CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 27102 of 2013

[Arising out of Order-in-Original No. 01/2013 dated 08/04/2013 passed by Commissioner of CUSTOMS, COCHIN.]

M/s. Asean Cableship Pvt. Ltd. 151 Chin Swee Road, #11-01/10, Manhattan House, SINGAPORE – 169 876	Appellant(s)

VERSUS

The Commissioner of Customs Custom House, Willingdon Island Cochin – 682 009. Kerala	Respondent(s)

WITH

Customs Appeal No. 27115 of 2013

[Arising out of Order-in-Original No. 01/2013 dated 08/04/2013 passed by Commissioner of Customs, Cochin.]

Mr. Too Talk Leong **Master, C. S. Asean Explorer** **M/s. Asean Cableship Pvt. Ltd.** 151 Chin Swee Road, #11-01/10, Manhattan House, SINGAPORE – 169 876	Appellant(s)

VERSUS

The Commissioner of Customs Custom House, Willingdon Island Cochin – 682 009, Kerala	Respondent(s)

Appearance:

Mr. Rohan Shah, Advocate Economic Laws Practice ADVS 1502, Dalamal Tower, Nariman Point, Mumbai – 400 021 (Maharashtra)	For the Appellant
Mr. P. Gopa kumar Jt. Commissioner (AR)	For the Respondent

Date of Hearing: 09/01/2020
Date of Decision:18/02/2020

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20218-20219/2020

Per : P. ANJANI KUMAR

Brief facts of the case are that ASEAN Explorer(AE), a Singapore flagged Vessel, was engaged to carryout repairs of cables located in South East Asia and Indian Ocean Area, in terms of South East Asia and Indian Ocean Cable Maintenance Agreement (**"SEAICOMA" / "Agreement"**). The vessel was berthed at Kochi port; the vessel had an operating Zone connecting India, Pakistan, Singapore, Indonesia, Malaysia,, United Arab Emirates, Sri Lanka, Myanmar, Bangladesh, Thailand, Cambodia, Vietnam, Brunei, Hong Kong, Taiwan, China, Philippines, Australia and Guam; was to undertake repair activities in respect of the sub-sea cables spread over an area of 105,000 km; out of which only 256 KM (0.25%) was within territorial waters of India. For this purpose, the Vessel had to move from various ports in India and also between ports outside India. During the movements it carried stores, spares, bunkers and crew and technical staff to and fro Indian Ports. During the period of dispute i.e. 11.07.2007 to 24.04.2012, the vessel had carried out 13 repair activities and 5 cable working exercises (CWEs) across the region; out of these only one recovery operation occurred 5-20 nautical miles of India, during the period 4.10.2007 to 6.10.2007. Revenue argued that out of 1750 days under consideration, the vessel was out for repairs only for 301 days and as such it cannot be considered as a 'Foreign Going Vessel' (FGV) and exemption availed for ship stores Bunkers etc is not available to the vessel. The vessel was seized on 17-02-2012 and was provisionally released on 27-02-2012. A show cause Notice dated 10-07-2012 along with a corrigendum dated 14-08-2012 was issued to the Appellant M/s Asean Cable Ship Pvt Ltd and Too Talk Leong, Master CS of the vessel. The Show Cause Notice was adjudicated by Commissioner of Customs, Cochin vide OIO 1/2013 dated 04-04-2013 where in the

Commissioner confiscated the Vessel but allowed the same to be redeemed on payment of Redemption fine of Rs 8,00,00,000; confirmed duty of Rs 9,98,58,697, along with Interest, on spares, stores and Bunkers and imposed equal penalty under Section 114A. Hence, Appeal No. 27102 of 2013 was filed by M/s Asean Cable Ship Pvt Ltd and Appeal No. 27115 of 2013 was filed by Mr. Too Talk Leong, Master CS of the vessel.

2. Shri Rohan Shah, Advocate, appearing for the appellants gave elaborate submissions oral as well as written, taking the Bench through the term of the SEAICOMA agreement, various activities undertaken by the vessel, definitions of various terms and numerous case laws. Learned senior Counsel submits that the undisputed facts in the present matter are that all activities are to be carried out in terms of SEAICOMA; the necessity to undertake repair activities of these Scheduled Cables in a time-bound manner emerges from the fact that these Scheduled cables are used for the purposes of telecommunication and data transmission. AE was stationed in Kochi - with the other two vessels under the Agreement being stationed in Singapore and Subic Bay, Philippines; However, given the criticality of undertaking such repair activities in a time-bound manner, in case the cable-ship which is the closest to the fault-area is already engaged in other repair activities, the next closest available cable-ship is required to undertake the repair activities; the scope of work required the vessel to be exclusively dedicated to undertake repair activities over an area of 1,05,000 km of cables extending from (a) Djibouti in the West, (b) Perth in the South, (c) Guam in the East, and (d) Toucheng (Taiwan) in the North, as defined in Clause 1.1 read with Clause 6 of the Agreement; during the contract period (1 July 2005 to 31 December 2012), the vessel undertook 29 instances of cable repair and 7 instances of cable-working exercises; out of these 36 operations, only one cable recovery (2.78%) was within the territorial waters of India; during the period of dispute (11 July 2007 to 26 April 2012), 13 instances of cable repair and 5 instances of cable- working exercises were undertaken.; out these 18 operations, only one (5.55%) cable recovery took place within territorial waters of India; there is no allegation that the vessel AE was put to any other use in the period of the contract.

ASEAN Cable Ship was a Foreign Going Vessel

3. Coming to the definition of FGV, Shri Seth submits that in terms of Section 2(21)(ii) of Customs Act, 1962 ("Customs Act"), an FGV has inter alia been defined as "any vessel engaged in fishing or any other operations outside the territorial waters of India"; AE, though stationed at the Cochin port under the SEAICOMA, was entrusted with maintenance of cables in the Indian ocean, with the major portion of such cables (over 99.7%) being outside the Indian territorial waters; since first berthed at the Kochi port in the year 2003, AE has undertaken only a single repair activity within the Indian territorial waters. The definition is in two parts, which are independent, and if a case falls within the inclusive part of the definition above, it would still be considered as an FGV; the term "engaged in" covers not only a period when there is direct participation or activities, it also includes the period between such participation or activity and the time spent in preparation or readiness to undertake the activity. "Foreign going vessels" as per precedent, also cover situations where there is a repair of a ship for which purpose it may remain dry docked/ berthed for many months; there is a transshipment vessel engaged in loading/ offloading cargo from mother vessels which are too large to come closer to the port; such transshipment vessels carrying foreign cargo to and from mother vessels, also pick up domestic cargo and carry the same from one Indian port to another. Therefore, as per the undisputed facts and the settled law, the vessel AE is clearly a Foreign Going Vessel and its stores are entitled to the benefit of Section 87.

4. Shri Seth submits that the term "engaged in" contained in Section 2(21)(ii) of the Customs Act has to be seen in the context of the contractual arrangement of AE, and not from the prism of its day-to-day activities; in this context, even if AE, at a given point in time, was not undertaking repair operations outside the Indian territorial waters, but rather berthing at an Indian port in operational readiness (as mandated under the SEAICOMA), it will still be considered to be "engaged in" in operations outside Indian territorial waters, since the only purpose of its berthing at such port was to be able to quickly and efficiently carry out operations in international waters, and thereby qualify as an FGV in terms of Section 2(21) of the

Customs Act. He relies on the judgment of Hon'ble Gujarat High Court in *Commissioner of Income-tax vs. Natwarlal Tribhovandas [(1973) 87 ITR 703 (Gujarat)],* wherein it has been held that the words 'engaged in' are often employed to denote a present obligation to devote time, attention and efforts to a particular activity, although, for the time being, there may not be any active participation or whole time involvement in such activity. Applying the ratio of this judgment to the present facts, AE, at all times under the SEAICOMA, was "engaged in" operations in international waters, irrespective of whether it was actively undertaking such operations, or was in a state of operational preparedness to undertake such operations. It is noteworthy that under the terms of the SEAICOMA, AE at any given point in time was required to be operationally ready and commence repair activities within a period of 24 hours from the time of intimation from maintenance authorities and was also restricted from undertaking any other activity during the tenure of the SEAICOMA. Given this, AE was at all times engaged in operations outside India, and thereby qualifies as an FGV in terms of Section 2(21)(ii) of the Customs Act.

5. Shri Seth further submits that in terms of judgments of the Supreme Court and various High Courts, AE qualifies to be an FGV.

(i). The definition of FGV under Section 2(21) of the Customs Act is an inclusive definition, inasmuch as the words "includes" is used in the definition. In terms of the law declared by the Hon'ble Supreme Court in *Bharat Cooperative Bank (Mumbai) Limited vs. Coop. Bank Employees Union [AIR 2007 SC 2320],* when the word "includes" is used in the definition, the Legislature did not intend to restrict the definition to its natural meaning, but extends the definition to cover what is enumerated even if it is beyond the natural meaning of the word.

(ii). Hon'ble Calcutta High Court, in the case of *Scindia Steam Navigation vs. CCE [1988 (36) ELT 581*, held that repairs of a vessel in dry docks to enable the vessel to proceed to foreign port with export cargo, cannot not take away the status of the vessel being an FGV. The Court held that

> *"13... Steps taken in proceeding to foreign ports with export cargo could not prevent the vessel from being a foreign going vessel within the meaning of the provision of Section 2(2*

> *1) of the Customs Act, 1962. Necessary repairs in the dry docks were one of such steps to enable the vessel to proceed to foreign port with export cargo."*

(iii). Similarly, it was held in *CCE Vs Shipping Corporation of India [1987 (29) ELI 182],* that an FGV does not lose its character because it is on a coastal run *enroute* to foreign countries even if the coastal cargo is larger than the foreign cargo; it was further held that this position would not change if the foreign going vessel discharged its entire foreign cargo at an Indian port and took cargo on its way to collect foreign cargo at another Indian port (para 10 and 13 of the judgment). Given this interpretation of Section 2(21) that even a vessel which presently is not engaged in carrying cargo from a foreign port to Indian port qualifies to be an FGV, if the main engagement of such vessel was carrying goods from a foreign port to Indian port. Juxtaposing this judgment with the facts at hand, AE was at all points in time exclusively engaged under the SEAICOMA to undertake operations outside the territorial waters of India, and therefore ought to be considered as an FGV, even if it undertook a one-off operation within the territorial waters of India.

(iv). The Hon'ble Calcutta High Court in *Turner Morrison & Co Ltd Vs Assistant Collector (1999 (110) E.L.T. 484 (Cal)]* laid down the law that the status of an FGV is not exclusively limited to those vessels which are actually engaged in carriage of goods from a port outside India to a port within India, but even a daughter vessel which is entrusted with carrying goods from a mother vessel (which was on a foreign run) to an Indian port can be considered to be an FGV.

6. Shri Seth submits that as can be gleaned from the above judgments, for categorization as an FGV under Section 2(21) of Customs Act, it is the nature of engagement of the vessel which ought to be seen. Therefore, in the case of AE, considering that it was engaged in operations outside India under the SEAICOMA, its classification as an FGV cannot be taken away merely because it was berthed at the Cochin Port. Hence, considering that the AE was docking at the Cochin port, in a state of operational preparedness to undertake repair operations outside the territorial waters of India, as mandated under SEAICOMA, it ought to be considered as an FGV.

7. Shri Seth further submits that the Impugned Order is bad in law in as much it extends the words contained in main limb of Section 2(21) to the inclusive limb; it proceeds to deny the FGV status to AE by extending the words 'for the time being' to the inclusive part of the definition; it is noteworthy that the words 'engaged in' are set out only in context of the main clause of the definition of FGV, i.e. in respect of vessels engaged in the carriage of goods or passengers between any port in India and any port outside India; impugned Order has erred in extending the scope of the same to even the inclusive limb of Section 2(21), i.e. for vessels engaged for operations outside India. Reliance is this regard can be placed on the judgment of the Hon'ble Supreme Court in *Commissioner Of Customs, Mumbai Vs Aban Lloyd Chiles Offshore Ltd (2017 (346) E.L.T. 513 (S.C.)],* wherein it has been clearly set out that each of the limbs of the definition set out in Section 2(21) is independent of each other, and the words set out in the main limb of the definition of FGV cannot be extended to the inclusive limb. The descriptive part and all three limbs of the inclusive part of the decision of FGV are satisfied. Commissioner failed to appreciate that the definition does not use the word 'Principally/Primarily'. The benefit of provision should not be denied by reading such condition of exclusivity in such legal provision. He relies upon.

(i). *UOI Vs TISCO Ltd 1977(1) ELT J61(SC)*
(ii). Naffar Chandra Jute Mills Ltd Vs ACCE 1993 (66) ELT 574(Cal)
(iii). Indian Organic Chemicals Ltd Vs UOI and Others 1983 (12) ELT 34(Mad)

8. ASEAN Explorer will qualify to be an FGV even if one of the limbs are satisfied as held in *Aban Loyd Chiles Offshore Ltd Vs CC Mumbai 2003(156) ELT 490 (Tri-Mum).* Commissioner failed to appreciate that AE is built to make voyages in high seas and to carry stores spares bunkers and crew and technical staff to and from Indian ports to and from foreign ports, as is evident from Lloyd's Certificate. The words 'for the time being' refer to an indefinite state of facts which will arise in the future and which may (and probably will) vary from time to time. Definition uses the term 'whether touching any intermediate port or airport in India or not indicates that intermediate acts are to be ignored. Clause (ii) of the inclusive definition states 'any vessel engaged in fishing or any other operations outside the territorial waters of India. Gujarat High Court in the case of CIT Vs

Natwarlal Tribhovandas 1973 (87) ITR (Guj) held that the words ’engaged in’ is often employed to denote a present obligation to devote time, attention and efforts to a particular activity, although, for the time being, there may not be any active participation or whole time involvement in such activity. Commissioner has also erroneously adopted the clause (iii) of the definition which says’ any vessel or aircraft proceeding to a place outside India for any purpose whatsoever. This covers vessels preparing to proceed to a place outside India, even though actually not proceeding to such place outside India at a given specific point of time as held in Scindia Case (supra).

9. Further, the findings in the Impugned Order, that AE, cannot be considered to be engaged in operations outside the territorial waters since it was berthing at Kochi port, is made without appreciating the law in as much as the 'engagement' of a particular vessel cannot change with every passing day; as an analogy, while a fighter jet is considered to be continuously engaged in the defence of the nation, it carries out sorties only on certain occasions when the need arises; therefore, for the period which it is not carrying out such sortie, it cannot be said that the said fighter jet is not engaged in the defence of the nation; it is evident that that merely because AE is not carrying out repair activities or cable-working exercises at a given moment in time, cannot take away its classification as an FGV.

The issue is barred by Limitation

10. Shri Seth submits that invocation of extended period of limitation unsustainable in present facts; there has not been any suppression of facts by the Appellant in the present facts; Customs Department was always aware of the fact that AE has been stationed at Cochin port during its engagement under the SEAICOMA, which emerges from the various correspondences with the Customs Department; such information was not only provided to the Customs authorities, but also to the relevant police officials at the Cochin port, clearly setting out that AE has berthed and that it will be berthing at the Cochin port for a long period of time; sample correspondences tabulated below are had with authorities at Cochin port.

Date	Addressed to	Context
20.09.2004	DC, Customs, Preventive Cochin Customs House	To inform the arrival of AE, a cable repair vessel is replacing CS Iris which has been berthing at the Cochin port for almost three years. Further, it was also informed that AR is going to make Cochin as its base port and will return back to Cochin port after undertaking cable repair work.
29.06.2006	AC Customs, Air Cargo, Cochin Airport	It was mentioned in the letter that AR has been berthing at the Cochin port since the law 3 years and will continue to be berthed there for a long period
13.11.2007	DC Customs, Preventive Cochin Customs House.	To inform the arrival of AE back to Cochin Port. It was also informed that AE is engaged for cable laying and maintenance under the sea, as also the fact that AR is on a foreign run
22.06.2011	The DSP of Police, immigration Department, Cochin Sea Port	The letter clearly mentions that AE has been berthing at the Cochin Port since the last seven years and will be in Cochin for a long period

11. Shri Seth further submits that in addition to numerous correspondences with the Customs department, as mandated under the Custom Act, 1962, the jurisdictional Customs authorities had physically visited and boarded AE regularly during the period of dispute. This fact can be confirmed from the entries in Deck Log Book on 11.07.2007 (visited from 1900 hours to 2025 hours); on 16.06.2009 (visit from 0835 hours to 0905 hours) and o4.12.2009 (visit from 1915 hours to 2020 hours). Further, as mandated, AE had to regularly file applications to the Customs authorities for obtaining port clearances, making specific declaration that the vessel was 'sailing under Foreign Run', along with the details of all voyages undertaken by the AE; these declarations were also made when the vessel was sailing from one Indian port to another Indian port. Relevant details of stay of AE at the Cochin Port were informed to both Customs and Police authorities. Therefore, it is evident that there has been no suppression of fact or misrepresentation which can be associated with the stay of AE at Kochi Port or its activities under the SEAICOMA; in the absence of such suppression of facts or misrepresentation, the Hon'ble Commissioner has erred in invoking the extended period of limitation; it was held by Hon'ble Supreme Court, in Pahwa Chemicals Private Limited Vs Commissioner (2005 (189) ELT 257 (SC), that mere failure to declare does not amount to willful misdeclaration or suppression; there must be some positive act on the part of the party to establish either willful misdeclaration or suppression; where facts are known to both the parties, it cannot be said that there has been any willful misdeclaration or suppression. As all relevant facts regarding AE, including its stay at the Cochin port and its FGV status, were known to the Customs department, the invocation of extended period of limitation is not available and bald allegations of the Customs Department on this count cannot sustain.

Obtaining of coastal Licences from DG Shipping will not change the character of the vessel:

12. Learned Counsel for the appellants submits that the Impugned Order (at paragraph 165) holds that the vessel AE, having procured licenses for coastal operations from the Director General of Shipping, was no longer entitled to a foreign run status. This approach is erroneous and legally untenable for the following reasons:

(i) During the period in dispute, license was obtained from the DG (Shipping) under Section 407 of the Merchant Shipping Act, 1958 **("Merchant Shipping Act")** on **4 (four) occasions only** and for the periods PF-266/07 from October 1, 2007 to October 24, 2007 (in the Indian territorial waters (October 4-6, 2007) and rest beyond territorial waters); PF-504/09 from November 25, 2009 to December 2, 2009 (Outside Indian territorial waters) and PF-116/10 from May 22, 2010 to May 30, 2010 (Outside Indian territorial waters) and PF-424/10 (where no service was performed); it is evident that the vessel AE had, as a measure of abundant caution, obtained Licences from the DG (Shipping) for four different periods.; out of the four periods, actual repairs in Indian territorial waters were undertaken only once.

(ii). The licenses were obtained under Section 407 of the Merchant Shipping Act, in terms of which, any ship other than an Indian ship (or a ship chartered by an Indian) is restricted to engage in the coasting trade of

India except under a licence granted by the DG (Shipping); "Coasting trade of India" has been defined in Section 2(2) of the Merchant Shipping Act to mean "the carriage by sea of passengers or goods from any port **or** place in India to any other port or place on the continent of India". It is noteworthy that the definition of a 'foreign going vessel' as contained under Section 2(21) of the Customs Act has no reference whatsoever of any term or provision of the Merchant Shipping Act. Accordingly, the approach of giving relevance to the treatment under the Merchant Shipping Act for the purpose of determining status as a foreign going vessel under the Customs Act, 1962 effectively results in incorporation of definitions/ provisions of one statute into another without any legislative basis for the same, which approach is legally untenable. Hon'ble Supreme Court, in the case of Commissioner of Sales Tax, Madhya Pradesh vs Jaswant Singh Charan Singh [1967 AIR 1454], laid down that it is not possible nor safe to adopt the meaning of the word given in the context of a particular statute to other statutes, especially when pertaining to tax statutes. Hon'ble Supreme Court, in UOI Vs Association of Unified Telecom Service Providers of India [2019(14) SCALE513], reiterated the well-established legal principle that when a term has been defined in the Statute, it ought to prevail over meaning from any other sources. Therefore, in the present case, wherein AE qualifies as an FGV on account of being contractually mandated to undertake operations outside India, the pre-emptive obtaining of a licence under Section 407 of Merchant Shipping Act cannot impede its classification as an FGV.

(iii). Hon'ble Bombay High Court in UOI Vs BPCL 1987 (30) ELT 383 (Bom), held that a status of a vessel as an FGV cannot cease merely because it had obtained a licence under Section 407 of the Merchant Shipping Act; on the contrary, the requirement to obtain such licence would by itself show that the vessel had retained the character of an FGV. The Impugned Order has sought to erroneously rely on the judgment in the case of Marco Shipping Services P. Ltd. vs. Commissioner of Customs, Ahmedabad 2008 (224) E.L.T. 93 (Tri- Ahmd) to arrive at the conclusion that procurement of a licence under Section 407 will alter the categorization of AE. However, the ratio in the case of Marco Shipping (supra) is inapplicable in the present case since the Tribunal did not considered the judgment of the Hon'ble

Bombay High Court in BPCL case (supra). Further, in the said case, the assessee had not only obtained a coastal shipping licence under Section 407 of Merchant Shipping Act, but also had converted the same to a coastal-run under the provisions of the Customs Act. The facts of the case are not applicable as AE had never converted itself to coastal run under the Customs Act nor was it directed to do so by the Customs authorities even after being aware that Cochin was to be the base-port of AE.

(iv). The Commissioner has further contradicted himself (Para 177 of OIO) wherein he himself records that "Liability to pay Customs duty is not linked to conversion of the vessel for coastal run or getting required permission from DG (Shipping) for conducting coastal operations". Without prejudice to the above, in case any demand of Customs duty is sought to be made on the stores which were consumed on AE, the same should be limited to the stores consumed during the period 04.10.2007 to 06.10.2007, wherein AE had factually undertaken maintenance/repair activities in Indian territorial waters. The quantum of duty applicable on stores consumed during such period is Rs 1, 63,479.

Other submissions

13. Learned Counsel for the appellants submits that in terms of Section 1 read with 2(27) of the Customs Act, the operations of the Customs Act is generally extended to only the Indian mainland and territorial waters of India (and not to the exclusive economic zone and continental shelf) for the activities of cable-repair; the only activities for which the operations of the Customs Act is extended to the continental shelf and exclusive economic zone of India, in terms Notification of the Ministry of External Affairs bearing no. 1-111/3/2002 dated 07.02.2002. Since the activities of AE are not in relation to oil exploration or supply of stores to vessels engaged in such exploration, repair activities which have been undertaken by it either in the exclusive economic zone or the continental shelf of India, will be considered to have been undertaken outside India. As AE has undertaken only a single repair activity within the territorial waters of India, the status of AE ought to be considered to be that of an FGV even for such one-off activity within the Indian territorial waters of India, since the vessel was engaged in operations outside India throughout. However, without prejudice, the

Appellant is willing to discharge the applicable Customs duty on the stores which have been consumed onboard during such period when the repair activity was undertaken, viz. 04.10.2007 to 06.10.2007, in Indian territorial waters. Shri Roshan Seth concludes his argument by submitting that in view of his arguments, the OIO may be set aside giving consequential reliefs.

14. Shri Gopa Kumar, Joint Commissioner, AR, arguing on behalf of the department, submits that C.S ASEAN Explorer cannot be categorized as foreign going vessel; the vessel was operating within the territorial waters of India without reverting into a vessel on coastal run; the vessel was carrying out cable repair in the Indian waters; the same is evident from the following.

(i). the master of the vessel stated, on 06.02.2012, that the vessel had discharged functions within the territorial waters of India, / that permission has been obtained only from the DG(Shipping) / Mumbai; no customs duty has been paid or exemption benefit availed on any of the consumables used by the vessel during its operation in Indian waters;

(ii). Letter dated 10.02.2012, issued by the DoT, in response to an application filed by M/s. Tata Telecommunications Ltd (submitted by the master of the vessel) indicated that the vessel was permitted to undertake operations at Mumbai, Chennai and Cochin offshore subject to the condition that the vessel is to operate in the EEZ in accordance with the provisions of the territorial waters, Continental shelf and other Maritime Zones act;

(iii). The General manager of M/s. ACPL Singapore, stated, on 28.02.2012, that they had entered into agreement with an establishment in India for performing certain specialized functions in the Indian waters and that the vessel had always obtained Licences from the D.G (Shipping) for submarine cable repair work within the Indian waters;

(iv). Captain Antony Wong, Master Mariner, stated that the Indian telephone companies will notify by phone call or by e-mail whenever there is a cable break in Indian area, and then ACPL will mobilize cable ship CAS ASESN Explorer for the cable repair; whenever cable repair work was to be done in Indian waters, license from DG (Shipping) was obtained and that the vessel was stationed at Cochin.

(v). On perusal of the letter dated 26.6.2012, by Deputy Conservator, Cochin Port, it is seen that last five activities at sea, the vessel had undertaken repair activities at 5 nautical miles from the baseline of India during the period 4.10.207 to 06.10.2007, i.e, within the territorial waters;

(vi). It is seen, from vessel's arrival departure declarations, during 25.04.2003 to 17.2.2012, that there were voyages from Cochin to Mumbai for which applications for port clearance were taken stating the vessel as 'foreign';

(vii). Out of 9 years stay in India, the vessel stayed for 7 years at Cochin and has not applied for conversation into a vessel on coastal run;

(viii). Submarine cable work was undertaken at a distance of 15 nm off the shore Mumbai and at 5-20 nautical miles off the shore of Mumbai (paras 32-35 page 1010); in compliance with the contract, the vessel had been rendering the services of 'repair and maintenance' at distances from 5 nautical miles to 145 nautical miles into sea off the Mumbai coast; these services have been rendered in the territorial waters and the exclusive economic zone/contiguous zone of India which extend up to 200 nautical miles in to the sea; the vessel was put into operations in India without having been first converted into a vessel on coastal run prescribed under CBEC circular 58/97 dt.06.11.1997;

(ix). the vessel was utilized for discharge of such services in India has been put to use in India and therefore, ought to have been converted into one on coastal run before applying the same to rendering of services in India; the vessel received, during its stay in India on board, spares and consumables essentially meant for submarine cable repair activity and fuel and ship spares as stores during the period from 11.07.2007 to 24. 04.2012.

Despite the above clear facts, appellant has been arguing that the vessel qualified to be a foreign going vessel; in all their declarations before the Customs authorities, they had declared the vessel as foreign going vessel only; this amounts to suppression of facts and the demand for the extended period and the penalties imposed are justified.

15. Learned Authorised Representative further submits that no IGM indicating the vessel as cargo was filed and duty on the stores and bunkers was discharged. This basic requirement of compliance of CBEC circular

58/97 was not done by the ASEAN Cable Ship, which is a clear violation of the Customs Act. Therefore, the vessel was confiscated and the duties demanded on the stores and bunkers and penalties were rightly imposed.

Learned AR relies upon the following case law.

(i). *Aban Lloyd Chiles Offshore Ltd & another Vs UOI & Others (2008(4)TMI 19- SC* where in it was held that

> *if the so-called foreign going vessel is located within a territory over which the coastal State has complete control and has sovereign right to extend its fiscal laws to such an area with or without modifications and the stores were consumed in the area to which the Customs Act has been extended, reference or reliance to the vessel being a foreign going vessel shall be of no consequence and the customs duty would be leviable as the goods are consumed within the territory to which the Customs Act has been extended as per the Maritime Zones Act, 1976 and the International Convention - UNCLOS, 1982."*

(ii). In the case of *Pride Foramer Vs UOI 2002 (148) ELT 19 (Bom)*, it was held that

> *Respondents are perfectly justified in refusing to permit the petitioner to clear, ship stores and spares for use on the Oil Rig, on transshipment 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."*

(i). It was held in CC, *Mumbai Vs M/S Aban Loyd Chiles Offshore Ltd. & Others 2017 (346) ELT 513(SC)* that

> ***24.*** *"As long as the rig was used for operations within the territorial waters of India, the rig would meet the requirement and satisfy the condition that it was an imported good meant for home consumption. There would be no doubt on the said legal position in view of the subsequent pronouncement in V.M. Salgaoncar(supra), wherein dwelling on the question of home consumption it was held that the expression 'consumption' does not involve complete using up of the commodity and would include putting the commodity to use to any type of utility within the territory of India. Even when this condition is satisfied, it would amount to home consumption."*
>
> ***31.*** *"The Customs 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 'good' meant for home consumption.*

Learned Authorised Representative further submits that the judgments support the department's view that when ASEAN Cable ship was brought into Indian territorial waters and put to use therein for operations- viz. Cable Repair work- the vessel should have been declared as Good by filing 1GM under Section 30 of the Customs Act. 'The Provisions of the Act are required to be met' and in the subject case as there was non- compliance of the provisions, the vessel was confiscated as per the provisions of the Act.

16. Heard both sides and perused the records of the case. We have also given careful consideration to the oral and written submissions of the rival parties. Though the senior counsel for the appellants and the authorised representative has given detailed and long drawn arguments on the subject, the issue is on a very narrow campus. The entire issue hinges on the short point as to whether the vessel in question can be considered as a Foreign Going Vessel in terms of the Customs Act, 1962 and whether consequentially eligible for duty free supply of ship stores, spares, bunkers etc and whether the demand is hit by limitation. To appreciate the finer points it is useful to have a look at the way the Customs Act, 1962, treats the vessels as foreign going vessels and the way tribunal and courts have interpreted the same. Section 2(21) of the Customs Act, defines Foreign Going Vessel (FGV) as follows.

Section 2 (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.

17. We find that whereas the appellant contends that in view of the inclusive clause-(ii), the impugned vessel qualifies to be a foreign going vessel, the Department contends that the AE has carried out operations outside the Indian territorial waters for only 300 days out of 1750 days covered in the disputed period. The appellants contend that the vessel was “engaged” by virtue of in the operational zone of SEAIOCMA which contains areas bound by either scheduled cables or by great circle lines connecting Djibouti in the West, Perth in the South, Guam in the East and Toucheng in the North which covering scheduled area 1,05,000/- KMs. The cables are owned by various telecom companies (Maintenance Authorities); these telecom companies form a consortium to enter into a contract for maintenance of these cables; three cable ships have been placed at three berth points i.e. (a) Cochin, India (b) Singapore and (c) Subic Bay, Philippines; whenever a fault is noticed any of these cables, the relevant ship berthed closest the fault area is contractually required to undertake repairs; they also attend to cable working exercises on such scheduled cables. There is a necessity to undertake repair activities in a time-bound manner as these cables are used for the purpose of telecommunication and data transmission and a fault somewhere can catastrophically affect global trade and commerce and security communications between Defence establishments. As such the cable ships are required to undertake repairs quickly and efficiently and therefore, the cable ships are required to be in operational preparedness all the times.

18. Learned Counsel for the appellants submits, drawing an analogy to a Fighter Plane that the Fighter Plane may not be engaged in a war all the times but it requires to be in readiness all the time. He submits that it is not proper for the Department to say that the vessel was mostly in Indian territorial waters; out of 18 instances of repair/cable-working during the disputed period (July 11, 2007 to April 26, 2012) and out of 36 instances of repair/cable-working during the life of Contract, only on a single occasion, the repair was carried out in the territorial waters of India. Even if, the vessel was berthing at Cochin Port for most of the time, it was required to be in readiness to go and carry out repairs. Therefore, the Contract itself defines the “engagement” of the vessel. We find that Learned Counsel for the appellants place reliance on the judgment of Hon’ble Gujarat High Court in the case of CIT Vs Natwarlal Tribhovandas, 1973 (87) ITR 703 (Guj.) wherein it has been held that the words “engaged in” are often employed to denote a present obligation to devote time, attention and efforts to a particular activity, although for the time being, there may not be any active participation or whole time involvement in such activity.

19. In order to appreciate, the engagement of the impugned vessel, it will be beneficial to look into the terms of the Contract under which the said vessel is engaged. The South-East Asia and Indian Ocean Cable Maintenance Agreement (SEAIOCMA) dated 15th December, 2005 reads as follows:

*"**(b)** The Maintenance Authorities wish to have made available cable ships, remote operated vehicles and depots for the repair and maintenance and storage of such submarine telecommunication cable systems.*

ACPL, GMSL and IOCPL, in their separate capacities shall make available three Cable ships and Remote Operated Vehicles (ROVs) namely the C.S.ASEAN Restorer and ROV Weddelli, CS Cable Retriever and ROV Barracuda and the C.S. ASEAN Explorer and a ROV (to be provided by 1 January 2008) respectively to the Maintenance Authorities for the repair and maintenance of such submarine telecommunications cables as are listed in Schedule B1 of this Agreement. C.S. ASEAN Restorer shall be based at port of Singapore, C.S. Cable Retriever shall be based at Subic Bay (Philippines) and C.S. ASEAN Explorer shall be based at port of Cochin (India) (as and when it comes into operation)."

We find that Article 5 speaks of provision cable ships, ROV and Depot (s) are as under:

(a) On and from the Effective Date, the repair and maintenance of the Scheduled Cables shall be carried out by three Cable ships and ROVs, such Cable ships and ROVs being as specified in Schedule G and Schedule N.

(b) ……..

(c) ….. Cable ship Operator shall exercise due diligence to maintain is Cable ship to ensure that it is equipped with the necessary Operator to fulfil its obligations under this Agreement.

(d) The Cable hip Operators shall carry out repairs and maintenance work expeditiously and in accordance with internationally accepted standards and in consultation with the relevant Maintenance Authority………. The cost of such additional facilities provided directly in respect of a particular repair or maintenance operation shall be charged directly to that operation in accordance with Clause 19(g).

Article 7(b) states that:

(b) Under the Reduced Manning arrangement, each Cable ship Operator shall ensure that its Cable ship is operated in such a manner so as to be able to put to sea without undue delay and normally within 24 hours of receipt of written notification from the

appropriate Maintenance Authority that the Cable ship's Services are required in accordance with Clause 11 unless Clause 15 and Clause 25 are applicable.

Article 13(a) specifies that:

(a) The Cable ships shall normally be located at the Base Ports as listed in Schedule A2 while on standby for repair and maintenance.

Article 19(a) specifies that

(a) The respective costs of each Cable ship (including its ROV) shall comprise Fixed Standing Charges and Running Costs. Running Costs incurred are calculated in accordance with Schedule D2. The Fixed Standing Charges from 1st July 2005 till 2012 are shown in Schedule D1.

20. Ongoing through the terms of the Contract, we do not have any doubt, whatsoever, in our minds that the impugned vessel is engaged for cable repair and cable-laying work in the areas specified therein; the ship requires to be in readiness to leave for repairs should an exigency arise and the vessel is paid both fixed charges as well as operational charges. Therefore, we find that the appellants have a strong case in their favour inasmuch as the (ii) inclusive definition is concerned. It is squarely covered by the terms "any vessel engaged in fishing or any other operations outside the territorial waters of India". We find that the term "engaged in" has not been defined in the Customs Act. Therefore, it is required to fall upon the interpretation given by the higher Courts with reference to the words. We find that the Hon'ble High Court of Gujarat has extensively discussed the term "engaged" in the case of Natwarlal Thribhovandas (supra). We find that Hon'ble High Court has observed at Para 8 that:

……. The expression "engaged in" is a term of various meanings depending on the context it is used but ordinarily, it is intended to signify continuation occupation or employment; it involves the concept of continuity of action as well as physical participation. However, the term is often employed to denote a present obligation to devote time, attention and efforts to a particular activity,

Hon'ble High Court has observed at Para 18 that:

……… The expression does not necessarily signify active and continuous participation in the actual transaction of the day-to-day business of the firm; it is flexible enough to take in the case of a partner who devotes time, attention and labour to some activity or assignment calculated or designed to lead to the preservation, growth or advancement of the business of the firm.

We also find that Hon'ble Apex Court in the case of Regional Provident Fund Commissioner, Bombay Vs Sree Krishna Metal Manufacturing Co, Bhandara & Oudh Sugar Mills Ltd., AIR 1962 SC 1536 held that:

"8. In our opinion, this argument is not well-founded. The expression "all factories engaged in any industry specified in Schedule I" does not lend itself to the construction that it is confined to factories exclusively engaged in any industry specified in Schedule I. What exactly is meant by the clause, we will have occasion to deal with later on. For the present, it would be enough to say that when the Legislature has described factories as factories engaged in any industry, it did not intend that the said factories should be exclusively engaged in the industry specified in Schedule I. The construction for which the respondents contend requires that we should add the word "exclusively" in the clause and that clearly would not be permissible."

21. In view of the above, we are of the considered opinion that the vessel ASEAN Explorer was a foreign going vessel in terms of inclusive definition contained in Section 2(21)(ii) of the Customs Act, 1962. We find that as contended by the Learned Counsel for the appellants, no time period is prescribed in the definition. The engagement of the vessel in its entirety under the Agreement request to be considered and not for a specific voyage or time period; the vessel is on a continuous engagement and the status of the vessel being the tough a foreign going vessel cannot be decided on a piece meal basis as the contractual terms require a continuous and a long drawn engagement. Therefore, as contended by the appellants, the benefit of the provision should not be denied by reading extraneous conditions into the legal provisions as held in *Tata Iron and Steel Co. Ltd.* (supra), *Naffar Chandra Jute Mills Ltd.* (supra) and Indian Organic Chemicals Ltd. (Supra).

22. The learned Counsel for the appellants, however, attempted to argue that the impugned vessel satisfies the descriptive part and all the three inclusive parts of the definition for foreign going vessels. We do not find merit in such an argument as the impugned vessel was not engaged in the carriage of goods or passengers between any Port or Airport in India or any Port or Airport outside India, whether touching any intermediate Port or Airport in India or not. Arguing that the impugned vessel carried goods (stores, spares and bunkers) and passengers (crew and technical staff) to and from Indian ports and foreign ports, is certainly long drawn and is against the principles laid down in the cases cited above, by the appellants themselves, holding that reading extraneous conditions in the provisions is incorrect. Substituting extraneous conditions to avail a benefit is as bad as substitution to deny a benefit. We do not find that the above argument will not hold good to make the vessel a foreign going one in terms of the main limb of the definition. Similarly, the vessel will not fall under the inclusive definition contained in (i) and (iii) of Section 2(21). However, in view of the discussion above, we are convinced that the impugned vessel is an FGV in terms of (ii) of Section 2(21) of the Customs Act, 1962.

23. We find that Learned Commissioner has argued that the appellants have obtained licenses from DG Shipping for Coastal run whenever repair activities were undertaken within the territorial waters of India. The appellants contend that such permission was obtained four times; however, actual repair operations within the Indian territorial waters were undertaken only once from 4th October 2007 to 6th October 2007. We find that Tribunal, in the case of Scindia Steam Navigation Vs CCE, 1998 (360) ELT 581, held that intermissions in the operations do not take away the status of a vessel as a foreign going vessel. The Tribunal observed that:

> ***12.*** *The only question involved in the instant application is as to whether the vessel concerned M.V. Jala Durga was a "foreign going vessel" within the meaning of Section 2(21) of the Customs Act, 1962. The learned Counsel appearing on behalf of the respondents submitted that the word "for the time being" pre-supposes that period on time is the material factor. It means or pre-supposes a vessel at the relevant time engaged in the carriage of goods or passenger between any port or airport in India and any port or airport outside India. The concept of movement according to the learned Counsel is implicit in the definition. In the instant case while the vessel was in the dry docks "for the time being" the vessel was not engaged in the carriage of goods. After repairs it might again be engaged in the carriage of goods both before and after the period when it was in the dry dock.*
>
> ***13.*** *Mr. Dipankar Gupta, appearing on behalf of the petitioner, submitted that the vessel was a "foreign going vessel" even while it was being repaired in the dry docks because at that time it was making all reasonable and proper preparation for carrying the cargo to foreign ports. The delay occurred in repairing could not make the vessel a non-foreign going vessel. It appears that the vessel was carrying cargo between Indian ports and foreign ports. In one such voyage while the vessel came to Calcutta from foreign port, the vessel had to undergo repairs in the dry docks. But that was necessary for reasonable and proper preparations for proceeding to foreign port with export cargo. Reasonable delay and intermissions in that operation could not take away in my opinion from the vessel the character of her being a "foreign going vessel". Steps taken in proceeding to foreign ports with export cargo could not prevent the vessel from being a foreign going vessel within the meaning of the provision of Section 2(21) of the Customs Act, 1962. Necessary repairs in the dry docks were one of such steps to enable the vessel to proceed to foreign port with export cargo.*

> ***14.*** *For what has been started hereinbefore it has to be held that the vessel M.V. Jala Durga was a "foreign going vessel" within the provision of Section 2(21) of the Customs Act 1962 even while she had been undergoing repairs at the dry docks.*

Similarly, Tribunal in the case of Shipping Corporation of India, 1987 (29) ELT 182 held that an FGV does not lose its status when on a coastal run *en route* to foreign countries. Tribunal held similarly in the following cases:

(i) IOCL Vs CCE, Hyderabad-II, 2007 (207) ELT 108 (Tri. Bang.)

(ii) IOCL Vs CCE, Mumbai-IV, 2008 (225) ELT 250 (Tri. Mum.)

(iii) Senior Airport Terminal Manager, IOCL Vs CCE, Hyderabad-II, 2006 (205) ELT 726 (Tri. Bang.)

Further, in the following cases, it was held that daughter vessels carrying goods from mother vessels, from a foreign Port to the Indian Port, would not lose its character as an FGV:

(i) Trustees of the Port of Madras Vs K.P.V. Sheik Mohd. Rowther & Co. Pvt. Ltd., 1996 (82) ELT 174 (SC).

(ii) Turner Morrison & Co. Ltd. Vs Asst. Collector of Customs For Exports (II), 1999 (110) ELT 484 (Cal.).

(iii) South India Corporation (Agencies) Ltd. Vs Collector of Customs and Others, 1987 (30) ELT 100 (Cal.)

(iv) CCE Vs Shipping Corporation of India, 1987 (29) ELT 182.

24. From the above decisions, it is clear that the status of any foreign going vessel does not change for the reason that it has had one or two incursions or engagements in the territorial waters of India. Moreover, the status does not change from day-to-day depending on the work the vessel attended that particular day. Such a finding would lead to absurd conclusions. We find that the status of the impugned vessel is decided by the terms of Agreement of SEAIOCMA as the vessel is engaged in the operations in terms of the Agreement in its area of operation notwithstanding the fact that for a major portion of time, the said vessel was berthed at Cochin Port and on a single occasion has undertaken the work within Indian territorial waters.

25. We find that Learned Commissioner placed reliance on Marco Shipping case (supra). However, we find that as submitted by Learned Counsel for the appellants that the facts of the case are different. In the above case, coastal permission was requested and granted; the vessel was held to be not engaged in the carriage of passengers and goods, whereas in the present case facts are different. We find that the case did not discuss the inclusive definition of a "foreign going vessel" as contained in (ii) of Section 2(21) of Customs Act, 1962 which is the case of the impugned vessel. However, the fact remains that during the course of coastal run, the vessel has consumed certain stores, spares and bunkers. Though the impugned vessel may not lose the status as an FGV for this incursion, a question arises as to whether the appellants are liable to pay duty on the same. The Learned Counsel for the appellants claimed that the duty comes to INR 1,63,479/-. However, before we decide whether duty is payable on such consumption, we find that it is relevant to have a look at the provisions of Section 87 of the Customs Act, 1962. The said Section reads as under:

"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."

26. On a plain reading of the Section 87 as above, it is evidently clear that as long as the vessel or the aircraft holds the status as a foreign-going vessel, exemptions contained in Section 87 applies without any doubt. Going by the ratio of the judgment of the Hon'ble Supreme Court in the case of Aban Lyod Chiles Offshore Ltd, 2008 (4) TMI 19 (SC) held that:

"79. It may not be correct to contend that the oil rigs installed by the appellants answer the description "foreign going vessel". A vessel may be a foreign going vessel but if the oil rig is situated in the area to which the Customs Act applies or extends, the aid of Section 2(21) of the Customs Act cannot be taken to get the benefit under Sections 86 and 87 of the same Act. The principle underlying under Sections 86 and 87 is that the stores are consumed on board by a foreign going vessel. If the so-called foreign going vessel is located within a territory over which the coastal State has complete control and has sovereign right to extend its fiscal laws to such an area with or without modifications and the stores were consumed in the area to which the Customs Act has been extended, reference or reliance to the vessel being a foreign going vessel shall be of no consequence and the customs duty would be leviable as the goods are consumed within the territory to which the Customs Act has been extended as per the Maritime Zones Act, 1976 and the International Convention UNCLOS, 1982."

From the above, we find that though the status of an FGV is not altered by the fact that such vessel or aircraft has run to a domestic Port or Airport during such time, duty on the stores consumed when the vessel was involved in operations within Indian territorial waters, needs to be collected in view of the above judgment. We find that Hon'ble Bombay High Court in the case of Pride Foramer has also taken the same view. This Bench has also followed the same in the case of Focus Energy, 2019 (11) TMI 22 (CESTAT BANG.) Therefore, we find that the appellants require to pay duty on the ship stores consumed by them while they were operating in the territorial waters of India. The appellants claim that such operations were only once during 4th October 2007 to 6th October 2007 and the applicable duty payable is Rs.1, 63,479. However, this is a matter of fact and the same requires to be ascertained/verified from the records like vessel's log books, correspondence with their masters, telcom authorities, information submitted to Port and Customs etc. For this reason, the matter requires to go back to the adjudicating authority for computation of the duty liability.

27. We find that Learned Authorized Representative for the Department has reiterated the findings of the Learned Commissioner. However, as per our discussion above, the contentions of the Department have been countered and held to be not maintainable under law. We also find that the cases relied upon by the Authorized Representative cannot help the cause of the Department. We find that the decision in the case Aban Lyod Chiles Offshore Ltd., Pride Foramer (supra) concerned about the vessels which were rigs engaged in oil exploration in the designated areas of continental shelf and exclusive economic zone, which were declared by a Notification to be a part of India for a limited purpose. However, we find that the cases are relevant only to the extent they decide the applicability of duty-free stores during the period the vessels were in Indian territorial waters. Moreover, the submissions of the learned AR are based on stray correspondence and no investigation to that extent appears to have been done in this regard. The crux of the argument of the department was that the Vessel was berthed in Cochin for most of the time during the disputed period and thus it ceases to be foreign going vessel. Moreover, we find that the vessel was anchored in Cochin Port and was under the watchful eyes of Customs and Port authorities. Many times, Customs authorities have boarded the Vessel as demonstrated by the counsel for the appellants. Customs officers were supervising the bonded stores of the vessel. It was well within the right and mandate of Customs authorities to advise the appellants to ensure that there were no procedural and other infractions. No proof of such efforts and correspondence, if any, has been placed on record before us. It can be seen that the arguments of adjudicating authority were controverted and we are inclined to hold that the impugned vessel is foreign going vessel and as such the exemption in terms of Section 87 of the Customs Act, 1962 is available to the appellants, despite the fact that it was lying berthed at Cochin for most part of the time. However, in view of the Hon'ble Apex court's decision in Aban Loyd Case (supra), we find that the duty on the ship stores consumed while the vessel was performing operations within Indian territorial waters requires to be paid by the appellants. Learned Counsel for the appellants has fairly conceded the same and expressed willingness to pay the same.

28. Learned Counsel for the appellants submits that a major portion of the demand is barred by limitation. He submits that declarations about the registry of the vessel, cargo, crew and nature of the vessel as a cable laying/repair vessel were declared in the IGMS; all declarations for procurement of stores were made vide transshipment applications; all the information right from the time the vessel berthed at Cochin were submitted to Customs and other authorities; in all the applications seeking Port clearances specific declaration was made that the vessel was sailing under foreign run; the nature of the work was also disclosed. He submits that, moreover, Customs officers visited the vessel a number of times for boarding formalities as well as bonding the stores and therefore suppression of any kind cannot be alleged against the appellants. We find that the contentions of the appellants are acceptable. The vessel which was berthed in Cochin Port for more than five years could not have but escaped the attention of Customs and Port Officers. Understandably, it is not a small piece of item that one could have smuggled in or out in his pocket of baggage. Moreover, in the seven long years, Customs Officers have boarded the vessel and have questioned the captain and the crew about the vessel, voyage etc. as part of their routine formalities. The officers have also supervised the bond stores aboard the vessel. Therefore, we find that extended period is not invokable in the circumstances of the case. The demand is clearly hit by limitation. We hold that the impugned vessel is a foreign-going vessel and as such eligible to procure stores in terms of Section 87 of the Customs Act, 1962. However, we hold that appellants are liable to pay duty on stores consumed while performing operations in the Indian territorial waters, for the normal period.

29. In view of the above, we find that the impugned vessel ASEAN Explorer is a foreign-going vessel, within the ambit of (ii) of Section 2(21) of the Customs Act, 1962, being engaged for performing repair/cable laying activities in the designated areas in terms of the Agreement with SEAIOCMA. The berthing of the vessel for long periods at Cochin Port does not alter this position and accordingly, the appellants are eligible to avail the exemption contained under Section 87 of the Customs Act, 1962 on the ship stores. However, they are required to pay duty on the ship stores consumed only during the period the said vessel was performing its designated work in Indian territorial waters, for the normal period. As the vessel is held to be a foreign-going vessel and that the exemption under Section 87 of the Customs Act, 1962 is available, the seizure of the vessel and consequent imposition of redemption fine in lieu of confiscation need to be set aside along with penalties imposed on both the appellants.

30. In the result, the Appeal No. C/27102/2013 is partly allowed by way of remand in the above terms; Remand is restricted to the extent of calculating applicable duty on the ship stores consumed by the appellant during the period the vessel was engaged in operations in Indian territorial waters and there too for the normal period. Appeal No. C/27115/2013 is allowed.

(Order was pronounced in Open Court on **18/02/2020**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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