

	<p>आयुक्त सीमाशुल्क (निवारक) का कार्यालय सीमाशुल्क भवन, जामनगर-राजकोट हाइवे, विक्टोरिया ब्रिज के पास, जामनगर- (गुजरात) ३६०००१</p> <p>-----</p> <p>Office of the Commissioner of Customs (Preventive), 'Seema Shulk Bhavan', Jamnagar – Rajkot Highway, Near Victoria Bridge, Jamnagar (Gujarat) – 361 001</p> <p>Email: commr-custjmr@nic.in; adj-custjmr@nic.in</p>			
DIN- 20240671MM0000717367				
1.	फाइलक्रमांक/ File Number	F. No. CUS/821/2023-ADJN		
2.	मूलआदेशक्रमांक/ Order-in-Original No.	04/Additional Commissioner/2024-25		
3.	द्वारापारित/passed by	चुना राम / Chuna Ram अपरआयुक्त/ Additional Commissioner, (सीमाशुल्क) निवारक /Customs (Preventive) जामनगर/ Jamnagar.		
4.	Date of Order/आदेशदिनांक	20/06/2024		
	Date of issue / आदेशजारीकिया	20/06/2024		
5.	कारणबताओनोटिसक्रमांकएवंदिनांक Show Cause Notice Number & date	No. ADC-09/2022-23 dated 27.02.2023 (Remand Proceedings)		
6.	नोटिसीकानाम/ Name of Noticee	M/s. Sagar Shipping Co., Shop No-6, Dayal Bhawan, Ground Floor, 104, Keshavji Nayak Rd, Mumbai.-400009		
01	इस आदेश की मूल प्रति संबंधित व्यक्ति को निशुल्क प्रदान की जाती है। The original copy of this order is provided free of cost to the person concerned			
02	<p>इस मूल आदेश से व्यथित कोई भी व्यक्ति सीमा शुल्क अधिनियम, 1962 की धारा 128A(1)(a), सीमा शुल्क (अपील) नियम, 1982 के नियम 3 के साथ पठित, के प्रावधानों के तहत, इस आदेश की प्राप्ति की तारीख से 60 दिनों के भीतर फॉर्म सीए-1 में निम्नलिखित पते पर अपील दायर कर सकता है। फॉर्म सीए-1 में अपील का प्रपत्र, दो प्रतियों में दायर किया जाएगा और उसके साथ इस आदेश की समान संख्या में प्रतियाँ संलग्न की जाएंगी जिसके विरुद्ध अपील की गई है। (जिनमें से कम से कम एक प्रमाणित प्रति हो)।</p> <table><tr><td>आयुक्त अपील ४ वीं मंजिल, हुडको बिल्डिंग, ईश्वर भुवन रोड, नवरंगपुरा, अहमदाबाद – 380 009</td><td>Commissioner (Appeals), 4th Floor, Hudco Bhavan, Ishvar Bhavan Road, Navrangpura, Ahmedabad – 380 009</td></tr></table>		आयुक्त अपील ४ वीं मंजिल, हुडको बिल्डिंग, ईश्वर भुवन रोड, नवरंगपुरा, अहमदाबाद – 380 009	Commissioner (Appeals), 4 th Floor, Hudco Bhavan, Ishvar Bhavan Road, Navrangpura, Ahmedabad – 380 009
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	Any Person aggrieved by this Order-In-Original may file an appeal in Form CA-1, within sixty days from the date of receipt of this order, under the provisions of Section 128 of the Customs Act, 1962, read with Rule 3 of the Customs			

	(Appeals) Rules, 1982 before the Commissioner (Appeals) at the above mentioned address. The form of appeal in Form No. CA.-1 shall be filed in duplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy).
03	अपील पर 5/- रुपये का कोर्ट फीस स्टाम्प लगा होना चाहिए। जैसा कि भारतीय स्टाम्प अधिनियम, 1989 के तहत प्रदान किया गया है, या राज्य विधान द्वारा संशोधित किया जा सकता है, जबकि इस अपील के साथ संलग्न आदेश की प्रति पर रुपये 0.50 (पचास पैसे केवल) का कोर्ट फीस स्टाम्प होना चाहिए। जैसा कि न्यायालय शुल्क अधिनियम, 1870 की अनुसूची - I, मद 6 के तहत निर्धारित किया गया है।
	The appeal should bear the Court Fee Stamp of Rs. 5/- as provided under the Indian Stamp Act, 1989, modified as may be, by the State Legislation, whereas the copy of the order attached with this appeal should bear a Court Fee Stamp of Rs. 0.50 (Fifty paise only) as prescribed under Schedule - I, Item 6 of the Court Fees Act, 1870.
04	अपीलीय ज्ञापन के साथ शुल्क भुगतान/ जुर्माना/ अर्थ दंड का सबूत भी संलग्न करे अन्यथा सीमा शुल्क अधिनियम, 1962, की धारा 128 के प्रावधानों का अनुपालन ना होने के कारण अपील को खारिज किया जा सकता है।
	Proof of payment of duty / fine / penalty should also be attached with the appeal memo, failing to which appeal is liable for rejection for non-compliance of the provisions of Section 128 of the Customs Act, 1962.
05	अपील प्रस्तुत करते समय यह सुनिश्चित करे की सीमा शुल्क (अपील) नियम, 1982 और सिस्टेट प्रक्रिया (प्रोसीजर) नियम, 1982 के सभी नियमों का पूरा पालन हुआ है।
	While submitting the Appeal, the Customs (Appeals) Rules, 1982, and the CESTAT (Procedure) Rules, 1982, should be adhered to in all respects.
06	इस आदेश के खिलाफ आयुक्त (अपील), सीमा शुल्क, उत्पाद शुल्क और सेवा कर अपीलीय न्यायाधिकरण के समक्ष मांग की गई शुल्क के 7.5% के भुगतान पर होगी, जहां शुल्क या शुल्क और जुर्माना विवाद में है, या जुर्माना विवाद में है, या जुर्माना जहां जुर्माना है अकेले विवाद में है।
	An appeal, against this order shall lie before the Commissioner (Appeals), on payment of 7.5% of the duty demanded, where duty or duty and penalty are in dispute, or penalty are in dispute, or penalty, where penalty alone is in dispute.

BRIEF FACTS OF THE CASE

The present proceeding has been taken up on account of the Hon'ble Commissioner of Customs (Appeals), Ahmedabad's Order No. JMN-CUSTOM-000-APP-62-24-25 dated 12.04.2024 in the matter of M/s Sagar Shipping Co., Shop No-6, Dayal Bhawan, Ground Floor, 104, Keshavji Nayak Rd, Mumbai whereby Hon'ble Commissioner of Customs (Appeals) has set aside the Impugned Order-in-Original No. 01/Additional Commissioner/ 2023-24 dated 31.05.2023 passed by the Additional Commissioner, Customs (Preventive), Jamnagar and remanded the matter back to the adjudicating authority with direction to pass a fresh order and has observed *inter alia* as under:-

“6. In light of the aforesaid facts and circumstances, I allow the appeals filed by the appellant by way of remand and remit the matter to the adjudicating authority, who shall ascertain the facts, examine the documents, submissions made in the appeal memorandum and case laws submitted by the appellant and pass speaking order after following principles of natural justice and adhering to the legal provisions. While passing this order, no opinion or views have been expressed on the merits of the dispute or the submissions by the appellant in this regard, which shall be independently examined by the adjudicating authority.”

1.1 In earlier proceedings, the adjudicating authority vide the Order-in-Original No. 01/Additional Commissioner/ 2023-24 dated 31.05.2023 has adjudicated the Show Cause Notice No. ADC-09/2022-23 dated 27.02.2023 issued to M/s. Sagar Shipping Co., Mumbai (**hereinafter referred to as “the Noticee”**) registered owner of the sailing Vessel MSV Sagar Darshan (BDI-1487) and also to Shri Sidik Talab Raja, Master/Tindal of Vessel MSV Sagar Darshan. M/s. Sagar Shipping Co., Mumbai preferred Appeal against the Order-in-Original No. 01/Additional Commissioner/ 2023-24 dated 31.05.2023 which was decided by Order-in-Appeal No. JMN-CUSTOM-000-APP-62-24-25 dated 12.04.2024. Therefore, the present remand proceedings is only in respect of Noticee M/s. Sagar Shipping Co., Mumbai in connection to Show Cause Notice No. ADC-09/2022-23 dated 27.02.2023.

2. Briefly stated the facts of the case are that the Country Craft Vessel/Dhow MSV Sagar Darshan (BDI- 1487) arrived at Salaya Port on 18.05.2022 from Mundra Port and filed IGM No. F/13 dated 18.05.2022. M/s Sagar Shipping Company, Mumbai, (Partners-Shri Digant D. Joshi and Shri Jagdish N. Vyas) are the registered owner of the Sailing Vessel MSV Sagar Darshan (BDI- 1487) as per the Certificate of Registry of Sailing Vessel. The

said Dhow has declared the 108 barrels (108*200=21600 Ltrs.) of High-Speed Diesel (*hereinafter referred to as "HSD" for brevity*) available in the Diesel Tanks of the Vessel in the IGM filed by the Tindal/Owner of the said vessel.

2.1 Intelligence was received by the Officers of Custom House Salaya that some quantity of HSD has been clandestinely removed from the Vessel MSV Sagar Darshan. Acting upon intelligence, the Officers of Custom House Salaya along with Shri Digant D. Joshi, Partner of M/s Sagar Shipping Co. owner of MSV Sagar Darshan and two independent Panchas boarded the Vessel Sagar Darshan on 01.10.2022 to ascertain the quantity of HSD present in the Vessel. Panchnama dated 01.10.2022 was drawn onboard the vessel in presence of two independent Panchas. During the proceedings of the Panchnama, it was revealed by measuring the quantity of HSD (High-Speed Diesel) in each Tanks that 70 barrels (14000 Ltrs) of HSD (High-Speed Diesel) has been clandestinely removed from the Vessel. As on arrival of the said Vessel at the Salaya Port, the quantity of HSD declared in IGM filed by the Tindel/Owner of the said vessel was 108 barrels, however, during boarding of Customs officials, only 38 barrels of HSD were found in the diesel Tanks. Hence, it was evident that 70 barrels of HSD has been surreptitiously removed from the Vessel.

3. During the course of investigation, a statement of Shri Digant D. Joshi, Partner of M/s Sagar Shipping Co. (owner of MSV Sagar Darshan) was recorded on 01.10.2022 under Section 108 of the Customs Act, 1962 before the Superintendent, Customs House, Salaya wherein he, inter-alia, stated as under:

- *That he is currently residing in Mumbai. He had given the whole sole responsibility of the Vessel to the Tindal/Captain of the Vessel i.e. Shri Sidik Talab Raja. He had no idea about the shortage of HSD noticed in the Vessel as his Tindal was managing the affairs of the Vessel and he was never informed by his Tindal about the above inconsistency noticed in the quantity of the Diesel;*
- *That being the partner of M/s Sagar Shipping Co. which is holding ownership of MSV Sagar Darshan, it was his duty to check any irregularities or any unlawful acts taking place in the Vessel.*
- *That he was present during the Panchnama proceedings on 01.10.2022 and it was noticed that the Vessel has deficit of 70 barrels of HSD as the Vessel had 108 barrels of HSD present on arrival at*

Salaya port on 18.05.2022. He further put his dated signature in the copy of IGM No. F/13 dated 18.05.2022 in token of having seen the same.

- That the Tindal/Captain Shri Sidik Talab Raja is responsible for the above irregularities. He admitted that 70 barrels of HSD were surreptitiously removed from the Vessel by the Tindal and the same has resulted in the violation of the provisions of the Customs Act, 1962
- That they have contravened the provisions of the Customs Act, 1962 and duty amounting to Rs.3.75 lakhs along with Interest and penalty is required to be paid to the Government. He further assured that he is ready to pay the duty arising due to the illicit removal of HSD along with interest and penalty.

4. Further, during the course of investigation, a statement of Shri Sidik Talab Raja, Master/Tindal of MSV Sagar Darshan was recorded on 03.10.2022 before the Superintendent, Customs House Salaya, under Section 108 of the Customs Act, 1962 wherein he, inter-alia, stated as under:

- That he is responsible for the above shortage of HSD found in the Vessel. He further stated that he had supplied some quantity of HSD to other fishing boats which is the reason for the above-mentioned shortage of HSD (High-Speed Diesel) in the Vessel.
- That after sailing from Mundra port on 17.05.2022 and at around 01:00 am of 18.05.2022, in the high seas in proximity to the Salaya lighthouse, he transferred Diesel to the nearby fishing boats. He was communicating with the nearby sailors of fishing boats through VHF and they urged him for the supply of HSD to their boats. That night he transferred High-Speed Diesel to three boats.
- That he was contacted by a nearby sailor of a fishing boat for the supply of diesel. As his Vessel was having adequate diesel and for some monetary benefits at that time, he acceded to their request and transferred 25 barrels to the boat. Thereafter, he supplied 25 barrels and 20 barrels to the second and third boats respectively.
- That he had charged Rs.10,000/- per barrel from each Boat.
- That he has contravened the provisions of the Customs Act, 1962 and duty amounting to Rs.3.75 lakhs along with interest and penalty is required to be paid to the Government.

5. Therefore, it appeared that the Master of the Vessel, Shri Sidik Talab Raja was engaged in the clandestine removal of 70 barrels (14000 Ltrs) quantity of High-Speed Diesel (HSD) and sold the same to three boats. The Tindal of the Vessel vide his statement dated 03.10.2022 has divulged that he was involved in the illicit removal of HSD from the vessel and the same was sold in the mid-sea at night to other boats before arriving at Salaya Port. This implied that the Tindal of the Vessel with mala fide intentions had submitted the details in the IGM filed at Salaya port wherein showed the quantity of HSD (108 barrels) instead of the actual quantity of HSD present in the Vessel. As 70 barrels of HSD were already illicitly removed before calling at Salaya Port, therefore, the actual quantity of the diesel was wrongly shown as 108 barrels by the Tindal to hide the illicit removal of 70 barrels. For the above act of omission/commission, the already removed HSD i.e. High-Speed Diesel of quantity 14000 Liters having assessable value at Rs.12,16,278/- appeared to be liable for confiscation under Section 111 of the Customs Act, 1962. However the same was not available for confiscation. Further, it appeared that as the goods were sold to three different boats in mid-sea, therefore the import duty on the surreptitiously removed goods was to be recovered along with appropriate interest and penalty under the provision of the Customs Act, 1962.

6. Since the vessel had been used as means for improper and unlawful removal of the offending cargo, the Vessel MSV Sagar Darshan (BDI-1487) valued at Rs.1,30,00,000/- as per the Insurance Policy of the Vessel, was placed under seizure vide Seizure Memo dated 01.10.2022 under the provisions of Section 110(1) of the Customs Act, 1962 and under the reasonable belief that the same is liable to confiscation under Section 115 of the Customs Act, 1962 .The details of the Vessel are as under:

Name of the Vessel	MSV Sagar Darshan
Port & No. of registry	Bedi Port
BDI No.	1487
Owner	M/s Sagar Shipping Co.
Under Flag of	Indian
GRT	388.97 T
NRT	370.47 T
Master/Tindal	Sidik Talab Raja

7. M/s Sagar Shipping Company vide their letter dated 15.11.2022 had requested to re-consider the value of the Vessel as per the current Market price of the Vessel and submitted a Valuation Report by M/s. Shraddha Surveyors, Jamnagar wherein the market value of Vessel –“Sagar

Darshan", Official No. BDI- 1487 was estimated around Rs.41,50,000/- (Rupees Forty-One Lakhs Fifty Thousand only). However, the United India Insurance Company Limited in the Insurance Policy of the Vessel commenced on 07.02.2022 has mentioned the Hull & Machinery value as Rs.1.30 Crores and hence the value of the Vessel considered accordingly.

8. Relevant Sections of Customs Act, 1962

(I) Section 111(d), (g) & (j) of the Customs Act, 1962 are reproduced below:

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

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(g) Any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45

(j) Any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission

(II) Section 112 (a) of the Customs Act, 1962 are reproduced below:-

Penalty for improper importation of goods, etc. —Any person,—

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

(b).....

Shall be liable,-

(i).....

(ii).....

(iii).....

(iv).....

(v).....

(III) Section 114 A of the Customs Act, 1962 is reproduced below:-

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 misstatement 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:]

(IV) Section 115. Confiscation of conveyances.-

(1) The following conveyances shall be liable to confiscation:-

e) any conveyance carrying imported goods which has entered India and is afterwards found with the whole or substantial portion of such goods missing, unless the master of the vessel or aircraft is able to account for the loss of, or deficiency in, the goods.

(2) Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal

(V) Section 28: Recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded.

(4) Where any duty has not been 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 ¹¹[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.

OFFENCE AND CONTRAVENTIONS

9. In view of the facts narrated in para-supra, it appeared that the above irregularity was revealed as a result of action taken by the officers on

the basis of intelligence regarding the clandestine removal of High-Speed Diesel from the Vessel. It appeared that the Officers checked the quantity of diesel in each tank of the vessel in presence of Owner of the Vessel-Shri Digant Joshi and two independent panchas and eventually, a shortage of 70 barrels of HSD was found. It further appeared that when the Tindal of the Vessel MSV Sagar Darshan, Shri Sidik Talab Raja was interrogated while recording his statement under Section 108 of the Customs Act, 1962, the fact of illicit selling of imported diesel was admitted. The statement of Shri Sidik Talab Raja, Tindal of the Vessel revealed that he had off-loaded HSD (High Speed Diesel) on three boats at the wee hours of 18.05.2022 in the sea after departing from Mundra Port. It therefore appeared that this act has rendered 14000 Ltrs. of High-Speed Diesel valued at Rs.12,16,278/- liable for confiscation under Section 111(d), (g) and (j) of the Customs Act, 1962. Further, the HSD (High-Speed Diesel) is a restricted goods, which is to be imported as per the Foreign Trade Policy and is allowed to import by the State Trading Enterprises (STE) only. Therefore, it appeared that the above act of omission/commission has rendered themselves liable for penal action under Section 112(a) of the Customs Act, 1962.

9.1 Therefore, it appeared that the 70 barrels of imported HSD were unlawfully removed from the Vessel MSV Sagar Darshan which was further confirmed by Sri Digant D. Joshi (owner of the Vessel) and Shri Sidik Talab Raja, the Tindal of the Vessel in their statements recorded under the provisions of Customs Act, 1962. It appeared that the Vessel MSV Sagar Darshan valued at Rs.1,30,00,000/- was used as means of conveyance for inappropriate removal of the offending goods and therefore the same is liable for confiscation under Section 115 of the Customs Act, 1962. It appeared that M/s Sagar Shipping Co., the owner of the Vessel MSV Sagar Darshan was liable for penal action under Section 112(a)/ 114A of the Customs Act, 1962.

10. Therefore, it appeared that appropriate customs duty is required to be recovered under Section 28(4) of the Customs Act, 1962 for the said unlawful importation and selling of HSD with applicable interest under Section 28AA of the Customs Act, 1962 from M/s Sagar Shipping Company. Whereas Shri Digant D. Joshi, Partner of M/s Sagar Shipping Co. has paid the Customs duty amounting to Rs. 3,75,328/- along with Interest of Rs. 10,921/- vide TR-6

Challan No-06/02/10/20922 dated 03.10.2022 towards illicit import and selling of HSD from the Vessel and therefore, the amount deposited required to be appropriated towards payment of duty and interest.

11. Therefore, M/s Sagar Shipping Co., Mumbai, was issued Show Cause Notice No. ADC-09/2022-23 dated 27.02.2023 as to why:

i. The "Vessel MSV Sagar Darshan valued at Rs.1,30,00,000/- should not be confiscated under Section 115 (2) of the Customs Act, 1962 as the same has been used as a conveyance in the removal of the offending goods.

ii. The 70 barrels (14000 litres) quantity of High-Speed Diesel valued at Rs.12,16,278/- removed illicitly from the Vessel should not be held liable to confiscation under Section 111 (d),111(g) & 111(j) of the Customs Act, 1962. However, the same is not available for confiscation.

iii. Penalty should not be imposed under Section 112 (a) of the Customs Act, 1962.

iv. The Customs duty on the removed HSD, amounting to Rs.3,75,328/- [Rupees Three Lakhs Seventy Five Thousand Three Hundred Twenty Eight only] should not be demanded and confirmed under Section 28(4) with interest under Section 28 AA of the Customs Act, 1962 and the amount of customs duty of Rs 3,75,328/- and Interest of Rs.10,921/- already paid vide TR-6 Challan no- 06/02/10/20922 dated 03.10.2022 should not be appropriated towards payment of duty and interest respectively.

v. Penalty should not be imposed under Section 114 A of the Customs Act, 1962 for the duty evaded through clandestine removal of HSD from the Vessel.

DEFENCE SUBMISSION:

12. M/s. Sagar Shipping Company filed defense reply dated 15.03.2023 wherein it was inter alia contended that it was not matter of dispute that the said vessel is foreign going vessel; that it is also admitted facts in the impugned Show Cause Notice by way of statements of one of the partners Shri Digant Joshi as well as master of the vessel/Tindel Shri Sidik Talab Raja dated 01.10.2022 and 03.10.2022 respectively that deficit of 70 barrels (14000 ltrs.) noticed during the course of Panchnama dated 01.10.2022 drawn on board vessel was due to clandestinely removed/sold to fishermen by the Master of Vessel /Tindel from the vessel MSV Sagar Darshan; that Shri Digant Joshi is staying at Mumbai and not aware of any shortage and informed that he had given all the responsibilities of his vessel to Tindel Shri Siddik Talab Raja and

he (Siddik Talab Raja) has admitted about such sale of Diesel to fishermen; that thus, it is clear case of theft and he was nowhere involved nor aware about such clandestine removal of HSD from on board vessel in high seas by the Tindel till informed and called by the officers of the Customs and asked to remain present during Panchnama.

12.1 M/s. Sagar Shipping Company submitted that it had neither imported nor clandestinely removed the HSD from on board vessel but sold to fishermen by Tindel while en-route to Salaya from Mundra Port; that it means that Tindel had imported HSD and not M/s. Sagar as owner of the vessel; therefore, if any action which can be initiated and taken under the Customs Act, 1962 can be initiated against master of vessel /Tindel only; however, being owner of the vessel at the behest of the officers M/s. Sagar has paid duty of Customs Rs.3,75,328/- with interest of Rs.10,921/- totaling to Rs. 3,86,249/- at the earliest opportunity vide Challan dated 03.10.2022 ; that they requested to conclude the matter as provided under Section 28(6) of the Customs Act, 1962; that accordingly, TR-6 Challan issued by the Superintendent, Custom House, Salaya on 15.03.2023 towards payment of 15% penalty i.e. Rs.56,300/- and same was paid in the designated bank on 15.03.2023; that they submitted self-certified copy of Challan No. 07/22-23 dated 15.03.2023.

12.2 M/s Sagar Shipping Company referred the provisions of Section 28(5) and (6) of Customs Act, 1962 and submitted that since it has already paid duty of Customs of Rs.3,75,328/- with interest of Rs.10,921 and 15% penalty of Rs.56,300/- well before 30 days of Notice as provided under sub-Section (5) of Section 28 of the Customs Act, 1962 then the proceedings in respect of person or other persons to whom the Notice is served shall be deemed to be conclusive as to the matters stated therein as provided under Sub-Section (6) of Section 28 of the Customs Act, 1962. Thus, the proceedings in respect of M/s. Sagar Shipping Company and the Master of Vessel/Tindel is deemed to be conclusive for the matters stated in impugned Show Cause Notice; that in other words, even vessel cannot be confiscated nor fine can be imposed in lieu of confiscation as well Diesel also cannot be held liable to confiscation nor any further penalty can be imposed under Section 112 and/or Section 114 of the Customs Act, 1962. In support of the above, they placed reliance upon decision of Tribunal in the case of M/s. Orbit Jewelers V/s. Commr. Of Cus., Air Cargo(Exports), New Delhi reported in 2016 (338) ELT 620 (Tri. Del.).

12.3 That even otherwise as per sub-section (1) of Section 125 of the Customs Act, 1962 whenever confiscation of any goods is authorized under the Customs Act, 1962 read with 1st proviso to sub-section (1) of Section 125 of the Customs Act, 1962 when the proceedings are deemed to be concluded under clause (i) to sub-section (6) in respect of goods no fine can be imposed; that the "goods" is defined under sub-Section (22) of Section 2 of the Customs Act, 1962 includes vessel and conveyance including vessel is liable to confiscation under Section 115(2) of the Customs Act, 1962 subject to condition stated therein; therefore, since duty, with interest and penalty on Diesel is paid as provided under sub-section (5) of Section 28 of the Customs Act, 1962, proceedings have to be considered as concluded as provided under sub-Section (6) of Section 28 of the Customs Act, 1962, therefore, no fine can be imposed in lieu of confiscation of vessel if any as per 1st proviso to Section 125(1) of the Customs Act, 1962. That since the proceedings under Section 28(6)(i) is concluded as to the matter stated in the Show Cause Notice which includes goods viz. diesel and vessel too therefore, no fine is imposable in lieu of confiscation of vessel which is not prohibited under Section 125(1) of the Customs Act, 1962; that it is not the case of the department that Diesel is liable to be confiscated as Show Cause Notice proposed the Diesel to be held liable to confiscation as same is not available for confiscation.

12.4 That Diesel was part of the stores in the natural course of business as fuel and vessel was never used as conveyance for the clandestinely removed goods; that in any case vessel was not liable to confiscation as per the provisions of Section (2) of Section 115 of the Customs Act, 1962; that it was admitted facts in the impugned Show Cause Notice by way of exculpatory statement of one of the partners and inculpatory statement of master of vessel/Tindel under Section 108 of the Customs Act, 1962 that clandestine removal of Diesel from on board of vessel was without knowledge of any of the partners of M/s. Sagar and same was done by the Tindel for his personal benefit only; that sale of Diesel lying on board of foreign going vessel on way from Mundra Port to Salaya by the Tindel was nothing but theft of Diesel and same came to knowledge of one of the partners only when the Custom Officer had informed and called from Mumbai to remain present in Panchnama proceedings dated 01.10.2022; that therefore, as provided under sub-section (2) of Section 115 of the Customs Act, 1962 vessel cannot be confiscated at all as same was used for alleged clandestine removal of Diesel without knowledge

or connivance of the owner of the vessel. They relied upon the decision of Tribunal in the case of Vishnu Thapav V/s. Commissioner- of Customs (Preventive), Lucknow reported in 2017 (358) ELT 1225 (Tri. All.)

12.5 That in the Show Cause Notice itself department has only proposed to held goods viz. the Diesel liable for confiscation as same is not available for confiscation; that in other words there was no proposal for confiscation of Diesel in the impugned Show Cause Notice and nobody can travel beyond the scope of the Show Cause Notice, Diesel cannot be confiscated with an option to pay fine in lieu of confiscation: that it was admitted facts on record that goods viz. Diesel were never seized by the department and not available for confiscation therefore, in absence of seizure nothing can be confiscated under Section 111 of the Customs Act, 1962 and no fine can be imposed under Section 125 of the Customs Act, 1962; that it cannot be disputed that option to redeem the confiscated goods can be given under Section 125 of the Customs Act, 1962 only when such goods are physically available; that it is seen that if option to redeem confiscated goods on payment of fine in lieu of confiscation is not exercised by the concerned person, then such goods shall automatically vest in the Central Government in terms of Section 126 of the Customs Act, 1962; that subsequently the officer adjudging confiscation shall take and hold possession of the confiscated goods as per the provision of Section 126; that in the instant case, it was mentioned in the notice itself that goods are not available for confiscation and if the goods are confiscated and redemption fine is imposed and the noticee fails to pay redemption fine, then it will be a piquant situation; that in other word, if fine in lieu of confiscation imposed is not paid, the confiscated goods will become property of the Central Government and the officer have to take possession of the same in view of above provisions of law which is not practically possible. In this regard, they relied upon the following decisions:

- (i) Appellate Collector of Customs & CE V/s. T.N.Khambati – 1988 (37) ELT 37 (AP)
- (ii) Commissioner V/s. Finesse Creations Inc. – 2010 (255) ELT A120
- (iii) Commissioner of Customs (Import), Mumbai Vs. Finesse Creation Inc. – 2009 (248) ELT 122 (Bom.)
- (iv) Shiv Kripa Ispat Pvt. Ltd.V/s. Commissioner of C.Ex. & Cus. Nasik – 2009 (235) ELT 623 (Tri. LB).
- (v) Commissioner of C. Ex., Amritsar V/s. Garg Forging & Casting Ltd – 2009 (235) ELT 472 (Tri. Del.)
- (vi) Commissioner of Customs, Kandla Vs. M. S. International Ltd. – 2004 (174) ELT 101 (Tri. Del.)

12.6 That matter may be concluded and vessel may not be confiscated and no penalty could be imposed upon M/s. Sagar as well as Tindel.

13. During the remand proceedings, M/s. Sagar Shipping Co in their written submission dated 27.04.2024 has inter alia referred their earlier submission dated 15.03.2023 to say that since the Noticee has paid duty along with interest and penalty as provided under Section 28 (5) the proceedings in respect of all the persons to whom Show Cause Notice is served are deemed to be conclusive as to the matters stated therein. It is further contended that in view of the provisions of Section 28(6) (1) of the Customs Act, 1962 , read with 1st proviso to Section 125 read with Section 115(2) of the Customs Act, 1962 and settled law position in the case law of M/s. Orbit Jewelers [2016 (338) E.L.T. 620 (Tri. - Del.)], no fine in lieu of confiscation of a vessel, which is also a goods, can be imposed under Section 125 of the Customs Act, 1962 when the proceedings are deemed concluded under Section 28 (6) of the Customs Act, 1962.

13.1 That "Goods" are defined under Section 2(22) of the Customs Act, 1962 to include "Vessel" and conveyance which includes "Vessel" is liable to confiscation under Section 115(2) of the Customs Act, 1962 subject to conditions stated therein; that as per 1st proviso to Section 125(1) of the Customs Act, 1962, since the duty on Diesel is paid alongwith interest and penalty under Section 28(5), the proceedings have to consider as concluded as provided under Section 28(6) and therefore, no fine can be imposed in lieu of confiscation of vessel if any; that since the proceedings under Section 28(6) (i) is concluded as to the matter stated therein the Show Cause Notice, which includes goods viz. "Diesel" and also the "Vessel" which is not prohibited, therefore, no fine is imposable under Section 125 (1); that it is not the case of the department that the Diesel is liable to confiscation as Show Cause Notice proposes Diesel to be held liable to confiscation as it was not available for confiscation; that the diesel was part of the stores in natural course of the business as fuel and the vessel was never used as conveyance for clandestinely removed goods and hence was also not liable to confiscation.

13.2 That it was admitted facts in the impugned Show Cause Notice by way of exculpatory statement of one of the partners and inculpatory statement of master of vessel/Tindel under Section 108 of the Customs Act, 1962 that

clandestine removal of Diesel from on board of vessel was without knowledge of any of the partners of M/s. Sagar and same was done by the Tindel for his personal benefit only; that sale of Diesel lying on board of foreign going vessel on way from Mundra Port to Salaya by the Tindel was nothing but theft of Diesel and same came to knowledge of one of the partners only when the Custom Officer had informed and called from Mumbai to remain present in Panchnama proceedings dated 01.10.2022; that therefore, as provided under sub-section (2) of Section 115 of the Customs Act, 1962 vessel cannot be confiscated at all as same was used for alleged clandestine removal of Diesel without knowledge or connivance of the owner of the vessel. They relied upon the decision of Tribunal in the case of Vishnu Thapav V/s. Commissioner of Customs (Preventive), Lucknow reported in 2017 (358) ELT 1225 (Tri. All.)

13.3 That being owner of the vessel at the behest of the officers M/s. Sagar Shipping Co has paid duty of Customs along with interest and penalty to so as to conclude the proceedings and release the vessel and the duty payment can not be considered as admission of guilt or offense by them.

13.4 That as per Section 115(2) of the Customs Act, 1962, when any such conveyance is used for the carriage of the goods, owner of any conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine not exceeding the market price of the goods which are sought to be smuggled goods or the goods smuggled as the case may be. Therefore, invoking provisions of Section 125 (2) for imposing fine is erroneous.

PERSONAL HEARING:

14. Personal hearing in the matter of M/s. Sagar Shipping Company was held virtually on 20.05.2024 at the request of the Noticee which was attended by Shri P.D. Rachchh, Advocate on behalf of the of the Noticee, wherein he reiterated the written submissions dated 27.04.2024. He further *inter alia* contended that the vessel is also a goods as defined under Section 2 (22) of the Act and in view of the provisions of Section 28(6) (i) of the Customs Act, 1962 , read with 1st proviso to Section 125 read with Section 115(2) of the Customs Act, 1962 and settled law position in the case law of M/s. Orbit Jewelers [2016 (338) E.L.T. 620 (Tri. - Del.)], no fine in lieu of confiscation can be imposed under Section 125 of the Customs Act, 1962 when the proceedings are deemed

concluded under Section 28(6)(i) of the Customs Act, 1962. He also contended that clandestine removal of Diesel was without knowledge or connivance of the owner of the vessel and therefore can not be confiscated in terms of provisions under Section 115 (2) of the Act. He relied upon the Order of the Honb'le CESTAT's in the matter of Vishnu Thapav V/s. C.C (Prev), Lucknow reported in 2017 (358) ELT 1225 (Tri. All.).

14.1 The records of virtual hearing in PDF format was emailed to Shri P. D. Rachchh, Advocate for his signature. Shri Rachchh vide his email dated 22.05.2024 submitted his duly signed copy of records of personal hearing by further incorporating his submissions in continuation to records of hearing wherein a brief of the matter was summarized and *inter alia* submitted as under:

14.2 That with reference to provisions of Section 28 (5) and Section 28 (6) (i) of the Customs Act, 1962, proceedings was deemed concluded in respect of person or other persons which includes owner of the vessel in their case to whom the notice was served for the matters stated therein which includes proposal to confiscate vessel/ conveyance; that no exception is carved from deemed to be conclusive of any matter stated in the Show Cause Notice not to speak of confiscation of conveyance at all in sub section (6) (i) of Section 28 of the Customs Act, 1962.

14.3 That Goods includes vessel but conveyance can not include goods; that in past at one point in time though vessel were coming to India as conveyance of goods bills of entry was required to be filed an even for shorter period on coastal conversion duty was required to be paid on coastal conversion of vessel to be used as conveyance; that in the instant case vessel as conveyance which is goods is also included and for the very reasons in Section 28 (6) (i) the language is used that be deemed to be conclusive as to the matters stated in the Show Cause Notice which includes confiscation of vessel as conveyance too. Therefore, no fine is imposable upon vessel as goods though used as conveyance.

14.4 That Diesel was part of the stores and vessel was not used as conveyance for smuggling of goods; that it is on record that vessel was used as conveyance without knowledge of the owner of the vessel; that master of the vessel can not be considered as agent of the Owner; that the only case of the

department is vessel was used as conveyance for in appropriate removal of offending goods and not for smuggling of diesel' that in any case vessel was never used for smuggling of diesel and hence no fine is imposable; that they relied case law in the matter of M/s. J. S. Steel Trades [2022(380) ELT 483 (Tri- Chan) and also in the matter of Vishnu Thapa [2017 (358) ELT 1225 (Tri- All.)

DISCUSSION AND FINDINGS:

15. I have carefully gone through the case records including Show Cause Notice dated 27.02.2023, submission dated 15.03.2023, written submission dated 27.04.2024 and also submissions made during personal hearing.

16. The limited issue involved in this remand proceedings is whether (i) the vessel Sagar Darshan can be held liable to confiscation under Section 115 of the Customs Act, 1962 and (ii) redemption fine can be imposed on owner of the Vessel Sagar Darshan i.e. Noticee M/s. Sagar Shipping Co, Mumbai in the circumstances when the Noticee M/s. Sagar Shipping Co, Mumbai has paid the Customs duty along with interest and also paid penalty @15% of duty amount within 30 days from service of Show Cause Notice and proceedings under Section 28(6)(i) of the Customs Act, 1962 has already been ordered for deemed conclusive in respect of offending goods i.e. High Speed Diesel.

17. I observe that the fact of the matter not in dispute is that illicit import and subsequent on board clearance/ selling of High-Speed Diesel [HSD] from the Vessel MSV Sagar Darshan was detected upon verification of quantity of HSD on board the vessel. It is not in dispute that against declared quantity of 108 barrels (108*200=21600 Ltrs.) of HSD in IGM No. F/13 dated 18.05.2022 filed at the time of arrival of the vessel at Salaya Port on 18.05.2022, actual quantity was found to be only 38 barrels of HSD as per Panchnama dated 1.10.2022. I observe that partner of the owner of the vessel in his statement dated 01.10.2022 accepted illicit removal of aforesaid quantity of the HSD by the Tindal resulting in contraventions and violations of Customs Act, 1962. Also, Shri Sidik Talab Raja, Master/Tindal of MSV Sagar Darshan in his statement dated 03.10.2022 admitted that he had transferred 70 Barrels (14000 Ltrs) of imported High-Speed Diesel on board after commencing journey from Mundra for Salaya. These facts are neither contested by the owner of the vessel nor by the Master / Tindal of the



Vessel either during the course of investigation or at the time of filing defense reply to the Show Cause Notice dated 27.02.2023. It is also not in dispute that HSD was a restricted item. In view of these facts, I hold that the HSD a dutiable prohibited goods, was improperly imported, removed and unloaded from the Vessel Sagar Darshan without being cleared for home consumption on payment of duty under Customs Act, 1962 in violation of Section 32 of the Customs Act, 1962 without permission of the proper officer. Thus, the goods are improperly imported goods in terms of Section 111(d), Section 111(g) and Section 111(j) of the Customs Act, 1962 and hence rendered it liable to confiscation. I therefore hold that the quantity of 14000 Ltrs (70 Barrels) HSD valued at Rs.12,16,278/-was imported, unloaded and removed by the Tindal of the Vessel Sagar Darshan is liable to confiscation under Section 111(d),111(g) & 111(j) of the Customs Act, 1962 and therefore demand of Customs duty of Rs.3,75,328/- involved in the aforesaid quantity of HSD is required to be confirmed under Section 28(4) along with applicable interest under Section 28AA of the Customs Act, 1962. I also observe that M/s. Sagar Shipping Co. has also rendered themselves liable to penalty under Section 114A of the Customs Act, 1962 as proposed in the Show Cause Notice.

18. The Show Cause Notice dated 27.02.2023 was issued to the owner of the vessel M/s. Sagar Shipping Co. for demand of customs duty under Section 28(4) along with interest under Section 28AA and penal action under Section 112 and 114A of the Customs Act, 1962 in addition to proposal for to held liable illicitly removed 14000 Ltr. HSD to confiscation under Section 111 (d),111(g) & 111(j) of the Customs Act, 1962. As discussed above, removal of HSD from the vessel in unauthorized and non-permissible manner is not in dispute and therefore, the quantity of 14000 Ltr. of HSD so removed in illicit manner is held liable to confiscation under Section 111 (d),111(g) & 111(j) of the Customs Act, 1962. The said goods are not under seizure and not available for confiscation being already cleared, question of redemption fine does not arise. However, once the goods are held liable to confiscation, penal action under Section 112 of the Customs Act, 1962 are attracted. Accordingly, the Noticee M/s. Sagar Shipping Co. is to be held liable to penalty under Section 112(a) of the Customs Act, 1962 as proposed in the Show Cause Notice. It is noted that penal provisions under Section 112 of the Customs Act, 1962 in the case of dutiable goods, other than prohibited goods are subject to the provisions of



Section 114A of the Customs Act, 1962. As per fifth proviso to Section 114A of the Customs Act, 1962, where any penalty has been levied under Section 114A, no penalty shall be levied under Section 112. As already held at Para supra, M/s. Sagar Shipping Co has held liable to penalty under Section 114 A and therefore, no penalty shall be levied under Section 112.

19. As regards request of M/s. Sagar Shipping Co. to conclude the proceedings, I find that M/s. Sagar Shipping Co. came forward with willingness to pay the customs duty payable on the illicit removal of imported 70 barrels (14000 Ltrs) of HSD with applicable interest during the course of investigation and paid Customs duty of Rs.3,75,328/- along with interest of Rs.10,921/- vide TR-6 Challan No. 06/02.10.2022 dated 03.10.2022. Further, upon service of Show Cause Notice dated 27.02.2023, M/s. Sagar Shipping Co. came forward to opt for payment of penalty @ 15% of duty amount and paid penalty of Rs.56,300/- [15% of duty amount] vide TR-6 Challan No. 07/22-23 dated 15.03.2023 and requested to conclude the proceedings in terms of provisions of Section 28(6) of the Customs Act, 1962. Relevant statutory provisions under Section 28 (5), Section 28 (6) of the Customs Act, 1962 are reproduced as under:-

(i) Section 28(5) of the Customs Act, 1962 provides as under :

"Where any duty has not been levied or not paid or has been short-levied or short paid] or the interest has not been charged 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 by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to 13 [fifteen per cent.] of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(ii) Section 28(6) of the Customs Act, 1962 provides as under :

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then, the proper officer shall



proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of ¹⁴[two years] shall be computed from the date of receipt of information under sub-section (5)

19.1 I find that the noticee M/s. Sagar Shipping Co. has paid duty with interest and penalty @15% of the duty specified in the notice issued under Section 28(4) within 30 days from receipt of the notice in terms of provisions of Section 28 (5) of the Customs Act, 1962. M/s. Sagar Shipping Co has therefore correctly opt for conclusion of proceedings under Section 28 (6) (i) of the Customs Act, 1962 in respect of import, unloading and removal of "High Speed Diesel" from the Vessel Sagar Darshan. In view of the entire facts stated above, I hold that the proceedings initiated under Section 28(4) of the Customs Act, 1962, against the Noticee M/s. Sagar Shipping Co. vide the impugned Show Cause Notice for recovery of duty and penalty and matters stated therein in respect of improperly imported goods "HSD" should be held to be deemed conclusive as per provisions of Section 28(6)(i) of the Customs Act, 1962 and I hold so.

20. The Show Cause Notice proposes confiscation of Vessel Sagar Darshan under Section 115 being used as conveyance for improper importation and inappropriate unloading & removal of the offending goods i.e. HSD. The Noticee contended that sale of diesel lying on board of foreign going vessel was nothing but theft of Diesel and it was came to their knowledge only upon information received from the Customs; that the Diesel was part of the stores as fuel of the vessel in natural course of business and the vessel was not conveyance for removed goods. In this regard, I find Noticee's argument contradicting with their submissions made at Para 4 of the defense reply to say that *"It had neither imported nor clandestinely removed the HSD from on board vessel but sold to fishermen by Tindel while en route to Salaya from Mundra Port. It means Tindel had imported HSD and not M/s. Sagar as owner of the vessel"*. Thus, on one hand it is argued that the HSD was part of the stores of the Vessel on the other hand it is argued that they had nothing to do with the said clearance as Tindel imported the offending goods. However, fact remains that the HSD was brought into India per Vessel Sagar Darshan imported improperly, unloaded and removed in violation of the provisions of the Customs Act, 1962 and hence argument of the Noticee is not acceptable.

20.1 M/s Sagar Shipping Co. contended that clandestine removal of HSD was

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made by Master / Tindel of the vessel for his personal benefit only without their knowledge and therefore, if any action which can be initiated and taken under the Customs Act, 1962 can be initiated against Master of Vessel /Tindel only. It is also argued that as provided under sub-section (2) of Section 115 of the Customs Act, 1962 vessel cannot be confiscated at all as it was used for alleged clandestine removal of Diesel without knowledge or connivance of the owner of the vessel and it was proved by the respective statements recorded during the investigation. They relied upon the decision of Tribunal in the case of Vishnu Thapav V/s. Commissioner of Customs (Preventive), Lucknow reported in 2017 (358) ELT 1225 (Tri. All.).

20.2 To better appreciate contentions of the Noticee, provisions of Section 115 of the Customs Act, 1962 are reproduced as under:-

Section 115. Confiscation of conveyances.-

(1) The following conveyances shall be liable to confiscation:-

(a)...

....

(e) any conveyance carrying imported goods which has entered India and is afterwards found with the whole or substantial portion of such goods missing, unless the master of the vessel or aircraft is able to account for the loss of, or deficiency in, the goods.

(2) Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal:

Provided that where any such conveyance is used for the carriage of goods or passengers for hire, the owner of any conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine not exceeding the market price of the goods which are sought to be smuggled or the smuggled goods, as the case may be.

20.3 It is not in dispute that the Vessel Sagar Darshan entered India carrying imported goods i.e. HSD and 14000 Ltrs of HSD was found missing and master of the vessel could not account for its loss as it was unloaded by him in the High Seas of Salaya Port without payment of Customs Duty in violation of provisions of Customs Act, 1962. The goods i.e. HSD were

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restricted and same was unloaded and removed by him in violation of Section 32 of the Customs Act, 1962 without permission of the proper officer. Thus, the goods are improperly imported goods in terms of Section 111(d), Section 111(g) and Section 111(j) of the Customs Act, 1962 and hence rendered it liable to confiscation. Thus, these goods are smuggled goods in terms of Section 2 (39) of the Customs Act, 1962. Further, deemed conclusion of proceedings under Section 28 (5) and Section 28 (6) in respect of demand of duty under Section 28 (4) of the Customs Act, 1962 does not alter the status of the goods being smuggled goods.

20.4 As per Section 115(2) of the Customs Act, 1962, conveyance used as a means for smuggling of goods, shall be liable to confiscation, unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance. Section 115 (2) provides that the owner of the conveyance has not only to prove that the conveyance (i.e. vessel in this case) was used for the intended purpose without his or his agent's knowledge but also without the knowledge of the person in-charge of the conveyance. It has to be noted that it is not only the owner but his agent and person in charge of the conveyance (vessel) have also been included in the Section. If the owner is able to show that action committing offense took place without his or his agent's knowledge and also without knowledge of the person in-charge of vessel, the vessel cannot be confiscated. The master of vessel is also included. But, the main person who is required to show this is the owner since the owner has been specifically included in Section 115 and the words used are "owner himself, his agent if any, and a person in-charge of the vessel". It is not 'or' but 'and'. The owner of the conveyance has not only to prove that the conveyance was used for the intended purpose without his knowledge but also without the knowledge of his agent and the person in-charge of the conveyance.

20.5 It is not the case before me that Tindel of the Vessel i.e. person in-charge of the conveyance was not having knowledge as it is an admitted fact that he himself has indulged in smuggling of HSD. In such a situation, I am of the view that Noticee's plea is misplaced as much as action of the Tindel prevented them to prove that person in-charge of the vessel did not have knowledge about smuggling of HSD. Therefore, it can not be said that none of the person i.e. the owner of the conveyance, his agent and person-in-charge was not having knowledge of the offense as mentioned in the Section 115 (2). In

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the present case, undisputedly the person in charge of the conveyance was the Tindel and he was in the knowledge of transporting of the offending goods. Under these circumstances, vessel requires to be the confiscated under Section 115 and argument advanced by M/s. Sagar Shipping Co for not to confiscate the vessel on this count does not sustain. The Noticee relied upon case law of Vishnu Thapav [2017 (358) ELT 1225 (Tri. All.)]. However, I find it relevant to refer to a latest judgment of the Hon'ble CESTAT in the case of Minati Saha reported as 2019 (370) E.L.T. 736 (Tri. - Kolkata), in identical case of confiscation of a vehicle, wherein it has been *inter alia* has held as under:

"7. I find from the record that none came forward to claim the seized goods. Therefore, I agree with the findings of the lower authorities that these were attempted to export to Bangladesh illegally. The Commissioner (Appeals) observed that the driver of the Truck, knowing fully well, loaded the impugned goods attempting to export to Bangladesh. Section 115 of the Customs Act, 1962 provides confiscation of conveyances. Sub-section (2) of Section 115 provides any conveyance used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in-charge of the conveyance. In the present case, the appellant herein, the owner of the seized truck failed to prove, that she and her agent the Driver, had no knowledge of the transporting of the smuggled goods. Hence, the confiscation of the seized truck is justified. The Learned Counsel relied upon the case of Munna v. Commissioner of Customs, Lucknow (supra) and submits that there was no evidence to show that the owner or Driver had knowledge about the smuggled nature of the goods. In the present case, it is evident from the record that the Driver had knowledge of the smuggled nature of goods. Accordingly, this case law is not applicable to the facts of the present case."

20.6 In view of the above, relying on the judgment of the Hon'ble CESTAT, I hold that the Vessel Sagar Darshan used as conveyance is liable to confiscation under Section 115 of the Customs Act, 1962.

20.7 The Noticee has relied upon following case laws which are not applicable in this case as discussed under:

(i) In the matter of M/s. Finessee Creation Inc. [2009 (248) E.L.T. 122 (Bom.)] the issue was that whether improperly imported goods are liable to confiscation under Section 111 of the Customs Act, 1962, where the goods were cleared and not available for seizure. Whereas in this case the confiscation of Conveyance is under Section 115 of the Customs Act, 1962 and not under Section 111 of the Customs Act, 1962 as held above. Hence, appellant's reliance on this case law is mis-placed.

(ii) In the case of M/s. Garg forging and casting Ltd [2009 (235) E.L.T. 472 (Tri. - Del.)], the issue involved was that the exporters have mis-declared

LSJ

the nature, quality and value of the goods exported and the adjudicating authority has accordingly ordered recovery of drawback claim in respect of goods already exported and drawback claims have already been settled and paid to the exporters. The issue before the Hon'ble CESTAT was departmental appeal against the Order of the Hon'ble Commissioner having held that the goods were liable to confiscation, had not ordered to pay fine in lieu of confiscation. In this case impugned goods was not available for seizure and hence the Hon'ble CESTAT has rejected the departmental appeal. Thus, the Hon'ble CESTAT's Order is not relating to confiscation of conveyance under Section 115 of the Customs Act, 1962 seized by the department and hence can not be made applicable in the case on hand.

(iii) Similarly, in the case of M/s. M S International, [2004 (174) E.L.T. 101 (Tri. - Del.)], the Hon'ble CESTAT has upheld the adjudicating authorities' order for not imposing redemption fine though it was held to be liable to confiscation under Section 111 of the Customs Act, 1962 where the imported goods were not seized by the department. Whereas, in the case on hand is confiscation of Seized conveyance under Section 115. Therefore, I find that the case law relied upon by the appellant is not applicable in this case.

(iv) In the matter of Shiv Kripa Ispat Pvt Ltd [2009 (235) ELT 623 (Tri-LB)], the Hon'ble CESTAT was dealing with the issue of imposition of Redemption Fine where goods were not available for confiscation of clandestinely cleared Excisable goods under Rule 25 of CER, 2002 with reference to provisions of Section 111 and Section 125 of the Customs Act, 1962. Therefore, the citation can not be made applicable in the present issue of Confiscation of Conveyance under Section 115 of the Customs Act, 1962.

21. As regards conclusion of proceedings under Section 28(6), the Noticee has relied upon the case law of M/s. J. S. Steel Traders [2022(380) ELT 483(Chan.)] and M/s. Orbit Jewelers [2016 (338) E.L.T. 620 (Tri. - Del.)]. In the matter of M/s. J.S. Steel Traders, the issue was conclusion of proceedings where the goods were provisionally released, the importer paid duty along with interest and penalty. However, penalties were imposed in adjudication of the Show Cause Notice issued. The Show Cause Notice was issued without invoking Section 28 to the Noticee holding that the duty has been paid by the appellant under Section 18(2) of the Customs Act, 1962 therefore the interest is



to be demanded under Section 28AA of the Act and penalties to be imposed under Section 112 and Section 114AA of the Act. The Hon'ble CESTAT has held that the duty payment along with interest and penalty was sufficient and the proceedings were deemed conclusive under Section 28(5) of the Customs Act, 1962. Thus, the matter did not involved confiscation of Conveyance.

21.1 In the matter of M/s. Orbit Jewelers [2016 (338) E.L.T. 620 (Tri. - Del.)] the matter involved was deemed conclusion of proceedings and adjudication requiring confiscation of the seized goods or imposing penalties where duties along with interest and penalty were paid by the Noticees in compliance to erstwhile first proviso to Section 28(1A) of the Customs Act, 1962. The Hon'ble CESTAT in this case, with regard to deemed conclusion of proceedings under erstwhile Section 28(1A) of the Customs Act, 1962, has allowed the Appeal of the Importer holding that proceedings were deemed conclusive and no further adjudication requiring confiscation of the seized goods or imposing penalties. Similarly, in line with the above judgments, in this case, it has already been held at foregoing para **19.1** that since the duty along with interest and penalty has been paid by M/s. Sagar Shipping Co, the proceedings are deemed conclusive in respect of offending goods i.e. HSD. However, the case laws relied upon by the Noticee can not be made applicable in case of Confiscation of 'Conveyance' under Section 115 of the Customs Act, 1962.

22. The Noticee referred definition of goods under Section 2 (22) of the Customs Act, 1962 to include "Vessel". However, to appreciate the contentions, it is necessary to understand certain concepts as envisaged under the Act. The Definition of "Conveyance" defined under Section 2 (9) of the Customs Act, 1962 includes a vessel, an aircraft and a vehicle. As per Section 2 (22), 'Goods' for the purpose of the Act includes vessels, aircrafts and vehicles, yet the distinction has to be recognized between a 'vessel' or an aircraft as a mere 'goods' and when the vessel or an aircraft comes to India as a 'conveyance' carrying imported goods. When a vessel or an aircraft is imported into India as a goods, customs duty is payable thereon. However, when a vessel is used as a conveyance of an imported goods, the position would be different. Therefore, I am not inclined to accept the argument of the Noticee that the Vessel Sagar Darshan was also a 'Goods' alongwith HSD and not conveyance in their case for the purpose of deemed conclusion under Section 28(6) of the Customs Act, 1962.



22.1 I further find that the Hon'ble CESTAT in the case of M/s. Orbit Jewellers has referred CBIC Circular No. 831/8/2006-CX, dated 26-7-2006 issued with reference to amendment in Section 11A of the Central Excise Act, 1944 regarding deemed conclusion of the proceedings. However, I find it relevant to mention CBIC Circular No. 11/2016- Cus dated 15/03/2016 clarifying provisions of deemed conclusion. The CBIC while clarifying to conclude the proceedings under provisions of Section 28 (6) in connection to Demand of duty and also notices issued under Section 28 to other persons, has categorically clarified that cases invoking confiscation provisions including under Section 115 would be out of purview of the Circular.

"(5) The provision of deemed conclusion is contingent upon the person to whom a SCN has been issued under sub-section (1) or sub-section (4) paying up all the dues of duty, interest and penalty as the case may be. Only in such a circumstance of compliance, shall closure of proceedings against other persons come into effect. Therefore, as a corollary, other persons implies person(s) to whom no demand of duty is envisaged with notice served under sub-section (1) or sub-section (4) as the case may be. Other persons who happen to be co-noticees in the SCN for their acts of commission or omission other than demand of duty would be benefitted by the deemed closure in cases where the compliance of conditions mentioned in proviso to sub-section (2) or clause (i) of sub-section (6), as the case may be, by the main noticee to whom inter alia a demand of duty has been issued has been fulfilled. Further, all such cases where proceedings reach closure stage under the provisions of Section 28, an order to the effect must be invariably issued by the concerned adjudicating authority.

(6) Section 28 primarily deals with the recovery of duty or erroneous refund. While introducing the facility of deemed conclusion, enabling provision was made for payment of interest and/or penalty. Therefore, all such SCNs or cases which involve duty, interest and/or payment of penalty shall be covered by the above clarification. Further, it may be noted that the cases involving seizure of goods under Section 110 of the Customs Act, or cases where confiscation provisions under sections 111, 113, 115, 118, 119, 120 and 121 are invoked, would be out of purview of this Circular.

22.2 In view of the above discussions, I am of the view that proceedings in respect of confiscation of Conveyance under Section 115 of the Customs Act, could not be held deemed concluded in line with the demand of duty on offending goods under Section 28 of the Customs Act, 1962. Therefore, I hold the Vessel Sagar Darshan liable to confiscation under Section 115 (1) (e) of the Customs Act, 1962. However, as stipulated under proviso to Section 115 (2), I



offer owner of the conveyance i.e. M/s. Sagar Shipping Co, Mumbai option to pay fine not exceeding Rs.12,16,278/- i.e. market price of the smuggled goods "High Speed Diesel Oil" in lieu of the confiscation of the vessel. I also find the quantum of Redemption Fine imposed to be commensurate with the facts of the case, role of the Owner of the Conveyance and market price of the smuggled goods i.e. HSD.

23. In view of the above discussion and findings, I pass the following order:

ORDER

I order for confiscation of the Vessel MSV "Sagar Darshan" under the provisions of Section 115(2) of the Customs Act, 1962. However, I offer the same for redemption under Section 115(2) of the Customs Act, 1962 upon payment of a fine of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand Only).

24. This order is issued without prejudice to any other action that may be taken against the Noticees or any other person under the Customs Act, 1962 or any other law for the time being in force.

Chuna Ram
20/06/2024

(चुना राम / Chuna Ram)
अपरआयुक्त/Additional Commissioner

F. No. CUS/821/2023-Adjn.

Date: 20.06.2024.

BY SPEED POST / HAND DELIVERY

To,
M/s Sagar Shipping Co.,
Shop No-6, Dayal Bhawan,
Ground Floor,
104, Keshavji Nayak Road,
Mumbai.40009

Copy to:

1. The Commissioner, Customs (Prev.), Jamnagar
2. The Superintendent (RRA), Customs (Prev.) HQ, Jamnagar
3. The Superintendent (Recovery), Customs (Prev.) HQ, Jamnagar
4. The Superintendent (Systems) Customs (Prev.) HQ, Jamnagar
5. The Deputy Commissioner, Customs Division, Jamnagar.

6. The Superintendent, Custom House, Salaya.
7. Guard file.