

	<b>OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS, CUSTOM HOUSE: MUNDRA, KUTCH MUNDRA PORT &amp; SPL ECONOMIC ZONE, MUNDRA-370421</b> <u>Phone No.02838-271165/66/67/68</u> <u>FAX.No.02838-271169/62</u>	
<b>A. File No.</b>	:	GEN/ADJ/COMM/387/2023-Adjn-O/o Pr. Commr- Cus-Mundra
<b>B. Order-in-Original No.</b>	:	MUN-CUSTM-000-COM-029-24-25
<b>C. Passed by</b>	:	K.Engineer Commissioner of Customs, Customs House, AP & SEZ, Mundra.
<b>D. Date of order and Date of issue:</b>	:	27.11.2024 27.11.2024
<b>E. SCN No. &amp; Date</b>	:	(i) SCN No. GEN/ADJ/COMM/387/2023-Adjn- O/o Pr. Commr- Cus-Mundra dated 29.11.2023.
<b>F. Noticee(s) / Party / Importer</b>	:	<b>1. M/s Mahi Marine Pvt. Ltd.,</b> Seawoods Grand Central, E-704-707, Tower 2, 7 <sup>th</sup> Floor, Seawoods, Navi Mumbai-400706.  <b>2. CB- Firm M/s Alaacrity Projects India Pvt. Ltd.,(AAKCA3961DCH002),</b> 301, Krishana Apartment, Netaji Subhash Palace,Wazirpur, New Delhi-34.  <b>3. M/s MBK Logistix Pvt. Ltd.,</b> Second Floor, Plot No.133, Sector 8, BOMGIM Complex, Gandhidham, Kutch-370201.
<b>G. DIN</b>	:	<b>20241171MO0000817607</b>

1. यह अपील आदेश संबन्धित को निःशुल्क प्रदान किया जाता है।

This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमाशुल्क अपील नियमावली 1982 के नियम 6(1) के साथ पठित सीमाशुल्क अधिनियम 1962 की धारा 129A(1) के अंतर्गत प्रपत्र सी ए 3-में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-

Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

“केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवाकर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ, 2<sup>nd</sup> फ्लोर, बहुमाली भवन, मंजुश्री मील कंपाउंड, गिर्धनगर ब्रिज के पास, गिर्धनगर पोस्ट ऑफिस, अहमदाबाद-380 004” “Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, 2<sup>nd</sup> floor, Bahumali Bhavan, Manjushri Mill Compound, Near Girdharnagar Bridge, Girdharnagar PO, Ahmedabad 380 004.”

- उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।

Appeal shall be filed within three months from the date of communication of this order.

- उक्त अपील के साथ - / 1000 रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, दंड यास्ति रूपये पाँच लाख या कम माँगा हो 5000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, शास्ति दंड पाँच लाख रूपये से अधिक किंतु पचास लाख रूपये से कम माँगा हो 10,000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, दंड व्याज या शास्ति पचास लाख रूपये से अधिक माँगा हो। शुल्क का भुगतान खण्डपीठ बैंक आहरित ट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी सार्वीयकृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा।

Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs. 50 lakh (Rupees Fifty lakhs) and Rs.10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.

- उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची-1, न्यायालय शुल्क अधिनियम, 1870 के मद सं-6 के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए।

The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.

- अपील ज्ञापन के साथ ड्यूटी/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये। Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
- अपील प्रस्तुत करते समय, सीमाशुल्क (अपील) नियम, 1982 और CESTAT (प्रक्रिया) नियम, 1982 सभी मामलों में पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

- इस आदेश के विरुद्ध अपील हेतु जहाँ शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहाँ केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष माँग शुल्क का 7.5% भुगतान करना होगा।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

## BRIEF FACTS OF THE CASE

Whereas, it appears that M/s Mahi Marine Pvt. Ltd., Seawoods Grand Central, E-704-707, Tower 2, 7<sup>th</sup> Floor, Seawoods, Navi Mumbai-400706 holding IEC-AAMCM9349R (*hereinafter also referred as "the importer" for the sake of brevity*) filed Bill of Entry No. 2818901 dated 18.02.2021 for import of old and used Vessel **MV SM Mahi** and Bill of Entry No. 2812728 dated 18.02.2021 for import of old and used Vessel **SM NEYYAR** through their CHT-M/s Alaacrity Projects India Pvt. Ltd. under CTH-8901.

2. An intelligence was gathered that the importers while filing Bill of Entry for import of old and used vessels were not declaring the bunkers and lubricants and their value in the Bill of Entry. However, as per Memorandum of Agreement (MoA) entered into for purchase of vessel, apart from the purchase price of the vessel, the importer was required to pay the amount towards the stock of remaining items viz., bunkers, lubricating oils and consumables. Thus, both the items (viz., 'Vessel and 'the bunker') and their values were clearly identifiable and were separately classifiable under respective Tariff headings (CTHs) for application of stipulated duty on import. Since, the payments for bunkers and lubricants were additional payments and the same not being part of the contracted value for the vessel, the same were required to be separately declared in the Bill of Entry for assessment of duty. Therefore, it appeared that the importer had evaded the duty on the cost of bunkers, lubricating oils and consumables by not declaring the same in the Bill of Entry.

3. On the basis of above intelligence, the vessel **SM NEYYAR** imported through Bill of Entry No.2812728 dated 18.02.2021 was not available as the same had sailed after Assessment/OOC, whereas the Bill of Entry No.2818901 dated 18.02.2021 filed for import of Vessel **MV SM Mahi** was still at assessment level. Therefore, the above Bill of Entry No.2818901 dated 18.02.2021 was put on hold for further inquiry and a letter was written on 24.02.2021 to the Dock Examination for the same. However, it was noticed that M/s MBK Logistix Pvt. Ltd., Gandhidham, the Vessel Agent got the Port Clearance from the concerned officers without informing him the facts and sailed the Vessel **MV SM Mahi** from Mundra without obtaining Out of Charge (OOC) of the Bill of Entry. Therefore, a search was proposed to be conducted at the premises of above Vessel Agent, M/s MBK Logistix Pvt. Ltd. Gandhidham through jurisdictional Customs i.e. Kandla Customs. The details of Bill of Entry No.2812728 dated 18.02.2021 and Bill of Entry No.2818901 dated 18.02.2021 are as under:

Sr. No.	Bill of Entry No. & Date	Goods declared	CTH	Value Declared	Duty (only IGST)
1.	2812728 dated 18.02.2021	Old and Used Container Ship MV SM MAHI	89011 010	USD 6000000 (Rs.44,28,00,000/-)	2,21,40,000/-
2.	2818901 dated 18.02.2021	Old and Used Container Ship MV SM Neyyar	89011 010	USD 12000000 (Rs.88,56,00,000/-)	4,42,80,000/-

3.1. To that effect, a search was carried out at the premises of M/s MBK Logistix Pvt. Ltd. Gandhidham on 25.02.2021 under Panchnama proceedings and some relevant documents were resumed for further scrutiny and investigation in the case such as Boarding and arrival documents of MV SM

MAHI and SM NEYYAR at Mundra Port on 22.02.2021, Bill of Entry, Commercial Invoices, Bill of Lading, Certificate of Registry, Certificate of Fair Market Value, Memorandum of Agreement, Provisional Certificate of Indian Registry along with specific trade type license etc.

**3.2. Statement dated 25.02.2021 of Shri Rashid Ali Mohd S/o Hisamuddin, Authorized Representative of M/s MBK Logistix Pvt. Ltd., Gandhidham**

In this connection, statement of Shri Rashid Ali Mohd S/o Hisamuddin, Authorized Representative of M/s MBK Logistix Pvt. Ltd., Gandhidham was also recorded on 25.02.2021 wherein he *inter alia* stated that:

- He is authorized representative of M/s MBK Logistix Pvt. Ltd., Gandhidham and working at M/s MBK Logistix Pvt. Ltd., Gandhidham for the last 8 years and looking after the work related to vessel husbandry.
- Regarding the business profile of M/s MBK Logistix Pvt. Ltd., he stated that as per his knowledge M/s MBK Logistix Pvt. Ltd. is a shipping vessel agent company. Shri M Prabakar Kine is the MD of the Company. The company's main business profile is the work related to vessel agency such as getting the vessels boarded, rummaged, work related to sign on sign off, immigration, assistance in supply of any technical or other items to ship, port clearance of the vessels. Further the company is also engaged in the work of booking of cargo containers on the ships from different shipping lines. The work related to booking of cargo/ containers is done in the cargo division of the company and this work for Mundra, Kandla ports are done from their Gandhidham Office.
- Regarding his specific job profile in detail, he stated that he has been working in the company for 8 years and he looked after the work related to vessel boarding, sign on- sign off, immigration, port clearance for the vessels being served by their company.
- On being asked that who were the persons authorized to sign the documents being produced before Customs on behalf of the company, he stated that Shri Rafiq Athaniya, Manager of their company at Mundra/ Gandhidham, Shri Murli Gopalkrishnan, marketing Manager and he himself were the persons authorized to sign the documents being produced before the Customs in the works being attended by their company.
- On being asked whether he was aware that recently two vessels namely MV SM NEYYAR and MV SM MAHI had berthed at Mundra port and their company had worked as the vessel agent for these two vessels, he stated that yes he is aware.
- On being asked that from where these vessels had arrived and what kind of documents were produced/ submitted before customs in respect of these vessels, he stated that both the vessels had arrived from Jebel Ali. The documents submitted before customs were regular documents being produced by the Captain during boarding such as last port clearance, port of call, crew list, crew effects, ship store,

currency declaration etc. Other than this the IGM was filed by the company in respect of the cargo being unloaded from the vessel.

- On being asked regarding any other documents/ Bill of Entry filed for the above vessels, he stated that yes, Bill of Entries for both of the above vessels were also filed. The Bills of Entries were filed as the vessels were touching the Indian port for the first time after change of ownership i.e. from foreign flag to Indian flag.
- On being asked whether he was aware of the procedure regarding processing of the Bills of Entries by Customs, he replied that he was not aware in that regard in detail.
- On being asked regarding payments in respect of the self-assessed duties in respect of the Bills of entries filed for the two vessels, he stated that the duty payment for MV SM NEYYAR was done on 19<sup>th</sup> Feb 2021 and on 23<sup>rd</sup> Feb 2021 in respect of MV SM MAHI.
- On being asked that when did they get their Out of Charge (OOC) for the two vessels, he stated that in case of MV SM NEYYAR, they got the OOC after payments of Duties and in the case of MV SM MAHI the OOC was yet to be granted by the Customs.
- On being asked that had he applied for the Port Clearance of the two vessels and whether the same have sailed or were still at Mundra port, he stated that for MV SM NEYYAR, the port clearance was applied and received on 19<sup>th</sup> Feb 2021 and the vessel had sailed on 19<sup>th</sup> Feb 2021 and at that time was at Kochi as per his knowledge. The application for the port clearance was signed by him.

**In case of MV SM MAHI**, the port clearance was applied on 22.02.2021, the application was signed by him. They received the Port clearance on 22<sup>nd</sup> Feb 2021 and the vessel had sailed on 22<sup>nd</sup> Feb 2021 and at that time was at Mangaluru as per his knowledge.

- On being asked that in response to above question he had stated that the Vessel had not been granted Out of Charge in respect of the Bill of Entry filed for import of the vessel MV SM MAHI whereas in response to another question, he had stated that he applied for the Port Clearance on 22<sup>nd</sup> Feb 2021 and why did he apply for PC before OOC and did he bring the facts to the notice of the officer issuing him port clearance. In this regard, he stated that he did not disclose the facts to the officer granting port clearance.
- On being asked whether the port authority /terminal operator asked for the copy of the out of charge copy in respect of the bill of entry filed for import of the vessel MV SM MAHI before allowing the vessel leave the port, he stated that they had not intimated the port authority /terminal operator regarding filing of the Bill of entry in respect of the vessel and hence they had not asked for the copy of the OOC documents from them.
- On being asked that who had appointed the Customs Broker for filing of the Bills of Entry for import of two ships as discussed above, he stated that their company, on behalf of the vessel owners, had appointed the CHA in that case.

- On being asked whether he asked his CHA before applying for the port clearance and sailing of the vessel or did he ask for the Out of Charge copy before sailing MV SM MAHI, he stated that no, they had not asked the CHA about above things.
- On being asked whether he wanted to say anything more, he replied no to the officer recording statement.

**3.3.** Whereas, during the course of investigation, CHA-M/s Alaacrity Projects India Private Limited, vide their letter dated 03.03.2021 informed that they had filed under First Check of the above Bill of Entry No.2818901 dated 18.02.2021 for clearance "Old and Used Container Ship" of Vessel Name as "MV SM MAHI" GRT 30047 TONS, NRT 12671 TONS, IMO NO: 9236511 imported by M/s Mahi Marine Pvt. Ltd., Seawood Grand Central, Navi Mumbai-400706. The Examination of said Bill of Entry was done under First Check on 22.02.2021 & assessed on 23.02.2021, the importer paid duty on same day i.e. 23.02.2021. After duty payment they approached for out of charge but due to some technical error in EDI system the OOC was not done. Meanwhile the SIIB hold the shipment due to applicability of duty on the Bunker and informed them verbally. At the same time, they informed to the Importer to pay the bunker duty manually and it had been paid through manual duty Challan of **Rs.20,05,354/- (Rupees Twenty Lakh Five Thousand Three Hundred Fifty Four Only)** Vide Challan No:6733 Dated 02.03.2021 and **Rs.77,52,872/- (Rupees Seventy Seven Lakh Fifty Two Thousand Eight Hundred Seventy Two Only)** vide Challan No.6734 dated 02.03.2021. Therefore, on behalf of the importer, they requested to give Out of Charge.

**3.4 Statement dated 04.03.2021 of Shri Jigneshsinh Jadeja, Authorized Person of M/s Alaacrity Projects India Pvt. Ltd, New Delhi**

A statement of Shri Jigneshsinh Jadeja, Authorized Person of M/s. Alaacrity Projects India Pvt. Ltd, Authorized by F-Card Holder Shri Ratnesh Kumar Pandey of Customs Broker Firm M/s Alaacrity Projects India Pvt. Ltd., New Delhi was recorded on 04.03.2021 wherein he *inter alia* stated that:

- His name was Jigneshsinh Jadeja and was working as a G-Card holder in CHA Firm M/s OM Namay Shivay International Pvt. Ltd. and looked after the works of assessment, documentation and other Customs related work of M/s OM Namay Shivay International Pvt. Ltd. He had been authorized to remain present for giving statement in respect of imports by M/s Mahi marine Private Limited.
- On being asked that how was he related to CHA firm M/s Alaacrity Projects India Pvt. Ltd and to explain the working/profile of the CB firm M/s Alaacrity Projects India Pvt. Ltd., he stated that his brother Sh. Krishna Raj Jadeja was using license of M/s Alaacrity Projects India Pvt. Ltd. for clearance of import and export goods at Mundra Port. Therefore, he appointed him to look after all the Customs clearance related work i.e. assessment, documents submission at different section of Customs as required by Customs for M/s Alaacrity Projects India Pvt. Ltd. M/s Alaacrity Projects India Pvt. Ltd. was engaged in clearing of import and export goods and registered in Delhi and Kanda as a Custom Broker.

- On being asked that since when he was in that profession and when was M/s Alaacrity Projects India Pvt. Ltd. constituted, he stated that he got G-Card No.G/062/2018-189 in 2016 and he was working with M/s Om Namay Shivay since 2018. M/s Alaacrity Projects India Pvt. Ltd. started work since January 2020 at Mundra Port.
- On being asked that how many employees were there in M/s Alaacrity Projects India Pvt. Ltd. at Mundra, he stated that there were 04 employees of M/s Alaacrity Projects India Pvt. Ltd. one was H-card holder and others were working in field at Mundra Port.
- On being asked regarding location of the office of M/s Alaacrity Projects India Pvt. Ltd situated at Mundra, he stated that A- 102 &105, Abhay CHS, Tilak Nagar, Chaimbur, Mumbai-400089. No office was present in Mundra and there was an office in Gandhidham i.e. Office No.01, SF, Plot No.55, Sector-08, Gandhidham.
- On being asked that who contacted him for clearance of import goods (Old Vessel) under BE No.2818901 dated 18.02.2021 and 2812728 dated 18.02.2021 and who provide the documents for filling the both bills of entry and what documents had he been received, he stated that Sh. Rashid Siddiqui contacted for clearance of import goods (Old Vessel) under BE No.2818901 dated 18.02.2021 and 2812728 dated 18.02.2021 and Sh. Rafiq Athaniya mailed the documents vide e-mail id- rafiq@mbklogistixpl.com at mail id-mun.maashippingandlogistics@gmail.com. He had received KYC of importer, BL, Invoice, CE Certificate of load port, vessel registration certificate, Contract Copy. Provisional registration certificate of Indian registry, License issued by Ministry of Ports, shipping and waterways related to the Vessel MV SM MAHI and MV SM NEYYAR.
- On being asked regarding filing of BE No. 2818901 dated 18.02.2021 and 2812728 dated 18.02.2021, he stated that Mr Ratnesh Kumar Pandey had filed the Bills of entry No.2818901 dated 18.02.2021 and 2812728 dated 18.02.2021 and the same could be verified from the supporting documents uploaded in E-Sanchit.
- On being asked to peruse the copy of memorandum of agreement uploaded in E-Sanchit duly digitally signed on the behalf of importer. As per contract, the seller shall deliver to the buyers with everything belongings to her onboard and on shore. Further, as per contract the importer should take over the remaining bunkers and unused lubricants/ Oils in the storage tanks and drums. **Further, payment for the lube oils and VLSFO bunkers needed to be done by the buyer as per contract for the quantities taken over by them.** In view of above, was he agreed that the said value of the bunkers and lubricant oils should have been declared separately before customs at the time of filing of bill of entry, he stated that he agreed.
- On being asked regarding agreement that corresponding duty payments on the bunkers and lubricants which have been undeclared in the bill of entry should have been discharged before taking clearance for home consumption, he stated that he agreed.
- On being asked to peruse the definition of goods as mentioned in section 2(22) of the Customs Act, 1962, he stated that he had seen and perused the same.

- On being asked to peruse the Section 87 of Custom Act, 1962 which permitted utilization of Stores on board vessels during the period when such vessels are foreign going vessels. The moment the bill of entry was filed for home consumption in respect of vessels, the vessels ceased to be foreign going vessels, therefore, the bunkers, lubricants and other provision onboard the vessel ceased to enjoy the benefit of exemption available to such items in stores/bunkers in foreign going vessels. Since after filing of bill of entry for home clearance and payment of duty, the vessel ceased to be foreign going vessel and became an Indian vessel and therefore liability of import duty on bunkers and stores on the vessel arose. If the said goods were not declared in the bill of entry and goods were imported in contravention of the provisions of the law, they become smuggled goods and on being asked, he stated that they had filed bill of entry on the basis of documents i.e. commercial invoices as received by the importer. The said importer failed to declare the bunkers separately. Had they declared imported items correctly in the invoice as per their contract in the bill of entry, he would have advised his client about the duty obligations and the compliance of Customs law/procedures. Further, he stated that there had been suppression of facts on the part of importer which has led to the default of the Custom duty.
- On being asked that why the bills of entry No. 2818901 dated 18.02.2021 and 2812728 dated 18.02.2021 had been filed for the import of a Vessel, to provide the related provisions under which he had filed bills of entry for import of Old & Used Vessel, he stated that they had filed both bills of entry of Old and Used Ships/ Vessels i.e. MV SM MAHI and MV SM NEYYAR for home consumption under Section 46 & 47 of Customs Act, 1962.
- On being asked that in both the bills of entry he had declared value of the goods i.e. Old Vessel and whether it was inclusive of Stores & Bunkers value of the Vessel at the time of import, he stated that as per invoice, the value declared was only of Vessel and value of Stores & Bunkers value of the Vessel were not included.
- On being asked whether he had declared the Value of Stores & Bunkers in the both bills of entry and If not, why? he stated that no they had not declared separately Value of Stores & Bunkers as they had not any documents related to the bunkers and stores. Importer provided them the invoices only.
- On being asked that at the time of examination, Ship Store/survey report of bunkers and stores would have been prepared and had he declared the ship store and bunkers in the bills of entry at the time of assessment and If not, why? he stated that Importer or Vessel agent informed that duty is not liable on bunkers and stores. Therefore, he had not informed/declared the same in BE's at the time of assessment.
- On being asked whether he was aware that at the time of import of any goods for home consumption customs duty was liable as per Customs Act, 1962 other than exempted goods, he stated yes.
- On being asked as he had stated that value of the stores and bunkers was not included in value declared in the bills of entry. It meant store and bunkers were excluded from the value of the Vessel and was he agreed with that he stated that yes, he was agreed.

- On being asked whether he was agree that value of Store and bunkers were other than the value of the Vessel which he had not declared in the bills of entry and same were liable to custom duty, he stated that yes he was agree.
- On being asked whether he had guided the importer before filing the bills of entry that value of the stores and bunkers were need to be declared separately in the bills of entry and if not, why? he stated that he had guided the importer representative/vessel agent that duty was leviable on the Stores and bunkers at the time of import of Vessel.
- On being asked that if he had guided and informed that the duty was leviable on the bunkers and stores of imported goods i.e. Vessel and why he had not declared in bills of entry, the bunkers and stores and what the importer said, he stated that Vessel agent said the MV SM NEYYAR was going on foreign run therefore duty was not leviable and they would pay duty for MV SM MAHI manually later on the ship store and bunkers. Accordingly, He had not declared the same in bill of entry.
- On being asked that it was noticed that BE No.2818901 dated 18.02.2021 had not OOC (Out of Charged) till that date; however goods i.e. Vessel MV SM Mahi had been sailed on 22.02.2021 from Mundra port without granting of OOC by the Proper Officer and was he aware of that, he stated that yes, he knew the OOC was pending. It came into his notice when it was decided that SIIB will examine the vessel, at that time i.e. on 25.02.2021 Sh. Rashid Siddiqi informed that the vessel had departed on 22.02.2021.
- On being asked whether he had informed the Customs about the departure of vessel MV SM MAHI without OOC and when he informed, he stated that he informed the DC (SIIB) verbally on 25.02.2021 about the departure of vessel.
- On being asked that as per the Rule 10(n) and of the Customs Brokers Licensing Regulations, 2018-

10. *A Customs Broker shall -*

- (d) *advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;*
- (e) *Exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;*
- (m) *discharge his duties as a Custom Broker with utmost speed and efficiency and without any delay;*

On being asked that what diligence had been done by him in respect of the filing of bills of entry, payment of Customs duty and departure of vessel without OOC. In this regard, he stated that he agreed to the responsibilities entrusted to the Customs Brokers by the Customs Department. He stated that in the instant case, they had taken and verified various KYC documents of the importer. He had informed the Vessel agent that duty was leviable on Bunker and stores at the time of import and they

were not aware that vessel had departed without OOC. Vessel agent was sole responsible for discharging the vessel without granting of OOC.

- On being asked whether he wanted to say anything more, he replied no to the officer recording statement.

**3.5 Statement dated 04.03.2021 of Shri Prabhaker Kini, Authorized Person of the Importer, M/s Mahi Marine Pvt. Ltd., Mumbai**

A statement of Shri Prabhaker Kini, Authorized Person of the Importer, M/s Mahi Marine Pvt. Ltd., Mumbai was recorded on 04.03.2021 wherein he *inter alia* stated as under:

- His name was Prabhaker Kini and he was working as a Chief executive officer of MBK Logistix Pvt. Ltd. based at Head office, Kochi and looked after the operations of agency. He was the contact point with respect to development of business with Principals or Vessel Owners.
- On being asked regarding his relation with M/s Mahi Marine Pvt. Ltd. and to explain the working/profile of M/s Mahi Marine Pvt. Ltd., he stated that they had authorized him to appear on their behalf at Mundra Custom since due to Bombay travel restrictions of COVID-19, they could not appear themselves. There were 02 directors in M/s Mahi Marine Pvt. Ltd. out of which only 01 director Mr. K. P. Unnikrishnan aged around 65 and his health was not in good condition, the other director was Mr. C. F. George, aged 62 years and based in Dubai and recently suffered with COVID-19. M/s Mahi Marine Pvt. Ltd. was founded in 2019 basically to own ships in India for operations within India and surrounding region to take advantage of Govt. of India Sagarmala Projects.
- On being asked that how many ships had been purchased / imported by M/s Mahi Marine till that date, Name and other details of all vessels, he stated that as on date 03 second hand old vessels had been purchased/ imported by M/s Mahi Marine namely **1. SM Kaveri 2. SM Neyyar 3. SM Mahi**. Out of these 03 vessels SM Neyyar operated as fully foreign going vessel and Other 02 vessels operated both in foreign as well as Coastal run.
- On being asked regarding employees in M/s Mahi Marine Pvt. Ltd., he stated that no employees were there in company. The Company was engaged in Vessel Owning only and all port related work, operations of the Vessel were attended by appointed Shipping agencies. At west coast of India except Bombay M/s MBK Logistix Pvt. Ltd. handles the operations of Vessels and MV Neyyer had gone to east coast of India where operation of vessel was handled by other agent.
- On being asked regarding the location of registered office of M/s Mahi Marine Pvt. Ltd., he stated that office of Company was situated at 7<sup>th</sup> floor, E-704 to E-707, tower 02, Nerul Node, Seawoods grand Central, Navi Mumbai.
- On being asked that who planned/ decided for clearance of import goods (Old Vessel) under BE No.2818901 dated 18.02.2021 and 2812728 dated 18.02.2021 and who provided and prepared the documents for filling the both bills of entry, he stated that as he might be knowing "India Maritime Summit" was being held from 02<sup>nd</sup> March to 4<sup>th</sup> March, 2021 to be

inaugurated by Hon'ble Prime Minister of India. In the summit, M/s Mahi Marine owned vessels were to be showcased to show growth in Indian shipping industry. For that purpose and to operate on the Indian coast and nearby regions, the director took the decision to purchase the ships and brought them under Indian Flag at Dubai.

- On being asked that who Prepared the Bill of lading for the filing of BE No.2818901 dated 18.02.2021, and 2812728 dated 18.02.2021 and to whom order the Bills of lading were prepared, he stated that the bills of lading for purpose of documentation and to facilitates the filing of BE's were prepared by employee of M/s MBK Logistix, Kochi on the request of Mr. K P Unnikrishnan.
- On being asked to peruse the copy of memorandum of agreement uploaded in E-Sanchit duly digitally signed on the behalf of importer. As per contract, the seller should deliver to the buyers with everything belongings to her onboard and on shore. Further, as per contract, the importer should take over the remaining bunkers and unused Lubricants/ Oils in the storage tanks and drums. Further, payment for the lube oils and VLSFO bunkers needs to be done by the buyer as per contract for the quantities taken over by them. In view of above, had he agreed that the said value of the bunkers and lubricant oils should have been declared separately before customs at the time of filing of bill of entry and asked to comment, he stated that they were in belief that bunkers on board of imported Indian Flag Container Ships trading within India and nearby foreign regions were exempted from duty vide many circulars, notifications and as per Section 87 of the Custom Act, 1962. He also stated that when the Indian Flag Vessel was converted for performing a Coastal Voyage then duty was being paid on the HSD, Lube Oil, for that particular Coastal Run. That was an incentive given by Govt. of India to promote Indian Shipping Industry and Sagarmala Project.
- On being asked regarding his agreement in respect of corresponding duty payments on the bunkers and lubricants which had been undeclared in the bill of entry should have been discharged before taking clearance for home consumption, he stated that as per Section 86 and 87 of the Custom Act, 1962, they believed that no duty was liable on store and bunkers on board for a foreign going vessel and in case of Coastal Run duty needed to be paid only for HSD and Lube Oil Consumed during Coastal Run.
- On being asked to peruse the definition of goods as mentioned in Section 2(22) of the Customs Act, 1962, he seen and perused the same.
- On being asked to peruse the Section 87 of Custom Act, 1962 which permitted utilization of Stores on board vessels during the period when such vessels were foreign going vessels. The moment the bill of entry was filed for home consumption in respect of vessels, the vessels ceased to be foreign going vessels, therefore, the bunkers, lubricants and other provision onboard the vessel ceased to enjoy the benefit of exemption available to such items in stores/bunkers in foreign going vessels. Since after filing of bill of entry for home clearance and payment of duty, the vessel ceased to be foreign going vessel and became an Indian vessel and therefore liability of import duty on bunkers and stores on the vessel had arisen. **If the said goods were not declared in the bill of entry and goods were imported in contravention of the provisions of the law,**

they had become smuggled goods and whether he was agree, he stated that firstly, the vessel was already an Indian Flag Vessel when she arrived at Mundra Port and the bill of entry was filed for the Vessel for the purpose of registration as Indian Flag Vessel which was a mandatory requirement of ministry of shipping, Govt. of India and needed to be done at the first port of call in India. By filing the bill of entry, the vessel had not lost its foreign going status as Indian flag vessels were permitted to be foreign going. It was with that good faith and belief that no duty on bunkers was leviable that was the reason why bill of entry were filed for the both vessels only and not for the bunkers on board. The bunkers on board had been declared by the Master of the Vessel in his log book/ Store list etc. and survey was also done in which bunker quantity had been ascertained and declared. Survey/ Inspection report also submitted during the assessment, examination and port clearance of Vessel before the Customs and they had not hid anything from the Customs authorities. Thus, there was no non-declaration of the bunkers and hence this could not be treated as smuggled. Quantity of bunkers were not declared in the bill of entry because they were in belief that their Vessels did not cease the foreign going status and eligible for exemption under Section 87 of Customs Act, 1962, therefore they did not declare the bunkers and stores for duty payment in bills of entry but the same were declared before Customs for other purposes i.e. Assessment, examination and Port Clearance.

- On being asked that in both the bills of entry they had declared value of the goods i.e. Old Vessel and whether it was inclusive of Stores & Bunkers value of the Vessel at the time of import, he stated that the value declared in the invoice was only of Vessel and Stores & Bunkers value of the Vessel were not included in the invoice value.
- On being asked whether he had declared the Value of Stores & Bunkers in the both bills of entry and if not, why; he stated that it had not been declared for the reasons given in answer above.
- On being asked that at the time of examination, Ship Store / survey report of bunkers and stores would have been prepared and whether he had declared the ship store and bunkers in the bills of entry at the time of assessment and If not, why; he stated that our understanding was that duty on bunkers of a foreign trading vessel was exempted vide Section 87 of Customs Act, 1962. They believed that for that reason, CHA did not include the bunkers value in bill of entry at the time of assessment.
- On being asked whether he was aware that at the time of import of any goods for home consumption custom duty was liable as per Customs Act, 1962 on other than exempted goods, he stated yes.
- On being asked regarding his agreement that value of Store and bunkers were other than the value of the Vessel which he had not declared in the bills of entry and same were liable to custom duty, he stated that no, they did not agree as they firmly believe that the intention of Govt. of India was to incentivize investment in Indian Shipping Industry and for promotion of Coastal Shipping under Sagarmala by giving specific exemption relief by exempting payment of duty on bunkers on board Indian flag foreign going vessel and for an Indian flag Vessel on Coastal run duty was to be paid on only HSD and Lube Oil consumed for that particular Coastal run.

- On being asked to peruse the statement of Sh. Jigneshsinh Jadeja recorded on 04.03.2021 in which he stated that he guided the importer before filing the bills of entry that value of the stores and bunkers were needed to be declared separately in the bills of entry and to offer comment, he stated that they had provided the invoice and other documents to CHA and on the basis of which he filed bill of entry. They were in the belief that duty was not liable for bunkers on board of a foreign going vessel and accordingly they had not given the bunkers value to the CHA at the time of filing bill of entry. However, he did not insist them to declare the value of bunkers separately.
- On being asked that it was noticed that BE No.2818901 dated 18.02.2021 has not OOC (Out of Charged) till that date; however goods i.e. Vessel MV SM Mahi had been sailed on 22.02.2021 from Mundra port without granting of OOC by the Proper Officer and was he aware about that, he stated that yes, on coming to know that vessel had sailed without OOC, they immediately enquired with the vessel agents, how that was happened and came to know that since vessel had completed operations at the terminal on 22.02.2021 and since there were other vessels to follow at the same berth, there was pressure from the port to sail out the vessel. He was told that examination was completed, report uploaded in the system, assessment also completed and duty paid, therefore OOC was just a formality which would automatically came in the system. They might submit that Customs also granted Port Clearance to sail the ship. He was further told that the system was hanging showing error and sometime none of the uploaded documents can be viewed too. The vessel agent showed me 01 screen shot taken at 12.34 PM on 23.02.2021 of the relevant bill of entry no.2818901 dated 18.02.2021 of ICEGATE where status of OOC shown as given, rest of the fields shown no record found. However, another screen shot taken at 16.05 dated 23.02.2021 which showed all fields were filled but status of OOC showed NA. This proved that there was system error prevailing for which reason the OOC not shown granted. In good faith and belief that all procedure had been completed and there was pressure from the port to sail the ship and in expectation of the OOC been generated automatically once the system rectifies, the vessel was sailed.
- On being asked to peruse the Alert Notice No.02/2021 dated 23.02.2021 issued by Commissioner, Custom House, Mangaluru and to offer comment, he after having seen and perused the same and stated that their understanding was related to a tanker vessel which called at Mangaluru Port. As far as they were concerned their vessels were containers ships engaged in trading within India and nearby regions for which there was a specific exemption for duty on bunkers and stores as an incentive to promote Indian shipping and bringing more vessels under Indian flag as part of the Sagarmala Project. The alert said that once bill of entry filed for home consumption, the vessel ceased to be on foreign run however their vessel MV SM Neyyar was still on foreign run and they had not converted the vessel into coastal run till date. With regard to Vessel MV SM MAHI, she was on a combination of coastal and foreign run in that at Mundra, they converted the vessel to coastal run up to Cochin and at Cochin they had reverted her back to foreign run as she was sailing from Cochin to Colombo. Basis of the conversion and reversion certificate, that duty was paid on HSD, Lube Oils consumed during the coastal run. Duty on Fuel

oil consumed during coastal run was exempted vide relevant notification no.31/2014-Customs dated 11.11.2014. They had been following the procedure religiously, diligently and in good faith.

- On being asked whether they wanted to say anything more, he stated that he wished to state that M/s MAHI Marine Pvt. Ltd. were legitimate and bonafide ship owners based in Mumbai, India operating their vessels within India and nearby regions. They were providing dedicated weekly fixed day weekly sailing connecting Indian Ports to Jebel Ali and Colombo. They were not fly by night operators. The directors were law abiding and upright citizens of India. The Company believed in strictly adhering to all laws of the land and will comply with all legal and legitimate requirements of the country. That being the case, even though they were of the firm belief that for their vessels duty on bunkers not applicable. Still they had Co-operated and deposited duty on bunkers on board for **MV SM MAHI** imported vide bill of entry no.2818901 dated 18.02.2021 vide manual challan no.6734 dated 02.03.2021 of **Rs.77,52,872/-**, challan no.6733 dated 02.03.2021 of **Rs.20,05,354/-**, Challan No.6794 dated 04.03.2021 for **Rs.1,55,810/-** & Challan No.6795 dated 04.03.2021 for **Rs.28,072/-**. Total Payment of **Rs.99,42,108/-**.
- With regard to **SM Neyyar**, they contended that the vessel was purely on foreign run and never ceased to be on foreign run. However, they had Co-operated and deposited duty on bunkers on board for **MV SM NEYYAR** imported vide bill of entry no.2812728 dated 18.02.2021 vide manual challan no.6807 dated 04.03.2021 of **Rs.1,11,72,366/-** and vide manual challan no.6808 dated 04.03.2021 of **Rs.50,506/-**; Total of **Rs.1,12,22,872/-**. He submitted therewith the copies of the challans along with, the copies of the duty calculation in respect of the above two Bill of entries.
- He further submitted that though they had made the above payments of the Customs Duties, their principals reserve their right for refunds, if the issue was settled in their favour at any later stage, as they still believed that the benefit of Section 87 of Customs Act, 1962 was available to them and no duty was payable. The duty paid by them might please be treated as "**paid under protest**".

**3.6** During the course of investigation, M/s MBK Logistix Pvt. Ltd. vide their letter dated 04.03.2021 **in respect of MV SM MAHI** submitted that:

*We have filed the BE for MV SM MAHI to fulfil the Government of India directives that any Indian Flag vessel should file the relevant Bill of Entry at the first India Port of arrival. They have relied on the following Notifications in good faith: -*

*As per Ministry of Shipping Notification dated 7th March 2015 and subsequent Department of Revenue vide Notification No.31/2014 - Customs dated 11th November, 2014 and extended notification No.46/2015 dated September wherein the following bunker fuels IF 180 and 380 CST used in Indian Flag coastal vessels for transportation of EXIM, domestic and Empty containers are exempted for payment of duty.*

Relying on the above sections, we have had filed the BE 2818901 Dated 18.02.2021, vessel examined and examination report uploaded, assessment done and duty by way of IGST paid. Further to inform you that duty on DO and Lube oil is being paid on completion of each costal voyage by the vessel regularly on the basis of conversion/ reversion certificate.

Past records will prove that we have very promptly and diligently paid the customs duty on bunkers consumed during the coastal voyages applicable on container vessels which clearly indicates that we are conscious of complying with all Customs Acts and Regulations.

It has been brought to our notice that on filing of BE for home consumption at the time of 1st importation of the vessel, the benefit of section 87 ceases and duty has to be paid on the bunkers on board. Our stand and understanding that GST is applicable only on the commercial value of the Indian Flag trading vessel which can display the national character of the ship as Indian Flag.

For your kind information, the Vessel is imported for further trading within India and outside. The vessel will be on a regular run performing both coastal and foreign voyages. Therefore, we are under the full belief that the benefit of section 87 is available to us being a trading vessel.

**3.7** During the course of investigation, M/s MBK Logistix Pvt. Ltd. vide their letter dated 04.03.2021 **in respect of SM NEYYAR** submitted that:

We have filed the BE for SM Neyyar Voy 0018 at Mundra, on 18.02.2021 to fulfil the Government of India directives that any Indian Flag vessel should file the relevant Bill of Entry at the first Indian Port of arrival with a payment of 5 percent GST on purchase /commercial value of the vessel.

SM Neyyar being an Indian Flag vessel in Foreign run there is no duty applicable for such vessels in line with any other Foreign Flag vessels operating in Indian Ports. The decision to impose duty on bunkers for Indian Flag Foreign going vessel will definitely effect the Government Initiative to Flag more vessels under Indian Tonnage. Further the Ministry also exempted duty on IFO for Indian Flag costal container vessels.

Relying on the above sections, we have had filed the BE 2812728 Dated 18.02.2021, vessel examined and examination report uploaded, assessment done and duty by way of IGST paid.

It has been brought to our notice that on filing of BE for home consumption at the time of 1st importation of the vessel, the benefit of section 87 ceases and duty has to be paid on the bunkers on board. Our stand and understanding that GST is applicable only on the commercial value of the Indian Flag trading vessel which can display the national character of the ship as Indian Flag.

For your kind information, the Vessel is imported for further trading within India and outside. The vessel will be on a regular run performing

foreign voyages. Therefore, we are under the full belief that the benefit of section 87 is available to us being a trading vessel.

**3.8** In the above submission, M/s MBK Logistix Pvt. Ltd., the Vessel Agent of M/s Mahi Marine Pvt. Ltd. in respect of MV SM MAHI submitted that relying on the **Notification No.31/2014-Customs dated 11<sup>th</sup> November, 2014** which exempts "Bunker Fuels IF 180 and 380 CST" used in Indian Flag coastal vessels for transportation of EXIM, domestic and empty containers. Therefore, they only paid IGST in respect of Bill of Entry No.2818901 Dated 18.02.2021 for import of vessel MV SM MAHI. Further, in respect of **SM NEYYAR**, M/s MBK Logistics Pvt. Ltd. submitted that SM Neyyar being an Indian Flag vessel in Foreign run there is no duty applicable for such vessels as per **Section 87 of the Customs Act, 1962** and relying on the above section. Therefore, they only paid IGST in respect of Bill of Entry No.2812728 Dated 18.02.2021 for import of vessel SM NEYYAR. However, M/s MBK Logistix Pvt. Ltd., the Vessel Agent and authorized representative of M/s Mahi Marine Pvt. Ltd., vide their letters dated 04.03.2021 in respect of SM Neyyar and SM Mahi have stated that they have made payment of Customs duty "**Under Protest**".

**3.9** During the course of investigation, M/s MBK Logistix Pvt. Ltd. vide their letter dated 14.09.2021 in respect of MV SM Mahi submitted that they had filed Bill of Entry No.2818901 dated 18.02.2021 for vessel MV SM MAHI imported at Mundra and made the payment of duty as per procedure basis value of ship as per invoice.

Subsequently, after that as per instruction from Customs department, they had paid the duty on available bunker of Fuel oil even when the vessel is exempted to collect the duty as per Custom **Notification No.50/2017 dated 30/06/2021 and 01/2020 02/02/2020 and Department of Revenue vide Notification No.46/2015 dated September 17/2015.**

Details herewith as under:

VESSEL NAME	MV SM MAHI
BILL OF ENTRY NUMBER	2818901
BILL OF ENTRY DATE	18.02.2021
DUTY PAID BASIS VALUE OF SHIP AS PER BE	22140000.0
ADDITIONAL DUTY PAID AS PER CUSTOM INSTRUCTION	2005354.0
PAYMENT MADE AGAINST INTEREST	28072.0
TOTAL PAYMENT MADE (A)	24173426.0

Basis new procedure, value of bunker to be added to value of ship and duty (GST 5%) to paid accordingly. The calculation is as under:

VALUE OF SHIP AS PER BE	442300000.0
VALUE OF BUNKER	18611172.0
TOTAL VALUE	461411172.0
DUTY GST 5% APPLICABLE ON TOTAL VALUE (B)	23070559.0
EXCESS DUTY PAID (A) - (B)	1102867.4

Hence, they requested to allow to recall Bill of Entry and amend the value of ship with adding Bunker value and the excess amount to close the file.

**3.10** During the course of investigation, M/s MBK Logistix Pvt. Ltd. vide their letter dated 14.09.2021 in respect of MV SM NEYYAR submitted that they had filed Bill of Entry No.2812728 dated 18.02.2021 for vessel MV SM NEYYAR imported at Mundra and made the payment of duty as per procedure basis value of ship as per invoice.

Subsequently, after that as per instruction from Customs department, they had paid the duty on available bunker even when the vessel was under foreign run.

Details herewith as under:

VESSEL NAME	SM NEYYAR
BILL OF ENTRY NUMBER	2812728
BILL OF ENTRY DATE	18.02.2021
DUTY PAID BASIS VALUE OF SHIP AS PER BE	44280000.0
ADDITIONAL DUTY PAID AS PER CUSTOM INSTRUCTION	11172366.0
PAYMENT MADE AGAINST INTEREST	50506.0
<b>TOTAL PAYMENT MADE (A)</b>	<b>55502872.0</b>

Basis new procedure, value of bunker to be added to value of ship and duty (GST 5%) to be paid accordingly. The calculation is as under:

VALUE OF SHIP AS PER BE	885600000.0
VALUE OF BUNKER	39573556.0
TOTAL VALUE	925173556.0
DUTY GST 5% APPLICABLE ON TOTAL VALUE (B)	46258678.0
<b>EXCESS DUTY PAID (A) - (B)</b>	<b>9244194.0</b>

**3.11** In the above submission, M/s MBK Logistix Pvt. Ltd., the Vessel Agent of M/s Mahi Marine Pvt. Ltd. has voluntarily requested to reassess their Bill of Entries in respect of import of vessels MV SM MAHI and SM NEYYAR by adding the value of bunkers in the value of vessels and payment of IGST thereof. They also requested to refund the differential amount as per their calculation. **However, the above request was not processed due to pending investigation.**

**3.12** During the course of investigation, it is noticed that Value i.e. USD \$6000000 (Rs.44,28,00,000/-) for MV SM MAHI and USD \$12000000 (Rs.88,56,00,000/-) for MV NEYYAR was declared by the importer for the purpose of assessment were actually FOB Value. However, as the assessment in the case of import is required to be done on the basis of CIF value a summons dated 03.02.2023 was issued to the importer for providing the details insurance and freight in the present case. In reply, the importer vide letter dated Nil received on 10.02.2023 requested to grant time till 20.03.2023 to submit the documents and reply against the said summons. However, till date no reply has been submitted by them.

#### **4. Scrutiny of the documents:**

**4.1** Some documents in respect of import of old and used container ship i.e. SM NEYYAR and MV SM MAHI were seized and some of the documents were submitted by the Ship Agent/Importer such as Bill of Entry, Commercial Invoices, Bill of Lading, Certificate of Registry, Certificate of Fair Market Value,

Memorandum of Agreement, Provisional Certificate of Indian Registry along with specific trade type license etc. which were scrutinized as detailed under:

**4.2 Commercial Invoice:**

The Commercial Invoice dated 09.01.2021 was issued by M/s Onyx Navigation Ltd. to M/s Mahi marine Pvt. Ltd. for sale of container ship "SM NEYYAR" having purchase price of **United States Dollars Twelve Million (US\$ 12,000,000)** only and Commercial Invoice No.032021 dated 09.01.2021 was issued by M/s Universal Navigation Ltd. to M/s Mahi marine Pvt. Ltd. for sale of container ship "MV SM MAHI" having purchase price of **United States Dollars Six Million (US\$ 6,000,000)** only.

**4.3 Certificate of Fair Market Value:**

The Certificate of Fair Value in respect of container ship "SM NEYYAR" bearing No.NTI/FE/SS/2021010801 dated 08.01.2021 was issued by M/s Navtech International, Marine Consultants & Surveyors, Dubai, UAE declaring fair market value (**FOB**) of the above container ship as **United States Dollars Twelve Million (US\$ 12,000,000)** only and the Certificate of Fair Value in respect of container ship "MV SM MAHI" bearing No.NTI/FE/SS/2021010501 dated 05.01.2021 was issued by M/s Navtech International, Marine Consultants & Surveyors, Dubai, UAE declaring fair market value (**FOB**) of the above container ship as **United States Dollars Six Million (US\$ 6,000,000)** only. It is pertinent to mention here that the assessment has been done on the above fair market value.

**4.4 Provisional Certificate of Indian Registry and License:**

**4.4.1** The Provisional Certificate of Indian Registry dated 10.02.2021 issued by the Surveyor to Indian Register of Shipping under Merchant Shipping Act, 1958 for container ship "SM NEYYAR" expiring on or before 09.08.2021 along with License No.MUM/18/W&C/2021 valid upto 09.08.2021 issued under Section 406 of the Merchant Shipping Act, 1958 co-terminus with the above Provisional Certificate of Registry having registered Trade as "WORLDWIDE & COASTAL".

**4.4.2** The Provisional Certificate of Indian Registry dated 11.02.2021 issued by the Surveyor to Indian Register of Shipping under Merchant Shipping Act, 1958 for container ship "MV SM MAHI" expiring on or before 10.08.2021 along with License No.MUM/19/W&C/2021 valid upto 10.08.2021 issued under Section 406 of the Merchant Shipping Act, 1958 co-terminus with the above Provisional Certificate of Registry having registered Trade as "WORLDWIDE & COASTAL".

**4.4.3** It is pertinent to mention here that the Provisional Certificate of Indian Registry are issued when a foreign flag vessel required to be entered in Indian Territory for the first time to be registered with Indian Registry as "Indian Flag Vessel".

**4.5 Memorandum of Agreement:**

**4.5.1** Memorandum of Agreement dated 28.01.2021 was entered between the seller, M/s Onyx Navigation Ltd., Kingstown, St. Vincent & the Grenadines and

the buyer, M/s Mahi Marine Pvt. Ltd., Seawoods Grand Central, E-704-707, Tower-2, 7<sup>th</sup> Floor, Seawoods, Navi Mumbai-400706 for sale of container ship "SM NEYYAR" wherein at **Sr. No.7- Spares, bunkers and other items**, in respect of bunkers and unused lubricating and hydraulic oils and greases in storage tanks and unopened drum, it is specifically mentioned that:

***"The Buyer shall take over remaining bunkers and unused lubricating and hydraulic oils and greases in storage tanks and unopened drum and pay either,***

***(a) luboils to be paid as per Sellers purchased prices, but such purchase/invoice not to be older than 24 (twenty four) months; and the actual net price (excluding bargeing expenses) as evidenced by invoices or vouchers; or***

***(b) VLSFO bunkers to be paid as per Platt's oil gram price Fujairah as published 2 (two) working days prior to the current not market price (excluding bargeing expenses) at the port and date of delivery of the Vessel or, if unavailable, at the nearest bunkering port,***

***for the quantity taken over.***

**4.5.2.** Memorandum of Agreement dated 07.01.2021 was entered between the seller, M/s Universal Navigation Ltd., Kingstown, St. Vincent & the Grendines and the buyer, M/s Mahi Marine Pvt. Ltd., Seawoods Grand Central, E-704-707, Tower-2, 7<sup>th</sup> Floor, Seawoods, Navi Mumbai-400706 for sale of container ship "MV SM MAHI" wherein at **Sr. No.7- Spares, bunkers and other items**, in respect of bunkers and unused lubricating and hydraulic oils and greases in storage tanks and unopened drum, it is specifically mentioned that:

***"The Buyer shall take over remaining bunkers and unused lubricating and hydraulic oils and greases in storage tanks and unopened drum and pay either,***

***(a) Lub oils to be paid as per Sellers purchased prices, but such purchase/invoice not to be older than 24 (twenty four) months; and the actual net price (excluding bargeing expenses) as evidenced by invoices or vouchers; or***

***(b) VLSFO bunkers to be paid as per Platt's oil gram price Fujairah as published 2 (two) working days prior to the current not market price (excluding bargeing expenses) at the port and date of delivery of the Vessel or, if unavailable, at the nearest bunkering port,***

***for the quantity taken over.***

**4.5.3** It is evident from the above condition mentioned at **Sr. No.7- Spares, bunkers and other items**, in respect of bunkers and unused lubricating and hydraulic oils and greases in storage tanks and unopened drum that the payment of bunkers and other items were not included in the sale price of both of the above container ships and to be paid for the quantity taken over.

#### **4.6 Bunker Survey Report:**

**4.6.1** As per the Bunker Survey Report of Vessel MV SM Mahi, the quantity of Lube Oil, HSD and Fuel Oil was as under:

Goods	Qty on Board (MT/LTR)
LUB. OIL	151350
HSD	50.002 (60502.42 ltrs)
FUEL OIL	1073.123

**4.6.2** As per the Bunker Survey Report of Vessel SM NEYYER, the quantity of Lube Oil, HSD and Fuel Oil was as under:

Goods	Qty. on Board (MT/ LTR)
LUB. OIL	67908
HSD	132 (159720 Ltrs.)
FUEL OIL	1325.558

## **5. Calculation of Duty:**

### **5.1 Details of duty to be paid on Bunkers:**

The calculation of the duty liability applicable on Lub. Oil, HSD and Fuel Oil remaining on Board at the time of import of the vessels "**MV SM MAHI**" and "**SM NEYYER**" as per their respective CTH, in addition to the duty liability required to be paid on the import of the vessels "**MV SM MAHI**" and "**SM NEYYER**", is calculated as under:

### **Duty Calculation on Bunkers for Import of "MV SM MAHI"**

**Table-1**

Goods	Qty on Board (MT/LTR)	Rate (Rs.)	Assessable Value (Rs.)	Basic Customs Duty	SAD @Rs.9/- Per Ltr	SWS 10%	Road & Infr. Cess @ Rs.18 per ltr	IGST	CVD @ Rs.7.19 Per Ltr	AIDC (Agri Cess)	SWS 3%	Total (Rs.)
LUB. OIL	151350	150	22702500	1135125	--	113513	--	4311205	--	--	--	5559843
HSD	50.002 (60502.42 ltrs)	48471	2423659	60591	544522	--	1089044	0	485012	151256	68413	2348838
FUEL OIL	1073.123	17343	18611172	930559	0	93056	--	981739	--	--	--	2005354
<b>TOTAL DUTY</b>												
<b>9914035</b>												

### **Duty Calculation on Bunkers for Import of "SM NEYYAR"**

**Table-2**

Goods	Qty on Board (MT/LTR)	Rate (Rs.)	Assessable Value (Rs.)	Basic Customs Duty	SAD @Rs.9/- Per Ltr	SWS 10%	Road & Infr. Cess @ Rs.18 per ltr	IGST	CVD @ Rs.7.19 Per Ltr	AIDC (Agri Cess)	SWS 3%	Total Duty (Rs.)
LUB. OIL	67908	150	10186200	509310	--	50931	--	1934359	--	--	--	2494600

HSD	132 (159720 ltrs)	48471	6398204	159955	1437480	--	2874960	0	1146387	399300	180602	6200684
FUEL OIL	1325.558	17343	22989152.39	1149458	0	114946		1212678	--	--	--	2477082
<b>TOTAL DUTY</b>												<b>11172366</b>

**5.2** In view of above, it is evident that at the time of import of the above old and used vessels i.e. "**MV SM MAHI**" and "**SM NEYYAR**", the importer failed to declared the quantity and value of the above Lub. Oil, HSD and Fuel Oil remaining on Board and evaded the duty totally amounting to **Rs.99,14,035/-** for "**MV SM MAHI**" and **Rs.1,11,72,366/-** for "**SM NEYYAR**" respectively. However, during the course of investigation, the importer has voluntarily paid duty **Rs.99,14,035/-** for "**MV SM MAHI**" and **Rs.1,11,72,366/-** for "**SM NEYYAR**" on the bunkers alongwith Interest amounting to **Rs.28,072/-** and **Rs.50,506/-** respectively vide GAR-7 Challans as detailed under:

<b>Duty paid for Vessel SM NEYYAR</b>						
Challan No	Challan Date	Amount	Duty Type	BE	BE Date	Vessel
6807	04.03.2021	<b>11172366</b>	Duty	2812728	18.02.2021	NEYYAR
6808	04.03.2021	50506	Interest	2812728	18.02.2021	NEYYAR

<b>Duty paid for Vessel MV SM MAHI</b>						
Challan No	Challan Date	Amount	Duty Type	BE	BE Date	Vessel
6794	04.03.2021	155810	Duty	2818901	04.03.2021	MAHI
6734	02.03.2021	7752872	Duty	2818901	04.03.2021	MAHI
6733	02.03.2021	2005354	Duty	2818901	04.03.2021	MAHI
		<b>9914036</b>				
6795	04.03.2021	28072	Interest	2818901	04.03.2021	MAHI

### **5.3 Details of duty to be paid on vessels on CIF value:**

On scrutiny of the documents, as detailed above, in respect of import of the above old and used vessels i.e. "**MV SM MAHI**" and "**SM NEYYAR**", it is noticed that the importer has declared the FOB Value for the purpose of assessment which was actually required to be done on the **CIF value** as per Section 14 of the Customs Act, 1962 read with Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Further, as the importer failed to provide the details of the actual amount of Insurance and Freight in the present case. Therefore, the value of the above old and used vessels to be re-determined as detailed under:

**Duty Calculation Import of MV SM MAHI**  
**Table-3**

Sr. No.	Particulars	Value
1	FOB Value in USD	6000000
2	Exchange rate at the time of filing of Bill of Entry	1 USD=INR 73.8
3	FOB	44,28,00,000
4	Freight @ 20% of FOB	8,85,60,000
5	Insurance @ 1.125%	49,81,500
6	CIF in INR	53,63,41,500

7	Assessable Value INR	53,63,41,500
8	BCD (Exemption vide Notification No.50/2017-Cus)	0
9	Social Welfare Surcharge @ 10% of BCD	0
10	IGST @ 5% to be paid	2,68,17,075
11	Total Customs Duty Payable	2,68,17,075
12	Total Customs Duty Paid	2,21,40,000
13	<b>Differential Duty Payable</b>	<b>46,77,075</b>

**Duty Calculation on Import of SM NEYYAR**  
**Table-4**

<b>Sr. No.</b>	<b>Particulars</b>	<b>Value</b>
1	FOB Value in USD	12000000
2	Exchange rate at the time of filing of Bill of Entry	1 USD=INR 73.8
3	FOB	88,56,00,000
4	Freight @ 20% of FOB	17,71,20,000
5	Insurance @ 1.125%	99,63,000
6	CIF in INR	1,07,26,83,000
7	Assessable Value	1,07,26,83,000
8	BCD (Exemption vide Notification No.50/2017-Cus)	0
9	Social Welfare Surcharge @ 10% of BCD	0
10	IGST @ 5% to be paid	5,36,34,150
11	Total Customs Duty Payable	5,36,34,150
12	Total Customs Duty Paid	4,42,80,000
13	<b>Differential Duty Payable</b>	<b>93,54,150</b>

**5.4** In view of above, it is evident from the above that the importer has mis-declared the value before Customs authorities by suppressing the element of freight and Insurance. Therefore, the importer has short paid the Customs amounting to **Rs.46,77,075/-** and **Rs.93,54,150/-** in respect of import of old vessels for "MV SM MAHI" and "SM NEYYAR" respectively as detailed above.

**Legal Provisions:**

**6.** The relevant provisions of law pertaining to import of goods in general, the policy & rules relating to imports, the liability of the goods to confiscation and the persons concerned to penalty for illegal importation under provisions of Customs Act, 1962 and the other laws for the time being in force are summarized as under:

**6.1** (i) As per **Section 2(2) of the Customs Act, 1962**, "assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to-

- (a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;
- (b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;
- (c) exemption or concession of duty, tax, cess or any other sum,

consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;

- (d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;
- (e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;
- (f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;

(ii) Further, **Section 2(22) of the Customs Act, 1962**, defines the term "goods" and "goods" includes –

- (a) vessels, aircrafts and vehicles;
- (b) stores;
- (c) baggage;
- (d) currency and negotiable instruments; and
- (e) any other kind of movable property;

6.2 **Section 2(25) of the Customs Act, 1962, defines the terms "Import Goods":**

*Section 2:*

(1)

(25)"Imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;

6.3 **Section 14. Valuation of goods:**

(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

*Provided..*

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

6.4 **Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007**

**Rule 10. Cost and services. -**

(1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -

(a) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-

- (i) commissions and brokerage, except buying commissions;
- (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
- (iii) the cost of packing whether for labour or materials;

(b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely: -

- (i) materials, components, parts and similar items incorporated in the imported goods;
- (ii) tools, dies, molds and similar items used in the production of the Imported goods;
- (iii) materials consumed in the production of the imported goods;
- (iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) —

(d) ---

(e) —

**Explanation .-** Where the royalty, license fee or any other payment for a process, whether patented or otherwise, is includable referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

(2) For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, and shall include -

- (a) the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods to the place of importation;
- (b) the cost of insurance to the place of importation:

**Provided** that where the cost referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

**Provided** further that where the free on board value of the goods is not ascertainable but the sum of free on board value of the goods and the cost referred to in clause (b) is ascertainable, the cost referred to in clause (a) shall be twenty per cent of such sum:

**Provided** also that where the cost referred to in clause (b) is not ascertainable, such cost shall be 1.125% of free on board value of the goods:

**Provided** also that where the free on board value of the goods is not ascertainable but the sum of free on board value of the goods and the cost referred to in clause (a) is ascertainable, the cost referred to in clause (b) shall be 1.125% of such sum:

**Provided** also that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:

**Provided** also that in the case of goods imported by sea or air and transhipped to another customs station in India, the cost of insurance, transport, loading, unloading, handling charges associated with such transshipment shall be excluded.

**Explanation** - The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on charted vessels, lighterage or barge charges.

(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.

6.5 **Section 17(1) of the Customs Act, 1962** provides for self-assessment of duty on imported goods by the importer himself by filing a Bill of Entry. Under this mode of self-assessment, the bill of entry was self-assessed by importer, with regard to correctness of classification, value, rate of duty, exemption notification or any other relevant particular having bearing on correct assessment of duty on import.

6.6 **Section 46. Entry of goods on importation:** (1) The importer of any goods, other than goods intended for transit or trans-shipment, shall make entry thereof by presenting electronically to the proper officer a Bill of Entry for home consumption or warehousing in the prescribed form:

Provided that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a Bill of Entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

*((4A) the importer who presents a bill of entry shall ensure the following, namely:*

- (a) The accuracy and completeness of the information given therein;
- (b) The authenticity and validity of any document supporting it; and
- (c) Compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

6.7 **Section 87 Customs Act, 1962** provides that:

*Any imported stores on board a vessel or aircraft (other than stores to which section 90 applies) may, without payment of duty, be consumed thereon as stores during the period such vessel or aircraft is a foreign-going vessel or aircraft.*

6.8 **Section 110 of the Customs Act, 1962**, provides for Seizure of goods, documents and things. - (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods.

6.9 **Section 111. Confiscation of improperly imported goods, etc.** - The following goods brought from a place outside India shall be liable to confiscation:-

(a) ...

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--

*(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77.*

*(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54.*

6.10 **SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases.** - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:

*Provided that where such duty or interest, as the case may be, as determined under sub-section (8) of section 28, and the interest payable thereon under section 28AA, 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 twenty-five per cent of the duty or interest, as the case may be, so determined:*

*Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:*

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AA, and twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

*Explanation. - For the removal of doubts, it is hereby declared that -*

- (i) the provisions of this section shall also apply to cases in which the order determining the duty or interest under sub-section (8) of section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;
- (ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.

**6.11 SECTION 117 Penalties for contravention, etc., not expressly mentioned.** - Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding ten thousand rupees.

**Custom Broker Licensing Regulations, 2018**

**6.12 Regulation 11 of the Customs Brokers Licensing Regulations, 2013 states the relevant obligations of Customs Broker as follows:**

*A Customs Broker shall:*

*(a)*

*-*

*/-*

- (d) advise his client to comply with the provisions of the Act and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;*

(e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage002E

**Outcome of the investigation and contraventions:**

7. M/s Mahi Marine Pvt. Ltd. filed Bill of Entry No.2818901 dated 18.02.2021 for import of old and used Vessel **MV SM MAHI** and Bill of Entry No.2812728 dated 18.02.2021 for import of old and used Vessel **SM NEYYAR** through their CHA-M/s Alacrity Projects India Pvt. Ltd. under CTH-8901.

7.1 As per Section 2(22) of the Customs Act, 1962, "goods" includes –

- (a) **vessels, aircrafts and vehicles;**
- (b) **stores;**
- (c) **baggage;**
- (d) **currency and negotiable instruments; and**
- (e) **any other kind of movable property;**

7.2 Further, as per Section 2(38) of the Customs Act, 1962 "**stores**" means **goods for use in a vessel or aircraft and includes fuel and spare parts and other articles of equipment, whether or not for immediate fitting.**

7.3 On combined reading of the above provisions, it appears that the act defines "**vessels**" and "**stores**" which includes fuel separately.

7.4 The Board issued Circular No.37/96-Cus dated 03.07.1996 regarding classification of Ships & other floating structures imported for breaking up wherein it was clarified that **Remaining fuel and oil and other ship stores including drinks and foodstuff imported on Board a ship for breaking up are classifiable separately in their own appropriate headings.** The above circular also appears to be applicable in case of import of remaining fuel and oil (bunkers) imported on board in an old and used vessel entered first time in India to be registered as Indian Flag Vessel. For ease of reference, Circular No.37/96-Cus dated 03.07.1996 re-produced as under:

*I am directed to say that doubts have been raised in the context of an audit para regarding classification of:*

- (i) *movable gears such as lifting and handling machinery, anchors, navigational equipment's, machine tools, fire fighting equipment*
- (ii) *bankers, such fuel oil, engine oil and*
- (iii) *ship stores, such as spare parts, food stuffs, alcoholic and other beverages imported on Board a ship for breaking up. [para No. 1.01 of the report of the C& A.G. of India for the year ended 31st March, 1991 (4 of 1992)].*

*While Department was of the view that the articles are classifiable u/s 89.08 of the Customs Tariff covering vessel and other floating structure for breaking up, Audit was of the view that these items are not covered by this heading and needs to be classified separately in their respective headings.*

*2. The issue was, referred to World Customs Organisation, Brussels, who has opined that:-*

(a) movable gears such as lifting and handling machinery, anchors, navigational equipment, machine tools, fire fighting equipment form part of vessel's normal equipment and hence classified u/h 89.08.

(b) Fuel and Oil contained in the vessel's machinery and engines can also be regarded as forming integral part of the vessels and hence be classified u/h 89.08.

(c) Spares parts (such as propellers), whether or not in a new condition and movable articles (furniture, kitchen equipment, table-ware etc.) showing clear evidence of use and which have formed part of normal equipment of vessels, are classifiable under heading 89.08.

(d) Remaining fuel and oil (other than that mentioned in sub-para (b) above and other ship stores, including drinks and foodstuff are classifiable separately in their own appropriate headings.

3. The matter was also discussed in a tripartite meeting comprising the Ministry of law, Justice and Company Affairs, the Office of C&AG of India and the Department of Revenue, where it was decided that opinion expressed by the WCO may be accepted as guidelines for the determining classification of different items imported on board the ship for breaking up. **The Board has accepted this decision**

**7.5.** The Board further issued Circular No.09/2018-Customs dated 19.04.2018 for clarification of above Board Circular No.37/96-Customs dated 03.07.1998 read with Notification No.07/2015-2020 dated 02.05.2015 wherein it was clarified that **remnant fuels (HSD/LDO) is to be classified in their respective Chapter i.e. CTH-27** and made special dispensation with regard to remnant fuels classifiable under heading 2710 and freed them from policy restriction vide Notification No. 07/2015-2020 dated 02.05.2015 which was imported on board. For ease of reference, Circular No.09/2018-Customs dated 19.04.2018 is re-produced as under:

*Kind attention is invited to the Board circular No.37/96-customs dated 3.7.1996 on the above subject. In the said circular, Board had inter-alia clarified that in the case of a vessel brought for ship breaking, the remnant fuel and oil (other than fuel and oil contained in the vessels machinery and engines), ships stores etc. are classifiable separately in their appropriate headings and not in CTH 8908.*

*2. References have been received in the Board from field formations that Bills of entries related to ship breaking are being provisionally assessed in view of the dismissal of the departmental Civil Appeal against the CESTAT order dated 08.07.14 by Supreme Court in D.No.41289 of 2014 dated 31.07.2015. in the said order, CESTAT held that classification of the ships/vessels brought in for breaking up along with surplus fuel, will have to be considered classifiable under CTH 89.08 of the import policy as an integral part of the vessel/ships and as the imports under CTH 89.08 are free without any restriction, therefore, such MGO/HSD contained in vessels brought in for breaking up, cannot be held as liable for confiscation and no penalties imposable under section 112 (a) of the Customs Act, 1962. As*

mentioned above, Hon'ble SC vide order dated 31.07.2015 upheld the order of the CESTAT.

3. Field formations have stated that in view of the dismissal of the departmental appeal, clarification is required on the classification of remnant fuel and oil other than that contained in vessel's machinery etc. Industry Associations have also requested to revisit the said circular and to classify remaining fuel and oil along with other items like stores and Spares etc. as integral part of the vessel under 8908 in view of Hon'ble SC order dated 31.07.2015.

4. The matter has been examined in detail. This issue was also deliberated at length in the Annual Tariff Conference of Chief Commissioners/ Directors Generals held in Delhi on 4/5<sup>th</sup> March 2018.

5. The background of the case is that CESTAT decided a bunch of appeals wherein the appellants were challenging levy of redemption fine on remnant fuel and imposition of penalty on the importers who had filed bills of entry for ship breaking. The importers had classified the remnant fuel under tariff heading of chapter 27 in accordance with the Board Circular 37/96-Cus dated 03.07.96 and paid the duties accordingly. However, adjudicating authority/ appellate authority took a view that since items under Chapter 27 were canalized, therefore, the said goods (remnant fuels) were duly confiscated, redemption fine levied and penalties imposed. The matter was challenged before CESTAT which agreed with the view of DGFT that so far as classification of the ships/ vessels brought in for breaking up along with remnant fuel, will have to be considered classifiable under heading 89.08 of the import policy as an integral part of the vessel/ ship. Department's appeal against the said CESTAT order was dismissed by the Supreme Court. The issue has attained finality as the SC's order accepted by the Department.

6. However, in a subsequent change of stand, DGFT changed its stand vide notification No.07/2015-2020 dated 20<sup>th</sup> May, 2015 and reverted to the earlier view that remnant fuels (HSD/LDO) would be classified under Chapter 27. It also freed these items from policy restrictions when imported, brought on board in old ships / vessels meant for breaking (copy attached).

7. In view of the above, import of remnant fuels referred to in para 2(d) of Board circular 37/96-customs would not be subject to any policy condition under chapter 27 prior to 20<sup>th</sup> May 2015. As on 20<sup>th</sup> May 2015, DGFT has made special dispensation with regard to remnant fuels classifiable under heading 2710 and freed them from policy restriction vide notification No.07/2015-2020.

8. Pending provisional assessments may be finalized accordingly.

**7.6** In view of above clarification issued by the board, it appears that the bunkers imported on board in an old and used vessel are classifiable separately in their own appropriate headings.

**7.7** As per Memorandum of Agreement (MoA) entered into for purchase of the above old and used vessels, apart from the purchase price of the vessels, M/s Mahi Marine Pvt. Ltd. was also required to pay the amount towards the stock of remaining items viz., bunkers, lubricating oils and consumables. Thus, both the items (viz., 'Vessel and 'the bunker') and their respective value were clearly identifiable and are separately classifiable under respective Tariff headings (CTHs) as discussed supra for application of stipulated duty on import.

**7.8** Further, Circular No.16/2012-Customs dated 13th June, 2012 clarified the procedure to be followed for import of Indian vessels and filing of Import General Manifest, Bill of Entry. As per the above circular, it was clarified that as the provisions of Section 29 of the Customs Act, 1962 read with Section 2 (22) and 2(25), the term 'imported goods', *inter alia*, includes vessels entering India from any place outside the country (India). Para 3.2 of the above circular clarifies **Foreign flag vessels** and Para 3.3 clarifies **Indian Flag vessels** as under:

**3.2 Foreign flag vessels:** *These are the vessels that are registered abroad and its entry into the country is for carrying cargo or passengers, as a conveyance. Hence, there is no requirement for filing an IGM, Bill of Entry for foreign flag vessel which is being used as conveyance. However, the requirement for filing an import manifest in the prescribed manner for the goods or passengers which are being carried in the vessel, on its entry into an Indian port in terms of the provisions under Section 30 of the Customs Act needs to be complied with.*

**3.3 Indian Flag Vessel:** *In terms of the provisions of Part-V of the Merchant Shipping Act, 1958, vessels entering into India for the first time, are required to be registered with specified authority of the Mercantile Marine Department as Indian ship, which can then display the national character of the ship as Indian Flag Vessel for the purpose of Customs and other purposes specified in the said Act. Such Indian ship or vessel may be used for foreign run or exclusively for coastal run/ trade. Further, any ship or vessel may be taken outside India or chartered for coastal trade in India, only after obtaining the requisite licence from the Director General of Shipping, under the provisions of Section 406 or 407, respectively, of the said Merchant Shipping Act. Hence, in all such cases the Customs declarations such as IGM, Bill of Entry is required to be filed with jurisdictional Customs authority.*

**7.9** In view of above, it is evident from the above clarification that a Foreign Flag Vessel does not require to file IGM or Bill of Entry. However, vessels entering into India for the first time are required to be registered as per the provisions of Merchant Shipping Act, 1958 as Indian Ship only after that she can display the national character of the ship as India Flag Vessel for the purpose of Customs.

**7.10** In the case of **Gujarat Adani Port Ltd., Vs Commissioner of Customs, Kandla** reported in **2013 (297) BLT 330 (Th-Ahmd)**, that on filing of Bill of Entry in respect of vessel and payment of import duty, the vessel ceases to be foreign going vessel and it becomes Indian vessel and the person who filed the Bill of Entry becomes the receiver of goods; that diesel and other provisions onboard the vessel cease to enjoy the benefit of exemption under Section 87, which permits their utilization during the period when such vessels are foreign

going vessels; that as soon as the vessel is allowed out of charge, provision/stores in it cease to be imported goods since vessel become part of the land mass of the Indian territory and considered to have been brought into India and that when vessel is imported as goods, bill of entry has to be filed for the vessel as well as for stores separately as done in the case of ship brought for breaking.

**7.11** Further, when the vessel is imported into India as goods and the importer files the Bill of Entry for Home Consumption for clearance of the vessel under self-assessment, the price paid for bunkers under the vessel purchase contract, if not declared in the Bill of Entry, gets excluded from assessment, though the same was supplied along with the vessel as goods, as per separate payment condition of sale and brought into India. Hence, the additional payment made by the buyer to the seller towards supply of bunkers and other consumables in the storage tanks of the vessel merits to be shown in the Bill of Entry for assessment to duty since the same is imported along with the vessel cleared for home consumption. If any duty exemption is applicable on bunkers and consumables brought in the storage tanks of the vessel, the importer has to claim the same in the Bill of Entry filed by them by citing the relevant notification and subject to fulfillment of conditions, if any, stipulated therein. Since, the payments for bunkers and lubricants were additional payments and the same were not part of the contracted value for the vessel, it was required to be separately declared in the Bill of Entry for assessment of duty. Therefore, it appears that the importer had evaded the duty on the cost of bunkers, lubricating oils and consumables by not declaring the same in the Bill of Entry.

**7.12** In view of above, as payment of the bunkers/consumables was made separately i.e. other than payment of Vessel and the transaction for the bunkers/consumables is clearly identifiable, the bunkers/consumables are to be classified separately and applicable duty are required to be paid as per their respective chapter.

**7.13** The importer in his statement claimed that the imported vessel continued to be a foreign-going vessel as defined under Section 2(22) of the Customs Act, 1962 and therefore enjoys the benefit of duty exemption provided under Section 87 Customs Act, 1962 for imported stores consumed during the period when the vessel is a foreign going vessel. Section 87 of the Customs Act, 1962, as extracted below:

*Any imported stores on board a vessel or aircraft (other than stores to which section 90 applies) may, without payment of duty, be consumed thereon as stores during the period such vessel or aircraft is a foreign-going vessel or aircraft.*

On perusal of the above, it appears that imported stores on board a foreign-going vessel can be consumed without payment of duty, during such period the vessel is on foreign-run. The foreign-going vessel has been defined in Section 2(21) of the Customs Act, 1962. As per the said Section 2(21), the definition of the foreign-going vessel is as below:

*"Foreign-going vessel or aircraft" means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not, and includes –*

- (i) Any naval vessel of a foreign Government taking part in any naval exercises;
- (ii) Any vessel engaged in fishing or any other operations outside the territorial waters of India;
- (iii) Any vessel or aircraft proceeding to a place outside India for any purpose whatsoever.

**7.14** Foreign Flag Vessel means a vessel of foreign registry and Foreign-Going Vessel means the vessel engaged in the carriage of goods between any port in India and any port outside India, whether touching any intermediate port in India or not. As per Section 406 of the Merchant Shipping Act, 1958, no Indian ship shall be taken to sea from a port or place within India or outside India except under a license granted by Director General of Shipping. As per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a **provisional certificate** and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. **Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance.** Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty.

**7.15** In view of above, it is evident that at the time of import of the above old and used vessels i.e. "**MV SM MAHI**" and "**SM NEYYAR**", the importer failed to declared the quantity and value of the bunkers (Lub. Oil, HSD and Fuel Oil). Therefore, the above bunkers (Lub. Oil, HSD and Fuel Oil) valued at **Rs.4,37,37,331/-** (MV SM MAHI) and **Rs.3,95,73,556/-** (SM NEYYAR) are liable for confiscation under Section 111(m) of the Customs Act, 1962. However, no seizure was made as the vessels had sailed to another port for the purpose of registration.

**7.16** As discussed above, the importer by not declaring and suppressing the quantity and value of the bunkers (Lub. Oil, HSD and Fuel Oil) evaded the Customs duty totally amounting to **Rs.99,14,035/-** for "**MV SM MAHI**" and **Rs.1,11,72,366/-** for "**SM NEYYAR**" respectively as discussed in preceding paras in contravention of the provisions of the Section 17 and Section 46 of the Customs Act, 1962 and required to be recovered under Section 28(4) of the

Customs Act, 1962 alongwith applicable Interest under Section 28AA of the Customs Act, 1962.

**7.17** During the course of investigation, it is noticed that the Invoice Value i.e. USD \$6000000 (Rs.44,28,00,000/-) for MV SM MAHI and **USD \$12000000 (Rs.88,56,00,000/-) for SM NEYYAR** declared by the importer for the purpose of assessment were actually FOB Value as per the Memorandum of Agreements entered between the seller and the importer and Valuation Certificates issued by the Chartered Engineer in respect of above vessels. Therefore, the value declared by the importer is required to be rejected and re-determined as **Rs.53,63,41,500/-** for MV SM MAHI and **Rs.1,07,26,83,000/-** for SM NEYYAR, as per Section 14 of the Customs Act, 1962 read with Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Therefore, the above vessels MV SM MAHI valued at **Rs.53,63,41,500/-** and SM NEYYAR valued at **Rs.1,07,26,83,000/-** are liable for confiscation under Section 111(m) of the Customs Act, 1962. However, no seizure was made as the vessels sailed to another port for the purpose of registration.

**7.18** As discussed above, the importer short paid/ not paid, the Customs duty amounting to **Rs.46,77,075/-** and **Rs.93,54,150/-** in respect of import of old vessels for "MV SM MAHI" and "SM NEYYAR" respectively as discussed in preceding paras in contravention of the provisions of the Section 14, Section 17 and Section 46 of the Customs Act, 1962 read with Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 are required to be recovered under Section 28(4) of the Customs Act, 1962 alongwith applicable Interest under Section 28AA of the Customs Act, 1962. Further, the importer for their acts and omission as discussion above also rendered themselves for penal provisions under Section 114A and Section 117 of the Customs Act, 1962.

**7.19** In the instant case, M/s. MBK Logistix Pvt. Ltd., engaged in shipping vessel agency service such as boarding, rummaging, sign on & sign off, immigration, and assistance in supply of any technical or other items to ship, port clearance of the vessels. Therefore, it appears that they are well aware of the provisions of Customs law pertaining to the vessel agency services. Therefore, they were required to get the Out of Charge (OOC) of the Bill of Entries before leaving the port of vessels. Further, the Bills of Entries for both vessels were filed as the vessels were touching the Indian port for the first time after change of ownership i.e. from foreign flag to Indian flag. However, they applied for port clearance on 22<sup>nd</sup> Feb 2021 for vessel MV SM MAHI before receipt of OOC and they did not disclose the facts to the officer granting port clearance. Moreover, before leaving the port of vessels, they were required to complete the procedure stipulated regarding the bills of entry, which they miserably failed to do in as much as they failed to intimate the port authority/ terminal operator regarding filling of bill of entry and also failed to submit the copy of the out of charge, in respect of the said bill of entry filed for import of the vessel MV SM MAHI. Therefore, inspite of being well aware of the relevant provisions of the Customs Act, they intentionally did not disclose the said facts to the officer granting port clearance. Hence they did not follow due diligence in respect of importation of the said old & used vessels and bunkers on board and they failed to declare the actual quantity and value for each goods separately, and also failed to disclose the true facts to the authority concerned. Thus, such act of non-disclosure/concealment of the facts to the officer granting port clearance, they appear to

have rendered themselves liable for penal action under Section 117 of the Customs Act, 1962.

**7.20** In this case, CB- Firm M/s Alaacity Projects India Pvt. Ltd. (AAKCA3961DCH002), 301, Krishana Apartment, Netaji Subhash Palace, Wazirpur, New Delhi-34 have not followed due diligence in respect of importation of the impugned old and used vessels and bunkers on board as they failed to declared actual quantity and value of the bunkers in their respective CTH and also failed to declare the CIF Value of the old and used vessels for the purpose of assessment; hence failed to comply with the provisions of the Custom Broker Licensing Regulations, 2018 (CBLR, 2018), thus, appears to be liable for penal action under Section 117 of the Customs Act, 1962 for contravention of CBLR, 2018.

**8.** In view of the foregoing paras, **M/s Mahi Marine Pvt. Ltd.**, Seawoods Grand Central, E-704-707, Tower 2, 7<sup>th</sup> Floor, Seawoods, Navi Mumbai-400706 were called upon to show cause to the **Commissioner of Customs**, Customs House Mundra, 5B, Port User Building, Mundra Port, Mundra (Gujarat) as to why:

- (i) The undeclared bunkers (Lub. Oil, HSD and Fuel Oil) valued at **Rs.4,37,37,331/-** (MV SM MAHI) and **Rs.3,95,73,556/-** (SM NEYYAR) should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962;
- (ii) The Customs duty amounting to **Rs.99,14,035/-** (*Rupees Ninety Nine Lakhs Fourteen Thousand and Thirty Five only*) for “**MV SM MAHI**”; and **Rs.1,11,72,366/-** (*Rupees One Crore Eleven Lakhs Seventy Two Thousand Three Hundred and Sixty Six Only*) for “**SM NEYYAR**” respectively should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962. Since the said Customs duty has been paid by them **‘UNDER PROTEST’**, why the protest should not be vacated and said Customs duty already paid by them should not be appropriated.
- (iii) Interest at an applicable rate should not be demanded and recovered from them, on the amount of duty in Para (ii) hereinabove, under Section 28AA of the Customs Act, 1962. Since M/s Mahi Marine Pvt. Ltd., have already paid the Interest amounting to **Rs.28,072/-** (*Rupees Twenty Eight Thousand Seventy Two only*) and **Rs.50,506/-** (*Rupees Fifty Thousand Five Hundred Six only*) ‘Under Protest’, why the protest should not be vacated and said Interest already paid by them should not be appropriated.
- (iv) The assessable value i.e. USD \$6000000 (Rs.44,28,00,000/-) for MV SM MAHI and USD \$12000000 (Rs.88,56,00,000/-) for SM NEYYAR declared by the importer should not be rejected and re-determined as per the provisions of Section 14 of the Customs Act, 1962 read with Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.
- (v) The imported vessels SM NEYYAR valued at **Rs.53,63,41,500/-** and MV SM MAHI valued at **Rs.1,07,26,83,000/-** for should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962;

- (vi) The differentially Customs Duty amounting to **Rs.46,77,075/-** (*Rupees Forty Six Lakhs Seventy Seven Thousand and Seventy Five Only*) and **Rs.93,54,150/-** (*Rupees Ninety Three Lakhs Fifty Four Thousand One Hundred and Fifty Only*) in respect of import of old vessels "MV SM MAHI" and "SM NEYYAR" respectively should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962.
- (vii) Interest at an applicable rate should not be demanded and recovered from them, on the amount in Para (vi) hereinabove, under Section 28AA of the Customs Act, 1962.
- (viii) Penalty should not be imposed on them under Section 114A of the Customs Act, 1962;
- (ix) Penalty should not be imposed on them under Section 117 of the Customs Act, 1962;

**8.1** In view of forgoing paras, CB- Firm **M/s Alaacrity Projects India Pvt. Ltd.** (AAKCA3961DCH002), 301, Krishna Apartment, Netaji Subhash Palace, Wazirpur, New Delhi-34 was called upon to show cause to **the Commissioner of Customs**, Custom House Mundra, 5B, Port User Building, Mundra Port, Mundra (Gujarat) within 30 days of this notice as to why:

- (i) Penalty should not be imposed on them under Section 117 of the Customs Act, 1962.

**8.2** In view of forgoing paras, **M/s MBK Logistix Pvt. Ltd.**, Second Floor, Plot No.133, Sector 8, BOMGIM Complex, Gandhidham, Kutch-370201 was called upon to show cause to **the Commissioner of Customs**, Custom House Mundra, 5B, Port User Building, Mundra Port, Mundra (Gujarat) within 30 days of this notice as to why:

- (i) Penalty should not be imposed on them under Section 117 of the Customs Act, 1962.

## **16. SUBMISSION OF THE NOTICEES AGAINST THE INSTANT SCN:**

### **a. Submissions made on behalf of Mahi Marine:**

- i) A list of dates and events in a tabular form for both vessels is given below for the convenient understanding of this authority:

<b>Date</b>	<b>Events (FOR MV. MAHI)</b>
07.01.2021	Memorandum of agreement between M/s Mahi Marine Pvt Ltd and M/s Universal Navigation Ltd
10.01.2021	Bill of Sale
11.02.2021	Certificate of Survey
11.02.2021	Provisional registry of the vessel
12.02.2021	Provisional General Trade Licence
18.02.2021	BOE No. 2818901 filed.
22.02.2021	Duty was assessed on the vessels and IGST was paid. Duty on a bunker on board was not paid, taking the benefit of S. 87 of the Customs Act.

22.02.2021	The vessel sailed out as "foreign going" after securing port clearance, a the same complied with provisions of MSA, 1958.
02.03.2021	Forced to pay interest on unpaid duty on bunker onboard vide receipt amounting to Rs 20,05,354/-
02.03.2021	Forced to pay duty on bunker onboard vide payment receipt amounting to Rs 77,52,872/-
04.03.2021	Letter issued by M/s MBK Logistics regarding the under-protest payment of duty on bunkers on board at the time of filing BOE.
06.08.2021	Permanent Registration of vessel under MSA
23.08.2021	Permanent General Trade Licence (GTL)
29.11.2023	Show cause notice issued by Commissioner of Customs, Mundra

Date	Events (MV. NEYYAR)
28.01.2021	Memorandum of agreement.
28.01.2021	Bill of Sale
10.02.2021	Certificate of survey
10.02.2021	Provisional certificate of Indian registry under MSA
12.02.2021	Provisional General Trade License (GTL) under MSA
18.02.2021	Bill of Entry No. 2812728 filed.
22.02.2021	Duty was assessed on the vessels and IGST was paid. Duty on bunker on board was not paid, taking the benefit of S. 87 of Customs Act.
22.02.2021	Vessel sailed out with as "foreign going" after securing port clearance, a the same was in compliance of provisions of MSA, 1958.
03.08.2021	Permanent GTL
04.03.2021	Forced to pay duty on bunker onboard vide challan amounting to Rs 1,11,72,366/-
04.03.2021	Forced to pay interest on the alleged unpaid duty on bunker onboard, vide challan amounting to Rs 50,506/-
04.03.2021	Letter issued by M/s MBK Logistics (Agent) regarding payment of duty & interest under-protest.
23.07.2021	Permanent certificate of Indian registry
29.11.2023	Show cause notice issued by Commissioner of Customs, Mundra

From the above-tabled sequence of events, the following aspects acquire more clarity;

- Mahi Marine has obtained statutory provisional registration certificates (on 11.02.2021 and 10.02.2021 respectively for the vessels) from the foreign port of purchase (Dubai) for the imported vessels, from the competent authority (MMD) under the provisions of the MSA, 1958, to import the vessels under the "Indian Flag".
- Mahi Marine has obtained the statutory provisional "General Trade Licence" (on 12.02.2021 for the vessels) under the

provisions of the MSA 1958 and remains under "Foreign Going" status while calling the first port of call in India.

- The BOEs were filed and Mahi Marine paid IGST @ 5% on the value of the old and used container vessels in compliance with Notification No. 46/2015, dated 17.09.2015, Notifications No.50/2017, dated 30.06.2017 & Notification No. 01/2020, dated 02.02.2020.
- Availing the benefit of Section 87 of the Customs Act, the duty on bunker/stores on board the "foreign going" vessel has not been paid by Mahi Marine.
- Port clearance to the vessels was granted in compliance with Section 410 of the MSA, 1958 and the vessels sailed from the port of first call on 22.02.2021.
- At the relevant point of time, by virtue of certificates issued under MSA, 1958, (Registration Certificates & General Trade Licenses) as well as operationally, both the vessels (M.V. SM MAHI & M.V. SM NEYYAR) remained foreign-going. Thus both the vessels qualified for the exemption on duty on bunker onboard under S. 87 of the Customs Act).
- The stores/bunkers that remained on board the vessels were consumed by M.V. SM MAHI & M.V. SM NEYYAR during their subsequent "foreign going" voyages respectively. A copy of the relevant itinerary/ schedule of both vessels, M.V. SM MAHI & M.V. SM NEYYAR, is marked and annexed as **ANNEXURE V[Colly].**

Therefore, as can be seen from the sequence of events and obvious compliances with the statutory provisions of the MSA, 1958 and Customs Act, 1962, Mahi Marine is;

- (a) Eligible for the refund of the duty on bunker and the interest thereon, paid "under protest".
- (b) Not liable for re-assessment and payment thereon of the value of the vessels, as the assessment was done in compliance with the provisions of the Customs Act.

- (c) The vessels covered under the present SCN of Mahi Marine are not liable to be confiscated as per S.111 (m) of the Customs Act.
- (d) Mahi Marine is not liable to pay the differential customs duty and interest thereon under S.28(4) & 28AA of the Customs Act.
- (e) Mahi Marine is not liable to bear a penalty under sections 114A and 117 of the Customs Act.

i. Reply to the findings in para 7.14 of the SCN:

It is affirmed that the provisional and permanent general trade licenses were secured by the vessels to acquire and remain "foreign-going". The contention of the Customs Department as per the SCN is that, upon filing of a bill of entry for a foreign-going imported vessel, the vessel ceases its foreign-going status. However, the said argument does not hold water for the following reasons:

- (a) The vessels had already acquired "Indian Flag" prior to filing BOE.
- (b) The vessels had already acquired the "Foreign Going" trade license prior to filing the BOE.
- (c) The "Foreign Going" certificate is issued by MMD under the provisions of MSA, 1958.
- (d) No provision in the Customs Act make the "Foreign Going" trade license of a vessel "co-terminus" with filing of BOE u/s.46 of the Customs Act, 1962.
- (e) The filing of BOE doesn't *ipso facto* nullify a valid certificate issued by the competent authority under the MSA, 1958.

ii. Reply to the finding vide Para 7.15 and 7.16 of the SCN

- (a) Given the above explanations (ii) and relying on the provisions of relevant statutes, the finding of the department that the duty on the bunker onboard the vessel, to the tune of Rs. Rs.99,14,035/- for MV SM MAHI; and Rs.1,11,72,366/- for MV SM NEYYAR towards Customs Duty and Rs. 28,072/- and Rs.50,506/-towards interest is payable, is erroneous, illegal not supported by provisions of law.

(b) Since the demand of duty and interest was illegal and unauthorized, the excess amount paid by Mahi Marine "under protest", is liable to be refunded with interest to Mahi Marine.

iii. Regarding the application of Circular No. 37/96 dated 03.07.1996, Circular No. 09/18 19.04.2018, read with Notification No. 07/2015-2020 to the present case:

(a) The application of the above circulars and the notification to the present case is baseless and erroneous. The said circulars/notifications are apparently on their face of record applicable only to old and used vessels that are imported into India for scrapping and do not apply to vessels that are imported for the purpose of trading for coastal/foreign going.

(b) Involving Mahi Marine in legal proceedings and insisting on duty and penalties runs counter to the declared shipping and tonnage acquisition policy of the Government of India, enabling the acquisition of more Indian tonnage of vessels to support the Sagarmala initiative and other shipping policies of GOI, in public interest.

(c) Finding in Para 7.4 of the SCN, are *ex-facie* erroneous and not applicable to Mahi Marine and its vessels because the used/second-hand vessels were not imported for scrapping but were for foreign going trade and they remained the same during the relevant period.

(d) *'The Board issued Circular No.37/96-Cus dated 03.07.1996 regarding classification of Ships & other floating structures imported for breaking up wherein it was clarified that Remaining fuel and oil and other ship stores including drinks and foodstuff imported on Board a ship for breaking up are classifiable separately in their appropriate headings. The above circular also appears to be applicable in case of import of remaining fuel and oil (bunkers) imported on board in an old and used vessel entered first time in India to be registered as an Indian Flag Vessel.'*

(e) The legal principle of 'eiusdem generis', states when a list of specific items or categories is followed by a general term, the general term should be interpreted in a way that limits it to things of the same kind or nature as the specific items listed and not to other things or items. Thus, in the above-mentioned circular, specific provisions are outlined to govern the importation of ships intended for breaking up and hence not applicable to ships/vessels imported for other purposes.

(f) Non-application of judicial principles, facts circumstances, and dictum in the case of 'Gujarat Adani Port Ltd. vs. Commissioner of Customs, Kandla.' It is incumbent on Mahi Marine to elucidate that the circumstances surrounding the judgment cited in the aforementioned Paragraph 7.10 of the SCN, are wholly disproportionate application to the exigencies of the present case. The factual matrix is different, the issues dealt with by the Hon'ble Court are different. In essence, the dictum and essence in 'Gujarat Adani Port Ltd. vs. Commissioner of Customs, Kandla' is upon a distinct set of factual events, and legal issues and has no applicability to the present case. Therefore, the SCN issued relying on the principle of judgment and further developments therefrom are erroneous and to be withdrawn.

V. Charges & Penal provisions invoked against Mahi Marine and MBK- Reference to section 111(l), 111(m), under section 114AA and section 117 of the Customs Act, 1962.

- i. Section 14 of the Customs Act, 1962 read along with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.
  - a. Under S. 14 of the Customs Act, r/w. Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, the 'value of the imported goods' has to be the "transaction value" of such goods.
  - b. In the present scenario, the vessel is the imported goods' brought by "self-propulsion" (not using any other conveyance)

from a place outside India to a port in India, wherein components such as 'freight, the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods' were not applicable.

- c. Thus, M/s. Mahi Marine has not incurred any 'costs or charges' as provided in Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, to make them liable to assess duty including the transportation charges. Therefore, as advised by the CHA appointed by the Agent, Mahi Marine did not consider the freight/cost of transportation to assess the import duty.
- d. In a worst-case scenario, if at all Mahi Marine is liable for the assessment of duty component (not payment of the same) on the freight/transportation cost could be the actual bunker/fuel consumed by the vessels, from its port of sale (Dubai) to first port of call in India (Mundra), which is the "ascertainable" cost of transportation.
- e. The said consumed fuel can be ascertained by taking the difference between the quantity of fuel on board the vessel at both ports, as declared by the master of the vessel, through his log book. Hence, the method of calculation and considering 20% of the FOB value is not justifiable on the following grounds:
  - (i) There is no cost of transportation or freight for bringing a vessel to India.
  - (ii) Since there is no cost of transportation or freight, the CHA did not assess the duty on freight and insurance and hence did not pay the IGST.
  - (iii) If at all the bunker consumed by a vessel is to be considered as "cost of transportation" (not admitted), the said cost is 'ascertainable' by finding the difference between the bunker on board as per the log book of the master of the vessel at the port of origin and the port of arrival.
  - (iv) In the above manner, the insurance is also ascertainable as per sub-rule 2 of Rule 10 of Customs Valuation (Determination of Value of imported goods) Rules, 2007, and the

insurance shall be assessed and valued at 1.125% of the sum of the invoice value and the cost of transport as calculated above.

**ii. Section 111 of the Customs Act, 1962 & Mahi Marine's reply.**

- a. Mahi Marine has imported the vessels as per relevant provisions of the Merchant Shipping Act, 1958, and Customs Act, 1962 and the vessels were foreign going till the time they were converted into a coastal run in the month of March 2021.
- b. Mahi Marine has filed the Bill of Entry as per Section 46 of the Customs Act, 1962, and has duly paid the duty on the imported vessels.

**iii. Section 114A in the Customs Act, 1962 & Mahi Marine's reply**

- a. Mahi Marine has not fraudulently or with an intent to defraud made, signed or used, or caused to be made, signed or used, any declaration, statement, or document which was false or incorrect in any material particular, in the transaction of any business for the purposes of this Act.
- b. There is no collusion nor any deliberate suppression of material facts.
- c. Contrary, as per the provisions of Section 87 of the Customs Act Mahi Marine is entitled to the benefit therein.

**iv. Section 117. Penalties for contravention, etc., are not expressly mentioned and Mahi Marin's reply.**

- a. Mahi Marine has not acted or abetted in contravention of the provisions of the Customs Act, 1965, with which it was their duty to comply.
- b. Invocation of penal provision u/s 117 shows the desperation and blind shooting. If at all liable, (not admitted), the party is liable for payment of the differential duty on the "consumed fuel", if to be treated as "the transportation cost" of the vessel to India.

In view of the proposed imposition of penalty under the above legal provisions and considering the above reply by Mahi Marine may be dropped as erroneous, and unsustainable based on both law and facts.

i. Judicial Pronouncements/Judgments:

Among other judgments to be produced at the time of the final hearing, we would like to place our reliance on the following important judgments at the moment.

- a. *Asean Cablesip Pte. Ltd vs. Commissioner of Customs (2022 SCC Online SC 1640)* the CESTAT Bangalore has held that the impugned vessel ASEAN Explorer is a foreign-going vessel, within the ambit of (ii) of Section 2(21) of the Customs Act, 1962, being engaged for performing repair/cable laying activities in the designated areas in terms of the Agreement with SEAIOCMA. The berthing of the vessel for long periods at Cochin Port does not alter this position and accordingly, the appellants are eligible to avail the exemption contained under Section 87 of the Customs Act, 1962 on the ship stores.
- b. In *Metro Marine Services Pvt. Ltd. and Ors. Vs. Commissioner of Customs (MANU/CC/0194/2007)* it is held that:

*“....we find that ship stores imported for use on a foreign going vessel need not discharge any customs duty. The commissioner found the conduct of the appellants to be under the bonafide belief that the impugned goods were not liable to discharge customs duty on their import to Chennai/transshipment to Kandla. The appellants had believed that the impugned goods were meant for use on a foreign-going vessel. Therefore, the allegation of willful misdeclaration as regards the value and description of the imported goods by the appellants is unsubstantiated. The appellants had no motive to suppress the import of Zinc and Aluminum anodes or the value of the consignment. Therefore, his finding that the impugned goods had been misdeclared and rendered liable for confiscation under Section 111(m), (n), and (l) of the Act by the appellants inviting liability to penalty, is not sustainable”*

- c. In M/s Chakiat Agencies vs Commissioner of Customs (Exports)

2023 TAXSCAN (CESTAT) 175 the tribunal observed as below:

*“...Be that as it may the appellant as a CHA cannot be expected to examine and ensure the nature of the goods in the consignment. There is no allegation or evidence to establish that the appellant had indulged in any overt act or played any role in any manner to assist the exporter in his attempt to export the goods. After appreciating the evidence and following the decision of the Tribunal in the above case, we are of the view that the penalty imposed on the appellants under section 114 of the Customs Act is not warranted.*

d. In the case of *Sameer Kumar Jaiswal* [2018 (362) ELT 348 (T-Mum)] tribunal has held as follows:

*“4.1 As regards penalty imposed on Shri Sameer Santosh Kumar Jaiswal, Director of the appellant company under Section 114AA, which reads as under:-*

*‘If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.’*

*From the reading of the above Section 114AA, it is observed that if the person knowingly makes the false declaration or signs any such document then only he will be liable to penalty under Section 114AA.”*

e. In the case of Commissioner of Custom vs. M/s. Phoenix Marine Services & ors (OIO no. 15/Additional Commissioner/2022-23 dated 31.01.2023) among other things, it was held that

*“17. As per Section 2(21) of the Customs Act, 1962 “foreign going vessel or aircraft” means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India. Thus, from the above definition it was clear that the Tug “Dona Paula - II” does not appear to be covered under Section 2(21) ibid as it was running from Bedi Port Jamnagar to Alang, Bhavnagar i.e. between two ports in*

India. Hence the consumption of imported stores in its voyage between Bedi Port Jamnagar to Alang, Bhavnagar was in violation of Section 87 of the Customs Act, 1962, which reads as under:

*SECTION 87. Imported stores may be consumed on board a foreign-going vessel or aircraft*

*Any imported stores on board a vessel or aircraft (other than stores to which section 90 applies) may, without payment of duty, be consumed thereon as stores during the period such vessel or aircraft is a foreign-going vessel or aircraft."*

f. In the decision in *JM Baxi & Co vs. Joint Commissioner* with reference to OIO no. 01/Joint Commissioner/2021-2022 dated 04.05.2021, the Joint Commissioner issued an order necessitating the payment of customs duty by the steamer agent, for the ship stores, bunkers, provisions, and other consumables used on a cruise vessel during its passage through territorial waters of India. This obligation arose because the vessel in question was not classified as a foreign-going vessel; it was engaged in coastal operations.

A contrary reading and interpretation of the judgment in the above case would reveal that as long as a vessel remains foreign-going status, by virtue of the provision of S.87 of the Customs Act, the bunker/ stores on board are not to be assessed and charged for payment of customs duty.

g. In the case of *Devushi Bhanji Khona and Ors. vs. C.C.-Cochin-Cus* (29.10.2019) CESTAT – Bangalore has held that the impugned vessel was not a foreign going vessel and such ship stores supplied to a vessel that is not a foreign going vessel are not applicable for exemption. This implies that MV SM Mahi and MV SM Neyyar were foreign-going vessels and thereby are entitled to be exempted from duty on stores as per section 87 of the Customs Act.

In light of the above facts, a list of dates, laws, and precedents, it is prayed that this Hon'ble Commissioner of Customs, Mundra, may be pleased to;

A. Set aside the impugned show cause notice issued on M/s. Mahi

Marine India Private Limited.

- B. The allegations and charges framed against Mahi Marine in the subject Show Cause Notice may be dropped/ quashed and be exonerated from offenses that are alleged to have been committed and
- C. To not impose any penalty upon Mahi Marine for the alleged violations of any of the provisions of the Customs Act or any other Acts for that matter.
- D. To refund the amount of Rs. 99,14,036/- (Rupees Ninety-Nine Lakh Fourteen Thousand and Thirty-Six only) towards the bunker duty paid and an amount of Rs. 28,072/- (Rupees Twenty-Eight Thousand and Seventy-Two Only) towards the interest paid on the above-mentioned duty for MV SM Mahi and amount of Rs. 1,11,72,366/- (Rupees One Crore Eleven Lakhs Seventy-Two Thousand Three-Hundred and Sixty-Six only) towards the bunker duty paid and an amount of Rs. 50,506/- (Rupees Fifty-Thousand Five Hundred and Six Only) towards the interest paid on the above-mentioned duty for MV SM Neyyar.
- E. To give an opportunity for a personal hearing, if any further clarifications are required, before this authority during the adjudication of the subject SCN and pass Orders accordingly.
- F. Allow us to alter, amend, or modify our submission until the time matter is decided.
- G. To pass any other Order as may be pleased by the Hon'ble authority.

**B. Submissions made on behalf of M/s MBK Logistix Pvt Ltd:**

- i. A list of dates and events in a tabular form for both vessels is given below for the convenient understanding of this authority:

Date	Events (FOR MV. MAHI)
07.01.2021	Memorandum of agreement between M/s Mahi Marine Pvt Ltd and M/s Universal Navigation Ltd

10.01.2021	Bill of Sale
11.02.2021	Certificate of Survey
11.02.2021	Provisional registry of the vessel
12.02.2021	Provisional General Trade Licence
18.02.2021	BOE No. 2818901 filed.
22.02.2021	Duty was assessed on the vessels and IGST was paid. Duty on a bunker on board was not paid, taking the benefit of S. 87 of the Customs Act.
22.02.2021	The vessel sailed out as "foreign going" after securing port clearance, a the same complied with provisions of MSA, 1958.
02.03.2021	Forced to pay interest on unpaid duty on bunker onboard vide receipt amounting to Rs 20,05,354/-
02.03.2021	Forced to pay duty on bunker onboard vide payment receipt amounting to Rs 77,52,872/-
04.03.2021	Letter issued by M/s MBK Logistics regarding the under-protest payment of duty on bunkers on board at the time of filing BOE.
06.08.2021	Permanent Registration of vessel under MSA
23.08.2021	Permanent General Trade Licence (GTL)
29.11.2023	Show cause notice issued by Commissioner of Customs, Mundra

Date	Events ( <u>MV. NEYYAR</u> )
28.01.2021	Memorandum of agreement.
28.01.2021	Bill of Sale
10.02.2021	Certificate of survey
10.02.2021	Provisional certificate of Indian registry under MSA
12.02.2021	Provisional General Trade License (GTL) under MSA
18.02.2021	Bill of Entry No. 2812728 filed.
22.02.2021	Duty was assessed on the vessels and IGST was paid. Duty on bunker on board was not paid, taking the benefit of S. 87 of Customs Act.
22.02.2021	Vessel sailed out with as "foreign going" after securing port clearance, a the same was in compliance of provisions of MSA, 1958.
03.08.2021	Permanent GTL
04.03.2021	Forced to pay duty on bunker onboard vide challan amounting to Rs 1,11,72,366/-
04.03.2021	Forced to pay interest on the alleged unpaid duty on bunker onboard, vide challan amounting to Rs 50,506/-
04.03.2021	Letter issued by M/s MBK Logistics (Agent) regarding payment of duty & interest under-protest.
23.07.2021	Permanent certificate of Indian registry
29.11.2023	Show cause notice issued by Commissioner of Customs, Mundra

From the above-tabled sequence of events, the following aspects acquire more clarity;

- Mahi Marine has obtained statutory provisional registration certificates (on 11.02.2021 & 10.02.2021 respectively for the

vessels) from the foreign port of purchase (Dubai), for the imported vessels, from the competent authority (MMD) under the provisions of MSA Act, 1958, to import the vessels under the "Indian Flag".

- Mahi Marine has obtained the statutory provisional "General Trade Licence" (on 12.02.2021 for the vessels) under the provisions of MSA Act, 1958, and remains under "Foreign Going" status while calling the first port of call in India.
- The BOEs were filed by MBK for Mahi Marine and paid IGST @ 5% on the value of the old and used container vessels in compliance with Notification No. 12/2012-Customs, dated, 17th March, 2012, Notification No. 46/2015, dated 17.09.2015, Notifications No.50/2017, dated 30.06.2017, Notification No. 01/2020, dated 02.02.2020 and Notification No.1/2017- Integrated Tax (Rate), dated, 28th June, 2017.
- Availing the benefit of Section 87 of the Customs Act, the duty on bunker/stores on board the "foreign going" vessel has not been paid by Mahi Marine.
- Mahi Marine, though MBK has obtained the Port clearance for the vessels as a corollary in compliance with S.410 of the MSA, 1958 and the vessels sailed from the port of first call on 22.02.2021.
- At the relevant point of time, by virtue of certificates issued under MSA, 1958, (Registration Certificates & General Trade Licenses) as well as operationally, both the vessels (M.V. SM MAHI & M.V. SM NEYYAR) remained foreign-going. Thus, both the vessels were qualified for the exemption on duty on bunker onboard under S. 87 of the Customs Act).
- The stores/bunkers that remained on board the vessels were consumed by M.V. SM MAHI & M.V. SM NEYYAR during their subsequent "foreign going" voyages respectively. A copy of the relevant itinerary of both vessels, M.V. SM MAHI & M.V. SM NEYYAR, has been appended as **ANNEXURE-V**.

- It is important to mention here that, documents such as boarding and arrival documents of MV SM Mahi and MV SM Neyyar at Mundra Port on 22.02.2021, Bill of Entry, Commercial Invoices, Bill of Lading, Certificate of Registry, Certificate of Fair Market Value, Memorandum of Agreement, Provisional Certificate of Indian Registry along with specific trade type license etc. were secured and taken away from the office of MBK by the investigating officers. Hence, MBK is not accessible to certain documents which would have supported their arguments. Hence, hereby it is requested to give access to the said files taken away from MBK's office to show a few relevant documents in support of the acts done by MBK.

Thus, as can be seen from the sequence of events and obvious compliances with the statutory provisions of the MSA, 1958 and Customs Act, 1962, Mahi Marine as the importer is;

- (f) Eligible for the refund of the duty on the duty on bunker and the interest thereon, paid "under protest" by MBK and
- (g) The BOEs are not liable for re-assessment and payment thereon of the value of the vessels, as the assessment was done in compliance with the provisions of the Customs Act.
- (h) The vessels covered under the present SCN of Mahi Marine are not liable to be confiscated as per S.111 (m) of the Customs Act.
- (i) MBK, having acted as a responsible agent of the vessels, in compliance with the Customs Act, is not liable to bear a penalty under section 117 of the Customs Act.

ii. Reply to the findings in para 7.14 of the SCN:

It is affirmed that the provisional and permanent general trade licenses were secured by the vessels to acquire and remain "foreign-going". The contention of the Customs Department as per the SCN is that, upon filing of a bill of entry for a foreign-going imported vessel, the vessel ceases its foreign-going status.

However, MBK submits that the said argument does not have the necessary grounds for the following reasons

- (f) The vessels had already acquired "Indian Flag" prior to filing BOE.

- (g) The vessels had already acquired the "Foreign Going" trade licence prior to filing the BOE.
- (h) The "Foreign Going" certificate is issued by MMD under the provisions of MSA, 1958.
- (i) No provision in the Customs Act makes the "Foreign Going" trade license of a vessel "co-terminus" with the filing of BOE u/s.46 of the Customs Act, 1962.
- (j) The filing of BOE doesn't *ipso facto* nullify a valid certificate issued by the competent authority under the MSA, 1958.

iii. Reply to the finding vide Para 7.15 and 7.16 of the SCN

- (c) Given the above explanations (i.e., ii above) and relying on the provisions of relevant statutes, the finding of the department that the duty on the bunker onboard the vessel, to the tune of Rs. Rs.99,14,035/- for MV SM MAHI; and Rs.1,11,72,366/- for MV SM NEYYAR towards Customs Duty and Rs. 28,072/- and Rs.50,506/-towards interest is payable, is erroneous, illegal not supported by provisions of law.
- (d) Since the demand of duty and interest was illegal and unauthorised, the excess amount paid by through MBK, by Mahi Marine 'under protest', is liable to be refunded with interest to Mahi Marine.

iv. Charges & Penal provisions invoked against MBK- Reference to section 117 of the Customs Act, 1962.

- i. Mahi Marine and MBK (as agent) have acted in compliance with Section 14 of the Customs Act, 1962 read along with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.
  - a. Under S. 14 of the Customs Act, r/w. Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, the 'value of the imported goods' has to be the "transaction value" of such goods.
  - b. The vessels were the 'imported goods', brought to India by "self-propulsion" (not using any other means of conveyance), from a place outside India to a port in India, wherein components such as 'freight, the cost of transport, loading, unloading and handling charges associated with the delivery

of the imported goods' were not applicable.

- c. Thus, as M/s. Mahi Marine has not incurred any 'costs or charges' as provided in Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, to make them liable to assess duty including the transportation charges, MBK has acted under said belief. Therefore, as advised by the CHA appointed by MBK, Mahi Marine did not consider the freight/cost of transportation while assessing the import duty.
- d. In a worst-case scenario, (without prejudice to the argument that there is no freight to be paid while importing the vessel(s) if at all Mahi Marine is liable for the assessment of duty component (not payment of the same) on the freight/transportation cost, it can be possibly the cost of actual bunker/fuel consumed by the vessels, during its transit, from its port of purchase/transaction (Dubai) to first the first port of call in India (Mundra), which is also the "ascertainable" cost of transportation.
- e. The said consumed fuel can be ascertained by taking the differential quantity of fuel on board the vessel at both ports, as declared by the master of the vessel, through his log book. Hence, the method of calculation and considering 20% of the FOB value is not justifiable on the following grounds:
  - (i) There is no cost of transportation or freight for bringing a vessel to India.
  - (ii) Since there is no cost of transportation or freight, MBK or their CHA did not assess the duty on freight and insurance.
  - (iii) If at all the bunker consumed by a vessel is to be considered as "cost of transportation" (not admitted), the said cost is 'ascertainable' by finding the difference between the bunker on board as per the log book of the master of the vessel at the port of origin and the port of arrival.
  - (iv) In the above manner, the insurance is also ascertainable as per sub-rule 2 of Rule 10 of Customs Valuation (Determination of Value of imported goods) Rules, 2007, and the insurance shall be assessed and

valued at 1.125% of the sum of the invoice value and the cost of transport as calculated above.

**ii. Section 117. Penalties for contravention, etc., are not expressly mentioned and MBK's reply.**

- a. MBK has not acted in contravention of the provisions of the Customs Act, of 1962.
- b. Invocation of penal provision u/s 117 shows the same has been incorporated without any valid or legal grounds. If at all liable, (not admitted), MBK is liable for the non-assessment of the differential duty on the "consumed fuel", if to be treated as "the transportation cost" of the vessel to India.

Given the proposed imposition of penalty under the above legal provisions and considering the above reply by MBK, may be dropped as erroneous, and unsustainable based on both law and facts.

**ii. Judicial Pronouncements/Judgments:**

Among other judgments to be produced at the time of the final hearing, we would like to place our reliance on the following important judgments at the moment.

- a. *Asean Cablesip Pte. Ltd vs. Commissioner of Customs (2022 SCC Online SC 1640)* the CESTAT Bangalore has held that the impugned vessel ASEAN Explorer is a foreign-going vessel, within the ambit of (ii) of Section 2(21) of the Customs Act, 1962, being engaged for performing repair/cable laying activities in the designated areas in terms of the Agreement with SEAIOCMA. The berthing of the vessel for long periods at Cochin Port does not alter this position and accordingly, the appellants are eligible to avail the exemption contained under Section 87 of the Customs Act, 1962 on the ship stores.
- b. In the case of *Commissioner of Custom vs. M/s. Phoenix Marine Services & ors (OIO no. 15/Additional Commissioner/2022-23 dated 31.01.2023)* among other things, it was held that:

*"17. As per Section 2(21) of the Customs Act, 1962 "foreign going vessel or aircraft" means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India. Thus, from the above definition it was clear that the Tug "Dona Paula*

- *It* does not appear to be covered under Section 2(21) *ibid* as it was running from Bedi Port Jamnagar to Alang, Bhavnagar *i.e.* between two ports in India. Hence the consumption of imported stores in its voyage between Bedi Port Jamnagar to Alang, Bhavnagar was in violation of Section 87 of the Customs Act, 1962, which reads as under:

**SECTION 87.** *Imported stores may be consumed on board a foreign-going vessel or aircraft*

*Any imported stores on board a vessel or aircraft (other than stores to which section 90 applies) may, without payment of duty, be consumed thereon as stores during the period such vessel or aircraft is a foreign-going vessel or aircraft."*

c. In the case of *Devshi Bhanji Khona and Ors. vs. C.C.-Cochin-Cus* (29.10.2019) CESTAT - Bangalore has held that the impugned vessel was not a foreign going vessel and such ship stores supplied to a vessel that is not a foreign going vessel are not applicable for exemption. This implies that MV Mahi and MV Neyyar were foreign-going vessels and thereby are entitled to be exempted from duty on stores as per section 87 of the Customs Act.

In light of the above facts, a list of dates, laws, and precedents, it is prayed that this Hon'ble Commissioner of Customs, Mundra, may be pleased to;

- A. Set aside the impugned show cause notice issued on M/s. MBK Logistix Private Limited.
- B. The allegations and charges framed against MBK in the subject Show Cause Notice may be dropped/ quashed and be exonerated from offences that are alleged to have been committed and
- C. To not impose any penalty upon MBK for the alleged violations of provisions of the Customs Act or any other Acts for that matter.
- D. To give an opportunity for a personal hearing, if any further clarifications are required, before this authority during the adjudication of the subject SCN and pass orders accordingly.
- E. Allow us to alter, amend, or modify our submission until the time matter is decided.

F. To pass any other order as may be pleased by the Hon'ble authority.

**C. Submission made by M/s Alaacrity Projects India Private Limited**

- i) Alaacrity is a company incorporated under the relevant provisions of the Companies Act, of 1956 and is engaged in the business of providing logistics management services. In the course of their business, Alaacrity has acted as the appointed Customs House Agent for the vessel operator/importer, M/s. Mahi Marine Private Limited, who has imported container vessels, MV SM Mahi and MV SM Neyyar (hereinafter collectively referred to as "Vessels").
- ii) By way of the present SCN, at para 8.1, the Commissioner of Customs, Custom House, Mundra, required Alaacrity to show cause, as to why:
  - (i) Penalty should not be imposed on them under Section 117 of the Customs Act, 1962;
- iii) In view of the above SCN and consequent penalties sought to be imposed on Alaacrity the following detailed reply is given.

In reference to para-no. 7.20 of the subject SCN which is stated as below:

*"In this case, CB-Firm M/s. Alaacrity Projects India Pvt. Ltd. (AAKCA3961DCH002), 301, Krishna Apartment, Netaji Subhash Palace, Wazipur, New Delhi-34 have not followed due diligence in respect of importation of the impugned old and used vessels and bunkers on board as they failed to declare actual quantity and value of the bunkers in their respective CTH and also failed to declare the CIF Value of the old and used vessels for the purpose of assessment, hence failed to comply with the provisions of the Customs Broker Licensing Regulations, 2018 (CBLR, 2018), this appears to be liable for penal action under Section 117 of the Customs Act, 1962 for contravention of CBLR, 2018.'*

- iv) In response to the above, Alaacrity provides the following reply:
  - i. That Alaacrity has diligently adhered to and complied with all provisions outlined in the Customs Broker Licensing Regulations of 2018, ensuring thorough and precise attention to detail in its operations.

- - ii. That in its capacity as the appointed Customs Broker for the importer in the subject matter, Alaacrity has meticulously processed and submitted the requisite Bill of Entries for both vessels, namely SM MV Mahi and SM MV Neyyar, exclusively relying on the documentation provided directly by the importer.
  - iii. That in alignment with the details provided in the invoice, Alaacrity has declared value of the vessels. Subsequently, the corresponding bill of entry for the aforementioned vessels has been duly prepared and filed by Alaacrity, ensuring full compliance with regulatory standards and procedural formalities.
  - iv. That importantly, Alaacrity has received information from the importer/vessel agent, indicating that, pursuant to the stipulations outlined in Section 87 of the Customs Act of 1962, no duty obligation is imposed on the bunkers of the vessels on foreign run, as affirmed by the importer/vessel agent, thereby confirming the legality of the exemption claimed.
  - v. Additionally, it is imperative to underscore that Alaacrity has adhered to regulatory requirements ensuring procedural compliance.
- v) Charges & Penal provisions invoked against Alaacrity- Reference to Section 117 of the Customs Act, 1962,
  - i. Alaacrity have acted in compliance with Customs Broker Licensing Regulations of 2018 and Section 14 of the Customs Act, 1962 read along with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Under S. 14 of the Customs Act, r/w. Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, the 'value of the imported goods' has to be the "transaction value" of such goods.
  - ii. The vessels were the 'imported goods', brought to India by "self-propulsion" (not using any other means of conveyance), from a place outside India to a port in India, wherein components such as 'freight, the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods' were not applicable.
  - iii. Thus, as M/s. Mahi Marine has not incurred any 'costs or charges' as provided in Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, to make them liable to assess duty including the transportation charges, Alaacrity has acted under said belief.

iv. In a worst-case scenario, (without prejudice to the argument that there is no freight to be paid while importing the vessels) if at all Mahi Marine is liable for the assessment of duty component (not payment of the same) on the freight/transportation cost, it can be possibly the cost of actual bunker/fuel consumed by the vessels, during its transit, from its port of purchase/transaction (Dubai) to first the first port of call in India (Mundra), which is also the "ascertainable" cost of transportation.

v. The said consumed fuel can be ascertained by taking the differential quantity of fuel on board the vessel at both ports, as declared by the master of the vessel, through his logbook. Hence, the method of calculation and considering 20% of the FOB value is not justifiable on the following grounds:

- i. There is no cost of transportation or freight for bringing a vessel to India.
- ii. Since there is no cost of transportation or freight, Alaacrity/vessel agent did not assess the duty on freight and insurance.
- iii. If at all the bunker consumed by a vessel is to be considered as "cost of transportation" (not admitted), the said cost is 'ascertainable' by finding the difference between the bunker on board as per the logbook of the master of the vessel at the port of origin and the port of arrival.
- iv. In the above manner, the insurance is also ascertainable as per sub-rule 2 of Rule 10 of Customs Valuation (Determination of Value of imported goods) Rules, 2007, and the insurance shall be assessed and valued at 1.125% of the sum of the invoice value and the cost of transport as calculated above.

vi) Section 117. Penalties for contravention, etc., are not expressly mentioned and Alaacrity's reply.

- i. Alaacrity has not acted in contravention of the provisions of the Customs Act, of 1962.
- ii. Invocation of penal provision u/s 117 shows the same has been incorporated without any valid or legal grounds. This suggests that the incorporation of this provision lacks justification or support according to established legal principles or regulations. In essence, it implies that the reference to section 117 as a punitive measure lacks proper legal reasoning or justification.

In light of the above facts, a list of dates, laws, and precedents, it is

prayed that this Hon'ble Commissioner of Customs, Mundra, may be pleased to;

- A. Set aside the impugned show cause notice issued on M/s. Alaacrity Projects India Private Limited.
- B. The allegations and charges framed against Alaacrity in the subject Show Cause Notice may be dropped/ quashed and be exonerated from offences that are alleged to have been committed and
- C. To not impose any penalty upon Alaacrity for the alleged violations of provisions of the Customs Act or any other Acts for that matter.
- D. To give an opportunity for a personal hearing, if any further clarifications are required, before this authority during the adjudication of the subject SCN and pass orders accordingly.
- E. Allow to alter, amend, or modify our submission until the time matter is decided.
- F. To pass any other order as may be pleased by the Hon'ble authority.

#### 17. Personal Hearing

#### In case of Noticee M/s Mahine Marine Pvt Ltd and M/s MBK Logistix Private Limited

'Audi alteram partem', is an important principle of natural justice that dictates to hear the other side before passing any order, Therefore, Importer was given first personal hearing on 09.09.2024 wherein they requested for adjournment vide email dated 05.09.2024. Hence, second opportunity for personal hearing was granted to importer on 27.09.2024, in which authorized representatives of Importer appeared before me. In the proceedings of personal hearing Shri Mohammed Rafiq, Advocate, appeared in the personal hearing, on behalf M/s Mahi Marine Pvt Ltd, and M/s Alaacrity Projects India Pvt Ltd. In the proceedings he inter-alia stated that:

1. SCN was issued on 29.11.2023 and BE was filed on 18.02.2021, hence it will not come under ambit of Section 28(i) of the Customs Act, 1962. Show Cause Notice has been served as per section 28(4) of the Customs Act, 1962. However, no suppression or will full mis-statement has been alleged in SCN. They have quoted SC judgement regarding this.
2. Vessels were purchased abroad and brought to port on provisional registration and continue till final registration by DGS. They stated that they have filed written submission regarding this. SM Neyyar was registered from 23.07.2021 to 09.08.2021, Similarly Mahi Marine was registered from 11.02.2021 to 05.08.21. As the vessels have licensed to operate world wise and they are entitled for exemption under section 87 of the customs act, 1962.

3. Vessels were in international voyage. As per vessel schedule the vessels were foreign going, so allegation that stores and bunkers were dutiable goods are baseless.
4. They have claimed exemption and the same cannot be counted as wilful mis-statement as a claim of exemption cannot be told as suppression.
5. SCN issued was beyond time.
6. Certificates suggest that they were foreign going vessel.
7. Section 40 of the Merchant Shipping Act, a provisional certificate for ship becoming Indian ship abroad. Such provisional certificate have effect till the expiry of six months or until the arrival of the ship at the port registry which first happens. They stated that this provision is applicable if the provisional certificate has not been extended beyond the expiry period. Here in this case all the applications were made before time.
8. As per Section 41 temporary passes are issued and in this case, the vessels have all the authority to conduct voyages. Certificates that they have enclosed is the strict proof that confers it as Indian vessel.
9. Transactional value has not been challenged. Both are second hand vessel, hence the value of second hand vessel has to be taken. No evidence has been provided to challenge the value of the vessel.
10. They will submit argument note shortly.

**In case of Noticee M/s Alaacrity Projects India Pvt Ltd**

Shri Nimit Shukla, Advocate, appeared in the personal hearing, on behalf M/s Alaacrity Projects India Pvt. Ltd, held on i.e. 27.09.2024 through virtual mode. In personal hearing, he reiterated the written submission dated 23.02.2024 and inter-alia stated that:

1. The addressee being CB supplied all the documents to customs as supplied by the Importer.
2. As per section 87 of the Customs Act, 1962, no duty has to be imposed on bunkers on vessels on a foreign run.
3. Rule 10 of CVR, 2007 read with section 14 of the Customs Act, 1962, the value of the imported goods has to be transactional value of the imported goods. The imported goods were brought by the self-propulsion from outside to India, hence the freight charges are not applicable.
4. M/s Mahi has not incurred any charges under rule 10 of CVR, which would liable them to assess duty including transport charges, on that believe Alacrity being the agent has acted on instruction.
5. All the mentioned ground they are not contravening to the any section of the customs act, 1962 and the Show cause notice to be dropped.

**17.1. Argument Notes submitted on behalf of M/s Mahi Marine Private Ltd and M/s MBK Logistix Pvt Ltd on 27.09.2024**

**1. THE PRIME ISSUE**

The prime issue that arises for consideration is whether the noticee companies failed to declare stores of vessels namely SM NEYYAR and SM MAHI in the Bills of Entry dated 18.02.2021.

**2. VESSELS WERE FOREIGN-GOING VESSELS DURING THE RELEVANT TIME**

2.1 They are container cargo vessels built to make voyages on the high seas and to carry stores, spares, bunkers, crew and technical staff for such voyages. Their status as foreign-going vessels was never subjected to any change during the relevant period.

2.2 As per Section 2(21) of the Customs Act, 1962, any vessel for the time being engaged in the carriage of goods or passengers between any port in India and any port or outside India, whether touching any intermediate port in India or not, is a foreign-going vessel.

2.3 Consumption of stores on board foreign going vessels is exempted under Section 87. The expression "during the period such vessel or aircraft is a foreign going vessel or aircraft" appearing in section 87 excludes only those vessels engaged in exclusive coast run from the purview of exemption.

2.4 M/s. Mahi Marine Private (Ltd.) purchased vessels and took delivery of the vessels afloat from foreign ports.

2.5 Mercantile Marine Department, Mumbai issued a Certificate of Indian Registry to S.M. NEYYAR under Section 34 of the Merchant Shipping Act, 1958 on 23.07.2021 as per ANNEXURE- II at page 63 of the written statement filed. The certificate would show that the vessel was provisionally registered from 10.02.2021 to 22.07.2021. During that period a licence under Section 406 of the Act authorising the vessel to ply in trade worldwide/Indian coast was also in vogue.

2.6 Mercantile Marine Department, Mumbai issued a Certificate of Indian Registry to SM MAHI under Section 34 of the Merchant Shipping Act, 1958 on 06.08.2021 as ANNEXURE-II at page 65 of the written statement. The certificate would show that the vessel was provisionally registered from 11.02.2021 to 05.08.2021. During that period licence bearing under Section 406 of the Act authorising the vessel to ply in trade worldwide/Indian coast was also in vogue.

2.7 Subsection (2) of Section 40 of the Merchant Shipping Act, 1958, mandates that a provisional certificate issued under subsection (1) shall have the effect of a certificate of registry during the period of its validity. Further, according to Section 41 of the Act, a temporary pass issued in lieu of the certificate of registry shall have the same effect as a certificate of registry. Section 406 authorises the Director General to issue licences to take the vessel to sea from a port or place within or outside India.

2.8 Thus, during the relevant time, ie., when the subject Bills of Entries were filed with the Customs and the commencement of the first voyage thereafter, the vessels were provisionally/permanently registered with the competent registry and they were Indian vessels licenced to be taken to the sea to ply 'Worldwide and Indian Coast' as envisaged under the Merchant Shipping Act, 1958.

2.9 Vessels reached the port of registration in the Indian jurisdiction with containers on board and remained as foreign-going vessels all along during the relevant period. Annexure IV colly would throw light on this aspect.

2.10 Voyage of the vessels from the foreign ports was in furtherance of contracts for overseas carriage. Vessels were berthed in Indian Port inter alia to fulfil obligations under Section 34 of the Merchant Shipping Act, 1958 in all preparedness to complete the overseas voyage already undertaken. Thus, vessels reached and left Mundra Port as 'foreign going vessels' in the course of the execution of existing overseas carriage contracts. The vessels entered, berthed and left the port, on the strength of provisional/permanent certificates of registry/temporary pass to ply in trade 'Worldwide and Indian Coast', all issued under the Merchant Shipping Act, 1958. The phrase "engaged" used in Section 2(21) of the Customs Act. 1962, assumes importance in the context of exemption available under Section 87 to stores on board the foreign going vessels as well. Therefore, the factum of berthing at the Indian port in the interregnum to fulfil the obligations under the Merchant Shipping Act, 1958 while "engaged" in overseas carriage, cannot in any way disentitle the benefits available to foreign going vessels under Section 87 of the Customs Act.

2.11 The Hon'ble Calcutta High Court in Scindia Steam Navigation Co. Ltd. v. Collector Of Customs reported 1977 SCC ONLINE CAL 356: 1988 ELT 36 58 that where the vessel was at all material times engaged in the carriage of goods between a port in India and another port abroad has to be construed as "a foreign going vessel" irrespective of the fact that it was berthed for some time and as such it was exempt from payment of any customs duty on imported stores consumed on board the vessel. The dictum so laid down is squarely applicable to the facts and circumstances of the instant case.

2.12 The exemption claimed under Section 87 of the Customs Act, 1962, read with Section 2(1) cannot be denied on illusory reference to provisions in the Merchant Shipping Act, 1958. The former Act is a fiscal legislation and the latter is regulatory in nature. Therefore, eligibility for exemption under Section 87 of the Customs Act, 1962 has to be considered independently upon appraising whether for the time being the vessels were engaged in the course of overseas carriage of goods as envisaged in Section 2(21).

2.13 The premises on which conclusions were made in the show cause notice are perverse and cannot be sustained in law and facts and circumstances of the case.

### **3. LIMITATION**

3.1 The show cause notice has been issued beyond the two years specified in Section 28(1)(a) of the Act. It is submitted that, given the language of subsection

(1) of Section 28, where non-levy/short levy has taken place for reasons other than collusion or any wilful misstatement or suppression of facts, the show cause notice has to be issued within two years from the relevant date.

3.2 Admittedly, the present show cause notice has been issued under Section 28(4) claiming an extended period of limitation. However, no case of wilful misstatement or suppression is either alleged or made out in the notice.

3.3 Further, the department had full knowledge of the factum of purchase of the vessels from the bills of entry and agreements relating to the purchase of vessels submitted before them.

3.4 Still further, the show cause notice has been issued on the questions of law as to the applicability of the exemption claimed.

3.5 It is trite as held by the Hon'ble Supreme Court in *Cosmic Dye Chemical v. Collector of Central Excise*, reported in (1995) 6 SCC 117, that the extended period of limitation can be invoked only when "suppression" or "collusion" is wilful with an intent to evade payment of duty. In the instant case no allegation of wilful suppression or misstatement with intent to evade payment of duty is alleged or made out.

3.6 Therefore, the department is not entitled to claim an extended period of limitation under Section 28(4) of the Act. Consequently, the subject show cause notice issued beyond the period of two years from the relevant date is barred by time, stale and bad in the eye of the law.

#### **4. VALUATION**

In para 7.17 of the SCN it is proposed (1) to reject the transaction value of the vessels declared by the importer and (2) to adopt fair value for the purpose of assessment. It is submitted that Section 14 speaks only of the transaction value, ie. the price actually paid or payable. As held by the Hon'ble Supreme Court in *Sounds N. Images v. Collector of Customs*, (2000) 9 SCC 143, It is always for the Customs Authorities to establish by methods known to law and in a satisfactory manner that the value of imported goods is not what the importer says it is and what that value actually is. That onus cannot be shifted to the importer. However, in the instant case, apart from simply referring to Section 14 of the Customs Act, 1962 and Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 the commissioner has not spelled out the circumstances under which the declared value is not acceptable. No material has been placed on record to reject the transaction value declared by the importer. Thus the onus on the part of the officer to prove that the declared value is incorrect is not discharged and hence the assessable value proposed in the SCN has no legal basis.

#### **5. REFUND**

Since the claims made in the show cause notice are illegal and stale, the amounts already paid as a duty under protest are liable to be refunded.

6. For the above reasons all the proposals in the SCN are liable only to be dropped  
Dated this 27th day of September 2024,

## 18. DISCUSSION AND FINDINGS:

**18.1.** I have carefully gone through impugned **Show Cause Notices** SCN No. GEN/ADJ/COMM/387/2023-Adjn-O/o Pr. Commr- Cus-Mundra dated 29.11.2023 issued by the Pr. Commissioner of Customs, Custom House, Mundra, relied upon documents, legal provisions and the records available before me. The main issues involved in the case which are to be decided in the present adjudication are as below whether:

- (i) The undeclared bunkers (Lub. Oil, HSD and Fuel Oil) valued at **Rs.4,37,37,331/-** (MV SM MAHI) and **Rs.3,95,73,556/-** (SM NEYYAR) are liable for confiscation under Section 111(m) of the Customs Act, 1962.
- (ii) The Customs duty amounting to **Rs.99,14,035/-** (*Rupees Ninety Nine Lakhs Fourteen Thousand and Thirty Five only*) for “**MV SM MAHI**”; and **Rs.1,11,72,366/-** (*Rupees One Crore Eleven Lakhs Seventy Two Thousand Three Hundred and Sixty Six Only*) for “**SM NEYYAR**” respectively are to be demanded and recovered from M/s Mahi Marine Pvt Ltd under Section 28(4) of the Customs Act, 1962. Since the said Customs duty has been paid by them **‘UNDER PROTEST’**, the protest is to be vacated and said Customs duty already paid by them is liable for appropriation.
- (iii) Interest at an applicable rate is recoverable from them, on the amount of duty in Para (ii) hereinabove, under Section 28AA of the Customs Act, 1962. Since M/s Mahi Marine Pvt. Ltd., have already paid the Interest amounting to **Rs.28,072/-** (*Rupees Twenty Eight Thousand Seventy Two only*) and **Rs.50,506/-** (*Rupees Fifty Thousand Five Hundred Six only*) ‘Under Protest’, the protest is to be vacated and said Interest already paid by them is liable for appropriation.
- (iv) The assessable value i.e. USD \$6000000 (Rs.44,28,00,000/-) for MV SM MAHI and USD \$12000000 (Rs.88,56,00,000/-) for SM NEYYAR declared by the importer is liable for rejection and re-determination as per the provisions of Section 14 of the Customs Act, 1962 read with Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.
- (v) The imported vessels MV SM MAHI valued at **Rs.53,63,41,500/-** and SM NEYYAR valued at **Rs.1,07,26,83,000/-** are liable for confiscation under Section 111(m) of the Customs Act, 1962;
- (vi) The differential Customs Duty amounting to **Rs.46,77,075/-** (*Rupees Forty Six Lakhs Seventy Seven Thousand and Seventy Five Only*) and **Rs.93,54,150/-** (*Rupees Ninety Three Lakhs Fifty Four Thousand One Hundred and Fifty Only*) in respect of import of old vessels “**MV SM MAHI**” and “**SM NEYYAR**” respectively is to be demanded and recovered from them under Section 28(4) of the Customs Act, 1962.
- (vii) Interest at an applicable rate is to be demanded and recovered from them, on the amount in Para (vi) hereinabove, under Section 28AA of the Customs Act, 1962.

- (viii) Penalty is imposable on them under Section 114A of the Customs Act, 1962;
- (ix) Penalty is imposable on them under Section 117 of the Customs Act, 1962;
- (x) Penalty under Section 117 of the Customs Act, 1962 is imposable on CB- Firm **M/s Alaacrity Projects India Pvt. Ltd.**
- (xi) Penalty under Section 117 of the Customs Act, 1962 is imposable on **M/s MBK Logistix Pvt. Ltd.**

**18.2** I observe that an intelligence was gathered that the importers while filing Bill of Entry for import of old and used vessels were not declaring the bunkers and lubricants and their value in the Bill of Entry. However, as per Memorandum of Agreement (MoA) entered into for purchase of vessel, apart from the purchase price of the vessel, the importer was required to pay the amount towards the stock of remaining items viz., bunkers, lubricating oils and consumables. Thus, both the items (viz., 'Vessel and 'the bunker') and their values were clearly identifiable and were separately classifiable under respective Tariff headings (CTHs) for application of stipulated duty on import. Since, the payments for bunkers and lubricants were additional payments and the same not being part of the contracted value for the vessel, the same were required to be separately declared in the Bill of Entry for assessment of duty.

**18.3** The details of Bill of Entry No.2812728 dated 18.02.2021 and Bill of Entry No.2818901 dated 18.02.2021 are as under:

Sr. No.	Bill of Entry No. & Date	Goods declared	CTH	Value Declared	Duty (only IGST)
1.	2812728 dated 18.02.2021	Old and Used Container Ship MV SM MAHI	89011 010	USD 6000000 (Rs.44,28,00,000/-)	2,21,40,000/-
2.	2818901 dated 18.02.2021	Old and Used Container Ship MV SM Neyyar	89011 010	USD 12000000 (Rs.88,56,00,000/-)	4,42,80,000/-

**18.4** Statement of the concerned persons in this matter was recorded under section 108 of the Customs Act, 1962 as mentioned below:

Sr No	Name	Firm	Recorded on
1	<b>Shri Rashid Ali Mohd S/o Hisamuddin,</b>	<b>Authorized Representative of M/s MBK Logistix Pvt.Ltd., Gandhidham</b>	25.02.2021
2	<b>Shri Jigneshsinh Jadeja,</b>	<b>Authorized Person of M/s Alaacrity Projects India Pvt. Ltd, New Delhi</b>	04.03.21
3.	<b>Shri Prabhaker Kini</b>	<b>Authorized Person of the Importer,</b>	04.03.21

		<b>M/s Mahi Marine Pvt. Ltd., Mumbai</b>	
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**18.5** I find that as per Memorandum of Agreement (MoA) entered into for purchase of the above old and used vessels, apart from the purchase price of the vessels, M/s Mahi Marine Pvt. Ltd. was also required to pay the amount towards the stock of remaining items viz., bunkers, lubricating oils and consumables. Thus, both the items (viz., 'Vessel and 'the bunker') and their respective value were clearly identifiable and are separately classifiable under respective Tariff headings (CTHs) as discussed supra for application of stipulated duty on import.

**18.6** Further, Circular No.16/2012-Customs dated 13th June, 2012 clarified the procedure to be followed for import of Indian vessels and filing of Import General Manifest, Bill of Entry. As per the above circular, it was clarified that as the provisions of Section 29 of the Customs Act, 1962 read with Section 2 (22) and 2(25), the term 'imported goods', *inter alia*, includes vessels entering India from any place outside the country (India). Para 3.2 of the above circular describes **Foreign flag vessels** and Para 3.3 describes **Indian Flag vessels** as under:

**3.2 Foreign flag vessels:** *These are the vessels that are registered abroad and its entry into the country is for carrying cargo or passengers, as a conveyance. Hence, there is no requirement for filing an IGM, Bill of Entry for foreign flag vessel which is being used as conveyance. However, the requirement for filing an import manifest in the prescribed manner for the goods or passengers which are being carried in the vessel, on its entry into an Indian port in terms of the provisions under Section 30 of the Customs Act needs to be complied with.*

**3.3 Indian Flag Vessel:** *In terms of the provisions of Part-V of the Merchant Shipping Act, 1958, vessels entering into India for the first time, are required to be registered with specified authority of the Mercantile Marine Department as Indian ship, which can then display the national character of the ship as Indian Flag Vessel for the purpose of Customs and other purposes specified in the said Act. Such Indian ship or vessel may be used for foreign run or exclusively for coastal run/ trade. Further, any ship or vessel may be taken outside India or chartered for coastal trade in India, only after obtaining the requisite licence from the Director General of Shipping, under the provisions of Section 406 or 407, respectively, of the said Merchant Shipping Act. Hence, in all such cases the Customs declarations such as IGM, Bill of Entry is required to be filed with jurisdictional Customs authority.*

**18.7** In view of above, I find that it is evident from the above clarification that a Foreign Flag Vessel does not require to file IGM or Bill of Entry. However, vessels entering into India for the first time are required to be registered as per the provisions of Merchant Shipping Act, 1958 as Indian Ship only after that she can display the national character of the ship as India Flag Vessel for the purpose of Customs. Importer has deposited amount under protest against duty liability on stores/bunkers. On scrutiny of the documents, as detailed above, in respect of import of the above old and used vessels i.e. "**MV SM MAHI**" and "**SM NEYYAR**",

it is noticed that the importer has declared the FOB Value for the purpose of assessment which was actually required to be done on the **CIF value** as per Section 14 of the Customs Act, 1962 read with Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Further, the importer failed to provide the details of the actual amount of Insurance and Freight in the present case.

**18.8** Before discussing the main issues to be decided in the case, it is important to examine the written defense submission submitted by different Noticee. I proceed to examine the defense submission of M/s Mahi Marine Pvt Ltd first.

**i) Discussions on defense submission of M/s Mahi Marine Pvt Ltd.**

a) In para C (i), Noticee has tabulated the various events for both the vessels. Further, it has been mentioned that:

- Mahi Marine has obtained statutory provisional registration certificates (on 11.02.2021 and 10.02.2021 respectively for the vessels) from the foreign port of purchase (Dubai) for the imported vessels, from the competent authority (MMD) under the provisions of the MSA, 1958, to import the vessels under the "Indian Flag". Ongoing through the fact of cases, I observe that as per Section 40 of the Merchant Shipping Act, 1958,

Section 40. Provisional certificate for ships becoming

*Indian ships abroad.—*

*(1) If at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular officer there may grant to her master on his application a provisional certificate containing such particulars as may be prescribed in relation to the ship and shall forward a copy of the certificate at the first convenient opportunity to the Director-General.*

*(2) Such a provisional certificate shall have the effect of a certificate of registry until the expiration of six months from its date or until the arrival of the ship at a port where there is a registrar whichever first happens, and on either of those events happening shall cease to have effect.*

From above, it is evident and clear that once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run.

- Mahi Marine has obtained the statutory provisional "General Trade Licence" (on 12.02.2021 for the vessels) under the provisions of the MSA 1958 and remains under "Foreign Going" status while calling the first port of call in India. Ongoing through the case, I find that as per section 406 of the Merchant Shipping Act, 1958:

*Section 406. Indian ships and chartered ships to be licensed. –*

*(1) No Indian ship and no other ship chartered by a citizen of India or a company [or a co-operative society] shall be taken to sea from a port or place within or outside India except under a licence granted by the Director General under this section:*

*Provided that the Central Government, if it is of opinion that it is necessary or expedient in the public interest so to do, may, by notification in the Official Gazette, exempt any class of ships chartered by a citizen of India or a company [or a co-operative society] from the provisions of this sub-section.*

*(2) A licence granted under this section may be-*

*(a) a general licence;*

*(b) a licence for the whole or any part of the coasting trade of India; or*

*(c) a licence for a specified period or voyage.*

*(3) A licence granted under this section shall be in such form and shall be valid for such period as may be prescribed and shall be subject to such conditions as may be specified by the Director General.*

On reading the license No. MUM/19/W&C/2021 dated 12.02.2021 issued by Mercantile Marine Department, Mumbai I find that license was co-terminus with the provisional certificate of registry. As the provisional certificate ceases to be valid once the ship reaches India, the trade license issued also ceases to be valid. When the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel.

- Noticee has stated that availing the benefit of Section 87 of the Customs Act, 1962, the duty on bunker/stores on board the "foreign going" vessel has not been paid by Mahi Marine. Here Noticee has failed to appreciate the fact that when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty.
- Further, Noticee has stated that at the relevant point of time, by virtue of certificates issued under MSA, 1958, (Registration Certificates & General Trade Licenses) as well as operationally, both the vessels (M.V. SM MAHI & M.V. SM NEYYAR) remained foreign-going. Thus, both the vessels qualified for the exemption on duty on bunker on board under Section 87 of the Customs Act). I find that as discussed in the earlier point, Foreign

Flag Vessel means a vessel of foreign registry and Foreign-Going Vessel means the vessel engaged in the carriage of goods between any port in India and any port outside India, whether touching any intermediate port in India or not. As per Section 406 of the Merchant Shipping Act, 1958, no Indian ship shall be taken to sea from a port or place within India or outside India except under a license granted by Director General of Shipping. As per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a provisional certificate and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance. Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty.

- Noticee has again submitted that the stores/bunkers that remained on board the vessels were consumed by M.V. SM Mahi & M.V SM Neyyar during their subsequent "foreign going" voyages respectively. A copy of the relevant itinerary/schedule of both vessels M.V. SM Mahi & M.V SM Neyyar is given by them. Hence they submitted that they are eligible for refund of the duty on bunker and the interest thereon paid under protest. The Bills of Entry are not liable for re-assessment and payment thereon the value of the vessels, as the assessment was done in compliance with the provisions of the Customs Act, 1962. The vessels covered under the present SCN of Mahi Marine are not liable for confiscation as per section 111 (m) of the Customs Act, 1962. They are not liable to pay the differential duty and interest under section 28(4) and 28(aa) of the Customs Act, 1962. They are not liable for penalty under section 114A and 117 of the Customs Act, 1962. From above discussions in above points, I find that as per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a provisional certificate and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade

license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance.

Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty. Further, by such suppression of fact i.e. not declaring the quantity of stores amounts before customs, M/s Mahi Marine Pvt Ltd has evaded customs duty and made such goods liable for confiscation under section 111(m) of the Customs Act, 1962. By doing such act of suppression M/s Mahi Marine is also liable to be penalised under Section 114A of the Customs Act, 1962.

**b)** In para C(ii), Noticee has submitted reply to the findings in para 7.14 of the SCN and stated that it is affirmed that the provisional and permanent general trade licenses were secured by the vessels to acquire and remain "foreign-going". The contention of the Customs Department as per the SCN is that, upon filing of a bill of entry for a foreign-going imported vessel, the vessel ceases its foreign-going status. However, the said argument does not hold water for the following reasons that the vessels had already acquired "Indian Flag" prior to filing BOE. The "Foreign Going" certificate is issued by MMD under the provisions of MSA, 1958. No provision in the Customs Act make the "Foreign Going" trade license of a vessel "co-terminus" with filing of BOE u/s.46 of the Customs Act, 1962. The filing of BOE doesn't *ipso facto* nullify a valid certificate issued by the competent authority under the MSA, 1958.

Ongoing through the facts and as discussed in the above paras I find that the provisional certificate was issued to the vessel however, it ceases once it entered the Indian Port as per section 40 of the Customs Act, 1960. The trade license issued was co-terminus with the provisional certificate. Hence as soon as the Provisional Certificate ceases to be valid the trade license also ceased to be valid. The Noticee failed to appreciate the fact that the trade license was co-terminus with the provisional certificate. Further, Circular No.16/2012-Customs dated 13th June, 2012 clarified the procedure to be followed for import of Indian vessels and filing of Import General Manifest, Bill of Entry. As per the above circular, it was clarified that as the provisions of Section 29 of the Customs Act, 1962 read with Section 2 (22) and 2(25), the term 'imported goods', *inter alia*, includes vessels entering India from any place outside the country (India). Para 3.2 of the above circular clarifies **Foreign flag vessels** and Para 3.3 clarifies **Indian Flag vessels** as under:

**3.2 Foreign flag vessels:** *These are the vessels that are registered abroad and its entry into the country is for carrying cargo or passengers, as a conveyance. Hence, there is no requirement for filing an IGM, Bill of Entry for foreign flag vessel which is being used as conveyance. However, the requirement for filing an import manifest in the prescribed manner for the goods or passengers which are being*

carried in the vessel, on its entry into an Indian port in terms of the provisions under Section 30 of the Customs Act needs to be complied with.

**3.3 Indian Flag Vessel:** In terms of the provisions of Part-V of the Merchant Shipping Act, 1958, vessels entering into India for the first time, are required to be registered with specified authority of the Mercantile Marine Department as Indian ship, which can then display the national character of the ship as Indian Flag Vessel for the purpose of Customs and other purposes specified in the said Act. Such Indian ship or vessel may be used for foreign run or exclusively for coastal run/ trade. Further, any ship or vessel may be taken outside India or chartered for coastal trade in India, only after obtaining the requisite licence from the Director General of Shipping, under the provisions of Section 406 or 407, respectively, of the said Merchant Shipping Act. Hence, in all such cases the Customs declarations such as IGM, Bill of Entry is required to be filed with jurisdictional Customs authority.

Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance. It was the provisional registration certificate which ceased and as the trade license was co-terminus with the provisional registration certificate, it also ceased to be operative.

c) In para C(iii) Noticee has stated that given the above explanations (ii) and relying on the provisions of relevant statutes, the finding of the department that the duty on the bunker on board the vessel, to the tune of Rs. Rs.99,14,035/- for MV SM MAHI; and Rs.1,11,72,366/- for MV SM NEYYAR towards Customs Duty and Rs. 28,072/- and Rs.50,506/-towards interest is payable, is erroneous, illegal not supported by provisions of law. Since the demand of duty and interest was illegal and unauthorized, the excess amount paid by Mahi Marine 'under protest', is liable to be refunded with interest to Mahi Marine. The issue has been discussed in the several paras here, however I will re-iterate the same for further clarity that once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance. Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty. Further, by such suppression of fact i.e. not declaring the quantity of stores amounts before customs, M/s Mahi Marine Pvt Ltd has evaded customs duty and made such goods liable for confiscation under section 111(m) of the Customs

Act, 1962. By doing such act of suppression M/s Mahi Marine is also liable to be penalised under Section 114A of the Customs Act, 1962.

d) In para c (iv), Noticee has mentioned that Circular 37/96 dated 03.07.1996, Circular No. 09/18 dated 19.04.2018 read with Notification No. 07/2015-20 to the present is not applicable. As the legal principle of 'ejusdem generis', states when a list of specific items or categories is followed by a general term, the general term should be interpreted in a way that limits it to things of the same kind or nature as the specific items listed and not to other things or items. I have gone through the above Circulars and Notifications and I find that the above circulars are for the ships/vessels which are imported for scrapping or breaking. The above circulars clarify that the stores have to be declared in appropriate heading and duty have to be paid. I think during investigation, the same was referred to bring out similarity as in both cases, Bills of Entry for home consumption have to be filed. The above circulars and notification illustrate and simplify the complications arising during filing of Bills of Entry regarding policy conditions and all. These circulars and notification can be taken for reference value. Firstly, the declaration of stores/bunkers have to be done as they disqualify for exemption provided under Section 87 of the Customs Act and secondly, the process of declaration of these bunkers are to be referred from these circulars/notification. Hence, I find that the above circulars/notifications are to be relied during declaring the store/bunkers before customs for assessing the duty.

Further, Noticees has stated that it is incumbent on Mahi Marine to elucidate that the circumstances surrounding the judgment cited in the aforementioned Paragraph 7.10 of the SCN, are wholly disproportionate application to the exigencies of the present case. The factual matrix is different, the issues dealt with by the Hon'ble Court are different. In essence, the dictum and essence in 'Gujarat Adani Port Ltd. vs. Commissioner of Customs, Kandla' is upon a distinct set of factual events, and legal issues and has no applicability to the present case. Therefore, the SCN issued relying on the principle of judgment and further developments there from are erroneous and to be withdrawn.

Ongoing through the judgement referred in case of Gujarat Adani Port Ltd., Vs Commissioner of Customs, Kandla reported in 2013 (297) BLT 330 (Th-Ahmd), it was held that

"As rightly observed by the ld. Commissioner in the impugned order, according to the definition of the goods in Section 2(22) of Customs Act, 1962, the vessels are included in the definition. Section 87 of Customs Act, 1962 permits utilization of imported stores on board vessels during the period when such vessels are foreign going vessels. The moment Bill of Entry is filed in respect of the vessels and import duty is paid, the vessels cease to be foreign going vessels. Therefore, the diesel and other provisions on board the vessel cease to enjoy the benefit of exemption available to such items in stores in foreign going vessel since after filing Bill of Entry on payment of duty, the vessel ceases to be a foreign going vessel and becomes an Indian vessel and therefore the liability of import duty on the provisions/ stores in the vessel arises"

Hence, I find that on filing of Bill of Entry in respect of vessel and payment of import duty, the vessel ceases to be foreign going vessel and it becomes Indian vessel and the person who filed the Bill of Entry becomes the receiver of goods;

that diesel and other provisions onboard the vessel cease to enjoy the benefit of exemption under Section 87, which permits their utilization during the period when such vessels are foreign going vessels. The ratio of the above judgement is rightly applicable in this case.

e) In para C(v) (i), Noticee has stated that the vessel is the 'imported goods' brought by "self-propulsion" (not using another conveyance) from a place outside India to a port in India, wherein components such as 'freight, the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods' were not applicable. M/s. Mahi Marine has not incurred any 'costs or charges' as provided in Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, to make them liable to assess duty including the transportation charges. Therefore, as advised by the CHA appointed by the Agent, Mahi Marine did not consider the freight/cost of transportation to assess the import duty. In a worst-case scenario, if at all Mahi Marine is liable for the assessment of duty component (not payment of the same) on the freight/transportation cost could be the actual bunker/fuel consumed by the vessels, from its port of sale (Dubai) to first port of call in India (Mundra), which is the "ascertainable" cost of transportation. The said consumed fuel can be ascertained by taking the difference between the quantities of fuel on board the vessel at both ports, as declared by the master of the vessel, through his log book. Hence, the method of calculation and considering 20% of the FOB value is not justifiable on the following grounds.

There is no cost of transportation or freight for bringing a vessel to India. Since there is no cost of transportation or freight, the CHA did not assess the duty on freight and insurance and hence did not pay the IGST. If at all the bunker consumed by a vessel is to be considered as "cost of transportation" (not admitted), the said cost is 'ascertainable' by finding the difference between the bunker on board as per the log book of the master of the vessel at the port of origin and the port of arrival. In the above manner, the insurance is also ascertainable as per sub-rule 2 of Rule 10 of Customs Valuation (Determination of Value of imported goods) Rules, 2007, and the insurance shall be assessed and valued at 1.125% of the sum of the invoice value and the cost of transport as calculated above.

Firstly, I will go through the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 Rule 10 before coming to the conclusion:

*(2) For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include - (a) the cost of transport of the imported goods to the place of importation; (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and (c) the cost of insurance : Provided that - (i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods; (ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c); (iii) where the cost referred to in clause (c) is*

**not ascertainable, such cost shall be 1.125% of free on board value of the goods; Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:**

*Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii). Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport referred to in clause (a). Explanation.- The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on charted vessels, lighterage or barge charges. (3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data. (4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.*

I find that Noticee has not declared the freight/insurance cost in the Bills of Entry. In case of failure to ascertain the freight and insurance, the same has to be applied at the rate of 20% and 1.125% of FOB value. Noticee claimed that their imported goods i.e. vessel has been brought by self-propulsion, hence transportation cost is not applicable. Here I would like to refer to the judgement in case of **M/s Samson Maritime Ltd vs Commissioner of Customs (I), Mumbai 2017 (352) E.L.T. 493 (Trib. Mumbai)** wherein the various costs/expenses to be included to arrive at the calculating the Freight /Insurance Cost can be referred in case of self-propelled vessel:

Particulars of Expenses	Amount in USD (1 USD = INR 45.65)	Amount in INR (Actuals)
Invoice No. 1-Repatriation of crew	44,375.00	20,25,719.00
Invoice No. 2 Medical Expenses Dr. Jayant Rele	78.86	3,600.00
Invoice No. 3. Manning Cost	66,244.99	30,24,084.00
Invoice No. 4-Invoice for Vicualling/Provisions from Avalontec for SGD 1143.68 (Actual SGD 1143.68 converted to USD @ 1 USD = 1.206SGD)	948.48	43,298.00
Invoice No. 5 colly : Poet Shipbuilding & Engineers Pte. Ltd. RMB42236		

Poet Shipbuilding & Engineers Pte. RMB 17400 (actual RMB 59.636 converted to USD @ 1 USD-6.25 RMB)		
Poet Shipbuilding & Engineers Pte. USD 113475.60	1,96,096.34	89,51,798.00
Poet Shipbuilding & Engineers Pte. USD 73073.98		
Invoice No. 6-Insurance Policy for Hull and Machinery - Rs. 242,044 from 15- 5-2011 to 14-8-2011 i.e. 242.044/91 days *43 days (i.e. from 15-5 to 26-6- 2011)	2,732.29	1,24,729.00
Invoice No. 7 - P&I Insurance USD 1660.48 from 15-5-2011 to 14-8-2011 i.e. USD 1660.48 equivalent to Rs. 74677  74677/91 days *43 days (i.e. from 15-5- to 26-6-2011)	765.00	34,922.00
Invoice No. 8 Port Charges etc. (Actual SGD 4972.43 converted to USD @ 1 USD = 1.267 SGD)	3,687.79	1,68,348.00
<b>Total (A)</b>	<b>3,14,929.00</b>	<b>1,43,76,498.00</b>
<b>LESS Items on board, declared in the Bill of Entry for Home Consumption :-</b>		
Marine Gas Oil	37,102.81	16,93,743.00
Lubricating Oils	11,141.76	5,08,621.00
Grease	163.50	7,464.00
Paints	413.00	18,853.00
Total of expenses already declared in the B/L	48,821.07	22,28,081.00
Freight AND insurance considered in CIF value as		
per Bill of Entry : Freight USD 77617.64		
Insurance : USD 780	78,397.64	35,78,853.00
<b>Total (B)</b>	<b>1,87,710.04</b>	<b>85,68,964.00</b>
Differential duty as may be charged @ 15.15%-(C)		12,98,198.00

Hence, I find that these details have not been provided by the Noticee either during the Investigation period or before adjudicating authority. Hence, the cost of freight and insurance can't be ascertained and there is no option left to rely on the Rule 10(2) that where the cost of freight and insurance is not ascertainable, then the same may be added @ 20% and @1.125% respectively.

¶ In para C (v) (ii), (iii) & (iv) , Noticee has stated that Mahi Marine has imported the vessels as per relevant provisions of the Merchant Shipping Act, 1958, and Customs Act, 1962 and the vessels were foreign going till the time they were converted into a coastal run in the month of March 2021. Mahi Marine has filed the Bill of Entry as per Section 46 of the Customs Act, 1962, and has duly paid the duty on the imported vessels. I find that M/s Mahi Marine has not

declared the stores/bunkers deliberately to evade customs duty. Further, they have not declared the Freight/insurance cost and mis-declared the FOB value as CIF value for vessels. Hence, due to this act of omission and commission, the goods have been held liable for confiscation under the provisions of section 111 (m) of the Customs Act, 1962.

Further, Noticee has stated that Mahi Marine has not fraudulently or with an intent to defraud made, signed or used, or caused to be made, signed or used, any declaration, statement, or document which was false or incorrect in any material particular, in the transaction of any business for the purposes of this Act. There is no collusion nor any deliberate suppression of material facts. Ongoing through the facts and evidences in the present case and discussion held supra, I find that the Noticee by not declaring and suppressing the quantity and value of the bunkers (Lub. Oil, HSD and Fuel Oil) evaded the Customs duty totally amounting to **Rs.99,14,035/-** for "**MV SM MAHI**" and **Rs.1,11,72,366/-** for "**SM NEYYAR**" respectively in contravention of the provisions of the Section 17 and Section 46 of the Customs Act, 1962 and required to be recovered under Section 28(4) of the Customs Act, 1962 alongwith applicable Interest under Section 28AA of the Customs Act, 1962. It is also evident that the importer has mis-declared the value before Customs authorities by suppressing the element of freight and Insurance. Therefore, the importer has short paid the Customs amounting to **Rs.46,77,075/-** and **Rs.93,54,150/-** in respect of import of old vessels for "**MV SM MAHI**" and "**SM NEYYAR**" respectively. On account of suppression of the material facts while declaring the value of Vessel and also suppressing the stores/bunkers intentionally by not declaring the same, the Noticee has rendered themselves for penalty under Section 114A of the Customs Act, 1962.

g) In subsequent paras, Noticee has relied on several judgements which are being discussed in detailed below:

#### **Judicial Pronouncements/Judgements**

##### **(a) Asean Cablesip Pte.Ltd vs Commissioner of Customs/2022 SCC Online SC 1640)**

In the above case, ASEAN Explorer (AE), a Singapore flagged Vessel, was engaged to carry out repairs of cables located in South East Asia and Indian Ocean Area, in terms of South East Asia and Indian Ocean Cable Maintenance Agreement ("SEAIOCMA"/"Agreement"). The vessel was berthed at Kochi port; the vessel had an operating Zone connecting India, Pakistan, Singapore, Indonesia, Malaysia, United Arab Emirates, Sri Lanka, Myanmar, Bangladesh, Thailand, Cambodia, Vietnam, Brunei, Hong Kong, Taiwan, China, Philippines, Australia and Guam; was to undertake repair activities in respect of the sub-sea cables spread over an area of 105,000 km; out of which only 256 KM (0.25%)

was within territorial waters of India. For this purpose, the vessel had to move from various ports in India and also between ports outside India. During the movements it carried stores, spares, bunkers and crew and technical staff to and fro Indian Ports. During the period of dispute i.e. 11-7-2007 to 24-4-2012, the vessel had carried out 13 repair activities and 5 cable working exercises (CWEs) across the region; out of these only one recovery operation occurred 5-20 nautical miles of India, during the period 4-10-2007 to 6-10-2007. Revenue argued that out of 1750 days under consideration, the vessel was out for repairs only for 301 days and as such it cannot be considered as a 'Foreign Going Vessel' (FGV) and exemption availed for ship stores Bunkers etc. is not available to the vessel.

However, in the current case, the Bills of Entry for Home Consumption has been filed by the Noticee. as per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a provisional certificate and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance. Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty. Further, by such suppression of fact i.e. not declaring the quantity of stores amounts before customs, M/s Mahi Marine Pvt Ltd has evaded customs duty and made such goods liable for confiscation under section 111(m) of the Customs Act, 1962. By doing such act of suppression M/s Mahi Marine is also liable to be penalised under Section 114A of the Customs Act, 1962. The ratio of judgement is squarely covered in Gujarat Adani Port Ltd., Vs Commissioner of Customs, Kandla reported in 2013 (297) BLT 330 (Th-Ahmd), it was held that

"As rightly observed by the ld. Commissioner in the impugned order, according to the definition of the goods in Section 2(22) of Customs Act, 1962, the vessels are included in the definition. Section 87 of Customs Act, 1962 permits utilization of imported stores on board vessels during the period when such vessels are foreign going vessels. The moment Bill of Entry is filed in respect of the vessels and import duty is paid, the vessels cease to be foreign going vessels. Therefore, the diesel and other provisions on board the vessel cease to enjoy the benefit of exemption available to such items in stores in foreign going vessel since after filing Bill of Entry on payment of duty, the vessel

ceases to be a foreign going vessel and becomes an Indian vessel and therefore the liability of import duty on the provisions/ stores in the vessel arises"

Based on the above discussions, I find that the fact of case in Asean Cablesip Pte.Ltd vs Commissioner of Customs(2022 SCC Online SC 1640) is different from the subject case. Hence, the ratio of judgement can't be relied upon.

**b) In Metro Marine Services Put. Ltd. and Ors. Vs. Commissioner of Customs (MANU/CC/0194/2007)**

Ongoing through the facts of the case it was a consignment of marine paints and thinners was imported by M/s. Jaisu Shipping Co. Pvt. Ltd., in April 1999 per vessel M.V. TIGER PEARL V-700 with the master of the vessel M.T. AL NIMS as consignee. M/s. Bharat Marine Company, Chennai, CHA filed an application on 23-4-99 on behalf of the importer for transshipment of the consignment to Kandla where the vessel M.T. AL NIMS was berthed. The transshipment application indicated that the goods were meant for consumption on board a vessel on foreign run. On receipt of the transshipment cargo by the Assistant Commissioner (Preventive), Custom House, Kandla, the officers of Kandla Custom House discovered that the vessel M.T. AL NIMS was not a vessel on foreign run. Therefore, the importer was asked to pay the duty due when copies of invoices No. 128/99 dated 12-4-99 and No. 128/99A dated 12-4-99 were produced. These were respectively for Singapore \$11345.15 and US\$ 2912.60. It transpired in the investigation that there was another parallel set of invoices with the same number and date, which had been submitted at the Chennai Custom House while applying for transshipment advice. The bill of lading had described the goods as nine pallets of marine paints and thinners. However, one of the two invoices No. 128/99A had covered Aluminium and Zinc anodes. Visits to the premises of the CHA, the cargo forwarder M/s. Metro Marine Services (P) Ltd., Chennai, who assisted the CHA in documentation for transshipment of imported cargo, M/s. Jaisu Shipping Co. Pvt. Ltd. and Indian executives of M/s. Jotun NOF (S) Pte. Ltd., indicated that the supplier M/s. Jotun NOF (S) Pte. Ltd., Singapore, had raised two sets of invoices, (one showed higher values compared to the invoices furnished to the Kandla Customs), showing the goods as meant for use as ship stores on a foreign going vessel. It was tentatively found by the department that the importer M/s. Jaisu Shipping Co. Pvt. Ltd and the appellants had entered into a conspiracy to import thinners, paints and anodes, evading the import duty due thereon. The importer surrendered the consignment when it was detected in investigation that the documents had been manipulated to evade the appropriate import duty.

Hence, it can be seen that the facts are different from the subject case. They have nothing in similar in terms of facts or issue. I find that the judgement can't be relied in absence of similarity of facts.

**c) M/s Chakiat Agencies vs Commissioner of Customs (Exports) 2023 TAXSCAN (CESTAT) 175**

Ongoing through the fact of the case I find that based on the intelligence that "Muriate of Potash", a restricted item for export, is smuggled out of India in the guise of 'Industrial Salt', the Officers of Custom House, Chennai detained an export consignment of 150 MTs of cargo declared as 'Industrial Salt' on 24-7-2009. The cargo was packed in polyethylene bags of 50 gms. each and were lying in the CFS area. The consignment was covered under 6 Shipping Bills and was

destined to Vietnam and Malaysia. The goods were examined in the presence of two independent witnesses, CHA, representative of exporter and the representative of CFS. On a reasonable belief that the consignment is misdeclared, samples were drawn for the purpose of chemical examination. The samples were forwarded to M/s. Coromandal Fertilizers Ltd., Chennai on 29-7-2009 for the purpose of chemical analysis to confirm the composition. After chemical examination, it was found that the consignment was "Muriate Potash" (Potassium Chloride). Based on the investigation, show cause notices were issued to the exporter and various other persons including M/s. Chakiat Agencies, who is the CHA, and Shri Soji Kuriakose who is the Manager (Exports) of the CHA firm (the appellants herein). After adjudication, the original authority imposed penalty of Rs. 1,00,000/- each on the appellants.

So from above, it can be seen that the fact of cases are poles apart. The relied judgement is in the case of CB who has filed the shipping bill for fraudulent export. In the current case, there is no relevance in terms of facts, issues or legality. Accordingly, the ratio of judgement can't be implicated here.

**d) Sameer Santosh Kumar Jaiswal Vs Commr of Customs, Import-II/2018 (362) ELT 348 (T-Munn)**

In the relied case judgement was held as below:

*As regards penalty imposed on Shri Sameer Santosh Kumar Jaiswal, Director of the appellant company under Section 114AA, which reads as under*

*if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.*

*From the reading of the above Section 114AA, it is observed that if the person knowingly makes the false declaration or signs any such document then only he will be liable to penalty under Section 114AA*

From above, it appears that the above judgement talks about the penalty under section 114AA, however in the current Show Cause Notice, there is nothing proposed about penalty under Section 114AA of the Customs Act, 1962. Hence, I find the relying on the above judgement by Noticee in subject case appears to be irrelevant.

**e) Commissioner of Custom vs. M/s. Phoenix Marine Services & ors (OIO no. 15/Additional Commissioner/2022-23 dated 31.01.2023)**

In the above judgements, it was held that as per Section 2(21) of the Customs Act, 1962 "foreign going vessel or aircraft" means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India. Thus, from the above definition it was clear that the Tug "Dona Paula - II" does not appear to be covered under Section 2(21) ibid as it was running from Bedi Port Jamnagar to Alang, Bhavnagar i.e. between two ports in India. Hence the consumption of imported stores in its voyage between Bedi Port Jamnagar to Alang, Bhavnagar was in violation of Section 87 of the Customs Act, 1962, which reads as under

**SECTION 87. Imported stores may be consumed on board a foreign-going vessel or aircraft**

*Any imported stores on board a vessel or aircraft (other than stores to which section 90 applies) may, without payment of duty, be consumed thereon as stores during the period such vessel or aircraft is a foreign-going vessel or aircraft*

The Noticee has stated that a contrary reading and interpretation of the judgment in the above case would reveal that as long as a vessel remains foreign-going status, by virtue of the provision of S.87 of the Customs Act, the bunker/stores on board are not to be assessed and charged for payment of customs duty. The Noticee here failed to appreciate the facts that **once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance**. Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty.

**f) JM Baxi & Co vs. Joint Commissioner with reference to OIO no. 01/Joint Commissioner/2021-2022 dated 04.05.2021.**

The order was issued necessitating the payment of customs duty by the steamer agent, for the ship stores, bunkers, provisions, and other consumables used on a cruise vessel during its passage through territorial waters of India. This obligation arose because the vessel in question was not classified as a foreign-going vessel; it was engaged in coastal operations.

The Noticee has stated that a contrary reading and interpretation of the judgment in the above case would reveal that as long as a vessel remains foreign-going status, by virtue of the provision of S.87 of the Customs Act, the bunker/stores on board are not to be assessed and charged for payment of customs duty. The Noticee here failed to appreciate the facts that **once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance**. Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the

vessel and the bunkers/consumables on board are treated as imported goods and liable to duty.

Hence, I find that both the judgements referred in point (e) and (f) has no relevance here.

**g) Devshi Bhanji Khona and Ors. vs. C.C.-Cochin-Cus (29.10.2019) CESTAT**

CESTAT – Bangalore has held that the impugned vessel was not a foreign going vessel and such ship stores supplied to a vessel that is not a foreign going vessel are not applicable for exemption. This implies that MV SM Mahi and MV SM Neyyar were foreign-going vessels and thereby are entitled to be exempted from duty on stores as per section 87 of the Customs Act.

Noticee here failed to appreciate the fact that whole dispute in this case has arisen on the fact whether both the impugned vessels are foreign going vessel or not. From the discussion held in the foregoing paras, it is apparently clear that vessels are not foreign going vessels, hence the duty on stores are not spared from the duty element by invoking the provisions of section 87 of the Customs Act, 1962.

Now I proceed to examine the defence submission of M/s MBK Logistix Pvt Ltd.

**ii) Discussions on defense submission of M/s MBK Logistix Pvt Ltd.**

**a)** In para C (i), Noticee has tabulated the various events for both the vessels. Further it has been mentioned that

- Mahi Marine has obtained statutory provisional registration certificates (on 11.02.2021 and 10.02.2021 respectively for the vessels) from the foreign port of purchase (Dubai) for the imported vessels, from the competent authority (MMD) under the provisions of the MSA, 1958, to import the vessels under the "Indian Flag". On going through the fact of cases I observed that as per Section 40 of the Merchant Shipping Act, 1958,

Section 40. Provisional certificate for ships becoming

*Indian ships abroad.—*

*(1) If at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular officer there may grant to her master on his application a provisional certificate containing such particulars as may be prescribed in relation to the ship and shall forward a copy of the certificate at the first convenient opportunity to the Director-General.*

*(2) Such a provisional certificate shall have the effect of a certificate of registry until the expiration of six months from its date or until the arrival of the ship at a port where there is a registrar whichever first happens, and on either of those events happening shall cease to have effect.*

From above, it is evident and clear that once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run.

- Mahi Marine has obtained the statutory provisional "General Trade Licence" (on 12.02.2021 for the vessels) under the provisions of the MSA 1958 and remains under "Foreign Going" status while calling the first port of call in India. Ongoing through the case, I find that as per section 406 of the Merchant Shipping Act, 1958:

*Section 406. Indian ships and chartered ships to be licensed. –*

*(1) No Indian ship and no other ship chartered by a citizen of India or a company [or a co-operative society] shall be taken to sea from a port or place within or outside India except under a licence granted by the Director General under this section:*

*Provided that the Central Government, if it is of opinion that it is necessary or expedient in the public interest so to do, may, by notification in the Official Gazette, exempt any class of ships chartered by a citizen of India or a company [or a co-operative society] from the provisions of this sub-section.*

*(2) A licence granted under this section may be-*

*(a) a general licence;*

*(b) a licence for the whole or any part of the coasting trade of India; or*

*(c) a licence for a specified period or voyage.*

*(3) A licence granted under this section shall be in such form and shall be valid for such period as may be prescribed and shall be subject to such conditions as may be specified by the Director General.*

On reading the license No. MUM/19/W&C/2021 dated 12.02.2021 issued by Mercantile Marine Department, Mumbai I find that license was co-terminus with the provisional certificate of registry. As the provisional certificate ceases to be valid once the ship reaches India, the trade license issued also ceases to be valid. When the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel.

- Noticee has stated that availing the benefit of Section 87 of the Customs Act, 1962, the duty on bunker/stores on board the "foreign going" vessel has not been paid by Mahi Marine. Here Noticee has failed to appreciate the fact that when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels

its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty.

- Noticee has stated that Mahi Marine, through MBK has obtained Port Clearance for the vessels as a corollary in compliance with Section 410 of the MSA, 1958 and the vessels sailed from the port of first call on 22.02.2021. Ongoing through the statement dated 25.02.2021 of Shri Rashid Ali Mohd authorized representative of M/s MBK Logistix Pvt Ltd, it has been found that on being asked why he applied for PC before OOC and did he bring the facts to the notice of the officer issuing him port clearance. In this regard, he stated that he did not disclose the facts to the officer granting port clearance. Further, on being asked whether the port authority /terminal operator asked for the copy of the out of charge copy in respect of the bill of entry filed for import of the vessel MV SM MAHI before allowing the vessel leave the port, he stated that **they had not intimated the port authority /terminal operator regarding filing of the Bill of entry in respect of the vessel and hence they had not asked for the copy of the OOC documents from them.** Hence, it is on record that M/s MBK Logistix has not taken due diligence in course of obtaining Port Clearance for the above vessel.
- Further, Noticee has stated that at the relevant point of time, by virtue of certificates issued under MSA, 1958, (Registration Certificates & General Trade Licenses) as well as operationally, both the vessels (M.V. SM MAHI & M.V. SM NEYYAR) remained foreign-going. Thus, both the vessels qualified for the exemption on duty on bunker on board under Section 87 of the Customs Act). I find that as discussed in the earlier point, Foreign Flag Vessel means a vessel of foreign registry and Foreign-Going Vessel means the vessel engaged in the carriage of goods between any port in India and any port outside India, whether touching any intermediate port in India or not. As per Section 406 of the Merchant Shipping Act, 1958, no Indian ship shall be taken to sea from a port or place within India or outside India except under a license granted by Director General of Shipping. As per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a **provisional certificate** and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. **Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance.** Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is

not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty.

- Noticee has again submitted that the stores/bunkers that remained on board the vessels were consumed by M.V. SM Mahi & M.V SM Neyyar during their subsequent "foreign going" voyages respectively. A copy of the relevant itinerary/schedule of both vessels M.V. SM Mahi & M.V SM Neyyar is given by them. Hence, they submitted that they are eligible for refund of the duty on bunker and the interest thereon paid under protest. The Bills of Entry are not liable for re-assessment and payment thereon the value of the vessels, as the assessment was done in compliance with the provisions of the Customs Act, 1962. The vessels covered under the present SCN of Mahi Marine are not liable for confiscation as per section 111 (m) of the Customs Act, 1962. They are not liable for penalty under section 117 of the Customs Act, 1962. From above discussions in above points, I find that as per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a provisional certificate and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance. Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty. Further, by such suppression of fact i.e. not declaring the quantity of stores amounts before customs, M/s Mahi Marine Pvt Ltd has evaded customs duty and made such goods liable for confiscation under section 111(m) of the Customs Act, 1962. Ongoing through the statement dated 25.02.2021 of Shri Rashid Ali Mohd authorized representative of M/s MBK Logistix Pvt Ltd, it has been found that on being asked why he applied for PC before OOC and did he bring the facts to the notice of the officer issuing him port clearance. In this regard, he stated that he did not disclose the facts to the officer granting port clearance. Further, on being asked whether the port authority /terminal operator asked for the copy of the out of charge copy in respect of the bill of entry filed for import of the vessel MV SM MAHI before allowing the vessel leave the port, he stated that they had not intimated the port authority /terminal operator

regarding filing of the Bill of entry in respect of the vessel and hence they had not asked for the copy of the OOC documents from them. Hence, it is on black and white that M/s MBK Logistix has not taken due diligence in course of obtaining Port Clearance for the above vessel. Further, they have also been being reckless by not following due diligence in respect of importation of the impugned old and used vessels and bunkers on board as they failed to declare the actual quantity and value for each goods separately. From above, discussion, it appears that they are liable for penalty under Section 117 of the Customs Act, 1962.

**b)** In para C(ii), Noticee has submitted reply to the findings in para 7.14 of the SCN and stated that it is affirmed that the provisional and permanent general trade licenses were secured by the vessels to acquire and remain "foreign-going". The contention of the Customs Department as per the SCN is that, upon filing of a bill of entry for a foreign-going imported vessel, the vessel ceases its foreign-going status. However, the said argument does not hold water for the following reasons that the vessels had already acquired "Indian Flag" prior to filing BOE. The "Foreign Going" certificate is issued by MMD under the provisions of MSA, 1958. No provision in the Customs Act make the "Foreign Going" trade license of a vessel "co-terminus" with filing of BOE u/s.46 of the Customs Act, 1962. The filing of BOE doesn't *ipso facto* nullify a valid certificate issued by the competent authority under the MSA, 1958.

On going through the facts and as discussed in the above paras I find that the provisional certificate was issued to the vessel however, it ceases once it entered the Indian Port as per section 40 of the Customs Act, 1960. The trade license issued was co-terminus with the provisional certificate. Hence as soon as the Provisional Certificate ceases to be valid the Trade license also ceased to be valid. The Noticee failed to appreciate the fact that the trade license was co-terminus with the provisional certificate. Further, as per Circular No.16/2012-Customs dated 13th June, 2012 clarified the procedure to be followed for import of Indian vessels and filing of Import General Manifest, Bill of Entry. As per the above circular, it was clarified that as the provisions of Section 29 of the Customs Act, 1962 read with Section 2 (22) and 2(25), the term 'imported goods', *inter alia*, includes vessels entering India from any place outside the country (India). Para 3.2 of the above circular clarifies **Foreign flag vessels** and Para 3.3 clarifies **Indian Flag vessels** as under:

**3.2 Foreign flag vessels:** *These are the vessels that are registered abroad and its entry into the country is for carrying cargo or passengers, as a conveyance. Hence, there is no requirement for filing an IGM, Bill of Entry for foreign flag vessel which is being used as conveyance. However, the requirement for filing an import manifest in the prescribed manner for the goods or passengers which are being carried in the vessel, on its entry into an Indian port in terms of the provisions under Section 30 of the Customs Act needs to be complied with.*

**3.3 Indian Flag Vessel:** *In terms of the provisions of Part-V of the Merchant Shipping Act, 1958, vessels entering into India for the first time, are required to be registered with specified authority of the Mercantile Marine Department as Indian ship, which can then display the national character of the ship as Indian Flag Vessel for the purpose of Customs and other purposes specified in the said Act. Such Indian ship or vessel may be used for foreign run or exclusively for coastal run/ trade. Further, any ship or*

*vessel may be taken outside India or chartered for coastal trade in India, only after obtaining the requisite licence from the Director General of Shipping, under the provisions of Section 406 or 407, respectively, of the said Merchant Shipping Act. Hence, in all such cases the Customs declarations such as IGM, Bill of Entry is required to be filed with jurisdictional Customs authority.*

Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance. It was the provisional registration certificate which ceased and as the trade license was co-terminus with the provisional registration certificate, it also ceased to be operative.

**c)** In para C(iii) Noticee has stated that given the above explanations (ii) and relying on the provisions of relevant statutes, the finding of the department that the duty on the bunker onboard the vessel, to the tune of Rs. Rs.99,14,035/- for MV SM MAHI; and Rs.1,11,72,366/- for MV SM NEYYAR towards Customs Duty and Rs. 28,072/- and Rs.50,506/-towards interest is payable, is erroneous, illegal not supported by provisions of law. Since the demand of duty and interest was illegal and unauthorized, the excess amount paid through MBK by Mahi Marine 'under protest', is liable to be refunded with interest to Mahi Marine. The issue has been discussed in the several paras here, however I will re-iterate the same for further clarity that once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance. Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty. Further, by such suppression of fact i.e. not declaring the quantity of stores amounts before customs, M/s Mahi Marine Pvt Ltd has evaded customs duty and made such goods liable for confiscation under section 111(m) of the Customs Act, 1962. By doing such act of suppression M/s Mahi Marine is also liable to be penalised under Section 114A of the Customs Act, 1962.

**d)** In para C(v) (i), Noticee has stated that the vessel is the 'imported goods' brought by "self-propulsion" (not using anyother conveyance) from a place outside India to a port in India, wherein components such as 'freight, the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods' were not applicable. M/s. Mahi Marine has not incurred

any 'costs or charges' as provided in Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, to make them liable to assess duty including the transportation charges. Therefore, as advised by the CHA appointed by the Agent, Mahi Marine did not consider the freight/cost of transportation to assess the import duty. In a worst-case scenario, if at all Mahi Marine is liable for the assessment of duty component (not payment of the same) on the freight/transportation cost could be the actual bunker/fuel consumed by the vessels, from its port of sale (Dubai) to first port of call in India (Mundra), which is the "ascertainable" cost of transportation. The said consumed fuel can be ascertained by taking the difference between the quantity of fuel on board the vessel at both ports, as declared by the master of the vessel, through his log book. Hence, the method of calculation and considering 20% of the FOB value is not justifiable on the following grounds

- 1) There is no cost of transportation or freight for bringing a vessel to India.
- 2) Since there is no cost of transportation or freight, the CHA did not assess the duty on freight and insurance and hence did not pay the IGST.
- 3) If at all the bunker consumed by a vessel is to be considered as "cost of transportation" (not admitted), the said cost is 'ascertainable' by finding the difference between the bunker on board as per the log book of the master of the vessel at the port of origin and the port of arrival.
- 4) In the above manner, the insurance is also ascertainable as per sub-rule 2 of Rule 10 of Customs Valuation (Determination of Value of imported goods) Rules, 2007, and the insurance shall be assessed and valued at 1.125% of the sum of the invoice value and the cost of transport as calculated above.

Firstly, I will go through the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 Rule 10 before coming to the conclusion:

*(2) For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include - (a) the cost of transport of the imported goods to the place of importation; (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and (c) the cost of insurance : Provided that - (i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods; (ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c); (iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods; Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:*

*Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value*

of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii). Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport referred to in clause (a). Explanation. - The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on charted vessels, lighterage or barge charges. (3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data. (4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.

I find that Noticee has not declared the freight/insurance cost in the Bills of Entry. In case of failure to ascertain the freight and insurance, the same has to be applied at the rate of 20% and 1.125% of FOB value. Noticee claimed that their imported goods i.e. vessel has been brought by self propulsion, hence transportation cost is not applicable. Here I would like to refer to the judgement in case of **M/s Samson Maritime Ltd vs Commissioner of Customs (I), Mumbai 2017 (352) E.L.T. 493 (Tri. Mumbai)** wherein the various costs/expenses to be included to arrive at the calculating the Freight /Insurance Cost can be referred in case of self-propelled vessel:

Particulars of Expenses	Amount in USD (1 USD = INR 45.65)	Amount in INR (Actuals)
Invoice No. 1-Repatriation of crew	44,375.00	20,25,719.00
Invoice No. 2 Medical Expenses Dr. Jayant Rele	78.86	3,600.00
Invoice No. 3. Manning Cost	66,244.99	30,24,084.00
Invoice No. 4-Invoice for Viciualling/Provisions from Avalontec for SGD 1143.68 (Actual SGD 1143.68 converted to USD @ 1 USD = 1.206SGD)	948.48	43,298.00
Invoice No. 5 colly : Poet Shipbuilding & Engineers Pte. Ltd. RMB42236 Poet Shipbuilding & Engineers Pte. RMB 17400 (actual RMB 59.636 converted to USD @ 1 USD-6.25 RMB) Poet Shipbuilding & Engineers Pte. USD 113475.60 Poet Shipbuilding & Engincers Pte. USD 73073.98	1,96,096.34	89,51,798.00
Invoice No. 6-Insurance Policy for Hull and Machinery - Rs. 242,044 from 15-5-2011 to 14-8-2011 i.e. 242.044/91 days *43 days (i.e. from 15-5 to 26-6-2011)	2,732.29	1,24,729.00

Invoice No. 7 - P&I Insurance USD 1660.48 from 15-5-2011 to 14-8-2011 i.e. USD 1660.48 equivalent to Rs. 74677	765.00	34,922.00
74677/91 days *43 days (i.e. from 15-5- to 26-6-2011)		
Invoice No. 8 Port Charges etc. (Actual SGD 4972.43 converted to USD @ 1 USD = 1.267 SGD)	3,687.79	1,68,348.00
<b>Total (A)</b>	<b>3,14,929.00</b>	<b>1,43,76,498.00</b>
<b>LESS Items on board, declared in the Bill of Entry for Home Consumption :-</b>		
Marine Gas Oil	37,102.81	16,93,743.00
Lubricating Oils	11,141.76	5,08,621.00
Grease	163.50	7,464.00
Paints	413.00	18,853.00
Total of expenses already declared in the B/L	48,821.07	22,28,081.00
Freight AND insurance considered in CIF value as per Bill of Entry :		
Freight USD 77617.64		
Insurance : USD 780	78,397.64	35,78,853.00
<b>Total (B)</b>	<b>1,87,710.04</b>	<b>85,68,964.00</b>
Differential duty as may be charged @ 15.15%-(C)		12,98,198.00

Hence, I find that these details have not been provided by the Noticee neither during the Investigation period nor before adjudicating authority. Hence, the cost of freight and insurance can't be ascertained and there is no option left to rely on the Rule 10(2) that where the cost of freight and insurance is not ascertainable, then the same may be added @ 20% and @1.125% respectively.

e) In para C (v)(ii), Noticee has stated MBK has not acted in contravention of the provisions of the Customs Act, of 1962. Invocation of penal provision u/s 117 shows the same has been incorporated without any valid or legal grounds. If at all liable, (not admitted), MBK is liable for the non-assessment of the differential duty on the "consumed fuel", if to be treated as "the transportation cost" of the vessel to India. Ongoing through the fact of the case, it has been found that in the statement dated 25.02.2021 of Shri Rashid Ali Mohd authorized representative of M/s MBK Logistix Pvt Ltd, it has been found that on being asked why he applied for PC before OOC and did he bring the facts to the notice of the officer issuing him port clearance. In this regard, he stated that he did not disclose the facts to the officer granting port clearance. Further, on being asked whether the port authority /terminal operator asked for the copy of the out of charge copy in respect of the bill of entry filed for import of the vessel MV SM MAHI before allowing the vessel leave the port, he stated that **they had not intimated the port authority** /terminal operator regarding filing of the Bill of entry in respect of the vessel and hence they had not asked for the copy of the OOC documents from them. Hence, it is on record that M/s MBK Logistix has not taken due diligence in course of obtaining Port Clearance for the above vessel. Further, they have also been reckless by not following due diligence in respect of importation of the impugned old and used vessels and bunkers on board as they failed to declare the actual quantity and value for each goods

separately. From above, discussion, it appears that they are liable for penalty under Section 117 of the Customs Act, 1962.

f) In subsequent paras, Noticee has relied on several judgements which are being discussed in detailed below:

**Judicial Pronouncements/Judgements**

**(a) Asean Cablesip Pte.Ltd vs Commissioner of Customs/2022 SCC Online SC 1640)**

*In the above case, ASEAN Explorer (AE), a Singapore flagged Vessel, was engaged to carry out repairs of cables located in South East Asia and Indian Ocean Area, in terms of South East Asia and Indian Ocean Cable Maintenance Agreement ("SEAIOCMA"/ "Agreement"). The vessel was berthed at Kochi port; the vessel had an operating Zone connecting India, Pakistan, Singapore, Indonesia, Malaysia, United Arab Emirates, Sri Lanka, Myanmar, Bangladesh, Thailand, Cambodia, Vietnam, Brunei, Hong Kong, Taiwan, China, Philippines, Australia and Guam; was to undertake repair activities in respect of the sub-sea cables spread over an area of 105,000 km; out of which only 256 KM (0.25%) was within territorial waters of India. For this purpose, the vessel had to move from various ports in India and also between ports outside India. During the movements it carried stores, spares, bunkers and crew and technical staff to and fro Indian Ports. During the period of dispute i.e. 11-7-2007 to 24-4-2012, the vessel had carried out 13 repair activities and 5 cable working exercises (CWEs) across the region; out of these only one recovery operation occurred 5-20 nautical miles of India, during the period 4-10-2007 to 6-10-2007. Revenue argued that out of 1750 days under consideration, the vessel was out for repairs only for 301 days and as such it cannot be considered as a 'Foreign Going Vessel' (FGV) and exemption availed for ship stores Bunkers etc. is not available to the vessel.*

However, in the current case, the Bills of Entry for Home Consumption has been filed by the Noticee. as per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a **provisional certificate** and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. **Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance.** Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as

Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty. Further, by such suppression of fact i.e. not declaring the quantity of stores amounts before customs, M/s Mahi Marine Pvt Ltd has evaded customs duty and made such goods liable for confiscation under section 111(m) of the Customs Act, 1962. By doing such act of suppression M/s Mahi Marine is also liable to be penalised under Section 114A of the Customs Act, 1962. The ratio of judgement is squarely covered in Gujarat Adani Port Ltd., Vs Commissioner of Customs, Kandla reported in 2013 (297) BLT 330 (Th-Ahmd), it was held that

"As rightly observed by the ld. Commissioner in the impugned order, according to the definition of the goods in Section 2(22) of Customs Act, 1962, the vessels are included in the definition. Section 87 of Customs Act, 1962 permits utilization of imported stores on board vessels during the period when such vessels are foreign going vessels. The moment Bill of Entry is filed in respect of the vessels and import duty is paid, the vessels cease to be foreign going vessels. Therefore, the diesel and other provisions on board the vessel cease to enjoy the benefit of exemption available to such items in stores in foreign going vessel since after filing Bill of Entry on payment of duty, the vessel ceases to be a foreign going vessel and becomes an Indian vessel and therefore the liability of import duty on the provisions/stores in the vessel arises"

Based on the above discussions, I find that the fact of case in Asean Cablesip Pte.Ltd vs Commissioner of Customs(2022 SCC Online SC 1640) is different from the subject case. Hence, the ratio of judgement can't be relied upon.

**b) Commissioner of Custom vs. M/s. Phoenix Marine Services & ors (OIO no. 15/Additional Commissioner/2022-23 dated 31.01.2023)**

In the above judgements, it was held that as per Section 2(21) of the Customs Act, 1962 "foreign going vessel or aircraft" means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India. Thus, from the above definition it was clear that the Tug "Dona Paula - II" does not appear to be covered under Section 2(21) ibidas it was running from Bedi Port Jamnagar to Alang, Bhavnagar L.e. between two ports in India. Hence the consumption of imported stores in its voyage between Bedi Port Jamnagar to Alang, Bhavnagar was in violation of Section 87 of the Customs Act, 1962, which reads as under

**SECTION 87. Imported stores may be consumed on board a foreign- going vessel or aircraft**

*Any imported stores on board a vessel or aircraft (other than stores to which section 90 applies) may, without payment of duty, be consumed thereon as stores during the period such vessel or aircraft is a foreign- going vessel or aircraft*

The Noticee has stated that a contrary reading and interpretation of the judgment in the above case would reveal that as long as a vessel remains foreign-going status, by virtue of the provision of S.87 of the Customs Act, the bunker/stores on board are not to be assessed and charged for payment of customs duty.

The Noticee here failed to appreciate the facts that once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance. Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty.

c) Devshi Bhanji Khona and Ors. vs. C.C.-Cochin-Cus (29.10.2019) CESTAT

CESTAT - Bangalore has held that the impugned vessel was not a foreign going vessel and such ship stores supplied to a vessel that is not a foreign going vessel are not applicable for exemption. This implies that MV SM Mahi and MV SM Neyyar were foreign-going vessels and thereby are entitled to be exempted from duty on stores as per section 87 of the Customs Act.

Noticee here failed to appreciate the fact that whole dispute in this case has arised on the fact whether both the impugned vessels are foreign going vessel or not. From the discussion held in the foregoing paras, it is apparently clear that vessels are not foreign going vessels, hence the duty on stores are not spared from the duty element by invoking the provisions of section 87 of the Customs Act, 1962.

iii) **Now I proceed to examine the defence submission of M/s Alaacrity Projects India Pvt Ltd**

Noticee has submitted that Alaacrity has diligently adhered to and complied with all provisions outlined in the Customs Broker Licensing Regulations of 2018, ensuring thorough and precise attention to detail in its operations. That in its capacity as the appointed Customs Broker for the importer in the subject matter, Alaacrity has meticulously processed and submitted the requisite Bill of Entries for both vessels, namely SM MV Mahi and SM MV Neyyar, exclusively relying on the documentation provided directly by the importer. That in alignment with the details provided in the invoice, Alaacrity has declared value of the vessels. Subsequently, the corresponding bill of entry for the aforementioned vessels has been duly prepared and filed by Alaacrity, ensuring full compliance with regulatory standards and procedural formalities. That importantly, Alaacrity has received information from the importer/vessel agent, indicating that, pursuant to the stipulations outlined in Section 87 of the Customs Act of 1962, no duty obligation is imposed on the bunkers of the vessels on foreign run, as affirmed by the importer/vessel agent, thereby confirming the legality of the exemption claimed. Additionally, it is imperative to underscore that Alaacrity has adhered to regulatory requirements ensuring procedural compliance. Ongoing through the fact of the case it has

been found that in the statement dated 04.03.21 of Shri Jigneshsingh Jadeja, authorized person of M/s Allaacrity Projects India Pvt Ltd it has been mentioned that on being asked whether he agreed that value of Store and bunkers were other than the value of the Vessel which he had not declared in the bills of entry and same were liable to custom duty, he stated that yes he was agree. M/s Allaacrity Projects India Pvt. Ltd. (AAKCA3961DCH002), have not followed due diligence in respect of importation of the impugned old and used vessels and bunkers on board as they failed to declared actual quantity and value of the bunkers in their respective CTH and also failed to declare the CIF Value of the old and used vessels for the purpose of assessment; hence failed to comply with the provisions of the Custom Broker Licensing Regulations, 2018 (CBLR, 2018), thus, appears to be liable for penal action under Section 117 of the Customs Act, 1962 for contravention of CBLR, 2018.

Noticee has submitted that Allaacrity have acted in compliance with Customs Broker Licensing Regulations of 2018 and Section 14 of the Customs Act, 1962 read along with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Under Section 14 of the Customs Act, r/w. Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, the 'value of the imported goods' has to be the "transaction value" of such goods. The vessels were the 'imported goods', brought to India by "self-propulsion" (not using any other means of conveyance), from a place outside India to a port in India, wherein components such as 'freight, the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods' were not applicable. Thus, as M/s. Mahi Marine has not incurred any 'costs or charges' as provided in Rule 10 (2) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007, to make them liable to assess duty including the transportation charges, Allaacrity has acted under said belief. In a worst-case scenario, (without prejudice to the argument that there is no freight to be paid while importing the vessels) if at all Mahi Marine is liable for the assessment of duty component (not payment of the same) on the freight/transportation cost, it can be possibly the cost of actual bunker/fuel consumed by the vessels, during its transit, from its port of purchase/transaction (Dubai) to first the first port of call in India (Mundra), which is also the "ascertainable" cost of transportation. The said consumed fuel can be ascertained by taking the differential quantity of fuel on board the vessel at both ports, as declared by the master of the vessel, through his logbook. Hence, the method of calculation and considering 20% of the FOB value is not justifiable on the following grounds:

- i. There is no cost of transportation or freight for bringing a vessel to India.
- ii. Since there is no cost of transportation or freight, Allaacrity/vessel agent did not assess the duty on freight and insurance.
- iii. If at all the bunker consumed by a vessel is to be considered as "cost of transportation" (not admitted), the said cost is 'ascertainable' by finding the difference between the bunker on board as per the logbook of the master of the vessel at the port of origin and the port of arrival.

iv. In the above manner, the insurance is also ascertainable as per sub-rule 2 of Rule 10 of Customs Valuation (Determination of Value of imported goods) Rules, 2007, and the insurance shall be assessed and valued at 1.125% of the sum of the invoice value and the cost of transport as calculated above.

The issue has already been discussed above in the foregoing para, however for the sake of convenience I am reiterating the same here:

*Rule 10(2) For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include - (a) the cost of transport of the imported goods to the place of importation; (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and (c) the cost of insurance : Provided that - (i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods; (ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c); (iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods; Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:*

*Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii). Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport referred to in clause (a). Explanation.- The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on charted vessels, lighterage or barge charges. (3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data. (4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.*

I find that Noticee has not declared the freight/insurance cost in the Bills of Entry. In case of failure to ascertain the freight and insurance, the same has to

be applied at the rate of 20% and 1.125% of FOB value. Noticee claimed that their imported goods i.e. vessel has been brought by self propulsion, hence transportation cost is not applicable. Here I would like to refer to the judgement in case of ***M/s Samson Maritime Ltd vs Commissioner of Customs (I), Mumbai 2017 (352) E.L.T. 493 (Trl. Mumbai)*** wherein the various costs/expenses to be included to arrive at the calculating the Freight /Insurance Cost can be referred in case of self-propelled vessel:

Particulars of Expenses	Amount in USD (1 USD = INR 45.65)	Amount in INR (Actuals)
Invoice No. 1-Repatriation of crew	44,375.00	20,25,719.00
Invoice No. 2 Medical Expenses Dr. Jayant Rele	78.86	3,600.00
Invoice No. 3. Manning Cost	66,244.99	30,24,084.00
Invoice No. 4-Invoice for Viciualling/Provisions from Avalontec for SGD 1143.68 (Actual SGD 1143.68 converted to USD @ 1 USD = 1.206SGD)	948.48	43,298.00
Invoice No. 5 colly : Poet Shipbuilding & Engincers Pte. Ltd. RMB42236 Poet Shipbuilding & Engineers Pte. RMB 17400 (actual RMB 59.636 converted to USD @ 1 USD-6.25 RMB) Poet Shipbuilding & Engineers Pte. USD 113475.60 Poet Shipbuilding & Engineers Pte. USD 73073.98	1,96,096.34	89,51,798.00
Invoice No. 6-Insurance Policy for Hull and Machinery - Rs. 242,044 from 15-5-2011 to 14-8-2011 i.e. 242.044/91 days *43 days (i.e. from 15-5 to 26-6-2011)	2,732.29	1,24,729.00
Invoice No. 7 - P&I Insurance USD 1660.48 from 15-5-2011 to 14-8-2011 i.e. USD 1660.48 equivalent to Rs. 74677  74677/91 days *43 days (i.e. from 15-5 to 26-6-2011)	765.00	34,922.00
Invoice No. 8 Port Charges etc. (Actual SGD 4972.43 converted to USD @ 1 USD = 1.267 SGD)	3,687.79	1,68,348.00
<b>Total (A)</b>	<b>3,14,929.00</b>	<b>1,43,76,498.00</b>
<b>LESS Items on board, declared in the Bill of Entry for Home Consumption :-</b>		
Marine Gas Oil	37,102.81	16,93,743.00
Lubricating Oils	11,141.76	5,08,621.00
Grease	163.50	7,464.00
Paints	413.00	18,853.00
Total of expenses already declared in the B/L	48,821.07	22,28,081.00
Freight AND insurance considered in CIF value as		
per Bill of Entry : Freight USD 77617.64		

Insurance : USD 780	78,397.64	35,78,853.00
Total (B)	1,87,710.04	85,68,964.00
Differential duty as may be charged @ 15.15%-(C)		12,98,198.00

Hence, I find that these details have not been provided by the Noticees neither during the Investigation period nor before adjudicating authority. Hence, the cost of freight and insurance can't be ascertained and there is no option left to rely on the Rule 10(2) that where the cost of freight and insurance is not ascertainable, then the same may be added @ 20% and @1.125% respectively.

Noticee has submitted that invocation of penal provision u/s 117 shows the same has been incorporated without any valid or legal grounds. This suggests that the incorporation of this provision lacks justification or support according to established legal principles or regulations. In essence, it implies that the reference to section 117 as a punitive measure lacks proper legal reasoning or justification. Ongoing through the fact of the case it has been found that in the statement dated 04.03.21 of Shri Jigneshsingh Jadeja, authorized person of M/s Alaacrity Projects India Pvt Ltd it has been mentioned that on being asked whether he agreed that value of Store and bunkers were other than the value of the Vessel which he had not declared in the bills of entry and same were liable to custom duty, he stated that yes he was agree. M/s Alaacrity Projects India Pvt. Ltd. (AAKCA3961DCH002), have not followed due diligence in respect of importation of the impugned old and used vessels and bunkers on board as they failed to declared actual quantity and value of the bunkers in their respective CTH and also failed to declare the CIF Value of the old and used vessels for the purpose of assessment; hence failed to comply with the provisions of the Custom Broker Licensing Regulations, 2018 (CBLR, 2018), thus, appears to be liable for penal action under Section 117 of the Customs Act, 1962 for contravention of CBLR, 2018.

iv) I find that person hearing opportunities were granted to all of the three noticees in this case.

**(a) Discussions on submissions made during personal hearing in case of M/s Mahi Marine India Pvt Ltd and M/s MBK Logistix Pvt Ltd**

- During personal hearing Noticee stated that SCN was issued on 29.11.2023 and BE was filed on 18.02.2021, hence it will not come under ambit of Section 28(i) of the Customs Act, 1962. Show Cause Notice has been served as per section 28(4) of the Customs Act, 1962. However, no suppression or will full mis-statement has been alleged in SCN. They have quoted SC judgement regarding this. Ongoing through the fact of the case, it has been found that suppression has been alleged in the Show Cause Notice. In para 5.4 of the SCN it has been mentioned that :

*In view of above, it is evident from the above that the importer has mis-declared the value before Customs authorities by suppressing the element of freight and Insurance. Therefore, the importer has short paid the Customs amounting to Rs. 46,77,075/- and Rs. 93,54,150/- in respect of import of old vessels for "MV SM MAHI" and "SM NEYYAR" respectively as detailed above.*

In para 7.16 of Show Cause Notice it has been mentioned that:  
As discussed above, the importer by not declaring and suppressing the quantity and value of the bunkers (Lub. Oil, HSD and Fuel Oil) evaded the Customs duty totally amounting to Rs.99,14,035/- for "MV SM MAHI" and Rs.1,11,72,366/- for "SM NEYYAR" respectively as discussed in preceding paras in contravention of the provisions of the Section 17 and Section 46 of the Customs Act, 1962 and required to be recovered under Section 28(4) of the Customs Act, 1962 alongwith applicable Interest under Section 28AA of the Customs Act, 1962.

From above and the discussions held on foregoing paras I find that suppression of material fact has been found during the investigation. Hence, section 28(4) of the Customs Act, 1962 has been rightly invoked.

- Noticee during personal hearing has submitted that vessels were purchased abroad and brought to port on provisional registration and continue till final registration by DGS. They stated that they have filed written submission regarding this. SM Neyyar was registered from 23.07.2021 to 09.08.2021, Similarly Mahi Marine was registered from 11.02.2021 to 05.08.21. As the vessels have licensed to operate world wise and they are entitled for exemption under section 87 of the customs act, 1962. Vessels were in international voyage. As per vessel schedule the vessels were foreign going, so allegation that stores and bunkers were dutiable goods are baseless. I find that this issue has been discussed in details in para 18.8 (i) (b).
- Noticee has further stated that they have claimed exemption and the same cannot be counted as wilful mis-statement as a claim of exemption cannot be told as suppression. As discussion above, it has been found that they have taken exemption by deliberately not declaring the stores/bunkers. Further, they have also not added the freight and insurance component to arrive at CIF value. They have suppressed the actual CIF value by declaring FOB value as CIF value. Further, they have mentioned that SCN issued was beyond time, however, the SCN has been issued under Section 28(4) and hence within time limit.
- Noticee has stated that certificates suggest that they were foreign going vessel. Section 40 of the Merchant Shipping Act provides for a provisional certificate for ship becoming Indian ship abroad. Such provisional certificate have effect till the expiry of six months or until the arrival of the ship at the port registry which first happens. They stated that this provision is applicable if the provisional certificate has not been extended beyond the expiry period. Here in this case all the applications were made before time. As per Section 41 temporary passes are issued and in this case, the vessels have all the authority to conduct voyages. Certificates that they have enclosed is the strict proof that confers it as Indian vessel. The issue has been discussed in details in para 18.8 (i) (b).
- Transactional value has not been challenged. Both are second hand vessel, hence the value of second hand vessel has to be taken. No evidence has been provided to challenge the value of the vessel. Ongoing through

the fact of the case it has been found that Noticee has not declared the Freight and insurance component and simply taken FOB value as CIF stating that as the vessels were self-propelled hence, the freight and insurance has not to be taken for arriving at valuation of goods under Section 14 of the Customs Act, 1962.

*"Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf"*

Hence as per Rule 10(2), the freight and insurance cost has to be added on value of the goods @ 20% and @1.125% of FOB value respectively. The issue has been discussed in detail in para-18.8 (1) (e).

**(b) Discussions on submission made during personal hearing in case of M/s Alaacrity Projects India Pvt Ltd**

Shri Nimit Shukla, Advocate, appeared in the personal hearing, on behalf M/s Alaacrity Projects India Pvt. Ltd, held on i.e. 27.09.2024 through virtual mode. In personal hearing, he reiterated the written submission dated 23.02.2024 and inter-alia stated that the addressee being CB supplied all the documents to customs as supplied by the Importer. As per section 87 of the Customs Act, 1962, no duty has to be imposed on bunkers on vessels on a foreign run. Rule 10 of CVR, 2007 read with section 14 of the Customs Act, 1962, the value of the imported goods has to be transactional value of the imported goods. The imported goods were brought by self-propulsion from outside to India, hence the freight charges are not applicable. M/s Mahi has not incurred any charges under rule 10 of CVR, which would liable them to assess duty including transport charges, and that they believe Alacrity being the agent has acted on instruction. All the mentioned ground they state are not contravening to the any section of the customs act, 1962 and the Show Cause Notice merits to be dropped.

I find that these issues have been discussed in details in para 18.8(iii).

**(c) Discussions on argument notes submitted after personal hearing in case of M/s Mahi Marine Private Ltd and M/s MBK Logistix Pvt Ltd.**

1. Noticee has submitted that vessels are container cargo vessels built to make voyages on the high seas and to carry stores, spares, bunkers, crew and technical staff for such voyages. Their status as foreign-going vessels was never subjected to any change during the relevant period. As per Section 2(21) of the Customs Act, 1962, any vessel for the time being engaged in the carriage of goods or passengers between any port in India and any port or outside India, whether touching any intermediate port in India or not, is a foreign-going vessel. Consumption of stores on board foreign going vessels is exempted under Section 87. The expression "during the period such vessel or aircraft is a foreign going vessel or aircraft" appearing in section 87 excludes only those vessels engaged

in exclusive coast run from the purview of exemption. M/s. Mahi Marine Private (Ltd.) purchased vessels and took delivery of the vessels afloat from foreign ports. Mercantile Marine Department, Mumbai issued a Certificate of Indian Registry to S.M. NEYYAR under Section 34 of the Merchant Shipping Act, 1958 on 23.07.2021 as per ANNEXURE- II at page 63 of the written statement filed. The certificate would show that the vessel was provisionally registered from 10.02.2021 to 22.07.2021. During that period a licence under Section 406 of the Act authorising the vessel to ply in trade worldwide/Indian coast was also in vogue. Mercantile Marine Department, Mumbai issued a Certificate of Indian Registry to SM MAHI under Section 34 of the Merchant Shipping Act, 1958 on 06.08.2021 as ANNEXURE-II at page 65 of the written statement. The certificate would show that the vessel was provisionally registered from 11.02.2021 to 05.08.2021. During that period licence bearing under Section 406 of the Act authorising the vessel to ply in trade worldwide/Indian coast was also in vogue. Subsection (2) of Section 40 of the Merchant Shipping Act, 1958, mandates that a provisional certificate issued under subsection (1) shall have the effect of a certificate of registry during the period of its validity. Further, according to Section 41 of the Act, a temporary pass issued in lieu of the certificate of registry shall have the same effect as a certificate of registry. Section 406 authorises the Director General to issue licences to take the vessel to sea from a port or place within or outside India. Thus, during the relevant time, i.e., when the subject Bills of Entries were filed with the Customs and the commencement of the first voyage thereafter, the vessels were provisionally/permanently registered with the competent registry and they were Indian vessels licenced to be taken to the sea to ply 'Worldwide and Indian Coast' as envisaged under the Merchant Shipping Act, 1958. Vessels reached the port of registration in the Indian jurisdiction with containers on board and remained as foreign-going vessels all along during the relevant period. Voyage of the vessels from the foreign ports was in furtherance of contracts for overseas carriage. Vessels were berthed in Indian Port inter alia to fulfil obligations under Section 34 of the Merchant Shipping Act, 1958 in all preparedness to complete the overseas voyage already undertaken. Thus, vessels reached and left Mundra Port as 'foreign going vessels' in the course of the execution of existing overseas carriage contracts. The vessels entered, berthed and left the port, on the strength of provisional/permanent certificates of registry/temporary pass to ply in trade 'Worldwide and Indian Coast', all issued under the Merchant Shipping Act, 1958. The phrase "engaged" used in Section 2(21) of the Customs Act, 1962, assumes importance in the context of exemption available under Section 87 to stores on board the foreign going vessels as well. Therefore, the factum of berthing at the Indian port in the interregnum to fulfil the obligations under the Merchant Shipping Act, 1958 while "engaged" in overseas carriage, cannot in any way disentitle the benefits available to foreign going vessels under Section 87 of the Customs Act.

Here, Noticee has failed to appreciate the fact that As per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a **provisional certificate** and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. **Hence, once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in**

foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance. Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty. On reading the license No. MUM/19/W&C/2021 dated 12.02.2021 issued by Mercantile Marine Department, Mumbai I find that license was co-terminus with the provisional certificate of registry. As the provisional certificate ceases to be valid once the ship reaches India, the trade license issued also ceases to be valid. When the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Further, issue has been already settled in case of **Gujarat Adani Port Ltd., Vs Commissioner of Customs, Kandla** reported in **2013 (297) BLT 330 (Th-Ahmd)**

2. Noticee has relied on the **Hon'ble Calcutta High Court in Scindia Steam Navigation Co. Ltd. v. Collector Of Customs reported 1977 SCC ONLINE CAL 356: 1988 ELT 36 58** that where the vessel was at all material times engaged in the carriage of goods between a port in India and another port abroad has to be construed as "a foreign going vessel" irrespective of the fact that it was berthed for some time and as such it was exempt from payment of any customs duty on imported stores consumed on board the vessel. The dictum so laid down is squarely applicable to the facts and circumstances of the instant case. In that case, as per the available case details, facts were different from this case. In that case, while the vessel came to Calcutta from foreign port, it had to undergo repairs in the dry docks. But that was necessary for reasonable and proper preparations for proceeding to foreign port with export cargo. Steps taken in proceeding to foreign ports with export cargo could not prevent the vessel from being a "foreign going vessel". Therefore, it has to be held that the vessel was a "foreign going vessel" within the provision of Section 2(21) of the Customs Act, 1962, while she had been undergoing repairs at the dry docks. In this case, Bill of Entry for home consumption has been filed by Importer. And the same issue has been squarely covered in case of **Gujarat Adani Port Ltd., Vs Commissioner of Customs, Kandla** reported in **2013 (297) BLT 330 (Th-Ahmd)**

3. Noticee has stated that the exemption claimed under Section 87 of the Customs Act, 1962, read with Section 2(1) cannot be denied on illusory reference to provisions in the Merchant Shipping Act, 1958. The former Act is a fiscal legislation and the latter is regulatory in nature. Therefore, eligibility for

exemption under Section 87 of the Customs Act, 1962 has to be considered independently upon appraising whether for the time being the vessels were engaged in the course of overseas carriage of goods as envisaged in Section 2(21). As discussed supra, the exemption is not extendable as the vessels have lost the status of foreign going vessels as discussed in details in above para 18.8 (i) (b).

4. Further, Noticee has stated that the show cause notice has been issued beyond the two years specified in Section 28(1)(a) of the Act. It is submitted that, given the language of subsection (1) of Section 28, where non-levy/short levy has taken place for reasons other than collusion or any wilful misstatement or suppression of facts, the show cause notice has to be issued within two years from the relevant date. Admittedly, the present show cause notice has been issued under Section 28(4) claiming an extended period of limitation. However, no case of wilful misstatement or suppression is either alleged or made out in the notice. Further, the department had full knowledge of the factum of purchase of the vessels from the bills of entry and agreements relating to the purchase of vessels submitted before them. Still further, the show cause notice has been issued on the questions of law as to the applicability of the exemption claimed. It is trite as held by the Hon'ble Supreme Court in Cosmic Dye Chemical v. Collector of Central Excise, reported in (1995) 6 SCC 117, that the extended period of limitation can be invoked only when "suppression" or "collusion" is wilful with an intent to evade payment of duty. In the instant case no allegation of wilful suppression or misstatement with intent to evade payment of duty is alleged or made out. The issue has been discussed in detail in foregone paras. It is evident that the importer has mis-declared the value before Customs authorities by **suppressing** the element of freight and Insurance. Therefore, the importer has short paid the Customs amounting to **Rs.46,77,075/-** and **Rs.93,54,150/-** in respect of import of old vessels for "MV SM MAHI" and "SM NEYYAR" respectively as detailed above. As discussed Supras, the importer by not declaring and suppressing the quantity and value of the bunkers (Lub. Oil, HSD and Fuel Oil) evaded the Customs duty totally amounting to **Rs.99,14,035/-** for "MV SM MAHI" and **Rs.1,11,72,366/-** for "SM NEYYAR" respectively as discussed in preceding paras in contravention of the provisions of the Section 17 and Section 46 of the Customs Act, 1962 and required to be recovered under Section 28(4) of the Customs Act, 1962 along with applicable Interest under Section 28AA of the Customs Act, 1962.

5. In para 7.17 of the SCN it is proposed (1) to reject the transaction value of the vessels declared by the importer and (2) to adopt fair value for the purpose of assessment. It is submitted that Section 14 speaks only of the transaction value, i.e. the price actually paid or payable. As held by the Hon'ble Supreme Court in *Sounds N. Images v. Collector of Customs*, (2000) 9 SCC 143, It is always for the Customs Authorities to establish by methods known to law and in a satisfactory manner that the value of imported goods is not what the importer says it is and what that value actually is. That onus cannot be shifted to the importer. However, in the instant case, apart from simply referring to Section 14 of the Customs Act, 1962 and Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 the Commissioner has not spelled out the circumstances under which the declared value is not acceptable. No material has been placed on record to reject the transaction value declared by the importer. Thus the onus on the part of the officer to prove that the declared value is incorrect is not discharged and hence the assessable value

proposed in the SCN has no legal basis. I find that in the impugned Show Cause Notice, it has been proposed that assessable value should be rejected and re-determined as per the provisions of Section 14 of the Customs Act, 1962 read with Rule 10 of Customs Valuation (Determination of value of imported goods) Rules, 2007.

Here Rule 12 of the Customs Valuation (Determination of value of imported goods) Rules, 2007 deals with the rejection of the declared value.

(1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

**Explanation.**-(1) For the removal of doubts, it is hereby declared that:- (i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

#### **When we read Section 14 of Customs act, 1962:**

For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

**Provided that such transaction value in the case of imported goods shall include, in addition to the price** as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf.

Hence, from plain reading of the section 14, it appears that the transportation and insurance charges has to be included.

Now when we read Rule 3 & Rule 10 of the CVR, 2007

**3. Determination of the method of valuation**

(1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10;

**10. Cost and Services**

(2) For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include (a) the cost of transport of the imported goods to the place of importation; (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and (c) the cost of insurance : Provided that - (i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods; (ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c); (iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods; Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:

Hence, I find that as the Noticee has not added insurance and freight in their declared value by suppressing the material fact that as agreement value was none other than FOB. The same can't be treated as transaction value in terms of Rule 14 (1) as the transaction value includes the cost of transportation and insurance. Since, in the investigation the purchase value or the price paid to the supplier has not been challenged, I find that the transaction value can be ascertained and the declared value can be adjusted by adding freight and insurance as Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Rule 10 and provisions of Section 14 of the Customs Act, 1962 to arrive at the assessable value/transaction value.

Noticee has further stated that since the claims made in the show cause notice are illegal and stale, the amounts already paid as a duty under protest are liable to be refunded. As per above discussion, it appears that duty is rightly demanded under Section 28(4) of the Customs Act, 1962. Hence, there is no question of refund.

**18.9** Now I come to the main issues which are to be decided in this case.

**a) Confiscation of undeclared Bunkers/Stores**

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

(a) ...

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(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54.

Ongoing through the facts, legal provisions and discussion held supra I find that as per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a **provisional certificate** and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. **Once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance.** Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty. Further, by such suppression of fact i.e. not declaring the quantity of stores amounts before customs, M/s Mahi Marine Pvt Ltd has evaded customs duty and made such goods liable for confiscation under section 111(m) of the Customs Act, 1962. Hence, I find that the undeclared bunkers (Lub. Oil, HSD and Fuel Oil) valued at **Rs.4,37,37,331/- (MV SM MAHI)** and **Rs.3,95,73,556/- (SM NEYYAR)** should be held liable for confiscation under Section 111(m) of the Customs Act, 1962.

As the impugned goods are found to be liable for confiscation under Section 111(m) of the Customs Act, 1962, I find that it is necessary to consider as to whether redemption fine under Section 125 of Customs Act, 1962, is liable to be imposed in lieu of confiscation in respect of the impugned goods as alleged vide subject SCN. The Section 125 ibid reads as under:-

**"Section 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 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, <sup>3</sup>[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.*

*<sup>4</sup> [(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.]*

*<sup>5</sup> [(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.*

***Explanation .-For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date\*\* on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received.]***

First proviso which was introduced vide Finance Act, 2018 says 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, the provisions of this section shall not apply.* Behind the proviso, there is an assumption that goods become liable for confiscation when there is demand under Section 28. Interestingly, the liability to confiscation is assumed to arise even in cases that do not involve an extended period of limitation not being cases of collusion or wilful mis-statement or suppression of facts.

At this point, one has to understand that there cannot be a demand of duty, where the goods are seized and are in the possession of the government. It is a basic principle that goods and duty travel together. Thus, when the goods are in the possession of the government having been seized, there cannot be a demand for duty. Duty payment, even differential duty payment arises when the goods are confiscated and ordered for release to the importer. Section 125(2) which provides that *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*, makes this above position clear.

Thus, the proviso which is inserted in Section 125 referring to cases under Section 28 which are essentially in respect of demand of duty where the goods are not seized/ detained by the department, gives room for interpretation that Redemption fine is imposable even if the goods are not seized and are not available for confiscation.

Further, this points were already settled in case of Judgment dated 11.08.2017 of Hon'ble High Court of Madras in C.M.A. No. 2857 of 2011 in the case of Visteon Automotive Systems India Ltd. Vs. CESTAT, Chennai/2018 (9) G.S.T.L. 142 (Mad.). Para 23 of the said Judgment is as follows:

"The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges, the improper and irregular importation is sought to be regularised, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the redemption fine. The 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."

Further, In the case of M/s Venus Enterprises vs CC, Chennai 2006(199) E.L.T. 661(Tri-Chennai) it has been held that:

"We cannot accept the contention of the appellants that no fine can be imposed in respect of goods which are already cleared. Once the goods are held liable for confiscation, fine can be imposed even if the goods are not available. We uphold the finding of the misdeclaration in respect of the parallel invoices issued prior to the date of filing of the Bills of Entry. Hence, there is misdeclaration and suppression of value and the offending goods are liable for confiscation under Section 111(m) of the Customs Act. Hence the imposition of fine even after the clearance of the goods is not against the law."

In case of M/s Asia Motor Works vs Commissioner of Customs 2020 (371) E.L.T. 729 (Tri. - Ahmd.) Hon'ble tribunal have demarcated between the words, "**Liable for confiscation**" and "**Confiscation**".

Hence, from the above discussion and relying on the above judgements. I find that goods are liable for confiscation and redemption fine can be imposed in view of judgement in case of C.M.A. No. 2857 of 2011 in the case of Visteon Automotive Systems India Ltd. Vs. CESTAT, Chennai [2018 (9) G.S.T.L. 142 (Mad.)].

b) **Applicability of Demand of Duty on undeclared Bunkers/Stores under Section 28(4) of the Customs Act, 1962, applicability of Interest on the demanded duty and appropriation of amount deposited**

**Section 28.** <sup>1</sup>[Recovery of <sup>2</sup>[duties not levied or not paid or short-levied or short- paid] or erroneously refunded. -

(4) Where any duty has not been <sup>10</sup>[levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

- (a) collusion; or
- (b) any wilful mis-statement; or
- (c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been <sup>11</sup>[so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

I find that with the introduction of self-assessment and consequent upon amendments to Section 17 of the Customs Act, 1962 w.e.f. 08.04.2011, it was the obligatory on the part of the importer to declare all the goods imported by them and pay the duty applicable in respect of the said goods. Therefore, by not disclosing the true and correct facts to the proper officer, at the time of clearance of imported goods, the importer appears to have indulged in mis-declaration and mis-classification by way of suppression of facts has evaded the payment of applicable Custom duties. Thus, the importer has contravened the provisions of Section 46(4) & 46(4A) of the Customs Act, 1962, in as much as they have not declared the goods imported by them, by suppressing the true value of the goods, while filing the declaration seeking clearance at the time of importation of impugned goods. **Section 17 (1) & Section 2 (2) of the Customs Act, 1962 read with CBIC Circular No. 17/2011- Customs dated 08.04.2011** cast a heightened responsibility and onus on the importer to determine duty, classification etc. by way of self-assessment. The importer, at the time of self-assessment, is required to ensure that they declared the correct classification, applicable rate of duty, value, benefit of exemption notifications claimed, if any, in respect of the imported goods while presenting the Bill of Entry.

I find that the importer by not declaring and **suppressing** the quantity and value of the bunkers (Lub. Oil, HSD and Fuel Oil) evaded Customs duty totally amounting to **Rs.99,14,035/-** for "**MV SM MAHI**" and **Rs.1,11,72,366/-** for "**SM NEYYAR**" respectively as detailed in table 1 and 2 of para 5.1, in contravention of the provisions of the Section 17 and Section 46 of the Customs Act, 1962 and required to be recovered under Section 28(4) of the Customs Act, 1962.

**Section 28AA of the Customs Act, 1962:**

(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

As the Noticee is liable to pay the demanded duty under section 28(4) of the Customs Act, 1962, he is also liable to pay the interest levied on the same on account of provisions of Section 28AA of the Customs Act, 1962.

Further, the deposited amount of Rs.99,14,035/- and Rs.1,11,72,366/- against the duty is to be appropriated against the above demanded duty. The deposited interest amount Rs 28,072/- and Rs 50,506/- is also liable to be appropriated against the liability of interest levied as per the provisions of Section 28AA of the Customs Act, 1962.

**c) Rejection of assessable value of two impugned vessels and re-determination of the same.**

Ongoing through the fact and discussions held supra, I find that during the course of investigation, it is noticed that the Invoice Value i.e. USD \$6000000 (Rs.44,28,00,000/-) for MV SM MAHI and USD \$12000000 (Rs.88,56,00,000/-) for SM NEYYAR declared by the importer for the purpose of assessment were actually FOB Value as per the Memorandum of Agreements entered between the seller and the importer and Valuation Certificates issued by the Chartered Engineer in respect of above vessels. Therefore, the value declared by the importer is required to be adjusted by adding insurance and freight cost and determined to **Rs.53,63,41,500/- for MV SM MAHI and Rs.1,07,26,83,000/- for SM NEYYAR under the provisions of section 14 of the Customs Act, 1962 read with rule 3 (1) and rule 10 (2) of Customs Valuation (Determination of Value of Imported goods) Rules, 2007 as discussed in para 18.8 (iv) (c) 5.**

**d) Confiscation of Imported vessels**

As discussed in point (c) above, that value was mis-declared for the impugned vessels. The same has been determined under the various provisions of **Customs Valuation (Determination of Value of Imported goods) Rules, 2007 read with Section 14 of the Customs Act, 1962.**

**Confiscation of undeclared Bunkers/Stores**

**Section 111. Confiscation of improperly imported goods, etc. – The following goods brought from a place outside India shall be liable to confiscation:-**

*(a) ...*

*–*

*–*

*(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54.*

**As the goods were mis-declared in the terms of value, it is evident that the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962.**

Further applicability of redemption fine on the confiscated goods have been already discussed in details in para 18.9 (a). On the basis of discussion held, I find that redemption fine is imposable on the confiscated goods.

**e) Demand of Duty in respect of old vessels under Section 28(4) of the Customs Act, 1962 and applicable interest under Section 28AA of the Customs Act, 1962.**

**Section 28.** <sup>1</sup>[Recovery of <sup>2</sup>[duties not levied or not paid or short-levied or short- paid] or erroneously refunded. -

(4) Where any duty has not been <sup>10</sup>[levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

- (a) collusion; or
- (b) any wilful mis-statement; or
- (c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been <sup>11</sup>[so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

Ongoing through the fact of the case and discussions held supra, I find that the importer has mis-declared the value before Customs authorities by suppressing the element of freight and Insurance as discussed in detail in para 18.8 (i) (e). Therefore, the importer has short paid the Customs duty amounting to **Rs.46,77,075/-** and **Rs.93,54,150/-** in respect of import of old vessels for "MV SM MAHI" and "SM NEYYAR" respectively as detailed in table 3 and 4 of para 5.3. As the suppression of element of freight and insurance is apparently clear, the above short paid duty has to be demanded under Section 28(4) of the Customs Act, 1962.

**Section 28AA of the Customs Act, 1962:**

(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

As the Noticee is liable to pay the demanded duty under section 28(4) of the Customs Act, 1962, he is also liable to pay the interest levied on the same on account of provisions of Section 28AA of the Customs Act, 1962.

**f. Applicability of Penalty on M/s Mahi Marine Private Limited under Section 114A and 117 of the Customs Act, 1962**

Before discussing the applicability of provisions of penalty under different sections of the Customs Act, 1962, I would like to examine the role and culpability of M/s Mahi Marine Private Limited in the present matter.

**Role and Culpability of M/s Mahi Marine Pvt Ltd.**

In the present case M/s Mahi Marine Pvt Ltd has imported two vessels namely MV SM Mahi and SM Beyyar. During filing of Bill of Entry they have not declared the stores/bunkers. Once the investigation started, the duty on stores/bunkers were paid by M/s Mahi Marine Pvt Ltd under protest. During investigation, they stated that as their vessel holds the status of Foreign Going Vessel, they are eligible to take benefit of Section 87 of the Customs Act, 1962 and the duty on stores/bunkers needs not to be paid. They produced provisional registration certificate and trade licenses during investigation. Noticee failed to appreciate the fact that as per Section 40 of the Merchant Shipping Act, 1958, if at any port outside India, a ship becomes entitled to be registered as an Indian ship, the Indian consular office there may grant a **provisional certificate** and such certificate shall have effect of a certificate of registry until the expiration of six months or until the arrival of the ship at a port where there is a registrar whichever first happens and on either of these events happening shall cease to have effect. **Once the ship reaches India, the provisional registration ceases and it is required to be registered as an Indian flag vessel and to obtain special trade license for engaging in foreign run. This implies that when imported, the vessel gets first cleared for home consumption and then after registering itself as Indian flag vessel, has to obtain specific trade license for carrying out its foreign run operating as a conveyance.** Further, when the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Therefore, the benefit of Section 87 applicable to Foreign Going Vessel is not available in the such case as at that time the import of such vessels its title as "Foreign-Going Vessel" is not available and at the time of first time of entry of the vessel enters Indian Territory, the vessel and the bunkers/consumables on board are treated as imported goods and liable to duty. On reading the license No. MUM/19/W&C/2021 dated 12.02.2021 issued by Mercantile Marine Department, Mumbai I find that license was co-terminus with the provisional certificate of registry. As the provisional certificate ceases to be valid once the ship reaches India, the trade license issued also ceases to be valid. When the ownership of a Foreign Flag Vessel comes to an Indian buyer and the vessel makes first entry in the Indian Territory on the basis of Provisional Certificate, she lost her identity as Foreign Flag Vessel/Foreign-Going Vessel as it is required to be registered afresh with Directorate General of Shipping as Indian Flag Vessel and thereafter only, it has to get license for Foreign Run Vessel or Coastal Run Vessel. Further, by such suppression of fact i.e. not declaring the quantity of stores amounts before customs, M/s Mahi Marine Pvt Ltd has evaded customs duty and made such goods liable for confiscation under section 111(m) of the Customs Act, 1962. Hence, I find that the undeclared bunkers (Lub. Oil, HSD and Fuel Oil) valued at **Rs.4,37,37,331/- (MV SM MAHI)** and **Rs.3,95,73,556/- (SM NEYYAR)** should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962. Further, duty amounting to **Rs.99,14,035/-** for store on

**"MV SM MAHI"** and **Rs.1,11,72,366/-** for stores on **"SM NEYYAR"** respectively is liable to be recovered under section 28(4) of the Customs Act, 1962. Further, such suppression of facts has also made Noticee liable to penalized under Section 114A of the Customs Act, 1962.

Further during investigation, it was found that the Invoice Value i.e. USD \$6000000 (Rs.44,28,00,000/-) for MV SM MAHI and USD \$12000000 (Rs.88,56,00,000/-) for SM NEYYAR declared by the importer for the purpose of assessment were actually FOB Value as per the Memorandum of Agreements entered between the seller and the importer and Valuation Certificates issued by the Chartered Engineer in respect of above vessels. Therefore, the value declared by the importer is required to be adjusted by adding insurance and freight cost and determined to **Rs.53,63,41,500/-** for MV SM MAHI and **Rs.1,07,26,83,000/-** for SM NEYYAR **under the provisions of section 14 of the Customs Act, 1962 read with rule 3 (1) and rule 10 of Customs Valuation (Determination of Value of Imported goods) Rules, 2007 as discussed in para 18.8 (iv) (c) 5.**

Therefore, for this act of omission and commission, the above vessels MV SM MAHI valued at **Rs.53,63,41,500/-** and SM NEYYAR valued at **Rs.1,07,26,83,000/-** are liable for confiscation under Section 111(m) of the Customs Act, 1962. The differential duty arising due to this suppression of facts is also recoverable under section 28(4) of the Customs Act, 1962 and hence the Noticee is liable for penalty under different provisions of Customs Act, 1962.

Now, I will proceed to examine the provisions of applicable Penalty on M/s Mahi Marine Pvt Ltd.

(i). I find that Section 114A stipulates that the person who is liable to pay duty by reason of collusion or any wilful mis-statement or suppression of facts as determined under section 28, is also be liable to pay penalty under Section 114A. These acts and omissions of the Importer rendered them liable for penal action under Section 114A of the Customs Act, 1962.

(ii). I find that there is a mandatory provision of penalty under Section 114A of customs act, 1962 where duty is determined under section 28 of customs act, 1962.

iii) Section 117 of the Customs Act, 1962 :

*"Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty"*

In this case, as penalty under Section 114A of the Customs Act, 1962, is imposable, hence penalty under Section 117 can't be imposed.

g. Applicability of Penalty on M/s MBK Logistix Pvt Ltd under Section 117 of the Customs Act, 1962.

Before discussing the applicability of provisions of penalty under different sections of the Customs Act, 1962, I would like to examine the role and culpability of M/s MBK Logistix Private Limited in the present matter.

#### **Role and Culpability of M/s MBK Logistix Pvt Ltd**

In the instant case, M/s. MBK Logistix Pvt. Ltd., engaged in shipping vessel agency service such as boarding, rummaging, sign on & sign off, immigration, and assistance in supply of any technical or other items to ship, port clearance of the vessels. Therefore, it appears that they are well aware of the provisions of Customs law pertaining to the vessel agency services. Therefore, they were required to get the Out of Charge (OOC) of the Bill of Entries before leaving the port of vessels. Further, the Bills of Entries for both vessels were filed as the vessels were touching the Indian port for the first time after change of ownership i.e. from foreign flag to Indian flag. However, they applied for port clearance on 22<sup>nd</sup> Feb 2021 for vessel MV SM MAHI before receipt of OOC and they did not disclose the facts to the officer granting port clearance. Moreover, before leaving the port of vessels, they were required to complete the procedure stipulated regarding the bills of entry, which they miserably failed to do in as much as they failed to intimate the port authority/ terminal operator regarding filling of bill of entry and also failed to submit the copy of the out of charge, in respect of the said bill of entry filed for import of the vessel MV SM MAHI. Ongoing through the fact of the case, it has been found that in the statement dated 25.02.2021 of Shri Rashid Ali Mohd authorized representative of M/s MBK Logistix Pvt Ltd, it has been found that he was asked why he applied for PC before OOC and did he bring the facts to the notice of the officer issuing him port clearance. In this regard, he stated that he did not disclose the facts to the officer granting port clearance. Further, on being asked whether the port authority /terminal operator asked for the copy of the out of charge copy in respect of the bill of entry filed for import of the vessel MV SM MAHI before allowing the vessel leave the port, he stated that **they had not intimated the port authority** /terminal operator regarding filing of the Bill of entry in respect of the vessel and hence they had not asked for the copy of the OOC documents from them. Hence, it is on black and white that M/s MBK Logistix has not taken due diligence in course of obtaining Port Clearance for the above vessel. Therefore, inspite of being well aware of the relevant provisions of the Customs Act, they intentionally did not disclose the said facts to the officer granting port clearance. Hence, they did not follow due diligence in respect of importation of the said old & used vessels and bunkers on board and they failed to declare the actual quantity and value for each goods separately, and also failed to disclose the true facts to the authority concerned. Thus, such act of non-disclosure/ concealment of the facts to the officer granting port clearance, they appear to have rendered themselves liable for penal action under provisions of the Customs Act, 1962.

#### Section 117 of the Customs Act, 1962:

*"Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty"*

In this case, I find that Noticee M/s MBK Logistix Pvt Ltd is liable to be penalised under Section 117 of the Customs Act, 1962.

**h. Applicability of Penalty on M/s Alaacrity Projects India Pvt Ltd under Section 117 of the Customs Act, 1962.**

In this case, CB- Firm M/s Alaacrity Projects India Pvt. Ltd. (AAKCA3961DCH002), 301, Krishana Apartment, Netaji Subhash Palace, Wazirpur, New Delhi-34 have not followed due diligence in respect of importation of the impugned old and used vessels and bunkers on board as they failed to declare actual quantity and value of the bunkers in their respective CTH and also failed to declare the CIF Value of the old and used vessels for the purpose of assessment; hence failed to comply with the provisions of the Custom Broker Licensing Regulations, 2018 (CBLR, 2018), thus, liable for penal action under Section 117 of the Customs Act, 1962 for contravention of CBLR, 2018.

**19. In view of the above detailed discussions, I pass the following order:**

**ORDER**

**19.1 In respect of undeclared Stores/Bunkers:**

- a)** I hold that the undeclared bunkers (Lub. Oil, HSD and Fuel Oil) valued at **Rs.4,37,37,331/- (Rupees Four Crore Thirty Seven Lakh Thirty Seven Thousand Three Hundred and Thirty One Only)** for MV SM MAHI and **Rs.3,95,73,556/- (Rupees Three Crore Ninety Five Lakh Seventy Three Thousand Five Hundred Fifty Six Only)** for SM NEYYAR are liable for confiscation under Section 111(m) of the Customs Act, 1962. I impose redemption fine of **Rs. 80,00,000/- (Rupees Eighty Lakh Only)** under Section 125 of the Customs Act, 1962 in view of above discussions in para 18.9 (a).
- b)** I confirm the demand of Customs duty amounting to **Rs.99,14,035/- (Rupees Ninety Nine Lakhs Fourteen Thousand and Thirty Five only)** for “**stores/bunkers on MV SM MAHI**”; and **Rs.1,11,72,366/- (Rupees One Crore Eleven Lakhs Seventy Two Thousand Three Hundred and Sixty Six Only)** for “**stores/bunkers on SM NEYYAR**” respectively in terms of the provisions of Section 28(8) read with Section 28(4) of the Customs Act, 1962 which is recoverable from Noticee M/s Mahi Marine Pvt Ltd. Since amount **Rs. 2,10,86,401/- (Rupees Two Crore Ten Lakh Eighty Six Thousand Four Hundred One Only)** has been deposited by Noticee **‘UNDER PROTEST’**, the protest stands vacated. Further, I order to appropriate the said amount deposited under protest against the duty demand.
- c.** I confirm the demand of applicable interest on the amount of duty in para (ii) under section 28AA of the Customs Act, 1962 which is recoverable from M/s

Mahi Marine Pvt Ltd. Since amount **Rs 28,072/-** (*Rupees Twenty Eight Thousand and Seventy Two Only*) and **Rs. 50,506/-** (*Rupees Fifty Thousand Five Hundred and Six Only*) has been deposited by M/s Mahi Marine Pvt Ltd under protest, the protest stands vacated. Further, I order to appropriate the said amount deposited against the interest liability.

**d.** I impose penalty of **Rs 2,10,86,401/-** (*Rupees Two Crore Ten Lakh Eighty Six Thousand Four Hundred and One Only*) on M/s Mahi Marine Pvt Ltd under Section 114A of the Customs Act, 1962.

#### **19.2 In respect of imported vessels:**

**a.** I find that the assessable value i.e. USD \$6000000 **Rs.44,28,00,000/-** (*Rupees Forty Four Crore Twenty Eight Lakh Only*) for MV SM MAHI and USD \$12000000 **Rs.88,56,00,000/-** (*Rupees Eighty Eight Crore Fifty Six Lakh Only*) for SM NEYYAR declared by the importer does not include freight and insurance. Hence, I order to adjust the declared value by adding freight and insurance under the provisions of sub rule (1) of rule 3 read with rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and as per the provisions of Section 14(1) of the Customs Act, 1962 for arriving to the assessable value to **Rs 53,63,41,500/-** (*Rupees Fifty Three Crore Sixty Three Lakh Forty One Thousand and Five Hundred Only*) in case of MV SM Mahi and **Rs 1,07,26,83,000/-** (*Rupees One Hundred Seven Crore Twenty Six Lakh Eighty Three Thousand Only*) in case of SM Neyyar.

**b.** I hold that the imported vessels MV SM Mahi valued at **Rs.53,63,41,500/-** (*Rupees Fifty Three Crore Sixty Three Lakh Forty One Thousand and Five Hundred Only*) and SM Neyyar valued at **Rs.1,07,26,83,000/-** (*Rupees One Hundred Seven Crore Twenty Six Lakh Eighty Three Thousand Only*) are liable for confiscation under Section 111 (m) of the Customs Act, 1962. I impose redemption fine of **Rs. 5,00,00,000/-** (*Rupees Five Crore Only*) under Section 125 of the Customs Act, 1962 in view of above discussions in para 18.9 (d).

**c.** I confirm the demand of differential Customs Duty amounting to **Rs.46,77,075/-** (*Rupees Forty Six Lakhs Seventy Seven Thousand and Seventy Five Only*) and **Rs.93,54,150/-** (*Rupees Ninety Three Lakhs Fifty Four Thousand One Hundred and Fifty Only*) in respect of import of old vessels "MV SM MAHI" and "SM NEYYAR" respectively in terms of the provisions of Section 28(8) read with Section 28(4) of the Customs Act, 1962 with applicable interest under

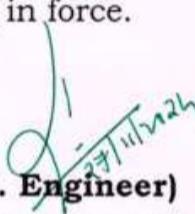
section 28AA of the Customs Act, 1962 which is recoverable from Noticee M/s Mahi Marine Pvt Ltd.

**d.** I impose penalty of **Rs 1,40,31,225/- (Rupees One Crore Forty Lakh Thirty One Thousand Two Hundred and Twenty Five Only/-)** on M/s Mahi Marine Pvt Ltd under Section 114A of the Customs Act, 1962.

**19.3** I impose penalty of **Rs. 1,00,000/- (Rupees One Lakh Only)** on CB Firm M/s Alaacrity Projects India Pvt Ltd under section 117 of the Customs Act, 1962.

**19.4.** I impose penalty of **Rs. 3,00,000/- (Rupees Three Lakh Only)** on M/s MBK Logistix Pvt Ltd under section 117 of the Customs Act, 1962.

**20.** This OIO is issued without prejudice to any other action that may be taken against the claimant under the provisions of the Customs Act, 1962 or rules made there under or under any other law for the time being in force.



(K. Engineer)

Pr. Commissioner of Customs  
Custom House Mundra.

**By Speed Post & through proper/official channel**

**To,**

**To (The Noticees),**

- 1. M/s Mahi Marine Pvt. Ltd.,**  
Seawoods Grand Central, E-704-707,  
Tower 2, 7<sup>th</sup> Floor, Seawoods,  
Navi Mumbai-400706.
- 2. CB- Firm M/s Alaacrity Projects India Pvt. Ltd.,**  
(AAKCA3961DCH002),  
301, Krishana Apartment, Netaji Subhash Palace,  
Wazirpur, New Delhi-34.
- 3. M/s MBK Logistix Pvt. Ltd.,**  
Second Floor, Plot No.133, Sector 8,  
BOMGIM Complex, Gandhidham, Kutch-370201.

**Copy to:**

1. The Chief Commissioner of Customs, CCO, Ahmedabad.
2. The Additional Commissioner of Customs, SIIB (I), Mundra Customs..

3. The Deputy Commissioner (EDI), Custom House, Mundra.
4. Guard File.
5. Notice Board.