

**IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL  
WEST ZONAL BENCH AT MUMBAI  
COURT No. I**

**APPEAL No. C/89765,90086/2014**

(Arising out of Order-in-Original No. PUN-CUSTM-000-COM-01-14-15 dated 21.10.2014 passed by Commissioner of Customs, Pune)

**Sesa Sterlite Ltd.**

**Appellant**

**Vs.**

**Commissioner of Customs, Pune**

**Respondent**

**AND**

**Commissioner of Customs, Pune**

**Appellant**

**Vs.**

**Sesa Sterlite Ltd.**

**Respondent**

**Appearance:**

Shri Naresh Thacker, Advocate, with Shri Gopal Mundra, C.A., for  
appellant-assessee  
Shri Roopam Kapoor, Commissioner (AR), for Revenue

**CORAM:**

**Hon'ble Dr. D.M. Misra, Member (Judicial)**

**Hon'ble Mr. Sanjiv Srivastava, Member (Technical)**

Date of Hearing: 21.6.2018

Date of Decision: 2.11.2018

ORDER No. A/**87810-87811/2018**

Per: Sanjiv Srivastava

These appeals are directed against the order in  
original of Commissioner of Customs, Pune dated  
21.08.2014, holding as follows:

- i. *The classification for the vessel "M V royal Sesa" under Customs Tariff item 89019000 imported by the noticee under Bill of entry No 006/JGD/12-13 dated 15,04,2013 by declaring the same as "self Propelled and Navigable Transshipment Barge" claiming classification under Chapter sub heading 89019000 through Jaigad Port under Ratnagiri Customs Division, is hereby ordered to be rejected and the said imported vessel is ordered to be classified under Chapter Sub Heading 89059090 of the Customs Tariff Act, 1975.*
- ii. *The benefit of exemption under notification No 12/2012-Cus dated 17.03.2012 (Sr No 461) and Notification No 21/2012-Cus dtd 17.03.2012 is ordered to be denied to the vessel imported under the above mentioned Bill of Entry filed by the noticee at Jaigad Port under Ratnagiri Customs Division.*
- iii. *Bill of Entry No 006/JGD/12-13 dtd 15.04.2013, filled by the noticee with Ratnagiri Customs Division is ordered to be re-assessed to appropriate duty of Customs by re-classifying the said vessel under Chapter Sub Heading 89059090 of the Customs Tariff Act, 1975.*
- iv. *Subsequent to re-assessment, I confirm the Customs duty amounting to Rs 12,43,46,232/-*

*(Rupees Twelve Crore Forty Three Lakh Forty six Thousand Two Hundred and Thirty Two only) as payable on the import of the vessel, M V Royal sesa. By mis declaring and misclassifying the same as "Self Propelled and Navigable transhipment Cargo Barge" under the provisions of Section 28(4) of the Customs Act, 1962.*

- v. I order to appropriate the amount of Rs 12,43,46,232/- (Rupees Twelve Crore Forty Three Lakh Forty six Thousand Two Hundred and Thirty Two only) paid by the noticee vide Challan No 001 dtd 04.04.14 towards the above liability.*
- vi. I confirm the interest of Rs 2,07,87,965/- (Rupees Two crores Seven Lakh Eighty Seven Thousand Nine Hundred and Sixty Five only) under the provisions of section 28 AA of the customs Act, 1962 for delayed payment of Customs duty as in Para (iv) above.*
- vii. I order for confiscation of vessel M V Royal Sesa valued at Rs 132,90,53,354/- (CIF) under the provisions of section 111(m) of the Customs Act, 1962. However, I give the noticee an option to redeem the vessel on payment of redemption fine of Rs 2,50,00,000/- (Rupees Two Crore Fifty Lakhs only).*

- viii. *I impose penalty of Rs 12,43,46,232/- (Rupees Twelve Crore Forty Three Lakh Forty six Thousand Two Hundred and Thirty Two only) on the noticee under section 114A of the Customs Act, 1962. The penalty amount will be reduced to Rs 3,10,86,558/- (Rupees Three Crore Ten Lakhs Eighty Six Thousand Five Hundred and Fifty Eight only) i.e. 25% of the penalty imposed if the noticee pays the interest and penalty within thirty days from the date of communication of this order in terms of first proviso to section 114A of the Customs Act, 1962.*
- ix. *Penalty of Rs. 1,00,00,000/- (Rupees One Crore only) is also imposed on the noticee under the provisions of Section 114AA of the Customs Act, 1962.*
- x. *This order is being issued without prejudice to any other action (s) that may be taken against the noticee or any other person (s) concerned with the impugned goods under the Customs Act, 1962 or any other law for the time force in Republic of India.”*

There are two appeals filed against the said order of Commissioner one by M/s Sesa Sterlite Ltd. Goa and second one by the department.

2.1 During course of search of office premises of appellants on 25.02.2014, officers of Directorate General of Revenue Intelligence came across certain documents relating to duty free import of a vessel named "M V Royal Sesa". The said vessel which is "*Floating Transfer Station*" has been imported by declaring the same as "self Propelled and Navigable Transshipment Cargo Barge" and classifying the same under CTH 8901, which covers the vessels meant for transportation of either persons or goods. They also availed the benefit of exemption under notification No 12/2012-Cus dtd 17.03.2012 (SI No 461) and Notification No 21/2012-Cus dated 17.03.2012 admissible to goods classifiable under heading 8901.

2.2 Scrutiny of documents, such as:

- i. Shipbuilding Contract No SGL for Construction of Floating Transfer Station 11-12 dated 21<sup>st</sup> May 2011;
- ii. Project Management Contract with M/s VIK-Sandvik Design India, bearing contract No FTS/ Project Management/ SCL/ 11-12 dated 18.05.2011;
- iii. Ship Design Contract with M/s wartsila Ship Design Singapore Pte Ltd., bearing No SGL/ FTS Design/ 1/12 dated 12.04.2011;

- iv. Commercial Invoice No Chengxi 2011-FTS 25-01 dated 27<sup>th</sup> August 2012 raised by M/s Chengxi Shipyard Co Ltd., China;
- v. Bill of entry No 006/JGD/12-13 dated 15.04.2013;
- vi. Builder's Certificate of Vessel;
- vii. Certificate of Indian Register of Shipping (IRS) – Certificate of Class No 14067 dated 18.02.2014;
- viii. Transshipment Permit No 01/2013 dated 21.03.2013;
- ix. The declaration Form (annexure-1) submitted by appellants to Ratnagiri Customs show description of goods as "Transshipment Cargo Barge";
- x. The certificate of Tuvalu Ship Registry issued at Singapore on 26.12.2012 shows the type of vessel as "transshipment Cargo Barge";
- xi. The Cargo ship Safety Radio Certificate, dated 07.04.2013 issued by American Bureau of Shipping showed vessel as a transshipment vessel operating within 20NM from the nearest coast of India;
- xii. Cargo Ship Safety Equipment Certificate dated 07.04.2013 showed that said vessel can operate within 20 NM from the nearest coast of India;
- xiii. Request for proposal for construction of FTS;
- xiv. Tender Notice;

- xv. Delivery Documents for 'M V Royal Sesa'
- xvi. The customs documents pertaining to the export of the vessel "M V Royal Sesa" from China to India such as shipping order No ZYRX01, Export Cargo Manifest of the Vessel 'M V Super Servant 3' and Mate receipt dated 18.10.2012, described the export cargo i.e. "M V Royal Sesa" as "Crane Barge";
- xvii. Qualification Certificate for the product dated 23.08.2012 issued by M/s China State Ship Building Corporation, Chengxi Shipyard Co Ltd., showed description as "Floating Transfer Station";
- xviii. Various emails recovered from the accounts of various officials of appellant recovered during the search on 25.02.2014;

and statements of various persons namely-

- i. Shri Mukesh Laddha Associate General Manager;
- ii. Shri S L Bajaj Director Finance;
- iii. Shri Suresh Kumar Rathi, Head Infrastructure & Logistics;
- iv. Shri Satish Thayapurath, Head Operations and Ship Building;
- v. Shri Prasad Palakil Mavilavatappil, Surveyor, Indian Register of Shipping Goa;

vi. Shri R Bhargavaa Custom House Agent (License No PN/R/25) and proprietor of M/s Avignon Shipping Co., Pune;

recorded under section 108 of Customs Act, 1962, revealed that the vessel imported was correctly classifiable under the heading 89059090 and the benefit of exemptions claimed by the appellants was not admissible. Accordingly a show cause notice dated 10.04.2014 was issued to the appellant.

2.3 After considering the submissions made by the appellant and affording them opportunity of personal hearing learned Commissioner adjudicated the matter holding as stated in para 1 supra.

2.4 Aggrieved by the order of Commissioner, appellants have filed this appeal. Department to has filed appeal against the order of the Commissioner for enhancement of penalty under section 114A to amount of duty confirmed plus interest.

3.1 We have heard Shri D B Shroff, Learned Counsel for the appellants and Shri Roopam Kapoor, Learned Commissioner, Authorized Representative for the revenue

3.2 In their ground of appeal and during the course of argument it was submitted-

- i. The vessel is principally designed for transportation of goods and hence more appropriately classifiable under heading 89019000 as claimed by them, in comparison to 89059090 which covers "*Other vessels, the navigability of which is subsidiary to their main function.*" Since navigability is one of the key function of the vessel without which it would not be able to perform other function, heading 8905 would not be applicable in their case;
- ii. Impugned vessel would be correctly classifiable under heading 8901 by application of general Rules of Interpretation.
- iii. As per HSN explanatory notes for the headings 8901 and 8905, heading 8905 encompassed those floating structures which were capable of navigability, but which normally performed their functions in stationary position. The vessel under consideration has to navigate along the length of the recipient vessel, without which the functional requirements could not be achieved. Since in the present case navigability is a critical factor for functionality the same cannot be said to be subsidiary for classifying this vessel under heading 8905.
- iv. Design is determinative factor for the purpose of classification

v. They relied on certificate issued by various authorities as follows in their support-

- a. International Load Line Certificate bearing 12234806-23057799=018 dated 07-04-2013 issued by American Bureau of Shipping;
- b. Cargo Ship Safety Equipment Certificate bearing No 12234806-23057799-012 dated 07-04-2013 issued by American Bureau of Shipping under authority of Government of Tuvalu
- c. Certificate of Class bearing No IR/40995/9664550 and Certificate No 14067 dated 18.02.2014 issued by Indian Register of Shipping;
- d. Certificate of Indian Registry dated 3.10.2013 by registrar of Indian Ships Murmagoa

vi. They relied upon the Classification made by the experts as follows:

- a. Certificate of Class No 14067 dated 18.02.2014 issued by IRS
- b. Certificate of Tuvalu Ship Registry issued at Singapore on 26.12.2012
- c. Tuvalu Ship registry – Provisional Ship Radio Station License dated 03.04.2014
- d. Tuvalu Ship registry – Provisional Minimum Safe Manning Certificate dated 03.04.2014

- e. The Cargo Ship Safety Equipment Certificate dated 07.04.2013 issued by American Bureau of Shipping
  - f. The Cargo Ship Safety Construction Certificate dated 07.04.2013 issued by American Bureau of Shipping
  - g. The Cargo Ship Safety Radio Certificate dated 07.04.2013 issued by American Bureau of Shipping
  - h. Interim Class Certificate issued by Indian Registry of Shipping on 1.10.2013
  - i. Certificate of Indian Registry dated 03.10.2013 issued by Registrar of Indian Ships Murmagoa
  - j. International Ship Security Certificate issued by Directorate General of Shipping on 22.09.2014
  - k. Approval dated 23.03.2013 by Indian Register of Shipping of plans for Royal SESA titling Navigational Bridge Visibility for Compliance
  - l. General or specified period license issued by Director General of Shipping, Registrar of Indian Ships on 04.06.2015 for a period coterminous with certificate of registry.
- vii. On the basis of the said certificates and classification made they claimed that all the

authorities have found that the vessel is transshipment cargo barge and should be classified accordingly

viii. They submitted in his statement Shri Parsad Palakki Mavilavalappil, Surveyor of Indian Registry has stated that vessel is not having cargo hatch but is having cargo coaming between two cranes on its deck and is capable of carrying cargo on deck. The vessel can be called as "General Cargo Ship"

ix. They strongly placed reliance on the decision of Tribunal in case of CGU Logistics [2011 (274) ELT 75 (T-Mum)]

x. They relied upon the authorities as follows in their support-

a. Hal Offshore Ltd Vs CC Import [2014 (303) ELT 119 (T)]

b. Hede Ferrominas Pvt Ltd [TS-7098-CESTAT-2015-CUST]

c. Raj Shipping Agencies Ltd [2015-TIOL-1405-CESTAT-MUM]

d. J M Baxi & Co & Other [Appeal No C/86330 to 86332, 86724 to 86726, 87210/13-Mum]

e. Prince Marine Transport Services Pvt Ltd & Another [Appeals Nos C/86323 & 86324/2013]

f. L & T Sapura Shipping Pvt Ltd [2016-TIOL-1519-CESTAT-MUM]

g. Pharm Aromatic Chemicals [1997 (95) ELT 203 (Bom)]

h. Faqir Chand Gulati vs Uppal Agencies Private Limited [2008 (12)STR 401 (SC)]

xi. Accordingly the vessel MV Royal Sesa merits classification under Chapter Heading 8901.

3.3 Arguing for the revenue Learned Authorized Representative submitted, that

i. From the various documents in relation to procurement, construction and export of the said vessel, it is quite evident that the vessel imported was not a transshipment cargo barge as claimed by the Appellants but was a floating crane. He relied upon the decisions as follows in his support to hold that based on the design features and actual functional capabilities of the vessel the correct classification of the vessel would be under heading 8905 and not under 8901 as claimed by the appellants.

a. LMP Precision Eng Co Ltd [2004 (163) ELT 290 (SC)]

b. Mahindra & Mahindra Ltd [2013 (296) ELT 485 (T-Bang)]

- c. Collector vs Business Forms Ltd [2002 (142) ELT 18 (SC)]
  - d. Akbar Badruddin Jiwani vs Collector [1990 (47) ELT 161 (SC)]
  - e. Urmila & Co Pvt Ltd [1998 (104) ELT 97 (T)]
  - f. SEBC Sugar Ltd [2011 (264) ELT 492 (SC)]
  - g. Grawar Construction Ltd [2009 (243) ELT 484 (BOM)]
- ii. He took us through various parts of the order where commissioner has specifically dealt with the contentions of the appellant in relation to navigability of the vessel and various certificates issued by various authorities, In his submissions he showed that these factors are not as relevant as shown by the appellants for determination of the classification of the said vessel. He emphasized that appellants had throughout sought to procure a floating crane or floating transfer station and it was only after the export of goods from the country of exportation they manipulated the documents to change the description to cargo transshipment barge.
- iii. He showed the various findings of Commissioner to hold the charges of suppression and misdeclaration against the appellants. He relied upon the decision in case of Jaishri engineering [1989 (39) ELT 449 (T)]

4.0 We have considered the submission made by both the sides. The issue for consideration is, whether the vessel imported declared as "Self Propelled & Navigable Transshipment Cargo Barge" classifiable under the CTH 89019000, and exempt from payment of duty under Notification No 12/2012-Cus dated 17.03.2012 (S No 461) and Notification No 21/2012-Cus dated 17,03,2012, or under 89059090 and subjected to duty at appropriate rate.

4.1 To appreciate the classification of the said vessel, certain facts need to be pointed out-

- i. Appellants filed a B/E No. 006/JGD/12-13 dated 15.4.2013, at Jaigad Port for clearance of the vessel "Self Propelled & Navigable Transshipment Cargo Barge M.V.Royal Sesa'. The assessable value of the vessel was declared as 132.90,53,354/-.
- ii. The vessel was cleared for home consumption by classifying under Customs Tariff item No. 8901 9000 claiming duty exemption available under Notfn. No. 12/2012-Cus dt 17.3.2012 (Sl.No.461) and Notfn. No. 21/2012-Cus dt 17.3.2012. The said B/E was assessed and given out of charge on 15.4.2013.
- iii. Investigations in the import of said vessel and the investigations broadly revealed that :

- (i) the importer floated RFP 'for the construction and supply of floating crane'. All the contracts entered by the importer with ship builder, the ship designer and Project Management service provider described the vessel to be constructed as Floating Transfer Station / Floating Transshipment Station for the purpose of carrying out loading of cargo in the open sea.
- (ii) The vessel constructed by M/s. Chenxi China was basically a pontoon fitted with two cranes and full fledged material handling conveyor system for handling ( loading and unloading operations) of bulk cargo in the open sea for the barges to the ocean going vessels or vice versa.
- (iii) It does not have any cargo hold or cargo hatch but was having only a funnel shaped 'cargo coaming' to primarily serve as buffer storage required for trimming and topping operation in the loading of the vessel or to hold cargo and use it to continue loading/ unloading when the barges laden with cargo are not available alongside..
- (iv) The vessel is not designed as a vessel for cargo transportation nor it was economical

or practical to use it for transportation of goods. The equipments and machinery fitted onboard the vessel viz. cranes, conveyor systems etc. indicate its essential characteristics of being a 'Crane Barge' and was primarily built for cargo loading operations.

- (v) Shri Suresh Kumar Rathi, Head-Infrastructure & Logistics of the Importer has in his statement dt 5.3.2014 admitted that the vessel was purchased to expand the loading capacity of the sea fleet so as to load the cargo from barges to mother vessel expeditiously while stating that the vessel could be used for several other incidental purposes, the primary function of the vessel was to use the vessel for the purpose of loading iron ore cargo and all other functions were subsidiary to the main function of the vessel i.e. loading / unloading the cargo. He also admitted that the vessel was described as "Floating Transfer Station" in the Contract between M/s. Sesa and Shipbuilder as the same description was given by the ship designer M/s. Wartsila Ship Design, Singapore; that their commercial department must have

advised M/s. Chengxi, China to mention the vessel as 'Transshipment Cargo Barge' on the invoice NO. Chengxi2011-FTS 25-01 dt 27.8.2012; that a barge carrying iron ore for the purpose of loading into a vessel receiving cargo for export cannot be called a transshipment barge because a barge can be used only for the purpose of transporting cargo and it could not do work of transshipment of cargo to the recipient vessel, that he had not idea as to why the description of M.V.Royal Sesa was mentioned as 'Crane Barge' in the China Customs export documents such as shipping order , EGM and invoice.

- (vi) Shri Satish Tahayapurath – Head Marine Operations and Ship Building, in his statement has affirmed that the vessel was specially designed for the purpose of loading cargo with two cranes and the conveyor belts.
- (vii) Shri Prakash Mavilavalappil , Surveyor Indian Register of Shipping (IRS) Goa, has in his statement dt 1.4.14 has affirmed that the vessel 'M.V.Royal Sesa' was not having any cargo hold and was having only 'Cargo Coaming' on the deck in between the two

cranes filled on its deck. It is submitted that the purpose of such storage facility on board is evidently to provide buffer storage for material handling and is neither meant or designed for regular transport.

(iv) On basis of the said investigations department held the view that correct classification of the vessel will be under heading 89059090 and the benefit of exemption under the notifications claimed by the appellant will not be available to them.

(v) Actual picture of the vessel is reproduced below:



From the above picture it is evident that the vessel is not a normal passenger or cargo vessel but has been designed and fitted with number of equipments for performing specific functions for which the vessel has been designed.

4.2 For ease of reference Chapter 89 of the CTH is reproduced below:

**CHAPTER 89**

**Ships, boats and floating structures**

*NOTE : A hull, an unfinished or incomplete vessel, assembled, unassembled, or disassembled, or a complete vessel unassembled or disassembled, is to be classified in heading 8906 if it does not have the essential character of a vessel of a particular kind.*

|          |     |                                                                                                                                   |
|----------|-----|-----------------------------------------------------------------------------------------------------------------------------------|
| 8901     |     | <b>CRUISE SHIPS, EXCURSION BOATS , FERRY-BOATS, CARGO SHIPS, BARGES AND SIMILAR VESSELS FOR THE TRANSPORT OF PERSONS OR GOODS</b> |
| 890110   | -   | Cruise ships, excursion boats and similar vessels principally designed for the transport of persons; ferry-boats of all kinds :   |
| 89011010 | --- | Ships                                                                                                                             |
| 89011020 | --- | Launches                                                                                                                          |
| 89011030 | --- | Boats                                                                                                                             |
| 89011040 | --- | Barges                                                                                                                            |
| 89011090 | --- | Other                                                                                                                             |
| 890120   | -   | Tankers                                                                                                                           |
| 890130   | -   | Refrigerated vessels, other than those of Sub-heading 8901 20                                                                     |
| 890190   |     | Other vessels for transport of the goods and other vessels for the transport of both persons and goods                            |
| 8902     |     | <b>FISHING VESSELS; FACTORY SHIPS AND OTHER VESSELS FOR PROCESSING OR PRESERVING FISHERY PRODUCTS</b>                             |
| 890200   | -   | Fishing vessels; factory ships and other vessels for processing or preserving fishery products :                                  |

|                 |     |                                                                                                                                                                                                                          |
|-----------------|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 89020010        | --- | Trawlers and other fishing vessels                                                                                                                                                                                       |
| 89020090        | --- | Other                                                                                                                                                                                                                    |
| <b>8903</b>     |     | <b>YACHTS AND OTHER VESSELS FOR PLEASURE OR SPORTS; ROWING BOATS AND CANOES</b>                                                                                                                                          |
| 890310          | -   | Inflatable                                                                                                                                                                                                               |
|                 | -   | Other                                                                                                                                                                                                                    |
| 89039100        | --  | Sail boats, with or without auxiliary motor                                                                                                                                                                              |
| 89039200        | --  | Motorboats, other than outboard motorboats                                                                                                                                                                               |
| 890399          | --  | Other :                                                                                                                                                                                                                  |
| 89039910        | --- | Canoes                                                                                                                                                                                                                   |
| 89039990        | --- | Other                                                                                                                                                                                                                    |
| <b>89040000</b> | -   | <b>TUGS AND PUSHER CRAFT</b>                                                                                                                                                                                             |
| <b>8905</b>     |     | <b>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</b> |
| 89051000        | -   | Dredgers                                                                                                                                                                                                                 |
| 89052000        | -   | Floating or submersible drilling or production platforms                                                                                                                                                                 |
| 890590          | -   | Other :                                                                                                                                                                                                                  |
| 89059010        | --- | Floating docks                                                                                                                                                                                                           |
| 89059090        | --- | Other                                                                                                                                                                                                                    |
| <b>8906</b>     |     | <b>OTHER VESSELS, INCLUDING WARSHIPS AND LIFEBOATS OTHER THAN ROWING BOATS</b>                                                                                                                                           |
| 89061000        | -   | Warships                                                                                                                                                                                                                 |
| 89069000        | -   | Others                                                                                                                                                                                                                   |
| <b>8907</b>     |     | <b>OTHER FLOATING STRUCTURES ( FOR EXAMPLE, RAFTS, TANKS, COFFER-DAMS, LANDING-STAGES, BUOYS AND BEACONS)</b>                                                                                                            |

|                 |   |                                                              |
|-----------------|---|--------------------------------------------------------------|
| 89071000        | - | Inflatable rafts                                             |
| 89079000        | - | Other                                                        |
| <b>89080000</b> |   | <b>VESSELS AND OTHER FLOATING STRUCTURES FOR BREAKING UP</b> |

4.3 From the structure of Chapter 89, it is quite evident that navigability is not a criteria for determination of the Classification under the said chapter. Navigability would be one of the features for all the goods classifiable under chapter 89. In Chapter 89, vessels performing specific functions are classified on the basis of the function performed although they may have navigability, self propulsions and cargo carrying facility i.e. fish vessel (8902), Tugs (CTH 8904), dredger, a salvage ship, house boat (CTH 8905), Warship, pilot boat, hospital ship (CTH 8906) are classified in separate headings and they obtain their essential character from the general structural design of the vessel and the equipments fitted onto the vessel to perform a specialized task. However the classification of the vessels cannot be determined on the basis of that criteria. Classification of any vessel is based on its essential character ascertained on the basis of the functional features, structural design and the equipment fitted on board the vessel. It is the basic design keeping in view the function that is intended to be performed which determine the classification of the

particular vessel. In this regard reliance is placed on the following judgments:

- a. Urmila & Co. Pvt. Ltd. [1998(104) ELT-97(Trib.)]
- b. L.M.P.Precision Eng.Co.Ltd.[2004(163)ELT 290(SC)]
- c. Mahindra & Mahindra Ltd. [2013(296)ELT 485(Tri-Bang)]

4.4 The description of the heading CTH 8905 categorically states that the navigability is subsidiary to their main function. The phrase “the navigability of which is subsidiary to their main function” has been explained in the HSN in the following manner:

“These normally perform their main function in a stationary position they include light vessels, drill ships, fire floats, dredgers of all kinds (e.g.) grab or suction dredgers, salvage ships for the recovery of sunken vessels; permanently moored air sea rescue floats, bathyscaphes, pontoons fitted with lifting or handling machines (e. G. Derricks, cranes, grain elevators and pontoons clearly designed to serve as a base for these machines. House boats, laundry boats and floating mills are also covered by this group.”

4.5 From the documents relating to RFP, Contract, Project Management etc it is evident that the vessel “M.V.Royal Sesa” was conceptualized and designed as a ‘Floating Transfer Station’ for the purpose of loading

bulk cargo like Iron Ore and not as vessel for transportation of goods, the structural design of the Vessel 'M.V. Royal Sesa' and the equipment fitted onto the vessel determine its essential character.

4.6 The appellant are claiming classification of the vessels under CTH 8901 on the ground that the vessel is principally designed for transport of goods and navigability is one of the main functions of the vessel. It is submitted that capacity of being self propelled and fully navigational cannot be the basis of eligibility to be classified under CTH8901. To claim the said features they have relied upon the various certificates and experts classifying the said vessel transshipment cargo barge. On perusal of the aid certificates and experts classification it is observed that these certificates have been issued by the various authorities to certify the availability of certain features such as navigability etc, but none of these certificates identify the essential character and function of the said vessel. Further these certificates cannot be the sole basis of classification under the CTH and the classification needs to be determined only after ascertaining the main/ essential function intended/ performed by the vessel and terms of the relevant tariff heading. Reliance In this regard is also placed on the case of Indian Aluminium Cables Ltd. v/s UOI (1985 (21) ELT 3 (SC) and Akbar B Jiwani v/s

Commissioner Customs 1990 (48) ELT 441 wherein it was held that the “ISI specification were not relevant (for classification under Customs Tariff) when they are only meant for quality control”.

4.7 It is observed that the beneficiary certificate issued by Chengxi Shipyard Co. Ltd. dated 01.12.2012 referred to the vessel as **Floating Terminal Station**. Similarly, the shipping order issued by the Chengxi Shipyard Co. Ltd. referred to the **vessel as crane barge**. Even Export Cargo Manifest of Chengxi Shipyard Co. referred to the vessel as “Crane Barge” when it was cleared for transportation of vessel ‘Super Servant 3’ on 18.10.12. Documents are reproduced below:

## BENEFICIARY CERTIFICATE

This is to certify that we, Chengxi Shipyard Co., Ltd., a corporation organized and existing under the Laws of the People's Republic of China, having its registered office at No.1 Hengshan Road, Jiangyin, Jiangsu Province, the People's Republic of China, as Beneficiary, have built One No. Floating Transfer Station as described hereunder to the order and on account of Sesa Goa Limited, a company incorporated under the Companies Act, 1956 and having its registered office at Sesa Ghor, 20 EDC Complex, Patto, Panjim, Goa, India, As per Contract No. SGL FOR CONSTRUCTION OF FLOATING TRANSFER STATION 11-12 dated 21.05.2011, made between Sesa Goa Limited and Chengxi Shipyard Co., Ltd. as the Beneficiary:

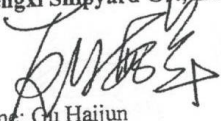
|                             |                                          |
|-----------------------------|------------------------------------------|
| Type of vessel              | : Floating Transfer Station              |
| Hull Number                 | : CX9501                                 |
| Name of vessel              | : Royal Sesa                             |
| Port of Registry            | : Mormugao                               |
| Class                       | : ABS, IRS                               |
| Length Overall              | : 92.4m                                  |
| LBP                         | : 89.4 mtrs                              |
| Breadth Moulded             | : 28m                                    |
| Depth Moulded               | : 6.5m                                   |
| Gross Tonnage               | : 5,522GT                                |
| Net Tonnage                 | : 1,657NT                                |
| Main Genset                 | : Wartsila 8L20 Auxiliary engines        |
| Place of Building           | : Jiangyin City, Jiangsu Province, China |
| Date of Steel Plate Cutting | : 15 <sup>th</sup> August 2011           |
| Date of Keel Laying         | : 15 <sup>th</sup> August 2011           |
| Date of Launching           | : 30 <sup>th</sup> June 2012             |
| Date of Delivery            | : 22 <sup>nd</sup> August 2012           |

Chengxi Shipyard Co., Ltd. have hereby executed this certificate.

Import covered under Chapter 2 of foreign trade policy AM 2000-2014 of Government of India & Importers/Exporters Code No. 1788000234

The Beneficiary:

**Chengxi Shipyard Co., Ltd.**

By: 

Name: Gu Haijun

Date: Dec 1<sup>st</sup>, 2012



**BILL OF SALE****KNOW ALL MEN BY THESE PRESENTS:**

The undersigned, CHENGXI SHIPYARD CO., LTD., a company organized and existing under the Laws of the People's Republic of China, having its registered office at No. 1 Hengshan Road, Jiangyin, Jiangsu Province, the People's Republic of China (hereinafter called the "Beneficiary"), in consideration of the sum of U.S. Dollars twenty one million seven hundred eighty thousand three hundred and thirty seven (\$21,780,337) and those matters and things more particularly set forth in the Shipbuilding Contract No. SGL for Construction of one FLOATING TRANSFER STATION 11-12 (Hull No.CX9501), dated 21<sup>st</sup> May 2011, and including any and all addenda thereto (hereinafter called the "CONTRACT"), made between the BENEFICIARY and SESA GOA LIMITED, a company incorporated under the Companies Act, 1956 and having its registered office at Sesa Ghor, 20 EDC Complex, Patto, Panjim, Goa, India (hereinafter called the "APPLICIANT"), do hereby set over, sell, transfer and assign onto the APPLICIANT all its title, right and interest in and to One FLOATING TRANSFER STATION (hereinafter called the VESSEL), together with all machinery, equipment, accessories, stores and spare parts now on board the VESSEL, to have and to hold said property onto the APPLICIANT, its successors, administrators and assignees forever.

The BENEFICIARY hereby covenants for itself, its successors and assignees that it is the lawful owner of the VESSEL, that it has the power and lawful right to sell and dispose of the VESSEL, her appurtenances and title thereto and that it warrants that the VESSEL is free and clear of any liens, charges, claims, mortgages, or other encumbrances and that it warrants and defends the title of the VESSEL against all claims whatsoever and that the VESSEL is not registered in any Chinese registry.

IN WITNESS WHEREOF, the BENEFICIARY has executed this BILL OF SALE by its duly authorized representative on 24<sup>th</sup> Aug, 2012.

Import covered under Chapter 2 of foreign trade policy AM 2000-2014 of Government of India & Importers/Exporters Code No. 1788000234

The BENEFICIARY:  
**CHENGXI SHIPYARD CO., LTD.**

By:   
Name: Gu Haijun  
Date: Dec 1<sup>st</sup>, 2012



EXPORT CARGO MANIFEST

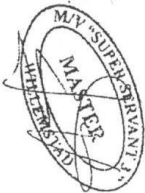


Seen J.L. Jeyaraj  
28/3/2014

DEPARTURE DATE: 2012.10.19

| VESSEL    | SUPPLY SERVANT 3                                                           | NATIONALITY      | CURACAO, KINGDOM OF THE NETHERLANDS | PORT OF LOADING           | PORT OF DISCHARGING | NUMBER OF PACKAGES | WEIGHT MT |
|-----------|----------------------------------------------------------------------------|------------------|-------------------------------------|---------------------------|---------------------|--------------------|-----------|
| 船名        | 船主                                                                         | 国籍               | 荷属安德列斯                              | 装货港                       | 卸货港                 | 数量                 | 重量        |
| CALL SIGN | PIPN                                                                       | VOYAGE NO        | 01                                  | 装货港                       | 卸货港                 | PACKAGES           | MT        |
| 船号        | PIPN                                                                       | 航次               | 01                                  | 装货港                       | 卸货港                 | PACKAGES           | MT        |
| B/L NO.   | S: SHIPPER<br>C: CONSIGNEE<br>N: NOTIFY PARTY                              | MARK AND NUMBERS | N/A, N/A                            | ONE CHARGE PARCELS<br>转运站 |                     | 1 VESSEL           | 4340      |
| ZYRX01    | S: CHENGXI SHIPYARD CO. LTD.<br>C: SESA GOA LIMITED<br>N: SESA GOA LIMITED |                  |                                     |                           |                     |                    |           |

备注:  
1. 运箱 1 个 (C/F); 1 NRO25331  
2. 承运人: GMS  
3. 抵达安城外埠 目的港: 安城外埠  
4. 抵达安城外埠 日期: 2012-11-05 / 0600LT  
5. 抵达日期: 2012-10-19 / 0300LT  
6. 货物装运日期: 2012-10-18 / 1300LT  
7. 通知同家: A  
PNEF NO. 1.1 12241地



173  
82

(174) (33)

中国外轮代理有限公司  
CHINA OCEAN SHIPPING AGENCY CO., LTD.  
CHENGXI SHIPYARD CO., LTD

Ship per 中船西船修造有限公司

No. ZYRX01      SUPER SERVANT 3 V-01

For GOA, INDIA

下列货物状况之货物业已收受无损  
Received on board the following goods apparent in good order and condition

| 标记及号码<br>Marks & Nos. | 数量<br>Quantity | 货物名称<br>Description of Goods | 重量<br>Weight |
|-----------------------|----------------|------------------------------|--------------|
| N/M                   | 1 VESSEL       | ONE CRANE BARGE<br>转运驳       | 4340MT       |

总件数 (大写)  
Total Number of Packages in Writing

日期 Date 18<sup>th</sup> Oct. 2014      时间 Time 1310

装入何轮 Stowed on Deck

共收 Received 4340 MT

理货员签名 Tallyed By      文 昌 Chief Officer

C: SESA GOA LIMITED

N: SESA GOA LIMITED

  
28/5/2014



It is not in dispute that under the HSN Explanatory Notes crane barge / floating cranes are classifiable under Chapter 8905 of HSN

4.8 Hon'ble Supreme Court in the case (i) M/s. O.K. Play(India) Ltd. Vs. Commissioner of C.Ex., Delhi-III,

Gurgaon [2005 (180) ELT (300) (SC)], held that no one single universal test can be applied for correct classification. Further, HSN along with the explanatory note provide the safe guide for interpretation of an entry. Hon'ble Supreme Court also held that functional utility, design, shape and pre dominant usage have also got to be taken into account while determining the classification on an item. When all the above observations are taken into account, it is seen that the vessel imported was fitted with cranes, and cranes provided the pre dominant usage and functional basis to the vessel.

4.9 The appellants have also sought to rely on the fact that vessel has self-navigation facility as well as capacity to transport persons. These submissions do not take the case of appellant any further because any vessel will have to provided for basic facilities to transport crew and operators on board. Further the vessel will have definitely some cargo carrying capacity. The question is not whether these functionalities are possible but the question that needs to be addressed whether these functionalities give the essential character to the vessel

4.10 So far as the navigability is concerned, following facts need to be considered;

- a. vessel has limited navigational capability and in the insurance papers (Hull Policy), it is clearly stated "P&I risks limited to vessel plying within 12 nautical miles from prominent points to Goa Port".
- b. RFP for construction of vessel clarifies that it is required to ply up till 22 nautical miles for transferring iron ore from barges to mother vessel.
- c. The vessel was transported from China to India not under its own steam but on board another vessel.

All the above factors show that navigability was not even the basic design essential for this vessel.

4.11 The tribunal has in case of Ocean Diving Centre Ltd Vs Commissioner of Customs Mumbai [2007 (2110 ELT 611 (T-MUM))] held as follows:

*"5.The primary function of the vessel in question is to provide accommodation to personnel working on oil rigs in the sea. It is also used for loading and unloading goods for the machines by the floating crane. The navigability of the vessel is secondary to its main function. The definition of the expression "Navigate" as per Law Lexicon at page 1284 is "to direct, manage or steer a vessel to pass by water". Since the Barge is not self-propelled, its navigability can only be considered to be subsidiary to its main function. HSN Explanatory Notes to Chapter 89.05 state that - This heading covers (A) Light-vessels, fire-floats, dredgers, floating cranes, and other vessels the navigability of which is subsidiary to their main function. These normally perform their main function in a stationary position. They include : light vessels; drill-ships; fire floats, dredgers of all kinds ( e.g.*

*grab or suction dredgers); salvage ships for the recovery of sunken vessels; permanently moored air-sea rescue floats, bathyscaphes, pontoons fitted with lifting or handling machines ( e.g. derricks, cranes, grain elevators) and pontoons clearly designed to serve as a base for these machines.*

**6.***The vessel in question is akin to a house boat in the sense that it performs function by accommodating personnel in a stationary position near oil rigs/platforms in the sea.*

**7.***The argument that similar vessel 'Vasuda' imported by M/s. Hind Offshore Ltd. was classified under CTH 89.01 cannot lead to the conclusion that the present vessel should also be so classified for the reason that the Customs authorities are not estopped from taking a different view. There is no estoppel in fiscal statutes.*

**8.***The reliance placed by the appellants on the judgments of the Apex Court in UOI v. V.M. Salgaoncar & Bros. (P) Ltd. [1998 (99) E.L.T. 3 (S.C.)] is misplaced as that decision is distinguishable from the facts of the present case. That case dealt with the issue of liability to examine in relation to capability of vessel sailing in the ocean and sea and the issue did not relate to classification which as we have seen from the scheme of Chapter 89, is on the basis of primary function.*

**9.***In the light of our finding that the primary function of the vessel is that of accommodation of personnel and its navigability is subsidiary to the above function, we agree with the authorities below that it rightly falls under the parentage of CTH 89.05, uphold the impugned order and reject the appeal."*

4.12 Appellants have heavily relied upon the decision of tribunal in case of CGU logistics in their support. In para 9, this tribunal held:

*“8. We have considered the submissions. The original authority found that the vessel only transhipped cargo from port area to the bulk carriers and vice versa. In another place of its order, that authority found that the vessel was not competent to carry cargo on its own but could only transfer cargo from one to other barge/place with the help of cranes fitted thereon. Yet in a third place, it was found that handling of cargo in docks and putting it on the big ships and carriers was its main function. By and large, the ratio of the decision of the original authority is that navigability of the vessel is subsidiary to its main function. The importer's contention to the contra was rejected. The learned Commissioner (Appeals) upheld the decision of the lower authority. In our view, an incoherent conclusion arrived at by the original authority came to be sustained with the passing of the impugned order. The view taken by the original authority that navigability is subsidiary to the main function of the vessel inconsistent with its finding that the vessel transships cargo from port area to bulk carriers and vice versa. Admittedly, the bulk carriers are anchored in the outer sea. The vessel in question has to navigate between the port area and the anchorage of the bulk carrier for the purpose of transshipment. Therefore, navigability of the vessel cannot be discounted. Of course, there are other modes of transshipment also, which, however, were not examined by the lower authorities. In the first mode of transshipment spelt out by the learned SDR, ‘BULK PROSPERITY’ is anchored between a bulk carrier and a barge and discharges cargo from the bulk carrier into the barge by making use of a conveyor belt system. This*

*mode of transshipment is not seen discussed in the impugned order, nor in the order-in-original. In the second mode of transshipment referred to by the SDR, the transhipper navigates between the anchorage of the bulk carrier and the shore. In the third mode of transshipment, it remains stationary at the initial and final stages of the process of transshipment and navigates at the intermediary stage. These modes of transshipment are also not seen discussed in the orders of the lower authorities. Both the orders were accepted by the Revenue.*

**9.** *That the vessel in question is used as a transshipment vessel transshipping cargo in all the aforesaid modes is not in dispute. That it is an ocean-going vessel as per the judgment of the Hon'ble Supreme Court is also a fact accepted by the Revenue. The various documents produced by the appellant described the vessel as "cargo ship", "general cargo ship", "transhipper" etc. The certificates issued by the Mercantile Marine Department are also significant in this regard. 'Cargo ship' is specifically classified under Heading 8901 irrespective of the extent or degree of its navigability. The HSN Note under Heading 89.01 says that this Heading covers all vessels for the transport of persons or goods other than vessels of Heading 89.03 and life boats, troop ships and hospital ships of Heading 89.06. HSN Heading 89.01 also includes cargo vessels of all kinds (other than tankers and refrigerated vessels) whether or not specialised for the transport of specific goods. The HSN Note proceeds to say that "these include ore vessels and other bulk carriers (for the transport of grain, coal etc.), container ships, Ro-Ro ships and LASH-type vessels". On the other hand, the HSN Notes under Heading 89.05 indicate that the vessels classified under this Heading 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. From this Note, it is evident that vessels which function in a stationary position get classified under Heading 89.05. We have already found that the vessel in question is, admittedly, not always in stationary position while carrying out transshipment of cargo. Some modes of transshipment definitely involve navigation. At times, the vessel may be stationary, but this would not ipso facto detract from classification of the vessel as a cargo ship under Heading 8901.”*

The said finding of tribunal needs to be looked into essentially in light of facts recorded in para 1, which clearly lay down:

“On examination of the goods under the supervision of the Assistant Commissioner (Docks), it was found that the vessel was (a) self-propelled with dedicated conveyor system in stationary position, (b) designed for short trade with service speed of 7 knots, (c) having no hatches to store cargo and (d) not competent to cruise with loaded cargo in the high seas. It was observed that the vessel was neither a cargo carrier nor engaged in transportation of bulk commodities and the same was found to be a bulk transhipper for loading/unloading bulk cargo into small barges in stationary position. Based on these findings arrived at on examination of the vessel, the assessing authority suggested that the vessel

be classified under Heading 8905. Subsequently, there was some correspondence between the assessing authority and the assessee. In a letter dated 22-4-2008 addressed to the Assistant Commissioner concerned, the assessee submitted that the vessel was a sea-going ship fitted with mechanical means of propulsion, which would imply that navigability is a primary function of the vessel. They submitted that the primary function of the vessel was to carry and transport cargo from other ships waiting at the bay and unload the same at the port and *vice versa*. It was submitted that this function was possible because the vessel was self-propelled and could navigate on its own. In an annexure to the said letter, the full description of the vessel was furnished, wherein dry cargo (coal, iron ore etc.) and agricultural products were specified to be the intended cargo and the purpose of design of the vessel was stated thus :  
*“The vessel shall be designed for short trade (about 20 miles from shore) for discharging of dry bulk commodities from bulk-carriers having maximum air draft 18 metres and maximum 45 metres beam and discharging into small barges through a dedicated conveyor system.”*

The facts of the said case are clearly distinguishable from the facts in present case further in para 8 of the said decision tribunal found incoherent stands taken by the adjudicating authority. The said case decided the

issue on the facts as placed before it holding the vessel under consideration was nothing but a cargo vessel.

4.13 In case of Hal Offshore Ltd., relied upon by the appellants, the facts as recorded in the said case are as follows:

*“3. Intelligence gathered by the Officers of the Central Intelligence Unit of the Custom House suggested that there has been gross-misdeclaration by both the importers at the time of import and accordingly investigations were carried out by the customs authorities which revealed the following :*

**(1) HAL Anant was built in the year 1982 and was named as Fu Lal and was classified as supply vessel. Thereafter it was taken over by M/s. Dulam International and named as Dulam Providence. M/s. HAL Offshore purchased the vessel in 2007 and renamed the vessel as HAL Anant.**

**(2) Malaviya Thirty Six was built in the year 1987 and was classified as Tug/Supply vessel. M/s. Great Offshore purchased the vessel in October 2006 from M/s. Geo Redereo AS, Norway and renamed the vessel as Malaviya Thirty Six (Ex-Skandi Bergen). The classification remained as Tug/Supply vessel.**

**(3) Both the importers got a contract from M/s. Oil and Natural Gas Commission (ONGC) in 2007 for charter of Multi-purpose Support Vessel for five years. After procuring the vessels, they sent the vessels for modification at Dubai, in order to make them capable of doing underwater inspection, Maintenance and Repair (IMR) operations and installed various equipment including fire fighting**

***systems and saturation diving system required for IMR operations.***

***(4) The class certificate issued by Bureau Veritas for HAL Anant gave the class notation of Fire Fighting Ship-2 and in the contract with the ONGC, the vessel was described as Multi-purpose Support Vessel. In the case of Malaviya Thirty six, prior to import, the importer got the anchor handling/towing winch removed from the vessel and reclassified the vessel as only supply vessel and got the tug notation deleted.***

***(5) In all the letters/communications with various agencies such as Indian Navy, ONGC, etc., the vessels have been described as “Multi-purpose Support Vessel (MSV) and not as supply vessels. The permission given by Indian Navy for these vessels was for underwater inspection and repair of offshore structures in Mumbai High oil fields of west coast and not for transport of goods or persons. The Indian Register of Shipping and Bureau Veritas assigned the class notations to these vessels which confirms that the vessel is equipped with specialized fire-fighting facilities, diving equipment and dynamic positioning capability which make it clear that the vessels are not supply vessels for transport of goods and persons but a specialized multi-purpose support vessel, the navigability of which is subsidiary to the main functions.***

***(6) The contract with the ONGC reveals that ONGC uses the terms Multi-purpose Support Vessel to mean a vessel which is capable of multi-purpose functions like fire-fighting, diving support, helicopter operation, rescue operations and pollution control operations etc. and because of***

**these functionalities, MSV is different from ordinary Supply Vessel.**

(7) The importers had suppressed the information regarding the contracts entered into by them with the ONGC at the time of import of the vessels, thereby suppressing the functionality of the vessel to evade customs duty by misclassifying them as supply vessels instead of multi-purpose vessels where the navigability is subsidiary to the main function of the vessel.

(8) In the case of M/s. HAL Offshore, there is an additional allegation that the importer had misdeclared the value of the vessel under importation by not including the cost of modification and saturation diving system totally worth US \$ 8.4 million.

**4.**On the basis of the investigation conducted and evidences unearthed, show cause notices were issued to the appellant vide notices dated 21-5-2010 (HAL Offshore) and notice dated 25-6-2010 (Great Offshore). These notices proposed to re-classify the vessels under CTH 8905 and demand differential duty of Rs. 15,50,78,867/- in the case of M/s. HAL Offshore (on account of both reclassification and also redetermination of assessable value) and differential duty of Rs.20,18,53,270/- in the case of M/s. Great Offshore on account of reclassification, by invoking the extended period under Section 28(1) of the Customs Act, 1962. The notices also proposed to recover interest on the differential duty liability under Section 28AB. There were also proposals for confiscation of the goods under Section 111(m) *ibid* and imposition of penalties under Sections 112(a)/114A on the importer and under 112(a) on the Managing Director/President and other officials connected with the import transaction of the importing firms.

**5.***The show cause notices were adjudicated and the duty demands were confirmed along with interest. Equivalent amount of penalties were imposed on the importers under Section 114A and varying penalties were imposed on the officials of the importing firm under Section 112(a) in the impugned orders. It is against these duty demands, interest and penalties, that the appellants are before us.*

**6.***The Id. Counsel for the appellants made the following submissions :-*

**(1)** *The vessels which have been imported by the appellants are ‘supply vessels’ as per the class certificate issued by the Indian Registry of Shipping under the Merchant Shipping Act, 1958.*

**(2)** *As per the regulations on class notation of ships, ‘supply vessels’ have been described as those “designed specially for supply services to offshore installations”. Thus supply vessels are basically meant for provision of supply services to offshore installations which implies they are meant for transporting goods and persons from ports to offshore installations. Therefore, navigation is certainly a primary function of vessels which are certified as ‘supply vessels’.*

**(3)** *The vessel Malaviya Thirty Six is capable of carrying approx. 2900 MT of cargo as well as 90 persons. Similarly vessel HAL Anant is capable of carrying 3972 tons of cargo and 90 persons. Thus the vessels are factually designed so as to be capable of carrying persons and goods from port to ONGC platforms and therefore, they are rightly classifiable under CTH 89.01.*

**(4)** *Even prior to the acquisition of the vessel, the vessels were performing as tug-cum-supply vessel-cum-anchor handling vessel. For performing these*

***functions, navigation was primary and not secondary or subsidiary. The design and construction of the hull and the vessel was made keeping the navigation of the vessel as a primary function. After acquisition, the design and construction did not undergo any substantial change and the navigation aspect continued to be a primary function.***

***(5) Supply of cargo and crew is also one of the functions to be performed by the vessels as per the scope of work prescribed in the contracts with the ONGC. The contract specifically requires the appellants to carry out transportation of material and equipment as and when required. The fact that in terms of the contract, the vessel has to be operated in a particular manner cannot discriminate the classification of the imported vessel.***

***(6) In addition to the transportation of cargo and personnel, the vessels would also be required for carrying on repairs and maintenance, inspection, rescue support, etc. at the ONGC platforms. The ONGC platforms at Bombay High are spread over a large area and therefore, without navigation, the vessels will be unable to perform most the required operations.***

***(7) In any case, navigability of the vessel is not subsidiary to the primary function and hence the impugned vessels are not classifiable under CTH 89.05.***

***(8) Applying the principle of ejusdem generic, the term “other vessels” appearing in CTH 89.05 should be read with the specific types of vessels mentioned in the entry i.e., light vessels, fire-floats, dredgers,***

***floating cranes. These vessels are floating structures which rarely require any navigation. The vessels imported by the appellants are not floating structures. They are capable of transporting cargo as also personnel. Hence they are not classifiable under CTH 89.05.***

(9) *Even if it is held that the vessels do not fall under Heading 89.01, they will fall under Heading 89.06 which covers "other vessels, including warships and lifeboats other than rowing boats" and as per HSM explanatory notes, the entry covers vessels such as scientific research vessels, laboratory ships, weather ships, pilot boats, hospital ships, etc. These vessels apart from navigation have other functions also. Under CTH 89.06, the applicable duty is Nil and hence no duty liability accrues.*

(10) *The demand is barred by limitation. The vessels were examined at the time of importation by the officers of the Customs and thereafter assessed under CTH 89.01. Since the notice has been issued after a period of more than six months from the date of original assessment, the demand is time barred and is not sustainable in law.*

(11) *The Id. Counsel relies on the case law and other technical literature supplied along with the appeal memorandum in support of their claims.*

On the basis of the facts as above the tribunal has concluded that the vessel under the consideration was a supply vessel after determining the supply as essential feature of the vessel. Since this decision too is distinguishable on facts reliance placed by the appellant on this decision is uncalled for. In our view the

decisions relied upon by the appellant are clearly distinguishable and not applicable in present case.

4.14 One factor which makes this case unique and distinguishable from all other cases is the declaration made by the exporter to the Customs Authority in China. Exporter has declared the said vessel as “floating cranes” as is evident from the documents resumed during the investigation. When the exporter himself is declaring the vessel as floating crane then how can the appellants claim the vessel to be different from the said declaration?

4.15 So far as change in the nomenclature from Floating Transfer Station to Crane Barge is concerned, various emails, discussions etc recovered during the course of investigation, regarding the classification, application for license under EPCG, decision not applying for the same and the consequential directions for the CHA's to change the description to “Cargo Barge” show that appellants had knowingly adopted the description to suit their convenience and classify the goods under heading 8901 so that they can avail the benefit of exemption. It was part of a well thought out strategy to evade duty of Customs.

4.16 In view of discussions as above we are of the view that the vessel M V Royal Sesa imported vide B/E No 006/JGD/12-13 dated 15.04.2013 is correctly

classifiable under heading 89059090 and benefit of exemptions claimed is not admissible to them.

5.0 Appellant contended that there was no suppression or mis- statement and hence invoking extended period of limitation is not justified. The Adjudicating Authority has in Para 23.4 of his order recorded that-

- i. The appellant had sought construction and supply of 'floating Crane'. The ship building contract with M/s. Chengxi, China, the project management contract and ship design contract with M/s. Wartsila, all mentioned about the designing and construction of the 'Floating Transfer or Transshipping Station.
- ii. The builder's certificate described the vessel as Crane Barge and the same was declared as such to the customs authorities in the country of export i.e. China.
- iii. Subsequently the description had been changed in the invoice and other documents to be submitted for customs clearance.
- iv. The officials of the company have admitted that the description on the invoice issued by M/s. Chengxi was as per their suggestions. It is evident that the appellants changed the description of the vessel to suppress the actual functional character

of the vessel knowingly and deliberately so as to misleading the department that the vessel was a cargo vessel to be used for transportation of the goods.

- v. Even though there was no duty on vessels under CTH 8901, they discussed applying for EPCG licence for duty free clearance, because they were aware that the vessel was classifiable under CTH 8905. This is also corroborated by the e-mails exchanged between the company the company officials and their consultants.
- vi. The act of changing the description shows intention to suppress the correct description which reflected the functional character of the goods from the custom to avoid proper classification and thereby to evade payment of appropriate duty.
- vii. In this the case of Jai Shree Engineering Company Pvt. Ltd. [1989(39) E.L.T. 449 (Tri.)] tribunal held-  
  
*“19. The next question to be decided is as regards the applicability of time bar of six months, as claimed by the appellants. Here, once again, the facts are against them. Appellants can hardly contend that they discharged the onus of making correct declaration if they themselves withhold the description which is commonly used in respect of the goods not only by themselves, but also by those from whom they buy or to whom they sell the products. When they were themselves both, buying*

*and selling the goods as nuts, it is difficult to understand why they should describe them as end fittings in the declaration to the department. Even if they did not agree that they were correctly classifiable under Item 52-CET, they should have in a straight forward manner, described the goods by their known commercial name as nuts. In not doing so, and in calling them end fittings, which appellants have not shown is an accepted commercial description, the intention could only be to suppress information about the correct nature and description of the goods from the department with a view to avoid proper classification and evade payment of duty at the correct rate. Clearly, there was mis-description of the goods showing mala fides on the part of the appellants.”*

**viii.** Since the appellant had suppressed the actual description and mis-represented the vessel as transshipment cargo barge, classifiable under CTH 89-01, the same amounted to misdeclaration for the purpose of section 111(m), Hon’ble CESTAT, Mumbai, in the case Multimetall Ltd. – [2002 (144) ELT 574 (T-Mum)]. (maintained by Hon’ble Supreme Court [2003(151) ELT A-309(SC).]) held as follows:

**ix.** *“9.The presence of prime material in the consignments having been confirmed, they become liable for confiscation under clause (m) of Section 111 of the Act. The contention that there were no mala fides is of no relevance in coming to this conclusion. Whether mala fide is presence or not, the goods became liable to confiscation. There*

*is no material otherwise would no doubt in determining the quantum of fine or offer for redeeming the goods. This again would be more appropriate to the Commissioner.*

- x. 10.** *We now come to the question of penalty. In coming to his conclusion that penalty is not imposable, the Collector has said that there is no suppression of value or any evidence of mala fide or deliberate mis-statement or misdeclaration. We have dealt with the question of value of these goods. Whether in the presence of 1/3rd of the consignments of the goods other than what they were stated to be, there was misdeclaration or not is the question. After considering the technical evidence adduced by both sides, the Collector has concluded these goods to be prime material, almost all usable as such. There has not been the slightest effort on the part of the importer to explain the presence of such a large proportion of prime material in the scrap. If such a valid explanation were forthcoming, a different view could have perhaps been taken. It is difficult to conclude that these materials found their way of the consignments by accident. After all, as we have noted, the cost of prime material is substantially, higher than the cost of scrap. To expect that the supplier included this prime material at the price paid for scrap, would lead to a conclusion either of double incompetence on his part or collusion between the supplier and the receiver of the goods. We would only say that we are unable to find any such incompetence on the suppliers part. We may also mention in passing that we were influenced to some extent by the fact that the goods are stated to be Armenian origin but have been shipped from*

*Hong Kong. When asked about this, the Counsel for the importer has no answer. In these circumstances, we therefore think that penalty was imposable under clause (a) of Section 112 of the Act but again think it proper for the Commissioner to determine the quantum.”*

- xi.** In view of above discussions we hold that extended period of limitation under Section 28 for demanding the duty was invokable in this case. Further in view of the misdeclaration made the vessel M V Royal Sesa was liable to be confiscated and has been rightly confiscated by the adjudicating authority.
- xii.** Since there was deliberate mis-declaration on the part of the importer, penalty under section 114A automatically will come. Reliance is placed on the Apex Court decision in case of Vandana Art Prints Pvt Ltd. [2017 (50) STR 91 (SC)]

*“4.A neat submission that has been made by Mr. K. Radhakrishnan, learned senior counsel appearing for the appellant, is that in terms of Section 11AC of the Central Excise Act (hereinafter referred to as ‘Act’), the penalty has to be equal to the duty so determined.*

**5.**Section 11AC of the Act reads as under :-

**Penalty for “11AC. short-levy or non-levy of duty in certain cases.** - *Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of*

*duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :*

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

**6.***On the basis of the aforesaid language in the Section, the submission of Mr. Radhakrishnan is meritorious. Thus, while the penalty as demanded in respect of one Show Cause Notice had been quashed, the Tribunal could not reduce it for an amount lesser than the duty which has been upheld. The duty in respect of two demands comes to Rs. 40,44,720/-. Therefore, going by the provisions of Section 11AC of the Act, the penalty should also have been Rs. 40,44,720/- and not Rs. 20 lakhs."*

- xiii.** The importer has caused deliberately sought to manipulate the invoices issued by M/s. Chengxi Shipyard Co. Ltd, bearing No Chengxi 2011-FTS 25-01 dated 27.08.2012 so as to give incorrect description of the impugned vessel, as against what was described in the contract or in the declaration made to the Custom Authorities in China. This Act of the appellant is squarely covered by the penal provisions under Section 114AA and hence we uphold the penalty imposed under that section too.

**6.0** In their submissions have claimed against the demand of interest from them. However we are not in agreement with said contention because demand of interest is a natural consequence on account of delay in payment of the tax. Since appellants have short paid the Customs duty interest is demandable from them under Section 28AA of the Customs Act, 18962. Issue with regards to statutory levy of interest is no longer res integra. Bombay High Court has in case of Commissioner Of Central Excise vs Padmashri V.V. Patil Sahakari [2007 (215) ELT 23 Bom] has held as follows:

*“10. So far as interest Under Section 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the official gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable Under Section 11AB are declared.*

*The second aspect would be whether there is any discretion not to charge the interest Under Section 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied / short paid / non levied / unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident*

*from the opening part of Sub-section (1) of Section 11, which runs thus:*

*Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under Sub-section (2) or has paid the duty under Sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate....*

*The terminal part in the quotation above, which is couched with the words "shall" and "be liable" clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional."*

**7.0 In view of the discussions as above we do not find any merits in the appeal filed by the Appellants.**

8.0 Against the impugned order of the Commissioner, revenue has also filed the appeal challenging the quantum of penalty imposed by the adjudicating authority under Section 114A. While adjudicating authority has imposed penalty equivalent to the duty evaded, the contention of revenue is that penalty should be equal to the duty evaded plus the interest due on the duty evaded. The said section 114A of the Customs ASct, 1962 is reproduced below:

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

8.2 In their appeal revenue has contended that in such case the word “or” should be read as “and” and penalty should be equivalent to the total of duty and interest short paid. This issue has been decided by the tribunal in case of B Suresh Vasudev Baliga [2015 (329) ELT 433 (T)] holding as follows:

*“As seen from above, the said section is applicable to a person who is liable to pay the duty ‘OR’ interest as the case may be, who shall be liable to penalty equal to the duty or interest so determined. The expression used is “or”, which is disjunctive between duty or interest. Further use of expression “as the case may be” clearly suggests that the said section is referring to two different persons and situations. One which may be liable to duty and the other which may be liable to interest only and provides that in both the situations, the person liable to duty would be liable to penalty equal to duty and the person liable to interest would be liable to penalty equal to interest. There is no warrant to read “or” as “and”. In view of the above I find no reasons to interfere with the impugned orders of Commissioner (Appeals). Revenue’s appeals are accordingly rejected.”*

8.3 We do not find any reason to differ with the said decision of tribunal. Accordingly the appeal filed by revenue is dismissed.

9.0 In result both the appeals filed by the Appellant and Revenue are dismissed.

(Pronounced in court on 2.11.2018)

**(Dr. D.M. Misra)**  
**Member (Judicial)**

**(Sanjiv Srivastava)**  
**Member (Technical)**

*tvu*