts functioning within the period specified therefor, as is not proved to the satisfaction of the Assistant Collector of Customs to have been installed in such hospital, or

(ii) if such hospital does not start functioning within the period specified therefore.

Explanation: For the purposes of this notification, the expression "Hospital" includes any Institution, Centre, Trust, Society, Association, Laboratory, Clinic and Maternity Home which renders medical, surgical or diagnostic treatment."
(emphasis added)

24.4 I find that the DGHS vide Order No. C-18018/3/2002-MG dated 27.01.2004 has stated the following:

- a) M/s M.P. Cancer Chikitsa Evam Sewa Samiti, Bhopal was a beneficiary under customs notification 64/88. Their eligibility to avail CDEC was examined by the DGHS and it was found they did not fulfill conditions of the notification. Hence, the CDEC was withdrawn on 3.2.1999 by the DGHS.
- b) The noticee filed a writ petition against the CDEC withdrawal. The Hon'ble High Court ordered a fresh joint inspection by DGHS and Customs officials. The inspection found the institution did not provide requisite free OPD and IPD treatment to patients.
- c) Key deficiencies which were found during inspection were a very low percentage of free OPD registration and radiotherapy treatment, no free indoor treatment in 1995-96 despite having poor patients, negligible free major surgeries/chemotherapy for poor patients, and unreliable data on free lab investigations.
- d) The DGHS in the Order has stated that *"The hospital did not maintain proper OPD and Indoor admission register. The case sheets did not have any mention of billing and waiving off amount, either full or partial. In fact, except for the 'Free' stamp/ written on the case sheet, there is no record to suggest that the patients indeed received free treatment. The only alternative, which the inspection team relied, was to corroborate the free treatment with the free entries of different Deptt and the drug section, which was observed to be very low.*
- e) Based on the inspection report, DGHS provided the noticee opportunities to present their case and records to prove compliance. However, the submissions and

evidence were found unsatisfactory and inadequate by DGHS which is stated in the DGHS Order as *“During personal hearing an opportunity was given to the petitioner to submit document to prove their case. The line listing of laboratory investigations submitted as substantive evidence for free treatment at the time of personal hearing, has the same patient entered repeatedly to inflate the number and percentage.”*

- f) The DGHS in the Order dated 27.01.2004 concluded that the noticee failed to fulfill conditions of notification 64/88. Hence, the CDEC was withdrawn and the request of the noticee for installation certificate was rejected by the DGHS.

24.5 I find that the DGHS vide its Order No. Z-37003/2/93-MG dated 03.02.1999 has rejected the request of the noticee for installation certificate and accordingly CDEC was withdrawn. On the directions of Hon’ble High Court, Jabalpur. Hon’ble High Court in the Order dated 31.03.1999 in Writ Petition No. 1012 of 1999, the DGHS made fresh inspection. After inspection, the DGHS vide order No. C-18018/6/99-MG dated 12.02.2001 reiterated its stand taken earlier in the aforesaid Order dated 03.02.1999. I find that the DGHS in its Order dated 27.01.2004 has again reiterated its earlier stand taken in its orders dated 03.02.1999 and 12.02.2001. The 2004 inspection team of DGHS consisted of customs officer also. Therefore, I find that there have been multiple inspections by the DGHS and in all the reports, DGHS has arrived at the same conclusion that post-import conditions were not fulfilled.

24.6 I find that the issue involved is no more res integra. The issue related to exemption benefit under Notification No. 64/88 dated 01.03.1988 has been decided many times now by the Hon’ble Apex Court as well as lower courts. The Hon’ble Supreme Court in the case of **Mediwell Hospital and Health Care** supra held that :

“..... Notification granting exemption must be constructed to cast continuing obligation on the part of all those who have obtained the certificate from appropriate authority and on the basis of that have imported equipment without payment of customs duty to give free treatment to atleast 40% of the outdoor patients as well as would give free treatment to all indoor patients belonging to the families with an income to less than Rs. 500/- per month.... If one such inquiry the authorities are satisfied that the continuing obligation are not being carried out then it would be fully opened to the authorities to ask the person who have availed benefit of exemption to pay the duty payable in respect of equipments which have been imported without payment of customs dutythat 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 person availing of the exemption Notification are being duly carried out and on being satisfied they can enforce Notification of the customs duty from them”.

24.7 Further, Hon’ble High Court of Karnataka in the case of **Medical Relief Society of South Kanara**¹³ has held that failure to discharge the obligations of the notification make the equipment liable to confiscation. Relevant part of the Order is reproduced below for reference :

“Medical equipment in the instant case was imported subject to the condition that the petitioners continuously discharge the obligation of providing a medical, surgical and diagnostic treatment to at least 40% of its outdoor patients and indoor patients with a family income of less than Rs. 500/- per month. Failure to discharge that obligation was liable to expose the equipment to confiscation besides entitling the respondents to recover the amount of duty payable on the same. Proceedings for recovery of the exempted customs duty or the confiscation of the equipment in the above circumstances does not fall foul of Section 28.”

24.8 Furthermore, in the case of **Lady Amphthil Nurses Institution**¹⁴ the Hon’ble Tribunal observed that the exemption Notification No. 64/88 is a conditional notification and the goods are liable to confiscation for violation of the condition of the notification and Customs can start recovery proceeding, recovery will be for the amount which was exempted, and equipment can be confiscated under Section 111(o) of the Customs Act, 1962

24.9 Also, a larger five-member Bench of the Hon’ble Tribunal in the case of **Bombay Hospital Trust**¹⁵ was constituted to reconsider the decision rendered in the case of **Lady Amphthil Nurses Institution** supra. Relevant part of the Order of the Hon’ble Tribunal is reproduced as below :

“22. Accordingly, we answer the reference as follows :-

(i) When a post-importation condition in an exemption notification is not fulfilled, the Department has the power to recover the escaped duty in terms of Section 12 of the Customs Act, 1962.

¹³1999 (111) E.L.T. 327

¹⁴ 2002 (150) E.L.T. 776 (Tri. - LB)

¹⁵ 2005 (188) E.L.T. 374

Paragraph 12 of the Apex Court decision in Mediwell (supra) also provides an authority for such recovery.

(ii) Such demand notices will not be subject to any limitation of time.”

24.10 I find, as the impugned goods were allowed for clearance without payment of duty subject to observance/fulfillment of post-import conditions laid down in the Notification No. 64/88-Cus dated 01.03.1988. Section 111(o) of the Act stipulates that goods which are exempted from customs duty on import, subject to the stipulated conditions, are liable for confiscation if the conditions attached to the availed exemption are not observed by the importer. Section 111(o) is reproduced as under:

“111. Confiscation of improperly imported goods, etc.—The following goods brought from a place outside India shall be liable to confiscation:—

.....

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

.....”

24.11 The noticee, vide their letter dated 01-08-2023, have also accepted that they were not eligible to claim the customs duty exemptions on the import of the said Cobalt-60 machine and they have voluntarily paid the entire customs duty of Rs. 1.13 Cr.

24.12 From the discussions above, it is concluded that the DGHS has categorically denied the request of the party to issue installation certificate and has also withdrawn the customs duty exemption certificate on the ground that the hospital was not running as a charitable hospital and was not maintaining proper records to show compliance of conditions 2(a), (b) and (c) of the said notification. Hence, the noticee failed to fulfill the continuing obligation or post-import conditions of the said notification. After protracted litigation in the High Court, the noticee has also withdrawn its writ petition; has accepted that it is not eligible for customs duty exemption and has also paid the entire duty liability. Accordingly, I hold that the medical equipment “Cobalt-60 Teletherapy Source for Theratron 780c Unit” imported vide the Bill of Entry No. 06161 dated 17.01.1994 is liable for confiscation under Section 111(o) of the Act.

24.13 Further, it is also observed that the entire Show Cause Notice has elaborated the grounds for confiscation as violation of post import conditions which attract Section 111(o). However in the charging para there has been a typographical error and

inadvertently **111(a) is mentioned in place of 111(o)**. The noticee in its final defense reply dated 08-09-2023 has tried to take advantage of this typographical error by digressing from the main issue and arguing that the port of unloading and import was a proper and legitimate customs port and therefore the ground of confiscation should be turned down and confiscation should be held to be invalid. The attention of the noticee was drawn to this typographical error in the charging para of SCN by the Adjudication Section vide office e-mail dated 20-10-2023, with the request that they should give their defense on proposed confiscation under Section 111(o) also, but they did not submit any defence on this point.

24.14 On this point of typographical error, I observe that there are various pronouncements of the Hon'ble Supreme Court and High Courts clarifying the point that mere typographical error in quoting the Section of the Act would not invalidate a Show Cause Notice if the charge has been adequately explained in the body of the Show Cause Notice.

24.14.1 The Hon'ble Supreme Court in the case of **Pradyumna Steel Ltd**¹⁶ ruled that mere mention of wrong provision of law when power exercised is available even though under a different provision, is by itself not sufficient to invalidate exercise of that power. Relevant part of the Order is reproduced below:

“3. It is settled that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power. Thus, there is a clear error apparent on the face of the Tribunal's order dated 23-6-1987. Rejection of the application for rectification by the Tribunal was, therefore, contrary to law.”

24.14.2 The Hon'ble Supreme Court in the case of **The Elphinstone Spinning and Weaving Mills Co Ltd**¹⁷ observed that :

“14. We are not inclined to accept the contention of Dr. Syed Mohammad that the expression 'levy' in Rule 10 means actual collection of some amount. The charging provision Section 3 (1) specifically says “There shall be levied and collected in such a manner as may be prescribed the duty of excise.....”. It is to be noted that sub-section (1) uses both the expressions “levied and collected” and that clearly shows that the expression “levy” has not been used in the Act or the Rules as meaning actual collection. Dr. Syed

¹⁶ Collector of Central Excise, Calcutta Vs. Pradyumna Steel Ltd 1996 (82) E.L.T. 441 (S.C.)

¹⁷ Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Co. Ltd 1978 (2) E.L.T. (J 399) (S.C.)

*Mohammad is, no doubt, well founded in his contention that if the appellants have power to issue notice either under Rule 10-A or Rule 9 (2) **the fact that the notice refers specifically to a particular rule, which may not be applicable, will not make the notice invalid on that ground as has been held by this Court in J. K. Steel Ltd. v. Union of India, (1969) 2 SCR 418 (AIR 1970 SC 1173) :***

“If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under different power does not vitiate the exercise of the power in question. This is a well settled proposition of law. In this connection reference may usefully be made to the decisions of this court in B. Balakotaiah v. Union of India, (1958) SCR 1052 = (AIR 1958 SC 232) ; and Afzal Ullah v. State of U.P., (1964) 4 SCR 1991 - (AIR 1964 SC 264).” (emphasis added)

24.14.3 The Hon’ble High Court, Calcutta in the case of **Ota Falloons Forwarders Pvt Ltd**¹⁸ observed that :

*“23. In The Elphinstone Spinning (supra) the Supreme Court is of the view that, if the authorities have the power to issue a notice, **the fact that, the notice refers specifically to a particular rule, which may not be applicable, will not make the notice invalid.** Similar view is expressed by the Supreme Court in Pradyumna Steel Ltd. (supra) where it holds that, mere mention of a wrong provision of law when the power exercised is available, even though under a different provision, is by itself not sufficient to invalidate the exercise of that power.....”*

24.15 Hence, I conclude that Section 111(a) mentioned in the charging para of the show cause notice should be read as 111(o).

25. Whether the demand is time-barred ?

25.1 The noticee has argued that the Show Cause Notice has been issued beyond the five year period and therefore it is in violation of the time limitation clause of Section 28. Also the recovery cannot take place under Section 142 of the Customs Act 1962 as it is not a confirmed demand.

¹⁸ Ota Falloons Forwarders Pvt. Ltd.Vs. Union of India - 2018 (362) E.L.T. 947 (Cal.)

25.2 The Hon'ble Supreme Court, High Courts and Tribunals have consistently held that violation of post-import conditions is not covered under time limit prescribed in Section 28 or any other provision of the Act, it is a case of continuing obligation. Hence there is no time limit for issuing demand notice in such cases.

25.2.1 As discussed earlier, Hon'ble Supreme Court in the case of **Mediwell Hospital and Health Care** supra, observed in para 12 of its judgment *“we would like to observe that the very notification granting exemption must be construed to cast continuing obligation on the part of all those who have obtained the certificate from the appropriate authority and on the basis of that to have imported equipments without payment of customs duty to give free treatment atleast to 40 per cent of the outdoor patients as well as would give free treatment to all the indoor patients belonging to the families with an income of less than Rs. 500/- p.m. 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. .. on being satisfied that the said obligations have not been discharged they can enforce realisation of the customs duty from them.”*(emphasis added)

25.2.2 The Hon'ble Supreme Court also in the case of **Jagdish Cancer & Research Centre**¹⁹ observed that when an order for confiscation is issued, the person has the option, as per Section 125(1) of the Act, to pay a fine instead of undergoing confiscation. However, the Apex Court underscored that if such an option is exercised and an order is subsequently passed under Section 125(2) of the Act, the importer becomes liable not only for the fine but also for any duty and charges applicable to the goods. Importantly, Hon'ble Supreme Court distinguished this situation from cases covered by Section 28(1) of the Act, which pertain to duty not levied, short levied, or erroneously refunded. Hon'ble Supreme Court observed that an order for payment of customs duty under Section 125(2) of the Act is an integral part of proceedings related to confiscation, especially when the violation involves the conditions of a notification granting exemption and, this demand/order for duty payment is not bound by any time constraints specified in Section 28 of the Act, indicating that the Department can demand for customs duty from the importer without any time limit if the conditions of the exemption are not met. Relevant part of the Order is reproduced under :

¹⁹ Commissioner v. Jagdish Cancer & Research Centre — 2001 (132) E.L.T. 257 (S.C.)

“11. Whenever an order confiscating the imported goods is passed, an option, as provided under Sub-section (1) of Section 125 of the Customs Act, is to be given to the person to pay fine in lieu of the confiscation and on such an order being passed according to Sub-section (2) of Section 125, the person shall in addition be liable to any duty and charges payable in respect of such goods. A reading of Sub-section (1) and (2) of Section 125 together makes it clear that liability to pay duty arises under Sub-section (2) in addition to the fine under Sub-section(1). Therefore, where an order is passed for payment of customs duty along with an order of imposition of fine in lieu of confiscation of goods, it shall only be referable to Sub-section (2) of Section 125 of the Customs Act. It would not attract Section 28(1) of the Customs Act which covers the cases of duty not levied, short levied or erroneously refunded etc.. The order for payment of duty under Section 125 (2) would be an integral part of proceedings relating to confiscation and consequential orders thereon, on the ground as in this case that the importer had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of the Customs Act. A reference may beneficially be made to a decision of this Court reported in Mohan Meakins Ltd.Versus Commissioner of Central Excise, Kochi (2000) 1 S.C.C. 462 wherein it has been observed in Para 6 :

“Therefore there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or charge payable on such goods apart from the redemption fine that he intends to levy under sub-section (1) of that section.....”

25.2.3 The SCN dated 29.03.2004 is issued under Section 124 of the Act on account of failure to fulfil the post-importation conditions under the Notification No. 64/88. As discussed earlier, in the case of **Bombay Hospital Trust** supra, Hon’ble Tribunal held that demand notices in the case when a post-importation condition in an exemption notification is not fulfilled demand notice issued in such a case will not be subject to any limitation of time. The decision of Larger Bench was approved by **Hon’ble Bombay High Court**²⁰. Also, in para 12 of the Order, Hon’ble Tribunal held -

“12. As regards the time limits under Section 28, both sides have agreed that since the duty demand does not relate to short levy or non

²⁰ as reported in 2006 (201) E.L.T. 555

levy at the time of initial assessment on importation, but has arisen subsequently on account of failure to fulfil the post-importation conditions under the Notification No. 64/88, the said Section 28 has no application to a duty demand of this kind. We do not, therefore, wish to dwell further on the inapplicability of Section 28 to such demands. However, we note that since no specific time limit is prescribed under any other provision of the statute, the notice of demand in such cases cannot be subjected to any limitation of time. This view is supported by the ratio of the following two decisions of the Hon'ble Bombay High Court and the Apex Court :-

- (i) Prakash Cotton Mills Pvt. Ltd. v. S.K. Bhardwaj, A.C.C.E. - (32) E.L.T. 534 (Bombay)*
- ii) Commissioner v. Raghuvar (India) Ltd. - 2000 (118) E.L.T. 311 (S.C.)”*

25.2.4 Attention is also invited to the case of **Bharat Charitable Cancer Hospital and Institute**²¹ wherein Hon'ble Tribunal held :

“....As regards time bar, it is well settled that when there is violation of post import condition of notification, there is no time limit for demand of duty. In these circumstances the impugned order denying exemption notification and holding that the goods are liable for confiscation is in order....” (emphasis added)

25.3 Therefore, on the basis of above discussions, I conclude that the demand in the present case raised vide SCN dated 29.03.2004 is not time barred.

26. Whether the demand of customs duty and accrued interest is not as per law?

26.1 The noticee has argued that the charging para of the SCN fails to highlight the basis for demand of the duty and a demand or recovery has to be backed with the relevant provision of law and that has to be categorically mentioned in the charging para of the demand/chargeability of duty. The noticee further argued that such a vague demand is not

²¹ Bharat Charitable Cancer Hospital and Institute [2007(216) ELT 567 (Tri-Ban)]

maintainable as per the law and relied upon the case laws of **Super Spinning Mills Ltd**²², **Balaji Enterprises**²³ and **Federation of India Chamber of Commerce & Industry**²⁴.

26.2 The SCN dated 29.03.2004 is issued under Section 124 of the Act subsequent to rejection of issuance of Installation Certificate by the DGHS. The SCN is issued on account of failure to fulfil the post-importation conditions under the Notification No. 64/88. Section 124 provides that an order for confiscation of the imported goods may be made after giving a show cause notice to the importer of the goods. It also provides for imposition of fine.

26.3 (i) Section 124 of the Act is reproduced below :-

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

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

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

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

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

26.3 (ii) Further, Section 125 is reproduced as below :-

“125. Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody

²²Commissioner of C.Ex. Tiruchirappalli vs Super Spinning Mills Ltd. 2015 (324) E.L.T 552(Mad)

²³Balaji Enterprises Vs Commissioner of C.Ex & S.T., Jaipur 2020(33) G.S.T.I. 97 (Tri-Del)

²⁴Federation of India Chamber of Commerce & Industry Vs.C.S.T. Delhi 2015(38) S.T.R. 529 (Tri-Del)

such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, no such fine shall be imposed:

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

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

26.4 As discussed above in the case law of **Jagdish Cancer & Research Center** supra, Hon’ble Supreme Court discussed in detail the implications of confiscations of imported goods on account of failure to fulfil the post-importation conditions under the Notification No. 64/88 under the Customs Act, 1962. Hon’ble Apex Court observed that the order for the payment of duty and interest under Section 125(2) is an integral part of proceedings related to confiscation and consequential orders. Hon’ble Apex Court held that the liability to pay duty arises under Sub-section (2) of Section 125 in addition to the fine imposed under Sub-section (1), therefore, an order for both the payment of customs duty and the imposition of a fine instead of confiscation is specifically governed by Sub-section (2) of Section 125 and such an order does not fall under Section 28(1) of the Customs Act, which deals with cases of duty not levied, short levied, or erroneously refunded.

26.5 I find that Hon’ble High Court of Bombay in the case of **Wockhardt Hospital**²⁵ has observed that the duty and interest can be demanded under Section 125(2) of the Act and even if there is no demand of duty in the show cause notice, still the duty becomes payable as soon as the goods are confiscated under Section 111(o) with an option to pay fine in lieu of confiscation. These observations of Hon’ble High Court are reproduced as under :

²⁵ Commissioner v. Wockhardt Hospital and Heart Institute — 2006 (200) E.L.T. 15 (Bom.)

“51. It is true that the Tribunal in several cases has held that the duty is not payable under Section 125(2) if the option of redemption is not exercised. However, our view, it is not a correct interpretation. It was contended that the show cause notice issued in Customs Appeal No. 17 of 2005 did not seek to recover duty and, therefore, the duty demand cannot be sustained. As stated earlier, where the liability to pay duty is consequential to confiscation then on confiscation if the goods are permitted to be redeemed by imposing fine, then on such imposition of fine duty becomes payable. Therefore, the fact that the duty was not specifically demanded in the notice would not matter. The contention that where the option is not exercised, the goods remain vested in the government and in that event Section 125(2) is not attracted is also without any merit. As stated earlier, in respect of the goods confiscated under Section 111(o) with an option to pay fine in lieu of confiscation the duty becomes payable on passing an order under Section 125(1). In such a case, whether the option is exercised or not is wholly irrelevant. Admittedly, the only issue canvassed before the Tribunal was regarding duty liability under Section 125(2) and, therefore, the question of remanding the matter for deciding the other issues raised in the appeal before the Tribunal does not arise.”

26.6 Let me now discuss the case laws cited by the noticee in its submissions :

- a) In the case of **Super Spinning Mills Ltd** supra, the relevant provision, namely, Section 72 of the Customs Act was not invoked in the show cause notice and the notice did not contain any material to support its invocation, hence, it was held that the assessee can not be asked to answer a charge that was not specifically raised by invoking the relevant provision.
- b) In the case of **Balaji Enterprises** supra the show cause notice did not specify the exact service being taxed out of the categories given under Section 65(19) and the SCN only made a vague statement that the subsidy would be covered under BAS, without specifying the exact service.
- c) In the case of **Federation of India Chamber of Commerce & Industry** supra, the show cause notices covered periods after 1.5.2011 when the provisions of Section 65 were amended after the Finance Act, 2011 to expand the scope of the taxable "Club or Association" service. However, there was no attribution in the show cause notices issued to the noticee alleging liability to service tax, as arising consequent on amendments introduced by the Finance Act, 2011.

26.7 The present case is distinguishable from the case laws relied upon by the noticee. In the present case the SCN dated 29.03.2004 specifically mentions and discusses the demand of customs duty of Rs. 1,13,18,954/- with the interest accrued thereon under Section 125(2) of the Customs Act, 1962 read with Hon'ble Supreme Court judgment in the cases of **Mediwell Hospital and Jagdish Cancer & Research Center** supra on account of liability of confiscation due to failure to fulfil the post-importation conditions and non-submission of Installation Certificate under the Notification No. 64/88. The statutory authority for the demand stems from the section 125(2) read with these Hon'ble Supreme Court judgments. As per Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India. The Hon'ble Supreme Court has so far not deviated/dissented from the ratio of these judgements, which are therefore binding.

26.8 I find that the noticee in its written submission dated 01.08.2023 has accepted that they were not eligible for the exemption under Notification No 64/88 dated 01/03/1998 for import of the goods "Cobalt-60 teletherapy machine" and paid a customs duty of Rs. 1,13,18,954/- through TR-6 Challan No. 236 dated 26.07.2023.

26.9 In the discussions supra, I have arrived that the imported equipment "Cobalt-60 Teletherapy Source for Theratron 780c Unit" is liable for confiscation under Section 111(o) of the Act, as the noticee failed to fulfill the continuing obligation of post-import conditions specified under the Para 2 (a), (b) and (c) of the Table annexed to the Notification No. 64/88 dated 01.03.1988. Therefore, based on the discussions supra, I arrive that on account of confirmation of confiscation of the goods, Section 111(o) of the Act, liability of customs duty of Rs. 1,13,18,954/- along with interest thereon under Sub-section (2) of Section 125 of the Act arises in addition to redemption fine in lieu of confiscation under Sub-section (1) Section 125 of the Act. Also, The noticee is liable to pay the interest accrued on the deferred payment of customs duty of Rs. 1,13,18,954/- as per the notified rates of interest till 26.07.2023.

27. Whether penalty should be imposed on the noticee under section 112(a) of the Customs Act, 1962?

27.1 The noticee in its written submission has argued that the noticee has not violated any law and penalty under Section 112(a) can only be imposed if goods are liable for confiscation under Section 111 of Customs Act, 1962. Section 112(a) of the Act is reproduced under :

"SECTION 112. Penalty for improper importation of goods, etc.-

Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

.....

shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees], whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher ..”

27.2 In the discussions supra, it has already been established that the goods are liable for confiscation under Section 111(o) of the Act since the noticee did not submit the installation certificate from the DGHS as required in terms of the conditions laid down in the Notification No. 64/88-Cus dated 01.03.1988, and the noticee also failed to fulfil the continuing obligation or post-import conditions specified under the Para 2(a), (b) and (c) of the Table annexed to the said notification. For penal action under Section 112(a) of the Act, intent to evade customs duty is not required, penal action is taken against the noticee for improper import which has led to confiscation under Section 111(o) of the Act. Therefore, since the improper import of the goods has rendered it liable for confiscation, I find that the noticee is liable for penalty in terms of provisions of Section 112(a) of the Act.

ORDER

28. In view of above discussions and findings, I pass the following order :

28.1 I confiscate the medical equipment “Cobalt-60 Teletherapy Source for Theratron 780c Unit” imported vide Bill of Entry No. 06161 dated 17.01.1994 with the total assessable value of Rs.1,00,38,983/- (Rupees One Crore Thirty Eight Thousand Nine Hundred Eighty Three only) in terms of Section 111(o) of the Act. However, in lieu of confiscation, I impose a redemption fine of **Rs. 10,00,000/- (Rupees Ten Lakhs only) under Section 125(1) of the Act.**

28.2 I reject the exemption claimed by the importer in term of Notification No. 64/88 dated 01.03.1988 in respect of the goods imported "Cobalt-60 Teletherapy Source for Theratron 780c Unit" vide Bill of Entry No. 06161 dated 17.01.94 and order for assessment without notification benefit.


28.3 I confirm the demand of customs duty of **Rs. 1,13,18,954/- (Rupees One Crore Thirteen Lakhs Eighteen Thousand Nine Hundred Fifty Four Only)** and accrued applicable interest for the delayed payment of duty made on 26.07.2023 under Section 125(2) of the Customs Act, 1962 read with the Hon'ble Supreme Court Judgement in the case of **Mediwell Hospital and Health Care Pvt Ltd²⁶**. An approximate calculation of total interest is enclosed as Annexure -A which the Appraising Group 5B may verify and inform the noticee.

28.4 I order to appropriate an amount of Rs. 1,13,18,954/- (Rupees One Crore Thirteen Lakhs Eighteen Thousand Nine Hundred Fifty Four Only) deposited by the importer vide TR-6 Challan No. 236 dated 26.07.2023 towards the payment of differential duty.

28.5 I impose a penalty of **Rs. 5,00,000/- (Rupees Five Lakhs Only)** upon M/s. M. P. Cancer Chikitsa Evam Seva Samiti, Bhopal under Section 112 (a) of the Act.

29. This order is issued without prejudice to any other action that may be taken against the noticee or person or imported goods under the provision of the Customs Act, 1962, or any other law for the time being in force in India.

Vivek
05.01.24
(विवेक पाण्डेय)
(Vivek Pandey)
आयुक्त सीमा शुल्क (आयात-I)
Commissioner of Customs (Import-I)
नवीन सीमा शुल्क भवन, मुंबई
New Custom House, Mumbai-01



Enclosed : Annexure -A

To,

M/S. M.P. Cancer Chikitsa Avam Seva Samiti,
(M/s. Jawaharlal Nehru Cancer Hospital & Research Center)

²⁶Mediwell Hospital and Health Care Pvt. Ltd. V/s. Union of India, 1997 (89) ELT 425 (SC)

P.B.No. 32 Cancer Hospital Rd. Idgah Hills
Bhopal, Madhya Pradesh
PIN-462001

Copy to:

1. The Pr. Chief Commissioner of Customs,
New Customs House, Mumbai Customs Zone-I,
Mumbai-400001.
2. The Additional Director General,
Central Economic Intelligence Bureau, A-Wing,
1st Floor, Janpath Bhawan, Janpath, New Delhi
3. The Additional Commissioner of Customs,
Appraising Gr. VB
New Customs House, Mumbai Customs Zone-I,
Mumbai-400001.
3. The Supdt./CHS, NCH,
New Customs House, Mumbai Customs Zone-I,
Mumbai-400001.– For Display on Notice Board
4. Office Copy.

Annexure-A

From Period	To the period	No. of days	Rate of Interest (%)	Ass. Value (in Rupees)	Interest Amount for the period (in Rupees)
1/17/1994	5/25/1995	493	24*	10038983	3254281
5/26/1995	2/29/2000	1740	20	10038983	9571414
1/3/2000	5/12/2002	860	24	10038983	5676839
5/13/2002	2/28/2011	3213	15	10038983	13255583
3/1/2011	2/29/2016	1826	18	10038983	9040035
3/1/2016	7/26/2023	2703	15	10038983	11151522
				Total	5,19,49,674

*Needs to be verified by the Appraising Group -5B, New Custom House, Mumbai, Zone-1