



भारत सरकार

वित्त मंत्रालय/ राजस्व विभाग

केंद्रीय अप्रत्यक्ष कर एवं सीमाशुल्क बोर्ड - मुंबई अंचल-1, भारतीय सीमाशुल्क

आयुक्त सीमाशुल्क (आयात-1) का कार्यालय

द्वितीय मंजिल, नवीन सीमा शुल्क भवन, शूरजी वल्लभदास मार्ग, बेलार्ड एस्टेट,

मुंबई-400001.

दूरध्वनि-22757401 फैक्स-22757402

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फा. सं. : F. No. GEN/ADJ/COMM/360/2024/IMP-I

के द्वारा जारी किया गया : विवेक पाण्डेय
आयुक्त सीमाशुल्क (आयात-1)

आदेश दिनांक: 31.01.2025
जारी दिनांक: 04.02.2025

सी.ए.ओ. क्रमांक : 76/2024-25/CAC/CC(IMPORT-I)/VP/ADJ(IMP-I)

DIN No. - 20250277000000123432

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 ड्रॉफ्ट 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.

Tel. No. 22757401 Fax No. 22757402

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F. No. : GEN/ADJ/COMM/360/2024/IMP-I

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

Date of Order: 31.01.2025
Date of Issue: 04.02.2025

C.A.O. No. : 76/2024-25/CAC/CC(IMPORT-I)/VP/ADJ(IMP-I)
DIN No. - 20250277000000123432

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: 2nd round adjudication consequent to Hon'ble Supreme Court Order dated 29.04.2024 & CESTAT's Remand Order Dated 19.12.2018 against Order-in-Original No. 2010/CAC/CC(I)/SHH dated 22.01.2010 on the SCN F. No. CIU/GEN-MISC-84/2007 dated 09.01.2009¹ regarding misutilisation of duty exemption notification under Sr.No. 230 of Notification No.21/2002-Cus dated 01.03.2002² by M/s. Gammon India Ltd, Mumbai resulting in evasion of duty of Rs. 86,17,471/-.

This is the second round of adjudication of the said SCN after the Hon'ble Tribunal remanded back the case vide order No. A/88154-88156/2018 dated 19.12.2018 which attained finality on 29.04.24 after dismissal of Deptt's appeal in Hon'ble Supreme Court.

2. Aggrieved by the Hon'ble CESTAT's Order dated 19.12.2018, the Department had gone to Hon'ble Supreme Court vide Civil Appeal No(s).8622-8624/2019. These appeals were dismissed by the Hon'ble Supreme Court vide Order dated 29.04.2024 on the ground of low tax effect, leaving the question of law open. Therefore, the Hon'ble CESTAT's Remand Order dated 19.12.2008 attained finality on 29.04.24 leading to this second round of adjudication .

3. The facts of the case are that an intelligence was gathered by the Officers of Central Intelligence Unit New Custom House, Mumbai, (CIU) that M/s. Gammon India Ltd.³ having registered Office at Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai-400 025 had imported & cleared Hydraulically Operated Self Propelled Piling Rig. Sr. No. HR 1801591012, with Accessories⁴ having Assessable Value of Rs.2,34,57,654/- vide Bill of Entry No. 672402 dated 04.05.2006, after claiming the benefit of conditional duty exemption under Sr No. 230 of Notification No. 21/2002-Customs dated 01.03.2002. At the time of import M/s. Gammon had submitted an Undertaking that they will use the said Rig exclusively for the constructions of Road Job namely "Widening and Strengthening to 4-lane of existing single/ intermediate lane carriageway of National Highway No. 57 section from Km 230 to 190 (Forbesganj-Simrahi Section) in the state of Bihar on East West Corridor under NHDP, Phase -II, Pkg. No. C-II/ BR-3 as per conditions of Notification No. 21/2002-Customs. However, the subject Rig was not used for the Projects of M/s National Highway Authority of India (NHAI) and just after the import it was directly sent to and used at the NOIDA Site of M/s Delhi Metro Rail

¹ said SCN

² said notification

³ Also referred to as Noticee- 1 or "the importer" or "M/s Gammon"

⁴ Also referred to as "the Rig" or "Machine"

Corporation (DMRC) instead of NHAI Project in the State of Bihar Based on this information preliminary enquiries were initiated.

4. The Notification No. 21/2002-Customs dated 01.03.2002 (Sr. No. 230) provides. exemption to all machines and equipments specified in List 18 of the said notification required for construction of roads from whole of the Customs duty leviable thereon and whole of the additional duty, provided that

(a) the goods are imported by –

(i) the Ministry of Surface Transport, or

(ii) a person who has been awarded a contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction corporation under the control of the Government or a State of Union Territory, or

(iii) a person who has been named as a sub-contractor in the contract referred to in (ii) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory,

(b) the Importer, at the time of importation, furnishes an undertaking to the Joint Commissioner of Customs or the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for a period of five years from the date of their importation.

5. The import documents i.e. copy of Bill of Entry No. 672402 dated 04.05.2006, Bill of Lading No. RCK16750DAMUM02 dated 07.04.2006, Invoice No. 108/E dated 25.03.2006; Undertaking dated 24.03.2006, Letter of Acceptance No. NHA1/30050/2004/Tech (NH-57) BR/683(A) dated 29.11.2005 issued by M/s NHAI, Agreement between NHAI & M/s. Gammon India Ltd dated 07.02.2006 for "Widening and Strengthening to 4-lane of existing single/intermediate lane carriageway of National Highway No. 57 section from Km 230 to 190 (Forbesganj - Simrahi Section) in the state of Bihar on East West Corridor under NHDP, Phase -II Pkg. No. C-II/ BR-3" submitted by the importer at the time of clearance to Appraising Group VA in F.No.S/40-UT- 97/2006 VA dated 04.05.2006.

6. The scrutiny of the import documents revealed that one set of "Hydraulically Operated Self Propelled Pilling Rig Model No. HR-180 with

accessories having Assessable Value of Rs. 2,34,57,654/- vide Bill of Entry No. 672402 dated 04.05.2006 was cleared duty free after claiming the benefit of duly exemption of Rs. 86,17,471/- (which otherwise is leviable at the line of import) under Notification No. 21/2002-Cus dated 01.03.2002. The supplier of the goods was M/s MAIT S.P.A. Machine Industriali Trivellatrici, via Flaminia Seconda N 149/153, P.O. Box 1040-60027, Osimo (AN), Italia.

7. In the Undertaking dated 24.03.2006 on a Stamp Paper submitted to Customs at the time of clearance of the said Piling Rig by the Importer, M/s Gammon, it was clearly mentioned that they will use the duty free imported goods, i.e., Hydraulically Operated Self Propelled Piling Rig Model Nos. HR-180 with accessories exclusively for the "Widening and Strengthening to 4-lane of existing single/ intermediate lane carriageway of National Highway No. 57 section from Km 230 to 190 (Forbesganj - Simrahi Section) in the state of Bihar on East West Corridor under NHDP, Phase -II. Pkg. No. C-II/ EIR-3" and the goods shall not be sold or otherwise disposed of in any manner for the period of 5 years from the date of importation.

8. Scrutiny of the various documents and the Undertaking given at the time of import of the Rig to the Department showed that the subject Rig was to be deployed by the Importer after its import for the "Widening and Strengthening to 4-lane of existing single/ intermediate lane carriageway of National Highway No. 57 section from Km 230 to 190 (Forbesganj - Simrahi Section) in the state of Bihar on East West Corridor under NHDP, Phase-II, Pkg. No. C-II/ BR-3

9. The statement of Shri Umakant Tiwari⁵, Assistant General Manager, M/s. Gammon India Ltd was recorded under section 108 of the **Customs Act, 1962**⁶, dated 12.09.2007 wherein he inter alia stated that they had imported 5 machines from MAIT under the Notification No. 21/2002 that in most of the cases the machines were sent to the stipulated site, in some cases the machine were sent to other sites as per instructions from the Plant Vice President Col. Charan Singh: that he was not aware and understand that as per the Notification the machine can be specifically worked for NHAI, PWD/Road Construction Corporation under charge of State Government, that the directions for the deployment of the Piling Rigs had come from his superior bosses in the level of President/vice President and accordingly in some cases he made arrangements for delivery of the machine to the sites other than stipulated in the Undertakings, that in the month of May 2006 the machine having model No. HR 180 Serial Number which he did not remember but were imported vide B/E No. 672402 dated 04.05.2006 was diverted from the stipulated site to DMRC project New Delhi as per the instructions of Vice

⁵ Also referred to as Noticee 2

⁶ the Act

President (Plant). Col. Charan Singh because clear site was clearly available at that time and had worked there for approximately 5-6 months and thereafter sent back to Kanpur for the stipulated project, that he did not inform the Customs Department about the diversion of the said machine imported vide B/E No 672402 as he was not aware, that it was a lapse on the part of his Company and he undertook that in future such lapses will not happen; that Company has to pay the differential duty applicable at the time of clearance for the machine imported vide B/E No. 672407 dated 04.05.2006.

10. During the course of investigations, the Importer made a deposit of Rs. 86,17,471/- vide Demand Draft No 261455 dt. 28.09.2007 towards his duty liability on the Rig imported vide Bill of Entry No 672402 dated 04.05.2005. The same was deposited with the Cash Section vide Challan No. 27 dated 03.10.2007

11. The Consignment Note No. 435308 and 435313 both dated 30.05.2006 issued by CHA M/s. Damani Shipping Pvt. Ltd (CHA No. 11/688) revealed that the said Rig covered vide Bill of Entry No. 672402 dated 04.05.2006 was consigned to M/s. Gammon India Limited, Plot No. 7. Near Dena Bank, MIDC, Taloja, Raigad, Maharashtra. Investigations revealed that this was the storage site of the Importer, M/s. Gammon where the Rig was kept temporarily for further deployment.

12. Statement of **Col. Charan Singh**⁷, Plant Vice President of M/s. Gammon India Ltd. was recorded under Section 108 of the Act on 19.08.2008 wherein he interalia stated that depending upon the requirement of various sites, he decided about the availability of the Piling Rigs and about the deployment of the Rigs to the sites where they were required; that the said Rig of Model No. MAIT HR-180 was imported vide Bill of Entry No. 672402 dated 04.05.2006, that in the import documents viz. invoice, Bill of Lading, etc. and in their own documents the Serial Number of the machine was mentioned as 1801601013, however vide letter Ref. No. IND/2007/gil/141 dated 10.09 2007 their supplier M/s. MAIT FAR EAST PTE. LTD informed them that due to a mistake of the Shipping Company, the Rig bearing Sr. No. 1801601013 was unloaded to some other buyer in Qatar and the Rig bearing Sr. No. 1801591012 was actually delivered to M/s. Gammon India Ltd at Mumbai Port, it was also mentioned in the said letter that both the Rigs had the same technical characteristics, Kelly Bar Size, etc, and submitted the copy of the said letter, that after the import the said Rig was sent to Taloja, Raigad for storage and was kept there till August, 2006 because the site for the deployment at the project mentioned in the undertaking was not available; that thereafter, the Rig was dispatched to

⁷ Also referred to as Noticee- 3

DMRC site at Noida in the month of August, 2006 vide Lorry Receipt No. 046381 dated 05.08.2006 through M/s Union Roadways Ltd and he submitted the copy of the Covering Note dated 05.08.2006 and Goods Forwarding Note dated 05.08.2006 issued by M/s. Gammon India Ltd duly signed by him; that the Rig was commissioned at Noida site of DMRC Project and worked there till July, 2007 and thereafter, the Rig was dispatched to Ganga Bridge and Flyovers Project at Kanpur which was a NHAI Project where this Rig worked till April, 2008: that thereafter, the Rig was dispatched to Brahamini Intake Well Project at Jajpur, Odisha and this project was of M/s Jindal Steel Works and was a private project, that till now this machine is working there: that all these deployments were decided by him on the basis of requirement of individual site, that he submitted the copy of the Commissioning Report dated 28.08.2006 wherein Sr. No. of the Rig is correctly mentioned as 1801591012 and the log book of the said Rig showing the work done at DMRC Project, Ganga Bridge Flyover Project and Brahamini Intake Well Project at Jajpur, Odisha, that the import of the Rig was handled by Shri Umakant Tiwari, Asstt. General Manager (Procurement), M/s. Gammon India Ltd and he only submitted the Undertaking to the Customs and was aware of the condition of the said Notification, that while deciding upon the deployment of the Rig, he was not informed or made aware about the condition of the Notification to be fulfilled; that the deployment of the said Rig was decided purely on the basis of technical reasons, however, now he realised that by deploying the Rig for the project other than that mentioned in the Undertaking they have violated the condition of the Notification and therefore, liable to pay the duty exemption availed at the time of import; that he understood that the statement of Shri Umakant Tiwari, Asstt. General Manager, M/s Gammon has already been recorded in this regard and submissions on behalf of their company had been given by him.

13. The Commissioning Certificate Note N D/43 dated 28 08 2006 of M/S. MAIT, the supplier, duly signed by Technician and Client Supervisor showed that the subject Rig Model No. HR 180, Serial No. 1801591012 was commissioned at Sector- 18, DMRC Project, Noida, contrary to the Declaration made at the time of import. Further it appeared that the DMRC Project was not a Project awarded by the Ministry of Surface Transport or by National Highway Authority of India or by the Public Works Department of a State Government or by a road construction corporation under the control of the Government or a State of Union Territory. Therefore, it appeared that the usage of this Rig for this Project did not qualify the said Rig for availing the duty exemption under Notification No. 21/2002-Cus.

14. The Logbook of the Rig Model No. HR 180, Serial No. 1801591012, submitted by Shri Charan Singh, Vice President of M/s Gammon also confirmed the usage of the Rig for the DMRC Project Noida, till July 2007, for Ganga Bridge and Flyovers Project at Kanpur till April-2008 and thereafter for Brahamini Intake Well Project at Jajpur, Odisha of M/s Jindal Steel Works which was a private project.

15. In another identical case booked against M/s Punj Lloyd Ltd. for the violation of the post import condition imposed on Piling Rigs imported availing exemption under Notification 21/2002-Cus. dated 01.03.2002 which were imported for the NHAI Project but was used for DMRC Project BC-9, the Project-in-Charge of M/s DMRC was summoned followed by the letter dated 04.02.09 addressed to Chief Project Manager, M/s Delhi Metro Rail Corporation, New Delhi seeking three specific and pertinent clarifications regarding DMRC, Project BC-9 and usage of the subject Piling Rigs. M/s DMRC vide Letter Ref No. DMC/CPM/-DW/PH-11/BC-9 dated 05.02.2009 gave the categorical clarifications as cited below:

a) DMRC is into the business of construction and management of Metro Rail Projects and not into Road Construction Business. However, DMRC does the maintenance /diversion work of the road along which metro work is taken up

b) Contract BC-9 was exclusively a Metro Rail Project and not a Road Construction Project. However, there was a provision of road maintenance/diversion work in Contract BC-9 to facilitate the metro work

c) It is clarified that the said two piling Rigs Model No. R. 516HD Sr. No. 2582 and Model No. R-620 Sr. No. 2594 were not used for the construction of roads under Contract BC-9.

16. The above clarifications given by DMRC made it clear that DMRC was not into the Road Construction Business and the Projects of DMRC were not Road Construction Projects, and the piling Rigs were not used for the construction of roads under Contracts of DMRC, making it abundantly clear that the said Rig was used by the Importer in gross and willful violation of condition of Notification. 21/2002-Cus dated 01.03.2002.

17. From the above, it appeared that the said Rig was knowingly diverted by the Importer to the Project not qualified for duty exemption under Sr. No. 230 of Notification No. 21/2002-Cus. in violation of the Condition No. 40 of the said Notification. It was also contrary to their Declaration made in the Undertaking submitted at the time of duty free import of the said Rig.

18. **Findings of investigation :** In view of the above, it was revealed that

(i) the Importer M/s Gammon had violated the condition No. 40 of Sr. No. 230 of Notification No. 21/2002-Cus under which duty exemption was availed by them for the said Rig, by directly commissioning and using the Rig at the site of DMRC Project Noida till July 2007 and then from April 2008 onwards till now or a Private Project 'Brahamini Intake Well Project' at Jajpur, Odisha of M/s Jindal Steel Works willfully in order to enhance the financial gains from the Rig.

(ii) there had been willful violation of the condition of Notification No. 21/2002-Cus by the Importer, as the delivery of the Rig was taken from the CHA at their own storage site at Taloja, Raigad, Maharashtra and kept there for around 4 months to camouflage the diversion and thereafter the Rig was directly commissioned and used at the site of DMRC Project at Noida and then for Private Project of M/s. Jindal Steel Works at Jajpur, Odisha.

(iii) the Importer had given false Undertaking at the time of clearance of their Rig fully knowing that their Rig was going to be diverted as the scheduled site was not even ready at the time of import of the Rig and Shri Umakant Tiwari, Asstt. General Manager, M/s Gammon was admittedly responsible for giving this Undertaking under his signature,

(iv) Col. Charan Singh, Plant Vice President of M/s. Gammon was admittedly responsible for the willful deployment of the Rig for the Projects other than the one mentioned in the Undertaking given at the time of availing the exemption. from Customs Duty:

(v) the duty amount of Rs. 86,17,471/- short paid at the time of clearance and on account of undue benefit of notification no. 21/2002 (sr. no. 230) claimed was recoverable from importer M/s. Gammon as the importer willfully misstated/ suppressed the facts in import documents/ undertaking with intention to evade the Customs duty. In view of the proviso to section 28(1) of the Act, the differential duty is recoverable within extended period.

(vi) the subject goods i.e. Piling Rig Model No. HR 180, Serial No. 1801591012 with accessories' imported vide B/E No. 672402 dated 04.05.2006 were liable for confiscation under Section 111 (o) of the Act.

19. Therefore, the noticees were called upon to show cause to the Commissioner of Customs (Import), having his Office at New Custom House, Ballard Estate, Mumbai - 400001 vide Show Cause Notice F.No. CIU/Gen-Misc-84/2007 dated 09.01.2009 followed by a Corrigendum dated 28.08.2009 to the aforementioned Show Cause Notice as to why :-

(a) the subject Rig having Assessable Value of Rs.2,34,57,654/- should not be confiscated under Section 111(o) of the Act and

(b) the benefit of concessional duty under Sr. No 230 of Notification No 21/2002- Cus, dated 01.03.2002 should not be denied and duty amount of Rs 86.17,471 foregone at the time of import of the subject Rig should not be confirmed and demanded under proviso to Section 28 (1) read with Section 125 (2) of the Act, from the Importer M/s. Gammon, and the amount deposited by the Importer during the investigation should not be appropriated against the duty demanded, and

(c) the interest should not be recovered from the importer, on the duty foregone from the date of import till the recoverable duty is actually part to the Department under Section 28AB read with Section 125 (2) of the Act; and

(d) penalty should not be imposed on M/s Gammon under Sections 114A of the Act, and

(e) penalty should not be imposed on Shri Umakant Tiwari, Assitt. General Manager, M/s Gammon under Sections 112(a) and 112 (b) of the Act, and

(f) penalty should not be imposed on Col. Charan Singh, Plant Vice President of Mis. Gammon, under Sections 112(a) and 112(b) of the Act.

20. Details of first round of Adjudication and Order of the Hon'ble CESTAT, Mumbai.

20.1 The said SCN dated 09.01.2009 was adjudicated in first round vide Order in Original No. No. 2010/CAC/CC(I)/SHH dated 22.01.2010 issued under F. No. S/10-14/Adj/2009/Gr. VA confirming the duty, interest and penalty. Operative portion of the said order is reproduced below:

“(a) I confiscate the Rig imported by M/s Gammon India Lid vide B/E No. 672402 dated 04.05.2006 having Assessable Value of Rs. 2,34,57,654/- under Section 111(0) of the Customs Act 1962 However, I give an option to the importer to redeem the said goods after payment of fine of Rs. 45,00,000/ (Rupees Forty Five Lakhs Only) under Section 125 ibid.

(b) I deny the benefit of concessional duty under Sr No. 230 of Notification No. 21/2002-Cus dated 01.03.2002 and order to recovery of the duty amount of Rs. 86,17,471/- foregone at the time of import of the subject Rig under proviso to Section 28(1) raad with Section 125(2) of the Customs Act, 1962 from M/s. Gammon India Lid.

(c) I order for appropriation of the amount of Rs. 86,17,471/- deposited by M/s Gammon India Ltd. during the Investigation against the duty demanded al (b) above under proviso to Section 28(1) of the Customs Act, 1962 along with appropriate interest under Section 28 AB ibid.

(d) I impose a penalty of Rs. 86,17,471/- (Rupee Eighty Six Lakhs Seventeen Thousand Four Hundred and Seventy One Only) on M/s. Gammon India Ltd under Sections 114A of the Customs Act, 1962. If the duty and interest as demanded above is paid within 30 days of communication of this order the amount of penalty imposed would be 25% of Rs 86,17,471/- as per first proviso to Section 114A *ibid*.

(e) I impose a penalty of Rs 5,00,000/- (Rupees Five Lakhs only) on Shri Umakant Tiwari, Asstt General Manager, Mis: Gammon India Ltd. under Sections 112(a) of the Customs Act 1962

(f) I impose a penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) on Col. Charan Singh, Vice President (Plant) of M/s. Gammon India Ltd. under Sections 112(a) of the Customs Act, 1962.

20.2 Further aggrieved by the said Order-In-Original dated 22.01.2010, noticees 1. M/s. Gammon India Ltd., 2. Sh. Umakant Tiwari and 3.Col Charan Singh preferred an appeal against the said OIO before the Hon'ble CESTAT, Mumbai challenging that the notification no. 21/2002-Cus dated 1 March 2002 exempting specified goods subject to certain conditions complied with at the threshold should bind the importer. The Hon'ble CESTAT vide Order No. A/88154-88156/2018 Dated 19.12.2018 disposed of the said appeals and remanded the matter back to the original Adjudicating Authority for fresh decisions.

The relevant part of the CESTAT Order dated 19.12.2018 is reproduced below:

"11. The exemption itself, from a plain reading, accords the privilege to specified entities that are bound by the obligation enshrined therein. The obligation, of continued possession and of utilisation during the possession, transcends the moment of import to bind for the prescribed time. That, however, is a distinct engagement encapsulated in an enforceable undertaking binding such entities that conform to entitlement at the threshold.

12. At the threshold, the prescribed condition of eligibility must be met. Other than Department s of government and their statutory instruments, private entities or public commercial enterprises that contract with these Department s or instruments fulfill the condition. The exemption notification does not, in relation to entitling of the entities, employ the expression 'for' to qualify such entitlement. Impliedly, the entitlement arises from a contractual engagement that permits access to the exemption notification. Not unnaturally, such a contract may terminate for manifold reasons. A mutual belief of such engagement that may, for some reason or the other, be disengaged even before commencement should not

operate retrospectively to disentitle of the entity that derived the advantage of the exemption at the threshold. Indeed, it would appear that, with the insistence on retention and utilisation, the safeguard of public interest distinguishes the eligibility at the threshold from the continuing eligibility thereafter. The two conditions are, thus, to be enforced separately and distinctly. Hence, it can be concluded that the scheme of exemption is not intended for exclusive use in contracts furnished as evidence of entitlement to the exemption. In the present dispute, the eligibility at the threshold, arising from the agreement with the National Highway Authority of India whose genuineness is not controverted, cannot be denied notwithstanding the subsequent breakdown of the engagement.

13. With the dichotomy of entitlement at the threshold, which stipulates contract with the designated Department , authority or instrumentality, and of continued use, restricted only to possession and utilisation exclusively on 'roads construction' without reference to the designated Department , authority or instrumentality, utilisation for any kind of 'road construction would suffice to meet the commercial objective of optimum utilisation and convergence with public interest that motivated the grant of exemption. Needless to say, deployment on a project other than road would serve as disentitlement.

14. According to the adjudicating authority, strict construction of the undertaking furnished by the importer precludes the deployment of the imported 'piling rig' at non-specified projects. The utilisation for some work on behalf of M/s Delhi Metro Rail Corporation, indisputably not among the statutory instruments enumerated in the exemption notification, as well as other bodies has been held to be breach of the undertaking. An averment of an official of the said Corporation has been relied upon to exclude the possibility of deployment in road contracts. It is common knowledge that the Corporation, though established for urban rail networks, does also construct, repair and maintain roads. As for as the other deployments are concerned, the adjudicating authority could not be expected to arrive at a conclusion in the absence of material furnished by the noticee. The appellant, admittedly, did not comply with the timelines insisted upon in the adjudication proceedings. The reasons for such failure were placed on record before the original authority.

15. **In the circumstances of our finding that deployment on any road construction project would suffice for continuing entitlement to the exemption**, the object of utilisation on the different projects must be examined. To enable that be done, the matter is remanded back to the original authority before whom the appellant shall produce details of deployment and that

authority shall cause the veracity to be ascertained before rendering a fresh adjudication order.

16. Considering the various decisions cited by Learned Counsel for the individual appellants, all of which lay particular emphasis on the need for isolating the role of each individual in the breach that led to confiscation, and considering the lack of such allegation in the show cause notice, no purpose is served by a fresh consideration of the matter. We do not find any reason to conclude that some specific act of omission or commission on the part of these two individuals contributed to the confiscation. Moreover, these are two employees who, not standing to benefit in any way, are entrusted with executing direction emanating from more responsible levels. Accordingly, the penalties imposed on these two individuals will not sustain. The appeals of Shri Umakant Tiwari and Col Charan Singh are allowed.” (emphasis added)

20.3 The said order of Hon'ble CESTAT was challenged by the Department before Hon'ble Supreme Court vide Civil Appeal No(s).8622-8624/2019 against the CESTAT order. These appeals are dismissed by the Hon'ble Supreme Court vide order dated 29.04.2024 on the ground of law tax effect, leaving the question of law open. Therefore the Hon'ble CESTAT order dated 19.12.2008 wherein the matter was remanded back to Adjudicating Authority attains the finally. On perusal of Hon'ble CESTAT order dated 19.12.2018, it has been observed that the matter is remanded back to the original authority before whom the appellant shall produce details of deployment and that authority shall cause the veracity to be ascertained before rendering a fresh adjudication order and set aside the penalty of Rs. 5 Lakhs each imposed on Noticee No.2 Sh. Umakant Tiwari and Noticee No.3 Col. Charan Singh. In this regard finding of Hon'ble CESTAT is as below :-

“16.We do not find any reason to conclude that some specific act of omission or commission on the part of these two individuals contributed to the confiscation. Moreover, these are two employees who, not standing to benefit in any way, are entrusted with executing direction emanating from more responsible levels. Accordingly, the penalties imposed on these two individuals will not sustain. The appeals of Shri Umakant Tiwari and Col Charan Singh are allowed”.

Further, it has been observed that the Department has not challenged the penalty set aside by Hon'ble CESTAT on both the noticees No. 2 & 3 while filling the Civil Appeal before the Hon'ble Supreme court.

21. DETAILS OF PERSONAL HEARING

21.1. As per the direction of Hon'ble Tribunal, fresh Personal Hearings were granted to Noticee. Details of Personal Hearing Memorandums are as under:

Details of Personal Hearings Conducted		
Date of issuing PH memo	Date of Personal Hearing	Details of P.H.
1. 28.08.2024	05.09.2024	Sh. Pradeep Jain, Dy. Legal Manager of company attended the P.H. and requested for 01 month time to collect old records.
2. 25.09.2024	03.10.2024	Authorised representative Sh. Pradeep Jain has requested vide email to adjourn the P.H. for 04 weeks since company has appointed PDS Legal as their advocate but Vakalatnama of PDS legal was not signed and data for the case was also not collected.
3. 03.10.2024	23.10.2024	Sh. Yash Prakash, Advocate, PDS Legal and Sh. Pradeep Jain attended the P.H. and argued the case at length. They have also requested to give them next date of hearing for final submission of the case.
4. 24.10.2024	14.11.2024	Adjourned due to authorised representative Sh. Yash Prakash was injured in accident.
5. 14.11.2024	03.12.2024 (Final Hearing)	Sh. Yash Prakash, Advocate, PDS Legal and Sh. Pradeep Jain attended the P.H. and submitted their final defence submission dated 03.12.2024 and concluded their final arguments.

22. WRITTEN SUBMISSION OF IMPORTER:

M/s. Gammon India Ltd. has submitted their reply dated 03.12.2024 to the Show Cause Notice during Personal Hearing held on 03.12.2024 of 2nd round of adjudication. Following submissions made by the Noticee ;-

22.1 They had imported 'hydraulically operated self-propelled piling Rig Model No. HR-80' valued at Rs. 2,34,57,654/- vide Bill of Entry No. 672402 dated 04.05.2006 ("Rig"), and had claimed benefit of exemption granted under Notification No. 21/2002-Cus dated 01.03.2002.

22.2 By an *ex parte* order-in-original No. 2010/CAC/CC(I)/SHH, dated 22.01.2010, the then Ld. Commissioner held that the conditions of exemption Notification No. 21/2002-Cus dated 01.03.2002 had been purportedly

breached by them and demand of Customs duty under section 28 of the Customs Act, 1962 ("Act") along with interest and penalty under Section 114A of the Act was confirmed. The impugned order confiscated the Rig and imposed a fine for redemption. Further penalties were also imposed on their ex-employees, Shri Umakant Tiwari and Col. Charan Singh, under Section 112 of the Act.

22.3. Being aggrieved by the said *ex parte* order-in-original dated 22.01.2010, they and other co- noticees had filed Appeal Nos. C/369-370 & 537/2010 before the Hon'ble CESTAT, WZB, Mumbai. By Final Order dated 19.12.2018, the Hon'ble CESTAT was pleased to hold as under:

"15. In the circumstances of our finding that deployment on any road construction project would suffice for continuing entitlement to the exemption, the object of utilisation on the different projects must be examined. To enable that be done, the matter is remanded back to the original authority before whom the appellant shall produce details of deployment and that authority shall cause the veracity to be ascertained before rendering a fresh adjudication order".

22.4 Further, vide the same Final Order dated 19.12.2018, the Hon'ble CESTAT was pleased to allow the appeals filed by Shri Umakant Tiwari and Col. Charan Singh and set aside the penalties imposed on them. The relevant para of the Order is reproduced below:

"16. We do not find any reason to conclude that some specific act of omission or commission on the part of these two individuals contributed to the confiscation. Moreover, these are two employees who, not standing to benefit in any way, are entrusted with executing direction emanating from more responsible levels. Accordingly, the penalties imposed on these two individuals will not sustain. The appeals of Shri Umakant Tiwari and Col. Charan Singh are allowed".

22.5. Being aggrieved by the said Final Order dated 19.12.2018 passed by the Hon'ble CESTAT, the Department had filed Civil Appeal No(s). 8622-8624/2019 before the Hon'ble Supreme Court.

22.6 By an order dated 29.04.2024, the Hon'ble Supreme Court was pleased to dismiss the said Civil Appeal No(s).8622-8624/2019 filed by the Department on the ground of low tax effect, as the appeals were below the threshold of two crores as per the Notification dated 02.11.2023 issued by CBIC.

22.7. Pursuant to the above, hearing with respect to the show cause notice issued dated 09.01.2009 was granted to them on 03.12.2024. The Authorized representative along with the Advocate appeared at the time of the said

personal hearing and explained the case in detail and requested to drop the proceedings initiated vide the said show cause notice. Further they were directed to produce relevant documents in respect of claiming of exemption notification under Sr.No. 230 of Notification No.21/2002-Cus dated 01.03.2002.

22.8 In this regard, they have submitted the copy of the logbook of the Rig used in Ganga Bridge and Flyover project at Kanpur from 10.07.2007 to 29.08.2008 which proves that the imported Rig was used in a road project. Copy of logbook of the Rig used in Ganga Bridge and Flyover project at Kanpur from 10.07.2007 to 11.08.2008. They further submitted that since the issue involved in the show cause notice pertains to an old period, almost one and half decade (15 years), they are unable to find any other documents pertaining to the use of imported Rig for any other project.

22.9 They further submitted that since the Hon'ble CESTAT has allowed the appeals filed by Shri Umakant Tiwari and Col. Charan Singh and has dropped the penalties imposed against them, they requested to not proceed with adjudication against them.

22.10 Without prejudice and in any event, they submit that the show cause notice proposing to demand duty liability under Section 28 of the Act for violation of post import condition is ex facie illegal and bad in law. Reliance in this regard, is placed upon the judgment of the Hon'ble Supreme Court in the following cases, wherein it was held that provision of Section 28 are not attracted in cases of violation of post import condition as Section 28 covers cases of duty not levied, short levied or erroneously refunded:

1. *Commissioner of Customs, New Delhi Vs. C. T. Scam Research Centre (P) Ltd.*⁸
2. *Commr. of Cus. (Import), Mumbai Vs. Jagdish Cancer & Research centre*⁹

22.11 Further, since, duty cannot be demanded under Section 28 of the Act in the present case, penalty cannot be imposed under Section 114A of the Act.

22.12. It is further submitted that the subject goods cannot be confiscated as the same is neither seized nor available for confiscation. Further, it is a settled position in law that when the imported goods are not available for confiscation, no fine can be imposed for redemption thereof. In this regard, reliance is placed on the judgment of the Hon'ble Bombay High Court in Commissioner of

⁸ Commissioner of Customs, New Delhi Vs. C. T. Scam Research Centre (P) Ltd. reported in 2003 (155) E.L.T. 3 (S.C.)

⁹ Commr. of Cus. (Import), Mumbai Vs. Jagdish Cancer & Research centre reported in 2001 (132) E.L.T. 257 (S.C.)

Customs (Import), Mumbai v. Finesse Creation Inc.¹⁰ wherein the Hon'ble Bombay High Court was pleased to hold thus:

"5. In our opinion, the concept of redemption fine arises in the event the goods are available and are to be redeemed. If the goods are not available, there is no question of redemption of the goods. Under Section 125 a power is conferred on the Customs Authorities in case import of goods becoming prohibited on account of breach of the provisions of the Act, rules or notification, to order confiscation of the goods with a discretion in the authorities on passing the order of confiscation, to release the goods on payment of redemption fine. Such an order can only be passed if the goods are available for redemption. The question of confiscating the goods would not arise if there are no goods available for confiscation nor consequently redemption. Once goods cannot be redeemed no fine can be imposed. The fine is in the nature of computation to the state for the wrong done by the importer/exporter".

22.13. Further, the Hon'ble Bombay High Court in the Commissioner of Customs (Import) Mumbai Versus Air India Ltd¹¹, has held as thus:

"5. .. the concept of redemption fine arises in the event the goods are available and are to be redeemed. If the goods are not available, there is no question of redemption of the goods. Under Section 125 a power is conferred on the Customs Authorities in case import of goods becoming prohibited on account of breach of the provisions of the Act, rules or notification, to order confiscation of the goods with a discretion in the authorities on passing the order of confiscation, to release the goods on payment of redemption fine. Such an order can only be passed if the goods are available for redemption. The question of confiscating the goods would not arise if there are no goods available for confiscation nor consequently redemption. Once goods cannot be redeemed no fine can be imposed. The fine is in the nature of computation to the state for the wrong done by the importer/exporter".

22.14. In view of the above, they submitted that the proceeding initiated vide the show cause notice issued dated 09.01.2009 is liable to be dropped.

22.15 Apart from the above, Noticee was again given to opportunity vide this office email dated 27.12.2024 to submit the proof of deployment of said Rig in any road construction project for the period covered by the subject SCN. They were also requested to submit the contract copy of Ganga Bridge & Flyover Project at Kanpur and to submit the copy of log book from 12.08.2008 to 29.08.2008 and reminder mail dated 08.01.2025 was also sent to the Noticee

¹⁰ Commissioner of Customs (Import), Mumbai v. Finesse Creation Inc. [2009 (248) ELT 122 (Bom.)]

¹¹ Commissioner of Customs (Import) Mumbai Versus Air India Ltd 2009 (8) TMI 115

for submission of their final defence reply in this regard. However, they have not submitted any submission in response to this office email as mentioned above.

23. DISCUSSIONS AND FINDINGS

23.1. The subject SCN dated 09.01.2009 was issued to the following 3 noticees:

Noticee-1 : M/s Gammon India Ltd

Noticee-2 : Shri Umakant Tiwari, AGM of M/s. Gammon India Ltd

Noticee-3 : Col. Charan Singh, Plant Vice President of M/s. Gammon India Ltd

23.2. I have examined all the case records, including the Show Cause Notice (SCN), the defence submission by the Noticee, and their statements made during personal hearings

23.3. I find that the said SCN was adjudicated by the then Adjudicating Authority vide OIO No.2010/CAC/CC(I)/SHH dated 22.01.2010. Aggrieved with the said OIO, all 03 noticees preferred appeals before the Hon'ble Tribunal. Further, the Hon'ble Tribunal vide Order No. A/88154-88156/2018 dated 19.12.2018 disposed of the said appeals and remanded the matter back to the Original Adjudicating Authority for fresh decision with the following direction:

"15. In the circumstances of our finding that deployment on any road construction project would suffice for continuing entitlement to the exemption, the object of utilisation on the different projects must be examined. To enable that be done, the matter is remanded back to the original authority before whom the appellant shall produce details of deployment and that authority shall cause the veracity to be ascertained before rendering a fresh adjudication order".

The Hon'ble Tribunal also set aside the penalty of Rs. 5 Lakhs each imposed on Noticee No.2 and Noticee No.3 vide first OIO dated 22.01.2010 on the ground that no specific act of omission or commission on the part of these two individuals contributed to the confiscation. They were only entrusted with executing direction emanating from more responsible levels.

23.4 I find that the said Order of Hon'ble CESTAT dated 19.12.2018 was challenged by the Department before Hon'ble Supreme Court vide Civil Appeal No(s).8622-8624/2019 only on the ground of wrong availment of exemption notification by Noticee-1 and not against the dropping of penalty against Noticees -2 & 3. This appeal was dismissed by the Hon'ble Supreme Court vide Order dated 29.04.2024 on the ground of low tax effect, leaving the question of

law open. As a result of the dismissal of the Department's appeal in the Supreme Court on the ground of monetary limit, the Hon'ble Tribunal's Order dated 19.12.2018 and dropping of charges against Notices-2 & 3 has attained finality . Thus, I have to decide the SCN only with respect to charges laid upon Noticee-1 keeping in mind the directions of the Hon'ble Tribunal.

23.4.1 The issue to decide is whether M/s Gammon India Ltd have used the imported Rig to any road construction project which is suffice to comply with the conditions of the Notification No. 21/2002-Cus. dated 01.03.2002 in the importation of the Rig vide B/E No 672402 dated 01.05.2006 and whether the Rig is liable to confiscation under relevant sections of the Act and the importer is liable to penal provisions under Act ibid. The appellant (Noticee-1) has been directed by the Hon'ble Tribunal to produce details of deployment of the imported Rig before the original authority.

Now let me take up the issues one by one for discussion.

23.5. To examine whether M/s Gammon India Ltd have used the imported Rig in any road construction project and also examine the utilisation of the imported Rig on the different projects.

23.5.1 I find that that M/s Gammon India Ltd. had imported '*Hydraulically Operated Self Propelled Piling Rig*' vide B/E No. 672402 dated 04.05.2006 by claiming duty exemption under Notification No. 21/2002-Cus. dated 01.03.2002 .

23.5.2 As per Condition 40 appended to Sr.No.230 of Notification No. 21/2002-Customs dated 01.03.2002, imported goods are provided exemption from payment of customs duty in the nature of machines and equipments which are specified in List 18 of the said notification and which are required for construction of roads from whole of the Customs duty leviable thereon and whole of the additional duty, provided that

(a) the goods are imported by-

(i) the Ministry of Surface Transport, or

(ii) a person who has been awarded a contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a Road Construction Corporation under the control of the Government or a State of Union Territory; or

(iii) a person who has been named as a sub-contractor in the contract referred to in (ii) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by Public Works Department of a State Government or by a Road Construction Corporation under the control of the Government of a State or Union Territory;

(b) the Importer, at the time of importation, furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, to the effect that he shall use the imported goods **exclusively for the construction of roads** and that he shall not sell or otherwise dispose off the said goods, in any manner, for a period of five years from the date of their importation.

23.5.3 In order to comply with the **Condition 40 (a)** of the Notification, they submitted Letter of Acceptance dated 29.11.2005 issued by NHAI and an agreement dated 07.02.2006 between NHAI & Gammon India Ltd. for *widening and strengthening of 4-lane of existing single/intermediate lane carriageway of National Highway No. 57 section from Km 230 to 190 (Forbesganj - Simrahi section) in the state of Bihar on East West Corridor under NHDP, Phase-II Pkg. No. C-11/BR-3*. They also submitted an **Undertaking** as prescribed under **Condition 40 (b)** of the said Notification that **they will use the Rig exclusively for the constructions of road job at the designated site** as mentioned above and that they shall not sell or otherwise dispose of the Rig, in any manner, for a period of five years from the date of their importation.

23.5.4 The undisputed chronology of events relating to Rig utilisation as per available records is as under :-

Sl. no.	Period	Event/Activity	Comments /Observation	Whether condition 40 of said notification violated or not ?
1	May, 2006	Import of the Rig	
2	May, 2006 to August, 2006	After importation, Rig was sent to Taloja, Raigad for storage and was kept there.		No

3	August, 2006 to July, 2007	Thereafter the said Rig was sent to DMRC site at Noida	DMRC has clarified vide letter dated 05.02.2009 that it was not a road construction project.	Yes, condition violated.
4	July, 2007 to April, 2008	The said Rig was used at Ganga Bridge and Flyover Project at Kanpur.	Despite the Hon'ble Tribunal's Order, Contract/Agreement & complete logbook not submitted by the Noticee, hence verification of compliance of all conditions not possible as explained below.	Yes, condition violated.
5	August, 2008 to 09.01.2009 (date of issuance of SCN).	Thereafter the said Rig was used at 'Brahamini Intake Well Project' at Jajpur, Odisha at private project of M/s. Jindal Steel Works	M/s Jindal Steel Works, being a Private Company, was not a specified agency as required under the impugned Notification.	Yes, condition violated.

23.5.5 I also find that Shri Umakant Tiwari, AGM, M/s Gammon India Ltd. in his voluntary statements has accepted that the said Rig after importation was diverted from the stipulated site to a DMRC project as per instructions of their Vice President(Plant) Col Charan Singh and thereafter sent back to Kanpur. Col. Charan Singh has also confirmed the diversion of the Rig from its designated site to other sites ie. Noida, then Kanpur and Jajpur, Odisha. As per delivery note issued by M/s Damani Shipping Ltd., the CHA, the delivery of the Rig, after importation was taken by the noticee at their storage site at Taloja, Maharashtra where it remained for 4 months before its deployment at the DMRC site, Noida. The diversion of the Rig from its designated site to other sites is also evident from the Commissioning Certificate Note dated 28.08.2006 of the foreign supplier, M/s M.A. T. duly signed by the Technician and Client Supervisor and the Logbook of the Rig. It has been confirmed by DMRC vide letter DMRC/CPM-Dw/Ph-II/BC-9 dated 05.02.2009 that they are into the business of construction and management of Metro Rail Projects and not into road construction business. The contract BC-9 was exclusively a Metro Rail Project and not a road construction project. It is

obvious that the project work at Jajpur, Odisha was awarded to the Noticee by M/s Jindal Steel Works, which is also not a specified agency as required under the impugned Notification.

23.5.6 During the PH held on 03.12.2024 , Noticee submitted only the logbook of the Ganga Bridge and Flyover project at Kanpur for a part period from 10.07.2007 to 11.08.2008 without the Contract/Agreement Copy. In their written submissions of the same date 03.12.2024 , the Noticee-1 has explained that the issue was one and half decade (15 Years) old so they are unable to find any other documents pertaining to use of the said imported rig. Noticee-1 was again given an opportunity vide this office email dated 27.12.2024 to submit the proof of deployment of said Rig in any road construction project for the period covered by the subject SCN. They were specifically requested to submit the contract copy of Ganga Bridge & Flyover Project at Kanpur and to submit the copy of log book from 12.08.2008 to 29.08.2008. Reminder e-mail dated 08.01.2025 was also sent. However, Noticee-1 has chosen to remain silent on this.

23.5.7 Noticee-1 has not been able to comply with the Hon'ble CESTAT Order dated 19.12.2018 wherein Noticee was directed to submit relevant documentary proof to adjudicating authority to show that the imported Rig was used in road construction projects only and not anywhere else. It is common law that onus to submit evidence to claim duty exemption is on the claimant and not on the Revenue. In case of doubt and lack of evidence, Duty Exemption Notifications are to be interpreted strictly in favour of Revenue.

23.5.8 I find that only submission of log book for a short period, it could not be ascertained that whether the Ganga Bridge and Flyover project at Kanpur was awarded by NHAI or by Public Work Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory as per the conditions of the said Notification.

23.5.9 Thus , it is seen that from May, 2006 to January, 2009 (period investigated in the SCN), the conditions of the notification have got repeatedly violated as the DMRC Project was not a road construction project , proper documents regarding Ganga Bridge and Flyover Project at Kanpur were not submitted and the Jindal Steel Works Project at Jajpur, Odisha was a private project. These projects were not awarded by Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a Road Construction Corporation under the control of the Government or a State of Union Territory.

23.5.10 Thus, it is clear that the imported Rig has not been used in the road construction projects for availing the duty exemption under Notification No. 21/2002-Cus. dated 01.03.2002.

23.6 Whether the benefit of concessional duty under Sr. No 230 of Notification No 21/2002- Cus, dated 01.03.2002 should be denied and duty amount of Rs 86,17,471 foregone at the time of import of the subject Rig should be confirmed and demanded under proviso to Section 28 (1) read with Section 125 (2) of the Act, from the Importer M/s. Gammon India Ltd., and the amount deposited by the Importer during the investigation should be appropriated against the duty demanded ?

23.6.1. As discussed in detail in the above paras , it is clear that the Noticee has violated the condition No. 40 of Sr. No. 230 of Notification No. 21/2002-Cus. dated 01.03.2002 under which duty exemption was availed by them for not using the said Rig in proper road construction projects awarded by the designated agency and has also used it in private projects other than road construction. Hence, Noticee is not entitled to the concessional duty benefit claimed under Sr. No 230 of Notification No 21/2002- Cus, dated 01.03.2002.

23.6.2 Noticee in their reply to SCN stated that the SCN proposing to demand duty liability under Section 28 of the Act for violation of post import condition is ex-facie illegal and bad in law and placed reliance upon the judgment of the Hon'ble Supreme Court in the cases of **C. T. Scan Research Centre (P) Ltd¹²** and **Jagdish Cancer & Research centre¹³** .

23.6.3 I find that in the case of **Jagdish Cancer Centre (supra)**, the Show Cause Notice did not invoke the Section 28(1) of the Act. But the Jagdish Cancer Centre argued before CESTAT that the Show Cause Notice should be interpreted to have been issued under Section 28(1) and therefore the time period of five years under section 28(1) would apply and the Show Cause Notice should be treated as time barred. Also the requirement of the show Cause Notice having been issued by a proper Officer under Section 28(1) has not been met. The CESTAT decided in favour of the Jagdish Cancer Centre. Department went on appeal to the Hon'ble Supreme Court, which held :-
"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

¹² Commissioner of Customs, New Delhi Vs. C. T. Scan Research Centre (P) Ltd. reported in 2003 (155) E.L.T. 3 (S.C.)

¹³ Commr. of Cus. (Import), Mumbai Vs. Jagdish Cancer & Research centre reported in 2001 (132) E.L.T. 257 (S.C.)

*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-sections (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". Thus, the Hon'ble Apex Court ruled in favour of the Department and negated the challenge by the importer that the limitations of time and proper officer under section 28 will not negate the demand of customs duty by the Department as it will be protected by section 125(2) of the Act and the concept of continuing obligation. The Hon'ble Supreme Court has agreed with its judgement in **Mediwell Hospital**¹⁴ to hold that the time limitation under section 28 will not apply in cases of violation of end use notifications.*

23.6.4 In the case of **Mediwell Hospital (Supra)** , Hon'ble Apex Court has held that in cases of compliance of end use notifications by the importers, there is a continuing obligation on the importers to comply with the end use notification and the Department in case of violation of the end use notification can demand duty from the importer at any stage without being restricted by the time limitation under Section 28 of the Act. (Para 12 of the judgement).

23.6.5 In the present Show Cause Notice, three sections section 28, section 111 and section 125 of the Act have been invoked. Hence the present case is distinguishable on facts from the two cases of Jagdish Cancer Centre and CT scan centre. CT Scan Centre judgement is exactly on the same line of Jagdish Cancer Centre. Thus, I find that all these 3 Judgements support the case of the Department without any help to the Noticee.

23.6.6 In view of the above, I find that the importer is not entitled to the benefit of concessional duty under Sr. No 230 of Notification No 21/2002- Cus, dated 01.03.2002 claimed at the time of clearance of Bill of Entry No. 672402 dated 04.05.2006 and duty amount of Rs 86,17,471/- foregone at the time of import of the subject Rig has to be recovered under proviso to Section 28 (1) read with section 125(2) of the Act along with applicable interest under Section 28AB of the Act from the Importer M/s. Gammon India Ltd., and the amount deposited by the Importer vide Demand Draft No. 261455 dated 28.09.2007 during the investigation is liable to be appropriated against the duty demanded.

¹⁴ Mediwell Hospital And Health Care Pvt. Ltd. Vs Union Of India 1997 (89) E.L.T. 425 (S.C.)

23.7 Whether the subject Pilling Rig imported vide B/E No 672402 dated 01.05.2006 having Assessable Value of Rs.2,34,57,654/- should be confiscated under Section 111(o) of the Act.

23.7.1 As discussed above, I find that the importer has given false undertaking at the time of clearance of the said Rig having fully knowing that the designated site was not even ready at the time of import of the said Rig. This has been accepted by Shri Umakant Tiwari, AGM, M/s Gammon India Ltd. in his statement dated 12.09.2007. At no stage, the Noticee-1 approached Customs/CBIC for any clarification or with request to modify the conditions/undertaking under which the import was made. Hence, I find that diversion of the said Rig by the importer is willful violation of the conditions of Notification No. 21/2002-Cus. dated 01.03.2002. The said Rig was knowingly and willfully diverted by the importer to a project/projects which were not declared at the time of importation of the Rig as well as which were not qualified for duty exemption under Sr. No. 230 of Notification No. 21/2002-Cus, in blatant violation of condition no. 40 of the said Notification and also contrary to the declaration made in the undertaking submitted at the time of import of the Rig. To camouflage the diversion, the importer intentionally took the delivery of the Rig, first to their storage site at Taloja, Maharashtra, before sending it to Noida, then Kanpur and thereafter to a Private project site of M/s Jindal Steel Works at Jajpur, Odisha.

23.7.2 As per the Mediwell Hospitals Judgement of the Hon'ble Supreme Court (supra) , the availment of exemption benefits by the importer under the aforesaid Notification is saddled with a continuous obligation on the part of the importer, to use the equipments which have been granted duty exemption for the purpose specified therein, at the declared place / project. Breach in regard to this condition within the specified time limit by the importer, will lead to violation of the said condition. It has not been disputed by the importer that the Rig was diverted to a project/projects other than declared before the Department at the time of clearance as well as Bond / undertaking and also to projects awarded by non-specified agencies. To reinforce my findings, I also rely on the case laws of **Pfizer Ltd.**¹⁵ and **Sarabhai M Chemicals**¹⁶ wherein it has been held that the conditions of an exemption notification have to be strictly construed. It has also been held by the Apex Court in the cases of **Parental Drugs (1) Ltd**¹⁷ and **Presto Industries**¹⁸ that the onus to prove

¹⁵ Pfizer Ltd. & Others Vs UOI & Others (1996 (65) ECR 155 (Bom))

¹⁶ Sarabhai M Chemicals# Vs CCE, Vadodara, [2005 (179) ELT 3 (SC)]

¹⁷ Central Excise, Indore Vs Parental Drugs (1) Ltd. [2009 (236) ELT 625 (SC)]

¹⁸ Collector of Customs Vs Presto Industries#, [2001 (128) ELT 321 (SC)]

fulfillment of conditions of exemption Notification lies on the party claiming exemption.

23.7.3 The Hon'ble Supreme Court in the case of **Dilip Kumar & Co**¹⁹ has held that the burden of proving the applicability of the conditions would be on the assessee to show that their case comes within the parameters of the exemption clause. I find that this burden has not been discharged by the noticee.

23.7.4 I also find in the case of (a) **Patel Engineering Ltd**²⁰ which was upheld by the Hon'ble Supreme Court by dismissing the appeal of M/s Patel Engineering Ltd wherein it was held that construction of roads is a necessary condition for eligibility to the exemption, (b) **Shreeji Construction**²¹ wherein it was held that benefit of exemption is available only for such entities as were awarded works by any of the instruments that were specifically enumerated in the exemption notification. (c) **Rajhoo Barot**²² wherein it was emphasised on the need for strict construing of the conditions of exemption failing which the benefit could be denied and (d) **Hon'ble Supreme Court in Gammon India Ltd**²³ and (e) **Dilip Kumar & Co**²⁴ as discussed above wherein emphasis has been placed on strict construction of exemption notification.

23.7.5 From the above discussion , it is concluded that the noticee has committed willful misstatement and suppression of facts regarding the usage of the Rig before the Department, and this has made the Rig liable to confiscation under Section 111(o) of the Act and rendered them liable to penal action under Section 114A of the Act *ibid*. Also the amount of duty exempted at the time of clearance becomes recoverable from the importers under proviso to Section 28(1) along with applicable interest under section 28AB of the Act read with section 125(2) of the Act.

23.7.6 Importer has relied upon the case laws of **Finesse Creation Inc.**²⁵ and **Air India Ltd**²⁶ to claim that when the imported goods are not available for confiscation, no fine can be imposed for redemption thereof.

¹⁹ Commissioner of Customs (Import) vs Dilip Kumar & Co ((2018 (361) ELT.577 (SC))

²⁰ Patel Engineering Ltd Vs Commissioner of Customs (Import), Mumbai (2013 (295) ELT 243 (Tri. Mumbai)

²¹ Shreeji Construction Vs Commissioner of Customs (Import), Mumbai [2014 (313) ELT 566 (Tri-Mumbai)

²² Rajhoo Barot Vs Commissioner of Customs (Import), Mumbai 2017 (348) ELT 562 (Tri-Mum))

²³ Hon'ble Supreme Court in Gammon India Ltd Vs Commissioner of Customs 2011 (269) ELT 289 (SC)

²⁴ the judgment of the Apex Court in Commissioner of Customs (imports) Vs Dilip Kumar & Co ((2018 (361) ELT 577 (SC))

²⁵ Commissioner of Customs (Import), Mumbai v. Finesse Creation Inc. [2009 (248) ELT 122 (Bom.)]

²⁶ Commissioner of Customs (Import) Mumbai Versus Air India Ltd reported in 2009 (8) TMI 115 - Bombay High Court

23.7.7 In this regard I find that the Hon'ble High Court of Chennai, in the case of **Visteon Automotive Systems India Limited**²⁷, has held that availability of goods is not necessary for imposing redemption fine. The Hon'ble Court held “....opening words of Section 125, “Whenever confiscation of any goods is authorised by this Act”, brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act.

23.7.8 I find that the above view of the Hon'ble Madras High Court was relied upon by **Hon'ble Gujarat High Court in the case of M/s. Synergy Fertichem Pvt. Ltd**²⁸. Hon'ble Gujarat High Court at para 174 and 175 held that “We would like to follow the dictum as laid down by the Madras High Court in Para-23 in the case of *Visteon Automotive Systems India Limited Vs CESTAT, Chennai.*”

23.7.9 Hence, I conclude that goods are liable for confiscation under section 111 (o) of the Act ; and redemption fine is imposable on the imported goods even if they have been cleared from the customs port and are not presently available for confiscation.

23.8 Whether penalty should be imposed on M/s Gammon India Ltd. under Sections 114A of the Act ?

23.8.1 Having held the Rig liable to confiscation under Section 111(o) of the Act on the above grounds and having confirmed the recovery of duty under proviso to Section 28(1) read with Section 125(2) of the Act and interest under Section 28 AB of the Act *ibid*, I now come to penal provisions attracted by the Noticee.

23.8.2 As discussed above, it is clear that the importer has given false undertaking at the time of clearance of the said Rig having fully knowing that the designated site was not even ready at the time of import of the said Rig. This has been accepted by Shri Umakant Tiwari, AGM, M/s Gammon India Ltd. in his statement dated 12.09.2007. At no stage, the Noticee-1 approached Customs/CBIC for any clarification or with request to modify the conditions/undertaking under which the import was made. Hence, I find that diversion of the said Rig by the importer is willful violation of the conditions of Notification No. 21/2002-Cus. dated 01.03.2002. The said Rig was knowingly

²⁷ Visteon Automotive Systems India Limited Vs CESTAT, Chennai-2018 (9) G.S.T.L. 142 (Mad.)

²⁸ M/s. Synergy Fertichem Pvt. Ltd reported in 2020 (33) G.S.T.L. 513 (Guj.).

and willfully diverted by the importer to a project/projects which were not declared at the time of importation of the Rig as well as which were not qualified for duty exemption under Sr. No. 230 of Notification No. 21/2002-Cus, in blatant violation of condition no. 40 of the said Notification and also contrary to the declaration made in the undertaking submitted at the time of import of the Rig. To camouflage the diversion, the importer intentionally took the delivery of the Rig, first to their storage site at Taloja, Maharashtra, before sending it to Noida, then Kanpur and thereafter to a Private project site of M/s Jindal Steel Works at Jajpur, Odisha.

23.8.3. In view of the above, I hold that the Rig imported by M/s Gammon India Ltd. vide B/E No. 672402 dated 04.05.2006 having declared assessable value as Rs. 2,34,57,654/- and applicable duty of Rs 86,17,471/- have been imported by contravening and violating the conditions of exemption Notification No. 21/2002 dated 01.03.2002 by way of deliberate suppression of facts with an intent to evade payment of legitimate Customs duty. The above discussed various acts of omission and commission on the part of the Noticee-1 has rendered the said Rig liable to confiscation under Section 111(o) of the Act and the Noticee-1 is liable to penal action under Section 114A of the Act

24. In light of the above discussion and findings, I pass the following order.

ORDER

24.1 I confiscate the Rig imported by M/s Gammon India Ltd vide B/E No. 672402 dated 04.05.2006 having an Assessable Value of Rs. 2,34,57,654/- under Section 111(o) of the Act. However, as the goods have already been cleared by customs, I impose a redemption fine of **Rs. 20,00,000/- (Rupees Twenty Lakhs Only)** in lieu of confiscation under Section 125(1) of the Act.

24.2 I deny the benefit of concessional duty under Sr No. 230 of Notification No. 21/2002-Cus dated 01.03.2002 and order recovery of the duty amount from M/s. Gammon India Ltd. of **Rs. 86,17,471/- (Rupees Eighty Six Lakh Seventeen Thousand Four Hundred and Seventy One Only)** foregone at the time of import of the subject Rig under proviso to Section 28(1) along with appropriate interest under Section 28AB (now section 28AA) ibid read with section 125(2) of the Act.

24.3 I order for the appropriation of the amount of **Rs. 86,17,471/- (Rupees Eighty Six Lakh Seventeen Thousand Four Hundred and Seventy One Only)** deposited by M/s Gammon India Ltd. during the investigation against the duty confirmed above.

24.4 I impose a penalty of **Rs. 86,17,471/- (Rupees Eighty Six Lakh Seventeen Thousand Four Hundred and Seventy One Only)** along with applicable interest on M/s. Gammon India Ltd under Sections 114A of the Act provided that where such duty and interest is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be 25% of the duty or interest, as the case may be, so determined. The benefit of reduced penalty shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days.

25. This order has been passed without prejudice to any other action that may be taken against the above mentioned Noticee under the provisions of the Act and / or any other law for time being in force in India.



Vivek

(विवेक पाण्डेय)

(Vivek Pandey)

आयुक्त सीमाशुल्क (आयात-I)

Commissioner of Customs (Import-I),

नवीन सीमाशुल्क भवन मुंबई -01

New Custom House, Mumbai-01

To

M/s. Gammon India Ltd., Gammon House, Veer Savarkar Marg, Prabhadevi,
Mumbai-400 025

Copy to:

1. The Pr. Chief Commissioner of Customs, Mumbai Zone-I, New Custom House, Mumbai.
2. The Addl. Commissioner of Customs (CIU), New Custom House, Mumbai-1
3. ADG (CEIB), Central Economic Intelligence Bureau, Janpath Bhavan, B-wing, 6th Floor, New Delhi-110001.
4. The DC , Appraising Group-5A, New Custom House, Mumbai-1
5. Office Copy.