CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/20890/2014-DB
C/21052/2014-DB
C/21066/2014-DB
C/21399/2014-DB

[All are arising out of Order-in-Original No. COC-CUSTM-000-COM-066/12-13 dated 20/01/2014 passed by Commissioner of CUSTOMS, COCHIN]

C/21269/2018-DB

[Arising out of Order-in-Appeal No36/2017-18 dated 23/03/2018 passed by Commissioner of CUSTOMS (Appeals) , COCHIN]

C/21271/2018-DB

[Arising out of Order-in-Appeal No37/2017-18 dated 23/03/2018 passed by Commissioner of CUSTOMS (Appeals) , COCHIN]

1.M/s. Devshi Bhanji Khona
(D B Khona)
Shipping Clearing And Forwarding Agents,
PO No. 650, Subramaniam Road, Wellingdon Island, Cochin-682003

2. Focus Energy Ltd
2nd Floor, Gopala Tower, 25,
RAJENDRA PLACE,
NEW DELHI
110088

3. Nicolas Singhal Master,

Tug M. V. Shunter,

Authorization Holder Mr. Prateek Sisodia,

2nd Floor, Gopala Tower, 25,
Rajendra Place, New Delhi -110088

4. GAC Shipping (India) Pvt. Ltd
Rep. by its PoA, Mr. Dicky Philip. T
PO No. 515, Subramaniam Road, Wellingdon Island, Cochin-682003

Appellant(s)

5. Focus Energy Ltd
2nd Floor, Gopala Tower, 25,
RAJENDRA PLACE,
NEW DELHI
110088

6. Focus Energy Ltd
2nd Floor, Gopala Tower, 25,
RAJENDRA PLACE,
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Versus

C.C-Cochin-Cus
CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN
KERALA
682009

Respondent(s)

Appearance:

Sh. V. Sridharan and Smt. Lakshmi Menon, Advocates for Focus Energy Ltd.

Lakshmi Kumaran & Sridharan
World Trade Centre NO.404-406, 4TH Floor, South Wing Brigade Gateway Campus No.26/1, DR. RAJKUMAR ROAD, Bangalore, Karnataka, 560 055

For the Appellant (s)

Shri Maruthi. S.H. Advocate
for GAC Shipping (India) Pvt. Ltd.
Sir Cariappa Wing, First Floor, Devatha Plaza, Residency Road, Bangalore-560025

None for Devshi Bhanji Khona

Mr. Veerabadra Reddy, Additional Commissioner (AR)

For the Respondent

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Date of Hearing: 17/07/2019

Date of Decision: 29/10/2019

<u>Final Order No. 20901-20906/2019</u>

Per : P. ANJANI KUMAR

Brief facts of the case are that the Appellants are, *inter alia,* engaged in the field of oil and gas exploration and exploitation; Government of India, Focus Energy Ltd. and Newbury Holdings Two Ltd have have entered in to a Production Sharing Contract (PSC) dated 2.3.2007 for undertaking petroleum mining operations; as per PSC (**Clause 17.5),** the appellants would be given exemption from the payment of customs duties on goods imported for undertaking petroleum operations; The Appellants brought a Jack - Up Rig "Mercury Focus" (previously known as "Trans-Ocean Mercury") from Egypt (flying Panama Flag), required for undertaking petroleum operations in the Block allotted to them under the PSC; the Rig can be used only for undertaking petroleum operations; From Egypt, the rig was carried by a larger dry-dock vessel named M.V. Talisman. An Anchor Handler Cum Supply Vessel (**AHTS**) was also brought to Cochin, for towing the rig from the port to the shipyard; the rig was not in an operable state, it was necessary that repairs be undertaken on it before it could be deployed for petroleum operations. Accordingly, the rig was brought to Cochin outer anchorage, so that it could be repaired in the customs bonded shipyard of Cochin Shipyard Ltd; the Shipyard is a customs bonded warehouse where the ship-building as well as ship repairs are undertaken in terms of the provisions of Section 65 of the Customs Act; Therefrom, an anchor handling tug-cum-supply vessel by the name "M.V. Shunter" (a support vessel for the rig and previously known as C.S. Safe) to tow and push the rig for repairs to the Cochin Shipyard was also brought to India. The said AHTS was brought in as it is a supply vessel designed to carry materials and men to and from the rig once the rig will be deployed for petroleum operations.

2. Request for entry inwards submitted and was granted on 17.03.2011; An IGM was filed was in respect of the M.V. Talisman, the Rig 'Transocean Mercury' and the AHTS 'M. V. Shunter'; Pursuant to the port clearance, the rig was towed to Cochin Ship-yard for repairs where the rig underwent repairs for almost a year; Pursuant to the repairs, the Appellants vide letter dated 7.04.2012 intimated to the customs department about the deployment of the rig for the purposes of petroleum operations. Accordingly, the appellants sought amendment of the IGMs filed when the rig and tug arrived in India. The amendments so sought were granted by the customs department in terms of Section 30 of the Customs Act; After the amendment of the IGM, a Bill of Entry No.176 dated 30.04.2012 (at page 240-241 of Vol II of the appeal memo) was filed for the rig and an essentiality certificate dated 13.04.2012 issued by the Director General of Hydrocarbon was also presented; the appellants sought exemption from payment of customs duties in view of the exemption contained in Notification No.12/12-Cus (Sl.No.359), granting exemption to goods imported for petroleum operations; Similarly, a Bill of Entry No.182 dated 4.05.2012, was filed for the supply vessel and an essentiality certificate dated 16.04.2012 issued by the Director General of Hydrocarbon was also presented; Customs, after examining the various aspects, assessed the bills of entry under Section 47, extending the exemption;

3. Subsequent to the clearance of the rig, an investigation was conducted by the department. A Show Cause Notice, dated 14th November 2012, was issued alleging that there has been an "import for home consumption" of the rig and the tug in March 2011, and as such they are liable to Customs duty at that point in time itself; benefit of the Notification No.12/12-Cus (Sl.No.359) was not available as the essentiality certificate is only obtained in April 2012; as the Bills of Entry have not been filed for the said vessels, the rate of duty should be determined in terms of Section 15(1)(c) of the Customs Act, 1962 and demanding duty on the rig, the tug and the stores and consumables. Commissioner of Customs, Cochin passed an Order in original dated, 20th January 2014, confirming a duty of Rs.11, 48, 43,512 on the Rig 'Transocean Mercury'; Rs. 1,32,13,016 on the tug AHTS C.S.SAFE; Rs.13,29,790 on the fuel and consumables used by the Rig Transocean

Mercury and Rs.39,08,893 on the fuel/ consumables used by the AHTS C.S. Safe. Commissioner confiscated the Rig and the Tug and imposed redemption fine of Rs.50, 00,000 and Rs.8, 00,000 respectively. Commissioner imposed a penalty of Rs.13, 32, 95,211 and appropriated an amount of Rs. 43, 23,515 AND Bank Guarantee of Rs 3.75 Crores. He also imposed penalties on others involved. The appeals filed are as below.

Appeal No.	**Appellant**	**Duty/ Penalty appealed against**
C/20890/2014	**M/s. Devshi Bhanji Khona (D B Khona)** Shipping Clearing and Forwarding Agents	Penalty of Rs 50,000
C/21052/2014	**Focus Energy Ltd**	Duty Rs 13,32,95,211/-Penalty Rs 13,32,95,211& RF Rs.50,00,000/-
C/21066/2014	**Nicolas Singhal Master** Tug M. V. Shunter, Authorization Holder Mr. Prateek Sisodia	Penalty of Rs 1,00,000
C/21399/2014	**GAC Shipping (India) Pvt. Ltd**	Penalty of Rs 10,00,000
C/21269/2018	**Focus Energy Ltd**	Appeal against Commissioner (Appeals) order allowing Department's appeal against amendment to IGM
C/21271/2018	**Focus Energy Ltd**	

4. Shri Sreedharan, appearing for the appellants, submits that the entire proceedings were initiated by the department in the instant case only after the bills of entry and the supporting documents were filed by the Noticees. Tracing the developments in the issue, right from the time the rig and the AHTS were brought to Cochin port, he submits that the customs department was always put to notice of the fact that the rig was first brought for repairs and that the AHTS will be used for towing the Rig to Cochin Shipyard; he submits the events, dates and documents as follows in the table below.

DATE	**EVENT**	**Documents submitted &details contained therein**
09.02.2011	Anchor Handling Cum Tug-cum-supply vessel **M.V.SUNTER** arrived at the Cochin Outer Anchorage	Arrival report submitted
17.03.2011	Tug berthed at Cochin Port after being	Request for entry inwards

	granted Entry Inwards	submitted and was granted for 17.03.2011
	Manual IGM for the AHTS Hunter/C.S. Safe was also filed	IGM No.1010936 was filed.
23.03.2011	Arrival Notice along with the documents such as ports of call for the Vessel M.V. Talisman which brought the rig into Cochin Port.	Mentioned clearly that the rig is to be released/ floated.
24.03.2011	Request for entry inward for the dry dock vessel was sought	Request submitted for the same
	Application filed seeking permission for filing manual IGM for the vessel M.V. Talisman and was granted	▪ Application clearly mentioned that the Rig will be released at Cochin road for ultimate repairs at Cochin Ship yard. ▪ That the rig is scheduled to reach on 27.03.2011.
	Manual IGM for M.V. Talisman filed	▪ IGM 9582/11 ▪ In the remarks column, it was mentioned "TRANSOCEAN MERCURY" carried from the port of Zenima to release at Cochin road for ultimate repairs at Cochin Shipyard.
24.03.2011	Application for filing of manual IGM for Rig TRANSOCEAN MERCURY.	• Clearly mentioned that the rig is being brought to Cochin shipyard for repairs. • Contains the noting by the department for considering the request for filing manual IGM.
25.03.2011	Letter written by the shipping agent to Dy. Commissioner, Preventive Department about the arrival of the rig 'Transocean Mercury'.	• Intimation to Customs Department about the arrival of the vessel with "Transocean Mercury"; • States that Rigs will be released at Cochin Shipyard for repairs; • Contain request for completing boarding formalities on 27.3.2011. • Counter verified by Customs

		Department.
25.03.2011	Application for entry inward filed for the Rig	• Entry inward sought for the Rig
30.03.2011	Cargo Declaration filed	• The position of the Rig is mentioned as 'CSL Shipyard'.
30.03.2011	IGM for the rig filed vide an application	• IGM No.9583/2011 • The IGM mentioned 'calling for repairs'. • Indicated that the Rig TRANSOCEAN MERCURY is towed by the AHTS CS safe • Indicated "Import Cargo to Cochin" • Counter verified by Import and Bond Department, Cochin Customs House.
	Letter written by Focus Energy to the Flag Officer Commanding, Southern Naval Area, Cochin.	• Mentions that the rig is being brought for repairs; • It is also mentioned that the rig will further be deployed for petroleum operations.
27.03.2011	Rig arrived at Cochin Anchorage	
29.03.2011	Application for Entry Inward and granted	• Indicates that the entry inward for the vessel was given on 29.03.2011.
30.03.2011	Certificate number E11030125 given by Cochin Port Trust to the Customs.	• Certified about the arrival of the Rig on 29.3.2011 at 14:45 from Abu Zenima and lying within the limits of Cochin Port Trust. • Verified also by the Import and Bond Department, Custom House, Cochin.

4.1. He submits that, vide the said documents, the customs department was made aware of all the facts; separate intimation was given that the rig was being taken to Cochin Shipyard for repairs and that it was being towed by the AHTS; only after considering the documents and after completion of the customs formalities was the rig allowed to be towed from the port to the Cochin ship yard by the AHTS; Only after the Appellants had filed the bill of entry for home consumption on 30.04.2012, the entire proceedings were initiated by the Department which now says that the Noticees ought to have filed the bill of entry in March, 2011; question of the Appellants having hidden any facts from the department does not arise.

4.2. Learned Counsel submits that there was a confusion existing even in the department as to the treatment of a vessel, whether as a goods or conveyance – Leading to non-filing of bills of entry; the customs officials who were in charge of granting customs clearance to the rig did not insist on filing of the bill of entry in March 2011 itself when the rig was first brought into India and now they allege that B/e should have been filed even for vessels arriving for repairs. The fact of confusion in the practice prevalent is also evident from the observation of the Hon'ble Tribunal in the case of **Samson Maritime Ltd. v. Commissioner of Customs** (Import), Mumbai 2016 (333) ELT 148 (Tri.-Mum). Though the Customs Act, 1962 is a perfect enactment while dealing with importation of goods into India, the confusion arises when the goods take the form of vessels, aircrafts etc which also qualify as conveyances for carrying the imported goods. From the circulars, No. 450/79/2010-Cus IV dated 23.09.2010 and Circular No.16/2012-Cus dated 13.06.2012 issued by the CBEC, it is clear that the field practice was that no bills of entry were being filed when vessels were being imported into India.

4.3. Further, as seen from the numerous circulars pertaining to stores and consumables, emphasis was always given to filing of bill of entry for the stores and consumables when the vessels were being converted from a foreign run to a coastal run; nowhere does it state that a bill of entry is to be filed for the vessel also; it was only clarified by the Board in 2010; a detailed procedure taking into account numerous scenarios was issued in 2012. Therefore, the appellants cannot be faulted with for not filing a bill of entry when the same was never insisted upon by the department and in the circumstances the Customs cannot demand duty in the present case. Placing reliance on the decision of Hede Ferrominas Pvt. Ltd. v. Commissioner of Cus, (Import, Mumbai) 2016 (334) ELT 540, learned counsel submits that Customs could have very well advised the appellant/ Shipping Agency to file Bill of Entry in respect of vessel also.

5. Learned Counsel submits that extended period of limitation is not invokable in terms of Section 28(4) of the Customs Act.; all facts pertaining to the rig and the tug were disclosed to the customs at all points of time; that the rig was being brought into India was clearly mentioned in all the documents; Customs officers have even boarded the rig and the AHTS before at the time it reached Cochin Port; documents evidencing the payment of boarding charges and lighterage dues are on record; the entire activity of the repair undertaken in the shipyard was under customs control; this is also evident from the RTI response dated 14.08.2014 given by the Cochin Customs; vide Letter dated 7.4.12, the Appellant suo moto declared before the customs that the rig was brought for repair works and now that the repair work was complete, the rig will be moved out of Cochin Ship yard, to be engaged for drilling assignment for petroleum operations in the Indian offshore; Appellants did not in any form or manner suppress any matter or material information from the Customs Department and instead were (acting themselves or through their duly appointed agents) transparent as regards their activities and the movement of the rig. Apex Court in the case of Aban Loyd Chiles Offshore Ltd Vs CC, Maharashtra, 2006 (200) ELT 370 (SC), held that demand by invoking the extended period of limitation will not be sustainable when the facts were within the knowledge of the department. Tribunal in the case of case of **Geep Industrial Syndicate Ltd Vs CCE, Allahabad** 1999 (114) ELT 850 (Tribunal), held that charge of suppression for invoking the larger period sustainable only when the assessee wants to obtain a benefit not available to him under the law. The demand is being made in the instant case on account of a change in the opinion of the department rather than a suppression of fact by the Appellant.

6. Learned Counsel submits that Cochin Shipyard is a customs bonded warehouse in terms of Section 58 of the Customs Act and the operation undertaken therein, either for ship repair or ship building, is in terms of Section 65 of the Customs Act; this has been certified by the Cochin Shipyard and Cochin Customs in response dated 15.10.2013 and 14.08.2014 respectively, against an applications made under the RTI Act. The decision of CESTAT in 267 ELT 387 also recognizes that ship repair is undertaken by Cochin Shipyard in terms of the provisions of Section 58 and Section 65. In terms of the provisions of Section 69 read with Section 15, a bill of entry for home consumption is to be filed at the time of removal of the goods from the warehouse for home consumption and duty is to be paid at this point of time. Therefore, even if an into bond bill of entry had been filed at the time of entry into India, no duty was required to be paid by the Appellants on the rig/tug as it was being entered for ware-housing. At the time of ex-bond, i.e. in April, 2012, the Appellants had obtained essentiality certificates for the rig as well as the tug, so that the rate of duty applicable in terms of Section 15(1) (b) read with the exemption Notification No.12/12-Cus (Sl.No.359) is Nil. Therefore, the question of any customs duty arising in the fact and circumstances of the instant case does not arise.

7. Learned Counsel submits that the essentiality certificate is to be considered as dating back to March 2011, i.e. to the date when the rig and the tug entered the Indian customs waters. It is an un-disputed fact that the Appellants had essentiality certificates when the bill of entry for home consumption was filed in April, 2012, when the rig and tug were to be deployed for petroleum operations. DGH have certified, vide their letter dated 25.10.2013, that they would have issued the same essentiality certificate in the year 2011 had the Appellants applied for. Appellants undertook imports availing the benefit of the Notification No.21/2002-Cus (Sl.No.271) for spares and equipment for the very rig in question on the strength of Essentiality Certificate No. ECIN 201104190039 dated 19.04.2011.

8. Learned Counsel for the appellants refutes the charge of customs that bringing goods into India for repairs amounts to home consumption. Whenever, the ship/vessel comes to India for undertaking operations within the Territorial Waters of India, such as transportation of cargo or persons or doing some operations like dredging, drilling etc and when the ship itself undergoes repairs, it is not put to use; therefore, there is no clearance for home consumption. This very aspect has been decided by the Tribunal in Aban Loyd Chillies Offshore Ltd. v. Commissioner of Customs, Mumbai 2003 (156) ELT 490 (Tri.-Mum) and affirmed by the Supreme Court of India at 2017 (346) ELT 513 (SC). Further, in the case of Scindia Steam Navigation Co. Ltd. v. Collector of Customs, 1988 (36)

ELT 581 (Cal), it has been observed that while undergoing repairs, a foreign going vessel will continue to retain its character as a foreign going vessel. The rig in question as well as the AHTS/Supply vessel continued to be a foreign going vessel till the repair activity was completed. Thus, no duty liability can arise. These vessels were also not converted for coastal run till 2012 i.e., till the time bills of entry dated 30.04.2012 and 4.05.2012 were filed.

9. Learned Counsel submits further that, without prejudice, import of the rig and the AHTS for home consumption is not complete till the time the goods cross the customs frontiers of India. The rig in question was brought into a customs bonded warehouse for the purpose of under-taking repairs. From March 2011 till April 2012, the rig was in the customs bonded warehouse under-going repairs. The Supreme Court of India in the case of **Garden Silk Mills Ltd. v. Union of India**, 1999 (113) ELT 358 (SC) has held that import of goods is completed only when it becomes part of the mass of the goods within the country. Further, the said decision also states that the taxable event is when the goods reach the customs barrier and the bill of entry for home-consumption is filed. Thus, in the instant case, as the rig in question was warehoused (which is an un-disputed fact), the act of importation is not complete and therefore, the Appellants have correctly filed the bill of entry for the rig and the tug in April 2012 when it was meant for home consumption. At this point, the question of duty demand does not arise as the Appellants are clearly eligible to avail the benefit of the Notification No.12/2012-Cus (Sl.No.359) dated 17.03.2012. Further, that the bill of entry has been filed one year late will not dis-entitle the Appellants from claiming the benefit of the Notification. As held in CC vs Shreeji Overseas (India) Pvt. Ltd., 2013 (289) ELT 401 (Guj), there is no time limit prescribed for the same under Section 46 of the Customs Act, 1962.

10. On the issue of classification of Anchor Handling cum Tug Supply vessel, learned Counsel submits that it is correctly classifiable under the Heading 89.01 of the Customs Tariff as a supply vessel. The vessel in question is basically an off-shore supply vessel. It is also equipped with Anchor-Handling and tugging facility. Appellants in the instant case, brought the said vessel into India so as to use the same in petroleum operations along with the rig. The Essentiality Certificate described AHTS as a supply vessel. This is certified to in the following documents –

(i). the class notation certificate issued by Lloyds Register clearly describes the tug-cum-supply vessel in question as offshore supply ship cum tug;

(ii). the safety management certificate dated 15.06.2011 mentions the vessel to be 'Other Cargo Ship';

(iii). the Minimum Safe Manning certificate issued by the Republic of Panama mentions the type of ship as 'Other Cargo/Supply Tug;

(iv). the Document of compliance issued by the Lloyds Register mentions the ship type to be an 'offshore supply vessel'

10.1. Hon'ble Commissioner has only dealt with the proposed classification under Heading 89.06 without considering the submission of the Appellants as to how the vessel is a supply vessel classifiable under the Heading 89.01. Heading 89.01 specifically covers supply vessels which have been designed to carry cargo and persons. The vessel in question is nothing but a supply vessel with a few additional features. That it is a supply vessel has also been certified to by the classification societies. This Heading 89.01 being the more specific heading, the vessel in question is correctly classifiable under the Heading 89.01 in terms of Rule 3(a) of the General Rules on Interpretation of Tariff. It has been held in the following cases that a supply vessel will continue to be classified under the Heading 89.01 even if it has certain additional features and facilities –

(i). HAL Offshore v. CC, Import, Mumbai 2014 (303) ELT 119 (Tri.-Mum);

(ii). Prince Marine Transport Services Pvt. Ltd. v. CC (Imports), Mumbai, 2015 (327) ELT 283 (Tri.-Mum); and

(iii). Lewek Altair Shipping Pvt. Ltd. v. Commissioner of Cus., Vijayawada, 2019 (366) ELT 318 (Tri.-Hyd.) affirmed by Apex Court vide order dated 5.07.2019.

10.2. Alternatively, Goods classifiable under Heading 89.01 or 89.06 are exempt from the payment of Basic Customs Duty, vide Sr. No. 352 and 354 of Notification No. 21/02-Cus dated 1.3.02. Hence, the duty demand on tug-cum-supply vessel needs to be reduced to the extent of Basic Customs Duty. The effective rate of CVD on vessels classifiable under the Heading 89.01/89.06 is 1% in terms of Sl.111 and 114 of the Notification

No.1/2011-C.E. During the period 2012-2013, the CVD is exempt on goods falling under 89.01 vide Sl.NO.306 of the Notification No. 12/12-C.E.

11. Learned Counsel submits that the impugned Order-in-Original has invoked clauses (d), (f), (g) & (h) of Section 111 of the Customs Act, 1962. However, confiscation is not possible under any of the clauses. Confiscation under Section 111(d) is possible if there is any prohibition on the import of the goods. For ship stores, bunkers, etc. there is no prohibition under the Customs Act or any other enactment for the time being in force. With regards to the usage of vessels, also there is no prohibition/restriction in force as the said vessels were not engaged in coasting trade as contemplated under the Merchant Shipping Act. Further, the impugned Order-in-Original invokes Section 3 and 11(1) of the Foreign Trade [Development and Regulation] Act, 1992 ("FTDRA") and Rules 11, 14(1) and 14(2) of the Foreign Trade (Regulation) Rules, 1993 ("FTDRR"). It is submitted that the Appellant has not signed/ used any declaration/statement/document for the purpose of importing goods, knowing or having reasons to believe that such declaration was false nor has the Appellants employed any corrupt or fraudulent practices for the purpose of importing any goods, and in the absence of these conditions being satisfied, the provisions of the FTDRA and FTDRR cannot be invoked. The declarations made by the Appellants in relation to the rig and the tug were under the *bona fide* view and belief, as also endorsed by the Customs Department itself, that no import had occurred for the rig and the tug, which *bona fide* belief is also evidenced from the fact that immediately upon the completion of the repairs, the Appellant filed the Bills of Entry and sought amendments to the IGMs for the rig and the tug, since the said goods were thereafter cleared for home consumption, since they were to be employed for the drilling operations.

11.1. As regards the application of clauses (f), (g) & (h) of the Section 111, it is submitted that the vessels or the ship stores thereon were not unloaded in contravention of the procedures under the Customs Act, 1962 and neither was the IGM incorrectly filed. As a matter of fact, the IGM was validly amended by the Customs Department, as can be evidenced from Paragraph 3 of the Show Cause Notice. Hence, once the IGM has been validly amended, that also by the Customs Department, there cannot be any application of clauses (f), (g) & (h) of Section 111. The Customs Department cannot recant on its own permission granted to the Appellant. As the goods in question are not liable for confiscation, the question of imposing redemption fine also does not arise. No demand of duty can also arise on the stores consumed by invoking the extended period of limitation. That the rig and the AHTS were carrying stores was within the knowledge of the department. Further, there is no liability to pay customs duty on the stores consumed on board a foreign going vessel. Till the time the Appellant’s vessel was not converted to foreign run, the question of paying duty on the stores does not arise.

11.2. The Hon’ble Commissioner in the impugned order is relying on the decision of Commissioner of Customs (Prev.,), Mumbai v. Ambalal & Co., 2010 (260) ELT 487 (SC) to state that the rig and the AHTS in question are smuggled goods and therefore the benefit of the Notification cannot be extended. The said decision will not be applicable to the facts of the instant case. In the case of Ambalal, the diamonds in question were imported without a license. The Assessee in that case could not explain how the same were imported into India. The facts came to light only pursuant to seizure undertaken by the department. Therefore, in the said context the Hon’ble Supreme Court took the view that benefit of the Notification will not be available to the diamonds. In the instant case, the department was at all times put to notice of the fact that the rig and the AHTS was being brought into India for repairs. Pursuant the same, the department was further put to note of the fact that they intent to import the rig and the AHTS into India for being used in petroleum operations. It was based on the declarations made by the Appellants that actions were initiated by the department. Therefore, unlike in the case of Ambalal, the department was at all times aware of the rig and the AHTS being in India.

12. Regarding the appeals 21269 and 21269 against the commissioner(Appeals) order allowing the department’s appeal against amendment to IGM, Learned Counsel submits that all the necessary declarations have been given in the IGM; In IGM 9582 dated 24.03.2011 rig was mentioned and a separate IGM i.e. 9583 was filed for rig; it was clearly mentioned that the rig was for repairs; though contract dated 2-3-

2007 was in existence at the time of import, the rig was not in apposition to be put to use without repairs; relying upon Circular No. 44/2005 he submits that when there is no fraudulent intention, amendment can be permitted and in the instant case there was no fraudulent intention; as no financial gain accrued to the appellants as a result of non-filing of bill of entry or late filing of IGM, no mala fide intention can be attributed. moreover, no time limit has been prescribed for filing amendment to IGM; Calcutta High Court in the case of Scindia Steam Navigation Co ltd V Collector of Customs 1988(36) ELT 581(Cal), held that vessel does not lose its status a foreign going vessel while undergoing repairs at dry docks. Placing reliance on Garden Silk Mills Ltd Vs UOI 1999(113) ELT 358 he submits that import is said to be completed when goods become part of the mass of the country; imported goods cannot be on the same footing as goods cleared for home consumption. The fact that the rig was brought to Cochin Shipyard for repairs is not disputed as various correspondences over a period confirms the same; they were under obligation as per clause 8.3(d) pf PSC 2.3.2007 to keep the rig and equipment in good and safe condition. During the period from 27.3.2011 till the filing of bill of entry for home consumption, the rig was not deployed for any drilling operations and it remained within the customs Bonded area; therefore, the rig cannot be said to be imported in March 2011 and cleared for home consumption; therefore, there was no requirement for filing bill of entry in march 2011 itself. They relied upon Aban Loyd Chiles Offshore Ltd Vs CC Mumbai 2003(156) ELT 490(Tri-Mum) affirmed by Apex Court 2017(346) ELT 513(SC). He also submits that the rig was undergoing repairs in Dock yard which is nothing but a Customs Bonded Warehouse and therefore relying on Apex Court in the case of M/s Asoka Hotel Vs AC Commercial Taxes 2012(276) ELT 433 (SC) when the goods are in bonded warehouse, it cannot be said that the goods have crossed customs barriers. On completion of repairs, they filed a bill of entry and imported availing the benefit of the notification No 12/12-Cus against essentiality certificate issued by the DGHC. Counsel submits, relying on Circular No. 16/2012-Cus dated 13-6-2012 that even assuming that the rig was in coastal run, they were not required to file bill of entry. In view of the DGH assertion that they could have issued essentiality certificate had they applied in 2011, they were liable for duty exemption under the said Notification. Therefore, amendment to IGM cannot be denied.

13. Regarding the penalties imposed on the Rig, Tug M/s. Devshi Bhanji Khona (D B Khona) Shipping Clearing and Forwarding Agents, Nicolas Singhal Master, Tug M. V. Shunter, Authorization Holder Mr. Prateek Sisodia and GAC Shipping (India) Pvt. Ltd, Learned Counsels reiterated the above submissions and submitted that as there were at best only procedural infractions caused by the lacunae in the law and as no duty was required to be paid by the appellants at any point of time, in view of the exemption, no mala fide intention can be attributed to any of the above appellants. Accordingly, penalties imposed on them need to be set aside.

14. Shri K. Veera Bhadra Reddy, Additional Commissioner, AR on behalf of the Revenue, reiterates the findings of OIO (in respect of Appeals C/21052/2014, C/21066/2014, C/20890/2014 and C/21399/2014) and OIA (in respect of Appeals C/21269/18 and C/21271/18). He submits that the Counsels for the appellants are trying to divert the case from essentials. Reading from the Customs Act,1962, he differentiates between 'goods' and 'stores' and submits that the 'Rig' is very much in the nature of goods and not declaring the same is violation of the provisions of Sections 30, 46 and 47 of the Customs Act,1962. Having not declared the them as good and having not filed bill of entry, the rig is rendered liable for confiscation under Sections 111(d) and (f) of Customs, Act 1962. Moreover, they have used the same in the coastal Run. Nothing stopped them from filing a bill of entry at the time of import and clearing the same on production of the essentiality certificate. Countering the Learned Counsels reliance on Aban Loyd case, Learned AR submits that in that case the vessel was imported only for repairs, therefore, it was held that bill of entry was not required to be filed. However, in subsequent cases it was held otherwise. Relying on Apex Courts decision in M. Ambalal &Co 2010(260) ELT 487 (SC) he submits that the goods are deemed to be smuggled goods and as such benefit of exemption would not be available.

14.1. He submits that the appellants have been harping on the point that the Rig was under repairs before filing the bill of entry for Home consumption. It is not the case of the appellants that they have filed a bill of entry for home consumption. Nothing prevented the appellants from filing a bill of entry from home consumption. Having not done the same they cannot take the argument that the goods were warehoused. It is a clear after thought. He submits that there was a clear violation in filing the IGM of the Tug. The Tug was deployed in India; therefore, it is deemed to have been imported improperly and therefore, assumes the quality of smuggled goods. He submits that exemption, if any, in view of the essentiality certificate issued by DGH would be applicable prospectively from 2012 and not for the import of Rig and the Tug made in 2011; the appellants have also violated the conditions of Notification 58/97.

14.2. He submits that the master of the vessel in his statement has accepted his mistake; the shipping agents M/s GM Baxi have paid the penalty and are not in appeal; therefore, the guilt of the appellants is established and they have been correctly penalised by the commissioner.

14.3. Learned AR concluded his argument pacing reliance on the following

(i). Malabar Diamond Gallery Pvt Ltd Vs ADG, DRI, Chennai 2016(341) ELT65 (Mad)

(ii). CC (Preventive) Mumbai Vs M. Ambalal & Co 2010(260) ELT 487(SC)

(iii). Pride Foramer Vs UOI 2002(148) ELT19(Bom)

(iv). Aban Loyd Chiles Offshore Ltd Vs CC, Mumbai 2003(156) ELT 490(Tri-Mum)

(v) CC (Import) NCH, Mumbai Vs PATVOLK 2006(202) ELT 411(Bom)

(vi). Maersk India Pvt Ltd Vs CC, Mumbai 2009(238) ELT 793 (Tri-Mum)

(vii). Sedco Forex International Drilling Inc Vs CC, Mumbai 2001(135) ELT 625(Tri-Mum)

(viii). UOI Vs V.M. Salgaonkar & Bros (P) Ltd 1998 (99) ELT 3 (SC)

15. Heard both sides. Perused the records of the case. Brief issues that require our consideration in the instant case are as follows:

(i) Whether the vessel mercury focus (formerly known as Transocean Mercury), imported by the appellants, which initially underwent repairs in the Cochin Shipyard and later moved to the site of exploration, merits to be called as a 'foreign going vessel' or it is to be treated as 'goods' for the purposes of Customs Act, 1962.

(ii) Whether the appellants required to declare the vessel and the tug as goods in the IGM and to this extent, is there any misdeclaration by the appellants. Whether they are liable for confiscation under Sections 111(d)(f)(g) and(h) of the Customs Act, 1962.

(iii) Whether the benefit of Notification No.12/2012 (Sl.No.359) dated 17.03.2012 is applicable to the appellants in respect of the vessel and the Tug.

(iv) Whether the said vessel and the tug MV Shunter which was brought to tow the above vessel is to be considered as a supply vessel meriting classification under 89.01 of Customs Tariff Act, 1975.

(v) Whether the amendments for IGM sought by the appellants and granted by the authorities is invalid in law.

(vi) Whether the appellants are eligible to avail the exemption available for ship stores, consumables, spare parts, etc.

(vii) Whether the penalties imposed on different parties are sustainable.

16. Coming to the first issue, we find that the Arrival Notice for MV Talisman was given on 23.03.2011. It is contended that it was clearly mentioned that the rig is to be released. Request of for entry involved was filed on 24.03.2011 and were granted on 27.03.2011. Vide Letter dated 24.03.2011, the agents of the shippers informed the Deputy Commissioner of Customs that the rig will be released at Cochin for ultimate repairs in the Cochin shipyards. In the manual Bill of Entry 24.03.2011, it was mentioned under the cargo declaration it was mentioned that the rig Transocean mercury towed by tug "CSKF", was calling for repairs. It is also noticed that manual IGM for the AHTS Shunter/CS Café was filed on 17.03.2011. It is seen from the Cargo declaration acknowledged by the Department on 25th April, 2012, the description of goods was given as old and used offshore drilling jackup rig "mercury focus" with associated equipment, tools, accessories and essential squares. The position of the rig was shown to be CSL Shipyard in the general declaration acknowledged by Import Department on 13th March, 2011. In an application dated 24th March, 2011, M/s JS Shipping India Ltd. informed the Deputy Commissioner of Customs that they were agents for "Transocean Mercury" calling Cochin Shipyard Ltd. for repairs; there are no cargo or crew on board and requested them for allowing manual IGM. From the above, it is seen that the rig has arrived on MV Talisman. In the cargo declaration filed for the MV Talisman, the said rig was not mentioned as Cargo. However, a separate IGM appears to have been filed for the rig itself claiming the same to be calling on Cochin Shipyard Ltd. for repairs. The Department disputes that the appellants have not declared the vessel and the tug as goods having been imported in the country. Though, in terms of the Production Sharing Contract (PSC) dated 02.03.2007 they were very much aware that the said vessel and the tug were to be used in the country for petroleum operations.

16.1. Leaving aside for a while the issue relating to whether or not the rig was to be declared as goods or conveyance, both sides do not dispute the fact that the rig and the tug are vessels. They have been brought to Cochin Shipyard with an understanding on the part of the appellants that the same will be deployed to undertake Petroleum operations in the block allotted to them, albeit after repairs. The appellants rely upon the case of Scindia Steam Navigation Co. Ltd. and state that while undergoing repairs the vessel retains character of a foreign going vessel. Therefore, they plead that Bill of Entry was not required to be filed in 2011 and after the repairs were completed, and before the vessel was put to used in Petroleum operations, they have filed a Bill of Entry. We find that Tribunal in the case of Aban Loyd Chiles Offshore Ltd (supra) have held that oil rig when enters Indian territorial waters for the purposes of repairs is not engaged in any operation outside India and loses its character of being a foreign going vessel. The Tribunal held that:

> ***6.*** *Section 2(21) of the Act defines a foreign going vessel or aircraft to mean 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 as including one any naval vessel of a foreign Government taking part in any naval exercises; (ii) any vessel engaged*

in fishing or any other operation outside the territorial waters of India; (iii) any vessel or aircraft proceeding to a place outside India for any purpose whatsoever. The definition thus in two parts. The main definition applies to a vessel or aircraft for the time being engaged carrying goods or passengers between any port or airport in India and any port or airport outside India. The expanded definition includes vessels which are undertaking activities entirely unconnected with carriage of goods or of passengers between India and a foreign country. Each of the first two clauses of the expanded definition applies to a specific situation, and the third to any vessel or aircraft proceeding to a place outside India for any purpose whatsoever. A vessel may be termed a foreign going vessel either because it falls within the first part of the definition or within any of the three clauses of the latter part.

7. *In Amership Management Pvt. Ltd., the Bombay High Court evidently found that a rig engaged in drilling or survey operations outside Indian territorial waters was a foreign going vessel, because of clause (2) of Section 24. The ship which came in for repairs, which was under consideration in Scindia Steam Navigation Co. Ltd. was held to be a foreign going vessel, not because it is engaged in any operation outside India but because it fell in the first part of the definition, that it was for the time being engaged in the carriage of goods or passengers between any port in India or any port outside India. Thus, a ship that is engaged in carriage of cargo or passengers between Mumbai and Abu Dhabi is a foreign going vessel covered by the first part of the definition and would be as such a foreign going vessel throughout the length of its voyage, if, during its voyage between these two ports, it touches other Indian ports. The judgment in Scindia Steam Navigation Co. Ltd. is based on the view that, despite being dry-docked for repairs, the ship was still engaged in the carriage of goods between Calcutta and the foreign port. A rig has been held in Amership Management Pvt. Ltd. as a foreign going vessel because it was engaged in the operations outside Indian territorial waters in view of clause (2) of the extended definition. It would not be appropriate to apply the first part of the definition while considering the second. Each of the three clauses of the extended definition has nothing to do with the main part of the definition and applied in different situations of facts. Each of these situations must thus be considered on its own merit. It would therefore not be possible to say that a craft which is anchored without undertaking any operation whatsoever for long periods outside the territorial waters is a foreign going vessel. So also, when a rig enters Indian territorial waters for purposes of repairs, it is obviously not engaged in any operation outside India and loses its character of foreign going vessel. It may no doubt resume its character as a foreign going vessel when it leaves Indian territorial waters and resumes its operation. This is in fact the view taken in Salgaonkar Engineering v. OJF Gomes. We, therefore, do not find it possible to say that the rig, on the occasion when it entered Indian territorial waters, was a foreign going vessel.*

> ***12.*** *This brings the question of liability of the rig to confiscation and the penalty imposed on its owners and others. The Commissioner has found contravention of the provisions of clauses (f), (g), (h) and (j) of Section 111 of the Act. These clauses relate respectively to any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import manifests which are not so mentioned; the goods which are unloaded from a conveyance in contravention of the provisions of Section 32; dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of Sections 33 and 34, and goods removed or attempted to be removed from a customs area or warehouse without a proper officer's permission. It appears to us that, notwithstanding with the applicability of the judgment of the Supreme Court to the effect that the import of the goods had not completed, the provisions of Section 111 will be attracted. The section applies to goods brought from a place outside India and this clearly covers the goods under consideration. The contravention of clause (f) has been established as the goods entered the transit or transhipment is required to be mentioned in the manifest. Clause (g) will also be attracted as the goods were unloaded without the permission of the proper officer as required in Section 32. The goods were also loaded or unloaded except under supervision of a proper officer. Clause (h) will therefore apply. Clause (j) also will apply as the goods were removed without the permission of a proper officer. The rig therefore becomes liable to confiscation. We do not find any deliberate intention on the part of the importer to contravene these regulations although there has been clear negligence and disregard of the rules. Having regard to these facts, we reduce the fine for redemption of the rig from Rs. 2 crores to Rs. 10 lakhs.*

16.2. It is seen that Tribunal has considered the said decision in the case of Scindia Steam Navigation. Hon'ble Apex Court has upheld the findings of the Tribunal with regards to the nature of the rig which has arrived for repairs. In view of the same, we are not in a position to accept the contentions of the appellants that the vessel was a foreign going vessel. Hon'ble Apex Court observed that:

> *31. While we are disposed to accept that there was no import, we would not on the said finding hold that the owner had not violated the provisions of the Act, which are much broader and wider in scope. The Act regulates and mandates compliance by the foreign going vessels when they enter the territorial waters. Provisions of the Act are required to be met and complied with even when no goods are to be unloaded for import into India or the vessel is not a 'goods' meant for home consumption. Thus, violations recorded by the Tribunal cannot be found fault with.*

16.3. Once the nature of the vessel was not that of a foreign going vessel, it acquires the nature of a vessel imported for the purpose of use in India.

Therefore, it requires to fulfil the conditions of import. As the vessel was not categorically declared as goods intended for import in the IGM filed on behalf of the appellants, contravention of section 30, 32 etc. of Customs Act have taken place. We find that Hon'ble High Court of Bombay in the case of **Pride Foramer Vs UOI** 2002 (148) E.L.T. 19 (Bom.), after considering the deeming extension of India territorial waters and its application to Customs Act held that:

> ***42.*** *Be that as it may, by virtue of Section 7 of the Territorial Waters Act, 1976 parliamentary enactments which are extended to notified areas comprised in the exclusive economic zone or continental shelf have effect as if the exclusive economic zone area/or the continental shelf area is a part of the territory of India. In this sense, India, for the purposes of the Customs Act, 1962 includes not only the territorial waters, but the areas of the exclusive economic zone over which the operation of the Act has been extended by reason of the notification adverted to above. The Territorial Waters legislation is a Special Maritime Zones Act and it prevails in the event of conflict with the provisions of or where the Customs Act, 1962 is silent in regard to a particular matter. In any case, Section 2(27) of the Customs Act does not explicitly exclude waters beyond the territorial waters from being part of India and therefore, the said sub-section will have to be interpreted taking into account the above factors including the aforesaid notifications issued by the Central Government.*

16.4. Tribunal in the case of Hede Ferrominsas (supra) held that

> ***6.4*** *In view of above discussions and settled legal position, we are of the considered view that the subject vessel "Happy Success" is correctly classifiable as 'Supply Vessel' falling under CTH 8901 and consequently exempted under Notification No. 21/2002-Cus. The ld. Adjudicating Authority in Para 50 of the impugned order confiscated the vessel on the charge of misdeclaration of classification of subject vessel. However, we held that classification of vessel under CTH 8901 as 'Supply Vessel' claimed by the appellant is correct; therefore confiscation of vessel does not survive. As regard non-filing of Bill of Entry, we find that once goods is exempted by customs exemption notification, non-filing of Bill of Entry at the time of import is merely a procedural lapse as there is no mala fide intention of the appellant as no benefit accrues to the appellant by non-filing of Bill of Entry. We agree with the submission of the appellant that at the material period i.e. in 2006 when the vessel was imported there was confusion among the assessees and department regarding filing of Bill of Entry in respect of vessel and the same was clarified by the Board vide clarification letter F. No. 450/79/2010-CUS-IV, dated 25-9-2010. Therefore, prior to the issuance of said clarification, non-filing of bill of entry is under the bona fide belief. Moreover, in the present case, the shipping agent of the appellant vide letter dated 6-11-2006 informed the Assistant Commissioner of Customs (Export) the details about the subject vessel and also filed IGM and Bill of Entry and paid customs*

duty on the cargo. The Preventive Officer and Superintendent of Customs Department after joint survey and examination ordered for conversion of vessel on 10-11-2006. Both the aforesaid documents are scanned below:

16.5. In view of the ratio of the decisions above, we hold that though no serious breach of provisions has occurred in non-filing of the bill of entry in 2011, the same cannot be said to be true in respect of cargo declaration in the IGM. We find that there is a purpose under the scheme of Customs Act, 1962 and regulations made under behind the requirement to declare the goods imported in a proper manner. This is not to be taken as casual information given by filling up of the forms. This would certainly give necessary information/inputs to the customs authorities as to have information as to which was the cargo imported by which vessel. This would help them to ensure that no dutiable goods imported escape payment of duty and also to ensure that no prohibited goods are imported in contravention of the law of the land. Therefore, we find that act of non-declaration of the rig as goods/ cargo in MV Talisman is a misdeclaration by the appellants. Provisions of Section 30 and 32 of Customs Act, 1962 have been violated, for this act of misdeclaration or non-declaration. Thus, for these reasons the goods have been rendered liable for confiscation under Sections 111 (f), 111 (g) and 111(h) of Customs Act, 1962. The appellants have submitted that they have informed the department at every step and as such no mala fide motives, in case it was a wrong declaration, can be attributed to them. We find that for the section 111 to be operational mala fide intention is not required. A mere act/ acts mentioned therein are enough to render goods liable for confiscation. The appellants have taken the plea that as the dockyard is a bonded ware house will not support the case as we don't find that the appellants have not filed ant into Bond Bill of entry. The appellant's contention that the rig was only undergoing repairs at Cochin dockyard is not satisfactory as they were availing exemption for spares for the rig and the tug, for a period of about one year, under Notification No. 12/2012-Cus dated 17.03.2012 as applicable to rigs/vessels engaged in Petroleum operations. Therefore, we find that Commissioner has correctly held that the "Transocean Mercury" and "MV Shunter" are liable for confiscation under Sections 111 (d) (f) (g) (h) of Customs Act, 1962 as per the discussion in the OIO. In the instant case, the Customs officers have even boarded the rig and the AHTS before at the time it reached Cochin Port. This is evident from the letter dated 25.03.2011 and the documents evidencing the payment of boarding charges to the officers of customs. The Appellants have even paid the lighterage dues and the boarding charges for the customs officers. At no point of time the officers gave guidance to the appellants. Therefore, looking into the facts of the case that the appellants have taken the plea of confusion in the Customs practices itself; that the appellants have been regularly keeping the Department to notice of all the activities and that the officers have boarded the vessels and supervised the supply of ship stores and spares to "Transocean Mercury" and "MV Shunter", we find that redemption fine imposed on appellants in lieu of confiscation of "Transocean Mercury" and "MV Shunter", can be reduced.

17. Coming to the applicability of the Notification No. 12/2012-Cus (SI. No. 359) dated 17.03.2012 which grants exemption to goods imported for Petroleum operations. We find that Tribunal and the Hon'ble Apex Court have been consistent in holding that though the vessel can be penalized for other infractions, exemption, if any, available cannot be denied. Revenue also accepts the fact that the said vessel and tug have been imported for the purposes of undertaking Petroleum operations at the designated slots as per the PSC. Department proceeds to deny the exemption on the count that the "Transocean Mercury" and "MV Shunter" were, in fact, imported in 2011 and at that point of time, the appellants did not file any Bill of Entry and the essentiality certificate was not in existence at that time; that the essentiality certificate issued to the appellants in 2012 was only prospective and cannot be allowed retrospectively. However, we find that such a constructed view is not permissible. It is not the case of the Department that the said "Transocean Mercury" and "MV Shunter" were put in to use for Petroleum operations without the essentiality certificate. On the contrary, the Department's contention was that the goods were imported for Petroleum operations and as such their declarations in the IGM in 2011 were incorrect. On completion of the repairs, the appellants filed a Bill of Entry for clearance of "Transocean Mercury" and to facilitate the filing of Bill of Entry amendment to IGM was also requested and accordingly granted. Only after the goods obtained the essentiality certificate, they were put to the intended use. Therefore, we find that the exemption is correctly availed. We find that Tribunal in the case of In the case of Frontier Aban Drilling (India) Ltd Vs CC, 2016 (343) ELT 227 (Tri. Mumbai), held that the production of Essentiality Certificate is a mere procedural formality when there is no doubt as to the intended purpose of the impugned goods. The relevant portion is reproduced as under –

> ***5.2*** *It is observed that the appellants finally obtained essentiality certificate in respect of the goods cleared under the trans-shipment permit. However, benefit of exemption was denied despite these essentiality certificates on two grounds: -*
>
> *(i) That the said certificates were issued mentioning Notification No. 21/2002 and not under Notification No. 17/2001. Notification No. 21/2002 came into effect w.e.f. 1-3-2002 i.e. after the clearance made at transhipment permit, while Notification No. 17/2001 granting similar benefits was available at the material time.*
>
> *(ii) That the certificates were produced after the clearance made on the transhipment permit and not at the time of clearance.*
>
> ***5.3*** *We find that Notification No. 17/2001 which was applicable at the material time, granted similar concession as are granted by Notification No. 21/2002. It can be seen from the proceedings before the Hon'ble High Court that obtaining essentiality certificate is not something for which the appellant can be blamed. There are a lot of procedural lapse and despite the intervention of Hon'ble Bombay High Court; it took a lot of time to issue the essentiality certificate. The assessee cannot be blamed in inherent delays of Governmental system. In view of the above, it is felt that so long as it is not in doubt that the goods were required for the intended purposes, production of essentiality certificate is merely a procedural formality. Production of such certificate on a later date cannot be a ground for denial of benefit of notification.*
>
> ***5.4*** *The fact that the goods cleared under transhipment permit are required for the intended purpose is clear from the facts that the essentiality certificate has been issued. Whether it is issued under Notification No. 17/2001 or 21/2002 is immaterial so long as the essentiality certificate covered the goods, benefit of notification cannot be denied.*

17.1. We find that Tribunal in another case of the appellants themselves have taken a similar view 2014 (313) ELT 231 (Tri.) Therefore, we find that the exemption contained in the Notification is very much available to the appellants. Learned AR for the department has taken a plea that the goods are rendered liable for confiscation; have been rendered to be smuggled goods and as such in view of the ratio of Ambalal Patel and other cases submitted by him, exemption cannot be extended. Learned counsel for the appellants on the other hand, submits that instant case cannot be equated with cases in which smuggling is involved by way of concealment etc. we find force in the argument. Though, technically in terms of Section 2(39) of Customs Act, 1962, all acts which render the goods liable for confiscation are regarded to be 'smuggling', the common understanding of the words is also required to be seen. It is not the case of the department that the Rig and the supply Vessel were concealed in any manner so as to escape the duty liability and other penal actions. It is on record that the appellants have declared every activity in relation to the Rig and the supply Vessel to the authorities. The crux of the allegation is that the Rig and the supply Vessel have not been mentioned as 'goods'. Equating the instant case, where incorrect or inappropriate declarations were give, with cases where goods were imported by way of concealment, is stretching things too far. In the instant case, Customs were put to notice of all the developments from time to time. Customs have also not guided the appellants in an appropriate manner. The instant case, at its worst, can be called a case of improper importation and for which certain amount of responsibility also lies with the department. In view of this we find that the filing of bill of entry and availing of exemption contained in Notification No 12/2012-Cus dated 17.3.2012 is quite acceptable.

17.2. Moreover, we find that Hon'ble Gujarat High Court in the case of Shreeji Overseas (supra) held that there is no time limit for filing the Bill of Entry. Hon'ble High Court held that

> ***4.*** *We are in agreement with the view of the Commissioner as confirmed by the Tribunal. Section 46 of the Act provides for entry of goods on importation and reads as under:*
>
> *"**46. Entry of goods on importation. -** (1) The importer of any goods other than goods intended for transit or transshipment, shall*

make entry thereof by presenting electronically to the proper officer a bill of entry for home consumption or warehousing in the prescribed form:

Provided that the Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner:

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

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

(3) A bill of entry under sub-section (1) may be presented at any time after the delivery of the import manifest or import report, as the case may be:

Provided that the Commissioner of Customs may in any special circumstances permit bill of entry to the presented before the delivery of such report:

Provided further that a bill of entry may be presented even before the delivery of such manifest if the vessel or the aircraft, by which the goods have been shipped for importation into India, is expected to arrive within thirty days from the date of such presentation.

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

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa."

5. *Section 48 of the Act prescribes procedure in case of goods not cleared, warehoused, or transshipped within 30 days after unloading and reads as us under:*

"48. Procedure in case of goods not cleared, warehoused, or transshipped within thirty days after unloading. - *If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transshipped within thirty days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof;*

Provided that -

(a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;

(b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.

Explanation - In this section, "arms" and "ammunition" have the meanings respectively assigned to them in the Arms Act, 1959 (54 of 1959)."

***6.** Section 117 of the Act provides for penalties for contravention, etc. not expressly mentioned and reads as under:*

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

***7.** Upon combined reading of the above-mentioned statutory provisions, it can be seen that Section 46 nowhere provides for any time-limit for filing a bill of entry by an importer upon arrival of goods. It is, of course, true that Section 48 permits the authorities to sell the goods after following the procedure if within thirty days of unloading the same at the customs station, the same are not cleared for home consumption or warehoused or transshipped. This is entirely different from suggesting that under Section 46 of the Act, there is any time-limit prescribed for filing of bill of entry.*

***8.** In that view of the matter, Section 117 of the Act would not come in picture since it cannot be stated that the importer breached any provision. Tax Appeal is therefore, dismissed.*

17.3. We also find that Tribunal has taken a similar stand in the case of Shreeram Rayons 2012 (262) ELT 347 (Tri. Ahm). In view of the above, we find that there is no infirmity in the filing of Bill of Entry in 2012 and allowing the exemption to "Transocean Mercury" and "MV Shunter" available as per Notification No. 12/2012-Cus dated 17.03.2012.

18. The appellants have taken a plea that the tug MV Shunter was an anchor handling cum tug supply vessel and is correctly classifiable under CTH 8901. They submit that the vessel in question is basically an offshore supply vessel and is equipped with anchor handling and tugging facility. They submitted the following documents as the proof of the same:

(i) The class notation certificate issued by Lloyds Register clearly describes the tug-cum-supply vessel in question as offshore supply ship cum tug.

(ii) The safety management certificate dated 15.06.2011 mentions the vessel to be 'Other Cargo Ship'.

(iii) The Minimum Safe Manning certificate issued by the Republic of Panama mentions the type of ship as 'Other Cargo/Supply Tug.

(iv) The Document of compliance issued by the Lloyds Register mentions the ship type to be an 'offshore supply vessel'.

18.1. We also find that in the essentiality certificate issued by Director General of Hydrocarbons describes the vessel to be a supply vessel. We find that Tribunal in the case of HAL Offshore Ltd. Vs CC (Import), Mumbai held that

[1]***7.*** *We have carefully considered the submissions made by both the sides. Our findings and conclusions are discussed in the ensuring paragraphs.*

7.1 *As the issue relates to classification, it will be useful to understand the scope of the relevant tariff entries.*

"89.01		*Cruise ships, excursion boats, ferry boats, cargo ships, barges and similar vessels for transport of persons or goods*
8901.10		*Cruise ships, excursion boats and similar vessels principally designed for the transport of persons; ferry boats of all kinds*
8901.20		*Tankers*
8901.30		*Refrigerated vessels, other than those of sub-heading No. 8901.20*
8901.90		*Other vessels for the transport of goods and other vessels for the transport of both persons and goods"*

The appellants have claimed classification under Heading 8901.90 for the impugned goods. The HSM explanatory notes says that the heading covers all vessels for the transport of persons or goods, other than vessels of Heading 89.03 (which covers "yachts and other vessels for pleasure or sports; rowing boats and canoes") and life boats, troop-ships and hospital ships (89.06). The note further says that the heading includes cruise ships and excursion boats, ferry-boats of all kinds, including train-ferries, car ferries and small river-ferries, tankers, *refrigerated vessels for the transport of meat, fruit, etc., cargo vessels of all kinds, whether or not specialized for the transport of specified goods such as ore vessels and other bulk carriers, container ships, Ro-Ro ships, LASH type vessels, barges of various kinds and vessels of the hydro-glider type, hydrofoils and hovercraft. Thus the coverage of Heading 8901 is very wide and all types of vessels for the transport of persons or goods would merit classification under the said heading.*

7.2 *The Revenue wants to classify the products under Heading 89.05 which reads as follows: -*

"89.05	*-*	*Light vessels, fire floats, dredgers, floating cranes, and other vessels the navigability of which is subsidiary to their main function; floating docks; floating or submersible drilling or production platforms.*
8905.10	*-*	*Dredgers*
8905.20	*-*	*Floating or submersible drilling or production platforms*
8905.90	*-*	*Other*

As per the HSN explanatory notes, the heading covers light-vessels, fire-floats, dredgers, floating cranes, and other vessels the navigability of which is subsidiary to their main function The vessels coming under this heading normally perform their main function in a stationary position and they include light vessels, drill ships, fire floats, dredgers of all kinds, salvage ships for the recovery of sunken vessels; permanently moored air-sea rescue floats; bathyscaphes; pontoons fitted with lifting or handling machines and pontoons clearly designed to serve as a base for these machines. The heading also includes floating docks, floating or submersible drilling or production platforms.

18.2. We find that similar decision was taken in the case of Hede Ferrominas Pvt. Ltd. v. CC (Import, Mumbai) 2016 (334) ELT 540, Prince Maritime Services Pvt. Ltd., 2015 (327) ELT 283 (Tri. Mum), Lewk Altair Shipping Pvt. Ltd., 2019 (366) ELT 318 (Tri. Hyderabad). We find that as the Tug is a supply vessel a few additional features to tow, it is correctly classifiable under CTH 8901. Therefore, we hold that the exemption under

Notification 12/2012-Cus dated 17.03.2012 is available to the appellants on "MV Shunter". Classification of the supply vessel is thus, answered.

19. Now, coming to the issue of dutiability of ship stores and spares supplied to "Transocean Mercury" and "MV Shunter", we find that we have already held above that the vessels were not foreign going vessels so as to be eligible for free supply of bunkers and ship stores. We find that Tribunal in the case of Aban Loyd 2003 (156) E.L.T. 490 (Tri. – Mumbai) observed that in *Pride Foramer v. UOI - 2002 (148) E.L.T. 19 (Bom.) the Bombay High Court, after taking note in the judgment in Amership Management Pvt. Ltd., said that the imported stores supplied to a rig located in an area designated under the Act 80 of 1976 would not fall within Section 86 of the Act. It relied upon the judgment of the Division Bench of the Court in Salgaonkar Engineering v. OJF Gomes - 1984 (86) Bom LR 127, to say that it is only that vessel which is actually carrying at a given point of time the goods or passengers between a port in India and a port outside India is a foreign going vessel.*

19.1. We also find that Hon'ble High Court of Bombay in the case of 2002 Pride Foramer (148) ELT 19 (Bom) (supra) held that

> ***53.*** *For all the reasons stated above, we are of the view that the respondents are perfectly justified in refusing to permit the petitioner to clear, ship stores and spares for use on the Oil Rig, on transhipment permit and without payment of customs duty while the Oil Rig is in a designated area. We also hold that the continental shelf land the exclusive economic zone are the parts of India in view of the provisions of Sections 6(6) and 7(7) of the Maritime Zones Act and for the purposes thereof and pursuant to notifications referred to in Para 26 (supra) the provisions of the Customs Act, 1962 were extended to such areas, consequently, the Oil Rigs proceeding to such areas or operating therein are not foreign going vessels under Section 2(21) of the Customs Act. If that is so, the petitioner is not entitled to the benefit of Section 53 read with 54 and/or of Section 86 r/w 87 of the Customs Act. In our view, the petition must fail.*

19.2. In view of the above, we hold that the impugned vessel is not a foreign going vessel; we find that such ship stores supplied to a vessel which is not a foreign going vessel are not applicable for exemption thereof. We find that Apex Court in the case of Aban Loyd Chiles Offshore Ltd 2006 (200) ELT 370 (SC) upheld the finding of the Tribunal as far as recovery of duty forgone on the ship stores, where the ships were not foreign going vessels. However, Apex court limited their judgement to the issue of limitation.

19.3. The appellants stated that they have also availed exemption for certain capital goods/spares under the Notification No. 12/2012-Cus dated 17.03.2012 and that commissioner included such value also in the duty recoverable on account of ship stores supplied. We hold that such exemption will not be available to the appellants for the period for which the Rig "Transocean Mercury" and the supply Vessel "MV Shunter" were either undergoing repairs or were in the anchorage. During this period the Rig and Tug were not engaged in any petroleum operations, though the intention behind bringing the vessels was to undertake Petroleum operations in the designated areas. To that extent we find that such exemption extended, though on the basis of essentiality certificates issued by the Competent Authority, is not available as the Vessels were not utilised for the intended purposes. Therefore, we find that there is no force in the argument of the Learned Counsel that the calculation of duty of stores and spares, supplied to "Transocean Mercury" and "MV Shunter", at the time of demand or provisional release included the capital goods and spares supplied under the essentiality certificate in terms of Notification No. 12/2012-Cus dated 17.03.2012. We hold that for such period the vessels were not put to use for petroleum operations, exemption would not be available. The exemption given is 'required for use in petroleum operations' not for items' intended for use' We find that Apex Court in the case of Dilip Kumar and Co 2016 (339) ELT A146 (SC) held that exemption notification requires strict construction and benefit of exemption cannot be given to assessee if two constructions are possible. For this reason, we hold that the demand, on the count of duty foregone on ship stores/spares/capital goods etc supplied to the vessels during the relevant period, is correctly raised and confirmed. However, we find that the demands need to be restricted to normal period as no suppression etc can be alleged as the entire activities of the vessels were within the knowledge of Customs and understandably, the supplies were made to Vessels located in a bonded area/Customs area and under the watchful eyes and supervision of the officers. For this reason, the issue needs to go back to the Original Authority for re-calculation of the duty foregone on ship stores, capital goods/spares supplied to both "Transocean Mercury" and "MV Shunter", for the normal period.

20. Coming to the appeals No. C/21269/2018 and C/21271/2018 filed against the OIA which allowed the Department's appeal against the amendment in the IGM allowed by the lower authorities, we find that the appellants have sought amendment to IGM and the same was allowed by the lower authorities. We find that in terms of Section 30 (3), if the proper officer is satisfied that the import manifest or import report is in any way incorrect or incomplete, and that there was no fraudulent intention, he may permit it to be amended or supplemented. As discussed above, we find that the appellants have been continuously in correspondence with the Department as far as the dealing with the vessel and tug are concerned. The officers have boarded the vessels and have given necessary entry inwards etc. They have also supervised the supply of stores and spares in to the ships. All the activities were within the knowledge of the Department. Therefore, it cannot be alleged that there was a fraudulent intention in seeking the amendment. Therefore, we find that the lower authorities have allowed the amendment of IGM after considering all relevant facts and after due application of mind and that the amendment allowed is well within the provisions of law. Therefore, we find that the OIA is not maintainable and liable to be set aside and appeals No C/21269/2018 and C/21271/2018 need to be allowed.

21. Coming to the various penalties imposed on various appellants, as discussed above, we already held that the benefit under Notification 12/2012-Cus dated 17.03.2012 is available to the appellants, M/s Focus Energy, on the Rig 'Transocean Mercury' and the AHTS 'M. V. Shunter' and that they are not liable to pay any duty in this regard. Therefore, the penalty imposed on M/s Focus Energy under Section 114A is set aside. As above, we find that there was a mis-declaration on the part of the appellants and the shipping agents, as far as the nature of the Rig 'Transocean Mercury' and the AHTS 'M. V. Shunter' is concerned, and the same have become liable for confiscation. However, we find that the issue being one of understanding of the existing practices in the Customs House and the fact that the agents had nothing to gain personally or professionally by such mis-declaration, penalties imposed on M/s DB Khona (Appeal No. C/20890/2014) and M/ GAC Shipping (Appeal No. C/21399/2014) can be reduced. We find that in respect of the Master Sh. Nicolas Singal (Appeal No. C/21066/2014), the allegation was that he has towed cargo from Anchorage to Shipyard. In view of the above discussion, there were reasons for the captain to be unsure/unaware of the procedures to be followed in such cases and as such ignorance of CBEC Circular 58/97 dated 06-11-1997 is understandable. Therefore, we find that penalty imposed on him can be reduced.

22. In the result, appeal filed by M/s Focus Energy (Appeal No. C/21052/2014) is partly allowed. While holding the confiscation of the Rig 'Transocean Mercury' and the AHTS 'M. V. Shunter' under Section 11 of the Customs Act, 1962 redemption fine is restricted to Rs.5,00,000 (Rupees Five Lakhs Only) and to Rs. 1,00,000 (Rupees One Lakh only) respectively. We hold that appellants are eligible for exemption on both the Rig 'Transocean Mercury' and the AHTS 'M. V. Shunter, under Notification No. 12/2012-Cus dated 17.03.2012. As regards the duty liability on stores, capital goods/spares, the issue is remanded back to the Adjudicating Authority for re-determining the duty for the normal period as discussed in Para 19 above.

23. Appeal No. C/21066/2014 is partly allowed restricting the penalty imposed on Sh. Nicolas Singal, Master of AHTS MV Shunter, to Rs.5,000(Rupees Five Thousands Only).

24. Appeal No (Appeal No. C/20890/2014) is partly allowed restricting the penalty imposed on M/s DB Khona, shipping/steamer agent of the tug 'MV Shunter' to Rs.5,000(Rupees Five Thousands Only).

25. Appeal No. C/21399/2014 is partly allowed restricting the penalty imposed on M/s GAC Shipping, shipping/steamer agents of the Rig 'Transocean Mercury', to Rs.50,000(Rupees Fifty Thousands Only).

526. Appeals No. C/21269/2018 and C/21271/2018 are allowed.

(Order was pronounced
in Open Court on **29/10/2019**)

(S.S GARG)
JUDICIAL MEMBER

(P.ANJANI KUMAR)
TECHNICAL MEMBER

pak/pk