DIN- 20240871ML000000FF99
OIO No. KND-CUSTM-000-COM-09-2024-25

OFFICE OF THE COMMISSIONER

CUSTOM HOUSE, KANDLA

NEAR BALAJI TEMPLE, NEW KANDLA

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DIN- 20240871ML000000FF99		
A	File No.	GEN/ADJ/COMM/527/2023-Adjn-O/o Commr-Cus-Kandla
B	Order-in-Original No.	KND-CUSTM-000-COM-09-2024-25
C	Passed by	M. Ram Mohan Rao, Commissioner of Customs, Custom House, Kandla.
D	Date of Order	06.08.2024
E	Date of Issue	06.08.2024
F	SCN No. & Date	CUS/SIIB/INT/59/2021-SIIB dated 08.08.2023
G	Noticee / Party / Importer / Exporter	M/s. Sima Marine India Pvt. Ltd and M/s. MBK logistix Pvt. ltd

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

2. 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:

Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench,

2nd Floor, Bahumali Bhavan Asarwa,

Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad - 380004

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

4. 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.

5. 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.

6. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.

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

8. An appeal against this order shall lie before the Appellate Authority on payment of 7.5% of the duty demanded wise duty or duty and penalty are in disupte, or penalty wise penalty alone is in dispute.

BRIEF FACTS OF THE CASE:

M/s. Sima Marine India Pvt. Ltd, E-704-707, 7th Floor, E-Wing, Tower-2, Sector-40, Nerul Node, Seawood Grand Central, Darave, Navi Mumbai holding IEC-0311031617 (hereinafter referred to as "the importer" for the sake of brevity) filed Bill of Entry No. 7534525 dated 07.08.2018 for import of old and used container ship MV MOGRAL and Bill of Entry No. 7759428 dated 24.08.2018 for import of old and used container ship MV Marada.

2. On the basis of Alert Notice No. 02/2021 dated 23.02.2021 issued by the Commissioner of Customs, Mangaluru, Custom House, Mundra started investigations against M/s. Mahi Marine Pvt. Ltd and related concerns namely M/s. Sima Marine Private Limited with respect to import of vessels at Mundra Port. During investigation, it was observed that the importers while filing Bill of Entry for import of old and used container ships 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 the 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 by not declaring the same in the Bills of Entry. Further, during the investigation at Mundra port, it has been revealed that M/s. Sima Marine Private Limited has imported two old and used container ships namely MV MOGRAL and MV VARADA at kandla port and had not paid the duties on the bunkers and lubricants. On being brought to the notice of the importer M/s. Sima Marine Private Limited, they had paid Rs. 66,29,625/- towards their duty liability on the import of old and used container ship MV MOGRAL at kandla port. During the investigation, both the ships MV MOGRAL and MV VARADA had a call at the Mundra port and the same was rummaged by the officers of Mundra Customs on 02.03.2021 & 06.03.2021 respectively.

3. The matter was transferred to Custom House Kandla vide letter dated 19.03.2021 alongwith Rummaging reports of each vessel. During rummaging of the vessel MV VARADA on 06.03.2021 by the SIIB Mundra, an undertaking was submitted by M/s. MBK Logistix Private Limited, Agent of M/s. Sima Marine Private Limited that duty payment for bunkers available on board MV

VARADA will be done by them and requested to issue the port clearance of the vessel Customs. In pursuance of the same, letters dated 29.06.2021 and 23.11.2022 were issued to M/s. MBK Logistix to provide the details of payment done by them. No reply was received from them. Further summon dated 15.12.2022 was also issued to M/s. MBK Logistix Pvt.Ltd on the matter but none appeared to produce the proof of payment. During investigation summons were also issued to the importer M/s. Sima Marine India Pvt. Ltd on 14.02.2023, 09.05.2023 and 14.07.2023 to tender their statement and produce evidences with regard to payment of bunkers on board of vessel MV VARADA but no one appeared. 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:-

S. No.	BoE No. & Date	Goods Declared	CTH	Value declared	Assessed Value	Duty only IGST
1.	7534525 dated 07.08.2018	Old and used container ship MV MOGRAL	89011010	USD 8750000 (Rs.60,59,37,500)	USD 8755000 (Rs. 60,62,83,750)	Rs. 3,03,14,188
2.	7759428 dated 24.08.2018	Old and used container ship MV VARADA	89011010	USD 13000000 (Rs.924300000)	USD 13009000 (Rs.924939900)	Rs. 4,62,46,995

4. After scrutinising the evidences available on record viz. Commercial invoice, Certificate of fair market value and assessed value, Provisional Certificate of Indian registry and license, Memorandum of Agreement, Bunker Survey report duty of customs as applicable on Bunkers (Lub. Oil, HSD and Fuel Oil) was calculated and it appeared that at the time of import of the above old and used container ships i.e. "MV MOGRAL and "MV VARADA", the importer failed to declare the quantity and value of the above Lub. Oil, HSD and Fuel Oil remaining on board and evaded duty totally amounting to Rs. 47,73,712/- for "MV MOGRAL" and Rs. 59,44,812/- for "MV VARADA". During the rummaging of the vessel by the Mundra Customs, it was brought to the notice of the importer and the importer voluntarily paid amount of Rs. 66,29,625/- (Rs. 47,77,990/- as duty challan no. 1041 dated 05.03.2021 + Rs.18,51,635/- as interest challan no.1040 dated 05.03.2021) for "MV MOGRAL. For the vessel MV VARADA an undertaking dated 06.03.2021 was submitted by M/s. M B Logistix Pvt. Ltd, Agent of the vessel M V VARADA that duty payment for Bunker on board vessel MV VARADA would be done by them.

5. Accordingly a Show cause notice F.No. CUS/SIIB/INT/59/2021-SIIB-O/o-Commr-Cus-Kandla dated 08.08.2023 was issued to M/s. Sima Marine

India Pvt. Ltd asking them as to why duty of customs amounting to Rs. 47,73,712/- (MV MOGRAL) and Rs. 59,44,812/-(MV VARADA) should not be demanded and recovered under Section 28(4) of the Customs Act, 1962 alongwith interest under Section 28AA of the Customs Act, 1962. Penalty under Section 114A and 117 of the Customs Act, 1962 were also proposed. They were also asked to show cause as to why the undeclared bunkers valued at Rs.2,91,11,943/-(MV MOGRAL) and Rs. 3,30,29,979/-(MV VARADA) should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962. Further the Show cause notice also proposed appropriation of amount paid by them.

6. M/s. MBK Logistix Pvt. Ltd were also asked to show cause as to why penalty under Section 117 of the Customs Act, 1962 should not be imposed upon them.

DEFENCE SUBMISSION-

7. M/s. Lloyd & Johnson, authorised representatives of both the noticees, vide submission dated 02.11.2023, 02.08.2024 and Argument note dated 16.05.2024, interalia, submitted the following:-

i. Sima Marine and MBK are the companies incorporated under the relevant provisions of the Companies Act, 1956.

ii. Sima Marine has been engaged in the business of vessel operations, container shipping and related logistic services. MBK is in the business of shipping, agency handling & logistics, holds the agency of Sima Marine in the present case and has acted as the agent in Guajarat, in good faith.

iii. The documentation & process followed while importing used/second-hand container vessels into India, for a foreign-going trade.

iv. The legal provisions invoked in the SCN, vis-à-vis their interpretations, and intended objectives (special reference to CA, 1962 and Merchant Shipping Act, 1958).

v. Part-V of the Merchant Shipping Shipping Act, 1958 prescribes that when vessels enter India for the first time, are required to be registered with the specified authority of the Mercantile Marine Department as Indian ships 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 an Indian vessel may be used either for trading as a foreign run or exclusively for coastal run. Further any such ship or vessel may be

taken outside India or chartered for coastal trade in India, only after obtaining the requisite license from the Director General of Shipping, under the provisions of Section 406 or 407, respectively, of the said Merchant Shipping Act.

vi. Sima Marine, in full compliance with the prescribed provisions of MSA, 1958, Custom Act, and Regulations, thus have filed the IGM, and Bill of Entries with jurisdictional Customs authority. The copy of the Registration Certificates issued under the provisions of "MSA, 1958, for the vessels MV MOGRAL and MV VARADA, for the purpose of flagging the vessels as Indian Flag are hereby marked and annexed as Annexure-II colly.

vii. Further/alongwith the flag registration proceedings, Sima Marine has obtained the necessary trade licences for the vessels to remain and maintain the status of foreign-going vessels until 10.08.2021 (MV MOGRAL) and 27.08.2021 (MV VARADA). The required certificate/trade license, to remain as foreign going/coastal trade, issued by MMD under the provisions of MSA, 1958, in the name of MV VARADA and in the name of MV MOGRAL.

viii. Moreover, it is essential to mention here that, in furtherance of the said trade licenses, the vessels in their subsequent voyages have remained as "foreign going vessels" which is evident from the attached schedule of MV MOGRAL and MV VARADA.

ix. The BOEs were filed and Sima Marine paid IGST @5% on the value of the old and used container vessels. They remained in a foreign-going status, with exim containers onboard when they arrived kandla port.

x. Sima Marine has filed the Bill of Entry as per the existing guidelines and paid 5 percent GST on the value of the vessel. In this case, both vessels continued to operate in Foreign run under the General Trading license granted by DG Shipping.

xi. Thus in view of the above, following Section 87 of the Customs Act, there is no liability to pay duty on bunkers and other consumables items during the period the vessels are in foreign-going status.

xii. At the relevant point in time, by virtue of certificates issued and operationally, both the vessels (M.V. MOGRAL & MV VARADA) remained foreign-going and thus vessels in Foreign status are not liable to pay duty on the onboard bunkers (on import of vessel) under S.87 of the Custom Act, 1962.

xiii. The stores/bunkers that remained on board the vessels were consumed by MV MOGRAL and MV VARADA during their subsequent voyages respectively.

xiv. The application of the Circular no. 37/96 dated 03.07.1996, Circular No. 09/18 dated 19.04.2018 read with Notification No. 07/2015-2020 to the present case is baseless and erroneous. The circulars are applicable to old 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.

xv. The Gujarat Adani port Ltd. Vs. Commissioner of Customs, Kandla is not applicable in the instant case.

xvi. Further, they have also relied upon various case laws:-

a. Asean cableship 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 CA, 1962, being engaged for performing 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 CA, 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/transhipment to Kandla. The appellants had believed that the impugned goods were meant for use on a foreign-going vessel. Therefore, the allegation of willful mis-declaration 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. M/s. Chakit Agencies vs Commissioner of Customs (Exports) 2023 Taxscan (CESTAT) 175

d. Sameer Kumar Jaiswal [2018(362)ELT 348(T-Mum)]
e. Commissioner of Customs vs. M/s. Phoenix Marine services & ors.
f. JM Baxi & co. vs. Joint Commissioner.

RECORD OF PERSONAL HEARING:-

8. Shri Mahammad Rafiq, Advocate, Lloyd & Johnson appeared for personal hearing on 16.05.2024. He briefly explained the case and also reiterated the facts in of their written submission dated 08.11.2023. On the basis of their submission he placed his contention that M/s Sima Marine has obtained statutory provisional registrations for the imported vessels from the competent Authority (MMD) under the provisions of MSA, Act, 1958, to flag the vessel as an India Flag. Further for the demand on the undeclared bunkers, they placed reliance in various judgments and requested to quash the demand.

DISCUSSION AND FINDINGS:-

9. I have carefully gone through the Show Cause notice, written submission, record of personal hearing and all the case laws cited by them.

10.1 The Show cause notice has alleged that the vessel has been imported in India as goods and the importer was required to file Bill of Entry for bunkers onboard and pay the duties of customs thereupon. The crux of the show cause notice is captured in Para 7.13 of the notice reproduced below:-

"*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 the 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 at a port where there is registrar, 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, 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 such case as at the time of 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."

10.2 Whereas, the noticee in their submission has argued that the vessels continued to remain foreign going vessels until the same were converted into coastal run vessel and they are exempt from payment of duties on bunkers.

11. Thus, the issues to be decided before me are:-

(i) In case of import of old and used vessels viz. MV MOGRAL and MV VARADA whether the undeclared bunkers of the vessels would be exempted from the duties of Customs as per Section 87 of the Customs Act, 1962.

(ii) Whether the undeclared bunkers are liable for confiscation under Section 111(m) of the Customs Act, 1962.

(iii) Whether they are liable for payment of duties of Customs amounting to Rs. 47,73,712/- for MV MOGRAL and Rs. 59,44,812/- for MV VARADA under Section 28(4) of the Customs Act, 1962 alongwith interest under Section 28AA of the Customs Act, 1962.

(iv) Whether penalties under Section 114A/117 of the Customs Act, 1962 are liable to be imposed.

12. I find that M/s. Sima Marine India Pvt. Ltd. has filed Bill of Entry No. 7534525 dated 07.08.2018 for import of old and used container ship MV MOGRAL and Bill of Entry No. 7759428 dated 24.08.2018 for import of old and used container ship MV Marada.

13. During investigation, it was found that the importers while filing Bill of Entry for import of old and used container ships did not declare the bunkers and lubricants and their value in the Bill of Entry. The issue under examination refers to question of eligibility of bunkers in present case to the benefit of exemption from the duties of customs under Section 87 of the Customs Act, 1962.

14. On perusal of the Memorandum of Agreement dated 04.07.2018(RUD-3) between the seller M/s. Northern Shipping Ltd., and the buyer M/s. Sima Marine (India) Pvt. Ltd. for sale of old & used container ship "MV MOGRAL", I

find that the seller, at Sr.No.7-spares/bunkers etc, has specifically mentioned that-

> "***The Buyer shall take over remaining bunkers and price to be based on closing Platts price Fujairah and unused lubricating price to be based on last purchase price of Sellers in storage tanks and sealed drums, pay the current net market price (excluding barging expenses) at the port and date of delivery of the Vessel.***
>
> ***Payment under this clause shall be made at the same time and place and in the same currency as the Purchase price."***

15. Further, on perusal of the Memorandum of Agreement dated 26.07.2018(RUD-4) between the seller M/s. Onyx Navigation Ltd., and the buyer M/s. Sima Marine (India) Pvt. Ltd. for sale of old & used container ship "MV VARADA", I find that the seller, at Sr.No.7-spares/bunkers etc., has specifically mentioned that-

> "***The Buyer shall take over remaining bunkers and price to be based on closing Platts price Fujairah and unused lubricating price to be based on last purchase price of Sellers in storage tanks and sealed drums, pay the current net market price (excluding barging expenses) at the port and date of delivery of the Vessel.***
>
> ***Payment under this clause shall be made at the same time and place and in the same currency as the Purchase price."***

16. It is clear from the above Memorandums of Agreement that the payment of bunkers was not included in the sale price of both the above container ships. Further, the importer has not disputed this in their submission.

17. As the noticee argued, *whether the import of old and used vessels viz. MV MOGRAL and MV VARADA falls under the definition of "foreign going vessel" and eligible for exemption of duties of customs as per the Section 87 of the Customs Act, 1962?*

17.1 In this regard, I find that the importer has argued that they filed Bills of Entry and paid IGST @5% on the value of the old and used container vessels. They have further argued that both the vessels continued to operate in Foreign run under the General Trading license granted by DG Shipping. They remained in a foreign-going status, with exim containers onboard when they arrived kandla port. Thus as per Section 87 of the Customs Act, there is no liability to pay duty on bunkers and other consumables items during the period the vessels are in foreign-going status.

17.2 Clearly, there is no dispute that the old and used vessels, including bunkers on board, started its journey from Jebel Ali and Dubai port, United Arab Emirates to Kandla. Thereafter, the importer filed the Bills of Entry for the import of vessels. In this regard the list of dates and Events, as submitted by the noticee, are given below:-

Name of the Vessel	Memorandum of Agreement	Bill of Entry	Arrival report	Provisional certificate/Temporary pass of Indian registry, issued under Section 40(1)/41 of MSA, 1958	Certificate of Indian registry issued under Section 34 of MSA, 1958
MV MOGRAL	04.07.2018	03.08.2018	09.08.2018	20.07.2018	24.10.2018
MV VARADA	26.07.2018	20.08.2018	23.08.2018	24.08.2018	21.09.2018

17.3 I find, from the above, that the Indian consular officer in Dubai issued a provisional certificate in respect of vessel MV Mogral on 20.07.2018 as per the provisions of Section 40(1) of Merchant Shipping Act (MSA), 1958. Further as per the provisions of Section 40(2), such certificate will have effect until the expiration of 6 months from its date or until the arrival of the ship at the port where there is a registrar. The relevant extracts of the Section 40 is reproduced below:-

> "***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."

17.4 Thereafter the vessel MV Mogral arrived at the Kandla port on 09.08.2018 and the vessel was subsequently registered in India on 24.10.2018 by Indian registry under the provisions of Section 34 of the MSA, 1958. The relevant extract of Section 34 is reproduced below:-

> 34. Grant of certificate of registry.—On completion of the registry of an Indian ship, the registrar shall grant a certificate of registry containing the particulars respecting her as entered in the register book with the name of her master.

17.5 As per the available records, I find that both the vessels are brought to India under a provisional registration as specified under MSA, 1958 for the purpose of registration in India. The vessels are here to be treated as 'goods' for the purpose of import under the Customs Act, 1962 and not as 'conveyance'. In this regard, relevant sections are reproduced:-

> "***Section 2***. *Definitions: In this Act, unless the context otherwise requires:-*
>
> *(23) "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;*
>
> *(27) "India" includes the territorial waters of India;*
>
> Section 12 of the Customs Act, 1962 which provides for levy of Customs duty on goods imported into India reads as under:-
>
> ***12. Dutiable goods.***
>
> *(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)] , or any other law for the time being in force, on goods imported into, or exported from, India.*
>
> *(2) [The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.]*

17.6 Above three provisions of the Customs Act, 1962 stipulate that duty is chargeable on goods imported into India. Importation takes place once goods enters into territorial waters of India and the event of importation/import attracts provisions of Customs Act, 1962 including levy of duty under Section 12 of the Act. The word "import" is defined in Section 2(23) and unless the context otherwise requires "import" with its grammatical variations and cognate expressions means bringing into India from a place outside India. The word 'India' is defined in Section 2(27) which is an inclusive definition and it states that 'India' includes the territorial waters of India. Thus the combined effect of the words 'import' and 'India" in these two sub-sections of Section 2 is that import takes place when goods are brought into the territorial waters of India from a place outside India. The duties of customs are levied with reference to the goods and the taxable event is the import of goods within India i.e. within territorial waters. The above provisions do not provide for levy of duty beyond territorial waters. Therefore, in view of the same, it is clear that the vessels and bunkers acted as goods when reached at the port of Kandla.

17.7 In this regard, I refer to Para 3.3 of the Circular No. 16/2012-Customs dated 13.06.2012 wherein it is clarified that vessel 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 vessel 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 license from the Director General of Shipping, under the provisions of Section 406 or 407, respectively of the said Merchant Shipping Act.

17.8 Thus as regards liability of bunkers in this case to customs duties, both temporary pass or registration certificate issued under Section 34 or 40 of the MSA, 1958, have to be understood w.r.t provisions of Section 2(23), 2(27) and Section 12 of the Customs Act, 1962; and these provisions of Merchant Shipping Act, 1958 cannot be understood as overriding the provisions of Customs Act, 1962.

17.9 Further, it is pertinent to examine the provisions contained in Section 2(21) and Section 87 of the Customs Act, 1962 in order to ascertain whether the vessels MV MOGRAL and MV VARADA were eligible for duties of customs on onboard bunkers not declared. The definition of the term "foreign going vessel or aircraft" as defined in sub-section 21 of Section 2 which reads as under:-

> *"(21) 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;"*

Further Section 87 of the Customs Act, 1962 is reproduced below:-

> **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.

17.10 On perusal of the Section 87, it is clear that the duty of customs on consumption of imported stores on board a vessel does not arise during the period such vessel is a foreign-going vessel. As discussed above, vessels in this case are goods for import. Bills of Entry were filed in this regard. As soon as the vessel is allowed out of Charge, the vessel alongwith its provision/stores in it cease to be imported goods since vessel becomes part of the landmass of the Indian territory and considered to have been brought into India. Thus, the old and used vessels of this case imported are to be classified as goods only and question of considering it as foreign going vessels on the date of importation, once the Bill of Entry is filed, doesn't arise. Further as discussed earlier it becomes eligible to be classified as foreign going vessel subsequent to the import and only when the certificate is issued under Section 34 of the Merchant Shipping Act, 1958 to be operated for foreign run.

17.12 Further the provisions of Section 406 and 407 of the MSA, 1958, that no 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, have to be understood according to the above findings.

17.13 Thus, the continuity of considering the vessel as being a conveyance on foreign run doesn't rest on the facts of the case as the filing of Bill of Entry for import of vessel represents the fact that vessel is imported as 'goods'. Provisional certification and subsequent certifications in this case under the provision of MSA, 1958 are in consonance with the scheme of Customs Act, 1962 to levy customs duties on import of vessels and its bunkers.

The sequence of acts to be performed for registration, after a vessel is imported, as stated in various sections of MSA, 1958 clearly establishes that there is no conflict between the Customs Act, 1962 and MSA, 1958 in recording a finding that a vessel under import alongwith bunkers should suffer customs duties when imported first into India as goods on filing of a Bill of Entry. Therefore, the argument of the noticee that the vessels were acting as foreign going vessels during the subsequent voyages has no effect on the situation in hand as during the import of vessels they acted as goods only and not as foreign going vessel as explained above.

17.14 Further, I find that Section 87 reproduced above is not applicable in the instant case as the said section is for foreign going vessels and the duty of

exemptions is allowed on consumption of stores during the period such vessel is foreign going vessel.

17.15 Therefore, the undeclared bunkers have been brought into the territorial waters of India from a place outside India and the duties of customs are levied with reference as the taxable event i.e. the import of goods within India i.e. territorial waters has taken place.

18. In this regard, I find that the judgement of Gujarat Adani port limited Vs. Commissioner of Customs, Kandla reported in 2013 (287) ELT 330 (Tri-Ahmedabad) is squarely applicable in the instant case. The relevant extract of the judgement is reproduced below:-

> *"M/s. Gujarat Adani Port Ltd. (hereinafter referred to as GAPL) and M/s. Valentine Maritime (Mauritius) Ltd. (hereinafter referred to as VMML) entered into an agreement on 1-12-2003 for erection and pre-commissioning of off-shore crude handling projects at Mundra Port. Pursuant to the agreement, Barge DLB 600, Tug Neptune Star, Tug Claudine, Tug M/V UCO-XIV arrived at Mundra in September 2004 and November 2004. In respect of all these barge and tugs, the Bills of Entry were filed by GAPL and vessels were imported on re-export basis in keeping with the terms and conditions of the contract. Even though, the Customs duty was duly discharged and Bills of Entry were filed in respect of vessels imported for use in Mundra Port and to be re-exported and appropriate duty was paid, subsequently it was found that no Bill of Entry was filed nor any duty was paid in respect of bunkers/diesel/lub oil/grease/provisions/paints etc. which were brought by these vessels into India. Accordingly, Show Cause Notice was issued to GAPL, proposing to recover the duty from them amounting to Rs. 1,02,98,597/-. The Show Cause Notice was issued to GAPL in view of the fact that it was GAPL who had filed Bills of Entry in respect of vessels and according to Clause No. 13.7 of Article 13 of the contract between VMML and GAPL, the GAPL was to pay Customs duty on the consumables which according to the definition of 'consumables' in the contract included the bunker items also.*
>
> *8. 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.*** *When the Bill of Entry is filed for the goods, the definition of importer as submitted is relevant. If no Bill of Entry is filed and the goods are imported in contravention of provisions of law, they become smuggled goods. According to Section 2(39) of Customs Act, 1962, "'smuggling', in relation to any goods means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113 of Customs Act, 1962". According to the definition of imported goods in Section 2(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". In this case, as regards stores on the barge/tugs, they were imported goods till the Bill of Entry was filed in respect of barge/tugs and duty was paid and were allowed out of charge. As soon as the vessel was allowed out of charge, the provisions/stores in the vessel cease to be imported goods and acquire the nature of smuggled goods since the barge/tugs had become part of the land mass of Indian territory and considered to have been brought into India and therefore the stores on board barge/tugs also have to be considered as brought into India without payment of duty and without following the formalities.*

19. In view of the above discussion and findings, it is amply clear that

the import of vessels MV VARADA and MV MOGRAL by the importer doesn't provide for exemption of custom duties under Section 87 of the Customs Act, 1962. Therefore, I hold that the importer is liable to pay duties of customs amounting to Rs. 47,73,712/- for "MV MOGRAL" and Rs. 59,44,812/- for "MV VARADA" on undeclared bunkers under the provisions of Section 28(4) of the Customs Act, 1962 alongwith interest under Section 28AA of the Customs Act, 1962.

20. I further find that various case laws, relied upon by the noticees, are not applicable in the instant case as the said cases refer to foreign going vessels which are used for the carriage of goods between Indian port and foreign port. Neither of the cases refers to the situation in hand where vessel is itself imported and bunker remains undeclared.

Confiscation of goods under Section 111 and Redemption fine under Section 125

21. With regard to confiscation of goods having assessable value of Rs. 2,91,11,943/- (MV MOGRAL) and Rs. 3,30,29,979/- (MV VARDA) imported through Kandla Port under the provisions of Section 111(m) of the Customs Act, 1962, I find that the importer has failed to declare the bunkers & lubricants and their values in the Bills of Entry No. 7534525 dated 07.08.2018 and 7759428 dated 24.08.2018 respectively. Such acts on their part have rendered their goods liable for confiscation under the provisions of Section 111(m) of the Customs Act, 1962.

In this regard, I rely on the judgement of CC Mumbai Vs Multimetal Ltd-2002(Tri-Mumbai) wherein the Hon'ble Tribunal held that when mis-declaration is established, goods are liable for confiscation irrespective of whether there was malafide or not-. This judgement of Hon'ble Tribunal has been upheld in Apex court in 2003 (ELT A309 (SC).

22. In the instant case, it is evident that the vessels are not physically available for confiscation. However, the provisions of Section 125(1) and Judgements of Hon'ble High Court of Madras and Hon'ble high Court of Gujarat, as discussed below, don't necessitate the requirement of physical availability of goods for confiscation.

Section 125 of the Customs Act, 1962 provides for an option to pay fine in lieu of confiscation. Relevant paras of Section 125 are reproduced hereunder:-

"Section 125: Option to pay fine in lieu of confiscation:--

(1) **Whenever confiscation of any goods is authorized by this Act**, the officer adjudging it may, in thecase of any goods, the importation or exportation whereof is prohibited under this Act or under anyother 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, suchgoods have been seized, **an option to pay in lieu of confiscation such fine as the said officer thinks fit:**

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

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

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner ofsuch goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty andcharges, payable in respect of such goods."

23. It is apparent from the sub-section (1) of Section 125 that whenever confiscation of goods is authorized by this Act, the officer adjudging it shall in the case of goods other than prohibited goods give an option to pay fine in lieu of confiscation. The pre-requisite for making an offer of fine under Section 125 ofthe Act is pursuant to the finding that the goods are liable to be confiscated. In other words, if there is no authorisation for confiscation of such goods, the question of making an offer by the properofficer to pay the "redemption fine", would not arise. Therefore, the basic premise upon which thecitadel of Section 125 of the Act rests is that the goods in question are liable to be confiscated underthe Act. It is clear that the goods, amounting to assessable value of Rs. 13,05,16,437/- imported through Kandla Port, are liable to confiscation under the provision of Section 111(m) of the Customs Act, 1962 as discussed above, therefore the imposition of fine under Section 125 in lieu of confiscation is sustainable even though the goods are not available for confiscation.

24. In this regard, I rely on the Judgement of Hon'ble High Court of Madras in the case of M/s. Visteon Automotive Systems vs the Customs, 2017, wherein the Hon'ble Court in Para 23 categorically held that the physical availability of goods doesn't have any significance for imposition of redemption fine under Section 125, which is reproduced as under:-

"23. 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. We accordingly answer question No.(iii)"

25. Further, the above judgement has been relied upon by the Hon'ble High Court of Gujarat in the matter of SYNERGY FERTICHEM PVT. LTD. Versus STATE OF GUJARAT {2020 (33) G.S.T.L. 513 (Guj.)}. The relevant Paras of the said judgement are reproduced hereinbelow:-

"174. The per-requisite for making an offer of fine under Section 130 of the Act is pursuant to the finding that the goods are liable to be confiscated. In other words, if there is no authorisation for confiscation of such goods, the question of making an offer by the proper officer to pay the "redemption fine", would not arise. Therefore, the basic premise upon which the citadel of Section 130 of the Act rests is that the goods in question are liable to be confiscated under the Act. It, therefore, follows that what is sought to be offered to be redeemed, are the goods, but not the improper conduct of the owner to transport the goods in contravention of the provisions of the Act or the Rules. We must also bare in mind that the owner of the goods is liable to pay penalty under Section 122 of the Act. The fine contemplated is for redeeming the goods, whereas the owner of the goods is penalized under Section 122 for doing or omitting to do any act which rendered such goods liable to be confiscated under Section 130 of the Act. In the aforesaid context, we may refer to and rely upon a decision of the Madras High Court in the case of M/s. Visteon Automotive Systems v. The Customs, Excise & Service Tax Appellate Tribunal, C.M.A. No. 2857 of 2011, decided on 11th August, 2017 [2018 (9) G.S.T.L. 142 (Mad.)], wherein the following has been observed in Para-23;

"23. 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. We accordingly answer question No. (iii)."

175. ***We would like to follow the dictum as laid down by the Madras High Court in Para-23, referred to above***.

176. We may also refer to and rely upon a Supreme Court decision in the case of M.G. Abrol v. M/s. ShantilalChhotalal& Co, AIR 1965 SC 197, wherein the Supreme Court dealt with the very same issue and held as under;

"Another contention raised for the respondent is that the Additional Collector could not confiscate the goods after they had left the country and that therefore his order of confiscation of the scrap which according to him was not steel skull scrap was bad in law. The affidavit filed by the Additional Collector, appellant No. 1, mentions the circumstances in which the scrap exported by respondent was allowed to leave the country. It was allowed to leave the country after the Collector had formally seized it and after the agents of the shipping company had undertaken not to release the

documents in respect of the cargo to its consignees. This undertaking meant that the cargo would remain under the control of the customs authorities as seized cargo till further orders from the Additional Collector releasing the cargo and making it available to the consignees by the delivery of the necessary documents to them. The documents were allowed to be delivered to them on the application of the respondents praying for the passing on of the necessary documents to the purchasers of the goods in Japan and on the respondents giving a bank guarantee that the full f.o.b. value to be released from the said parch would be paid to the customs authorities towards penalty or fine in lieu of confiscation that might be imposed upon the respondents by the adjudicating authority. The customs authorities had seized the goods when they were within their jurisdiction. It is immaterial where the seized goods be kept. In the circumstances of the case, the seized goods remained on the ship and were carried to Japan. The seizure was lifted by the Additional Collector only when the respondents requested and gave bank guarantee. "The effect of the guarantee was that in case the Additional Collector adjudicated that part of the goods exported was not in accordance with the licence and had to be confiscated, the respondents, would, in lieu of confiscation of the goods, pay the fine equivalent to the of the bank guarantee. Section 183 of the Act provides that whenever confiscation is authorised by the Act the Officer adjudging it would give the owner of the goods option to pay in lieu of confiscation such fine as the officer thinks fit. This option was extended to the respondent at the stage before the goods were released from seizure. The formal order of confiscation had to be passed after the necessary enquiry and therefore when passed in the present case after the goods had actually left this country cannot be said to be an order which could not be passed by the Customs Authorities. I, therefore, do not agree with this contention."

26. In view of the above discussion, case laws and provisions of Section 125 of the Custom Act, 1962, I find it apt to impose fine in lieu of confiscation under section 125(1) of the Custom Act.

27. Penalty under Section 114A of the Customs Act, 1962.

27.1 With regard to the penalty under Section 114A of the Customs Act, 1962, it is already held that they have not paid the Custom duties amounting to Rs. 47,73,712/- and Rs. 59,44,812/- by way of wilfull suppression of facts, therefore, they are liable for penalty under section 114A of the Finance Act, 1962.

27.2 Further, I find that the Board vide Circular no. 61/2002-Cus dated 20.09.2002 clarified that while imposing penalty under Section 114A the quantum of penalty must be the amount of duty and interest. The contents of the board Circular no. 61/2002-Cus dated 20.09.2002, is as under:-

"It has been reported that a number of show cause notices were issued proposing the demand of not only duty, but also interest payable in terms of provisions of para 128 of the Hand Book of Procedures (1st April, 1993 - 31st March, 1997). While the Show Cause Notices have quantified/specified the amount of duty, the interest to be demanded has not been specified, although demands have been raised. It has been reported that in all such cases, penalty under section 114A is being imposed equivalent to the amount of duty which stands determined on the date of adjudication order. The Board has been requested to clarify as to whether mandatory penalty imposed under section 114A of the Customs Act, 1962 would be equal to the amount of duty or it would be equal to duty plus interest. Section 114A provides for levy of penalty equal to the duty or interest payable by a person in cases involving collusion or any willful mis-

statement, or suppression of facts by the said person. Conjunction "or" in section 114A seems to be creating confusion at the field level.

2. The matter has been examined in consultation with the Ministry of Law. The Ministry of Law, has stated that Maxwell's Interpretation of Statutes (p-229) while dealing with conjunctions "or" and "and" provides that - "To carry out the intention of the legislature, it is occasionally found necessary to read conjunctions "or" and "and" one for the other." The Hon'ble Supreme Court in a case reported AIR 1957 SC p.699 State of Bombay vs. R.M.D.Chamarbougwala also read the word "or" as "and" to give effect to the clear intention of the legislature. In view of this, the Ministry of Law is of the view that to carry out the intentions of the legislature, it is occasionally found necessary to read the conjunction "or" and "and" one for the other. A Constitutional Bench of the Hon'ble Supreme Court in a case reported in AIR 1963 SC p.1638 T.S.GovindlaljiMaharaj vs. State of Rajasthan has also observed that sometimes "or" must mean "and" as has been mentioned vide para 39 of the said judgment. A copy of the Ministry of Law's opinion is enclosed.

3. In view of the above, **it is clarified that penalty under section 114A of the Customs Act, 1962 should be equivalent to duty and interest**….."

In view of the same, I hold that the importer is liable to pay penalty under Section 114A of the Customs Act equal to the duty plus interest.

28. Penalty under Section 117 of the Customs Act, 1962.

28.1 I find that during investigations summons dated 14.02.2023, 09.05.2023 and 14.07.2023 to tender their statements and produce evidences with regard to payment of bunkers on board of vessel MV VARADA but no one appeared. Such act on their part has rendered them liable for penal action under Section 117 of the Customs Act, 1962.

28.2 Similarly, M/s. MBK logistix were requested, vide letters dated 29.06.2021 and 23.11.2022 to provide details payment of duties of customs in respect of MV VARADA as per their undertaking dated 06.03.2021. Further they have also dishonoured the summons dated 15.12.2022. Such act on their part has rendered them liable for penal action under Section 117 of the Customs Act, 1962.

29. In view of the above discussion and findings, I hereby pass the following order:-

(i) I order to confiscate the undeclared bunkers valued at Rs. 2,91,11,943/- (Rupees Two Crore Ninety One Lakhs Eleven Thousand Nine Hundred and Forty three only) onboard vessel MV MOGRAL and undeclared bunkers valued at Rs. 3,30,29,979/- (Rupees Three Crore Thirty Lakhs Twenty Nine Thousand Nine Hundred and Seventy Nine only) onboard vessel MV VARADA under Section 111(m) of the Customs Act, 1962.

As regards the undeclared bunkers and lubricants not physically available for confiscation, I impose redemption fine of Rs. 62,14,192/-(Rupees Sixty Two Lakhs Fourteen Thousand One Hundred and Ninety two only) upon M/s. Sima Marine India Pvt. Ltd under Section 125 of the Customs Act, 1962.

(ii) I determine and confirm the duties of customs amounting to Rs.

47,73,712/-(Rupees Forty Seven Lakhs Seventy Three Thousand Seven Hundred and Twelve only) for MV MOGRAL and Rs. 59,44,812/-(Rupees Fifty Nine Lakhs Forty Four Thousand Eight Hundred and Twelve only) for MV VARADA and order to recover the same from M/s. Sima Marine India Pvt. Ltd under Section 28(4) of the Customs Act, 1962.

I order to appropriate the amount of Rs. 47,77,990/-already paid by them against the demand of duty.

(iii) I order to recover the interest at applicable rate on the amount confirmed above at (ii) from M/s. Sima Marine India Pvt. Ltd under Section 28AA of the Customs Act, 1962.

I order to appropriate the amount of Rs. 18,51,635/-already paid by them.

(iv) I impose penalty equal to the duty plus interest confirmed above upon M/s. Sima Marine India Pvt. Ltd under Section 114A of the Customs Act, 1962.

(v) I impose penalty of Rs. 2,00,000/-(Rupees Two Lakhs only) upon M/s. Sima Marine India Pvt. Ltd under Section 117 of the Customs Act, 1962.

(vi) I impose penalty of Rs. 2,00,000/-(Rupees Two Lakhs only) upon M/s. MBK Logistix Pvt. Ltd under Section 117 of the Customs Act, 1962.

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

Signed by M Ram Mohan Rao
Date: 06-08-2024 19:15:48

(M. Ram Mohan Rao),
Commissioner,
Custom House, Kandla

BY SPEED POST A.D. /BY EMAIL

DIN- 20240871ML000000FF99

To,

(i) M/s. Sima Marine India Pvt. Ltd.,
E704-707, 7th Floor, E-Wing, Tower-2,
Sector-40, Nerul Node, Seawood Grand Central,
Darave, Navi Mumbai

(ii) M/s. MBK Logistix Pvt.Ltd.,
Second floor, Plot no. 133, Sector-8,
BOMGIM Complex, Gandhidham, Kutch-370201

Copy to:-

1. The Chief Commissioner, Customs Zone, Ahmedabad for the purpose of Review
2. The Superintendent (TRC/EDI/SIIB), Custom House Kandla, for further necessary action.
3. Guard File