2013 (1) ECS (113) (Tri-Ahd)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

COURT-I

M/s Gujarat Adani Port Ltd
Versus
Commissioner of Customs, Kandla

Appeal No. C/83, 84, 87, 88, 76 to 79, 111, 112, 475/2008

Arising out of: OIO No.KDL/Commr/51/2007, dated 31.12.2007

Passed by: Commissioner of Customs, Kandla

Appellant :

M/s Gujarat Adani Port Ltd, Shri Dinesh Bansai, M/s Shakti Clearing Agency, Shri P.A. Vasudevan, M/sArcadia Shipping Ltd., Shri Henary Jesiraj, M/s Tauras Shipping, Shri Sanjeev Datta, M/s Valentine Martine, M/s Great Offshore Ltd, M/s UCO Marine Contracting WLL & Co.

Respondent:
CC Kandla

Represented by:
For Assessees: Shri Naresh Thacker, Shri P.M. Dave, Shri P.V.Sheth, Shri S.N. Kantawala, Shri Paritosh Gupta, Shri Dhaval Shah: Advocates

For Revenue: Shri Jeetesh Nagori, A.R.

CORAM:

Mr.M.V. Ravindran, Hon'ble Member (Judicial)
Mr. B.S.V. Murthy, Hon'ble Member (Technical)

Date of Hearing: 27.09.12, 3.10.2012 & 4.10.12
Date of Decision: 08.11.12

ORDER No. A/1612 to 1622/WZB/AHD/2012, dated 4.10.12/8.11.12

"The moment Bill of Entry is filed in respect of the vessels and import duty is paid, the vessels cease to be foreign going vessels. Therefore, the diesel and other provisions on board the vessel cease to enjoy the benefit of exemption available to such items in stores in foreign going vessel since after filing Bill of Entry on payment of duty, the vessel ceases to be a foreign going vessel and becomes an Indian vessel and therefore the liability of import duty on the provisions/stores in the vessel arises" [Para 8]

"Moreover, if GAPL undertakes to file Bill of Entry because VMML did not have IE code in respect of barge/tugs, the same principle would apply to the stores also. If GAPL accepted the liability for the vessels on the ground that IE code was not available, on the same logic, they should have filed Bill of Entry in respect of stores since both stores and vessels were imported simultaneously."[Para 9]

"Whatever way we look at the facts and circumstances, the person who holds himself out to be the importer of the barge /tugs is the one who has to think of the stores also since all other persons concerned cannot be found fault with if they assume that having filed the Bill of Entry for the barge/tugs, the same person would file the Bill of Entry for the bunker items also. This is another aspect which would show that not only the Department thought that GAPL was the importer but all the persons concerned with the transactions also thought that GAPL was the party responsible for filing Bill of Entry for stores."[Para 9]

Per: B. S. V. Murthy:

1. M/s Gujarat Adani Port Ltd. (hereinafter referred to as GAPL) and M/s Valentine Maritime (Mauritius) Ltd. (hereinafter referred to as VMML) entered into an agreement on 01.12.2003 for erection and pre-commissioning of off-shore crude handling projects at Mundra Port. Pursuant to the agreement, Barge DLB 600,Tug Neptune Star, Tug Claudine, Tug M/V UCO-XIV a rived at Mundra in September 2004 and November 2004. In respect of all these barge and tugs, the Bills of Entry were filed by GAPL and vessels were imported on re-export basis in keeping with the terms and conditions of he contract. Even though, the Customs duty was duly discharged and Bills of Entry were filed in respect of vessels imported for use in Mundra Port and to be re-exported and appropriate duty was paid, subsequently it was found that no Bill of Entry was filed nor any duty was paid in respect of bunkers/diesel/lub oil/grease/provisions/paints etc which were brought by these vessels into India. Accordingly, Show Cause Notice was issued to GAPL, proposing to recover the duty from them amounting to Rs.1,02,98,597/-. The Show Cause Notice was issued to GAPL in view of the fact that it was GAPL who had filed Bills of Entry in respect of vessels and according to Clause No. 13.7 of Article 13 of the contract between VMML and GAPL, the GAPL was to pay Customs duty on the consumables which according to the definition of 'consumables' in the contract included the bunker items also. VMML had appointed M/s Arcadia Shipping Ltd. Mumbai

(hereinafter referred to as ASL) as their agent, who in turn, appointed M/s Tauras Shipping Pvt. Ltd. (hereinafter referred to as TSPL) as their sub-agent to complete the inward/outward clearance, filing of Import General Manifest (IGM)/Export General Manifest (EGM), signing off/on crews, husbanding of vessels, inventory of stores of marine spread etc. The Show Cause Notice issued also proposed to recover duty amounting to Rs.1,04,15,923/- payable on 1660 MT of diesel supplied by vessels Maqdeem-II, Vicky-II and Zakhar Victory to barge DLB 600 after its arrival at Mundra since the diesel was brought from abroad and filled into the tank of DLB 600 without following the proper procedure and without filling Bill of Entry and without payment of duty, for used within port area at Mundra. These vessels, who supplied diesel, arrived from Abu Dhabi and a quantity of 610 MT of diesel was supplied by barge DLB 600 to various barges/tugs within its marine spread. In addition to above, the Show Cause Notice also proposed confiscation of bunkers totally valued at Rs.3,29,55,395/- which was found on-board various vessels forming part of barge DLB 600 and its marine spread. The confiscation was proposed on the ground that no import duty was paid at the time of filing of Bill of Entry in respect of these vessels. In addition, the Show Cause Notice also proposed confiscation of vessels viz. Maqdeem-II, Vicky-II Zakhar Victory and the barges/tugs for having stored the bunkers without payment of duty and dealt with diesel and supplied it to other barges without following the Customs procedure. The Show Cause Notice also proposed imposition of penalty on GAPL, VMML, ASL, TSPL and M/s Shakti Clearing Agency (a CHA of GAPL) for various omissions/commissions by them. Penal action was also proposed against Shri Debasis Mitra – General Manager (Constructions) of GAPL, Shri Dinesh Bansal – Assistant Manager (Finance & Accounts) of GAPL, Shri Anil K. Singh – Vice President (Marine) of GAPL and Shri K.V.V. Prasad – Assistant Manager of GAPL, Shri Saeed Abu Hassan – Sr. Project Manager of VMML, Capt. Sandeep Datta – CEO of TSPL, Shri Henry Jasiraj – Manager (Off-shore) of ASL, Shri P.A. Vasudevan – Power of Attorney for CHA M/s Shakti Clearing Agency and M/s Shakti Clearing Agency. Further, penalty was also proposed against Masters/Barge Superintendents viz. Mr. Gerald James Aamayo, Mr. Kher A. Kher, Mr. Abed Sentina and Mr. Georgio Baroncini for dealing with non-duty paid diesels. Show Cause Notice also proposed penalty against the masters of tugs under Section 112A of Customs Act, 1962. Some other officers of tugs were also issued Show Cause Notice requiring to show cause why penalty should not be imposed. After adjudication process, in the impugned order, the Commissioner confirmed duty demand for bunker items, ordered confiscation of seized diesel, lub oils, paints, grease etc, ordered confiscation of vessels and allowed them to be redeemed on payment of fine and imposed penalty on 26 persons/firms in addition to GAPL.

2. We heard the learned advocates on behalf of various appellants and learned A.R. on behalf of the Revenue for 3 days and detailed submissions were made and various contentions were raised. Instead of taking up the arguments advanced by each party on various issues, we consider it more appropriate that we take up each issue and deal with the same and determine the liability to duty/confiscation/liability to penalty of the persons, which, in our opinion, will facilitate proper decision in accordance with the law.

This is mainly because there were conflicts of interest amongst the parties since if the claim of one party is accepted, it would adversely affect the claim of another party. Therefore, instead of considering the submissions made by several parties on one issue, it would be appropriate to discuss and determine the liability of the goods for duty, confiscation and penalty of the persons concerned, we proceed to do so.

3. The whole case arose as a result of action taken by the Revenue on the basis of intelligence that a fishing boat had purchased diesel from the foreign tugs. When tandel of the fishing boat was interrogated, the fact of purchase of diesel was admitted and officers proceeded with the fishing boat to the foreign tug M/V UCO-XIV and the tandel successfully negotiated for the supply of diesel from the tug to the fishing boat started. Thereafter, the tug was brought for further investigation on 04.02.2005. Further investigation with the staff of the tug and other persons concerned revealed that no duty was paid on bunkers and provisions in respect of barges and tugs at the time when they were brought into India and Bill of Entry was filed for payment of duty by GAPL. Further, it was also found that 1660 MT of diesel had been supplied by VMML through Maqdeem-II etc as detailed above, on which also no duty was paid. The duty liability on the bunkers and provisions in barge DLB 600 and other tugs has been fixed on GAPL and has been demanded from them. The question to be determined is whether GAPL is liable to pay duty or not.

4. The first submission on behalf of the GAPL was that GAPL in this case cannot be considered as importer at all. According to Section 2 (26) of Customs Act, 1962, "importer" in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself but to be the importer. It was submitted that in so far as the consumables and bunkers are concerned, GAPL did not place any orders for the same nor they were responsible for bringing the same into India from outside India and therefore they were neither owners nor any person holding them out to be the importers of the consumables/bunkers. It was also submitted that the masters of the concerned barges/tugs in the statement had stated that the owners of the barge/tugs had directed them to receive the consumables/bunkers on board for consumption thereon and therefore the consumables cannot be said to be imported by the appellant. According to the contract dated 01.12.2003, the responsibility of operating and maintaining the vessels was that of VMML who had chartered the vessels, received the consumables and bunkers.

5. The transactions relating to the import of barges/tugs is independent of import of consumables/bunkers into India, while it was admitted that the appellants were under a contractual obligation to pay the Customs duty on consumables, it was submitted that it does not mean that on this basis, the statutory liability can be imposed on the appellant. According to the Id. Counsel, the statutory liability under the said Act is on the person bringing the consumables into India from outside India and not on GAPL, just because GAPL is required to reimburse the Customs duty under a contract to VMML. It was VMML who had applied and obtained licence/approvals for costal trade under Merchant

Shipping Act, 1958 and not GAPL. The vessels at all times were under the control and possession of VMML and therefore GAPL is not liable to pay duty. GAPL has nothing to do with the supply/receipt/import of bunkers and the transactions relating to the bunkers were totally independent of the transactions relating to barges/tugs. GAPL had filed Bills of Entry in respect of barges and tugs in their name because VMML did not have the IE code and just because the GAPL filed Bills of Entry on behalf of VMML, they cannot be considered as importer particularly when all formalities and handling work was undertaken by ASL and TSPL as agent of VMML. It was ASL and TSPL who had applied for conversion of the vessels from foreign going vessels to coastal vessels and on that ground also it was VMML who are liable to pay duty.

6. It was also submitted that 1660 MT of diesel which was supplied was supplied to the barge/tugs without including in the manifest and GAPL cannot be responsible/held responsible for payment of duty on un-manifest cargo.

7. As regards bunkers and provisions found on the barge/tugs, the Bills of Entry were filed by GAPL.

8. As rightly observed by the Id. Commissioner in the impugned order, according to the definition of the goods in Section 2 (22) of Customs Act, 1962, the vessels are included in the definition. Section 87 of Customs Act, 1962 permits utilization of imported stores on board vessels during the period when such vessels are foreign going vessels. The moment Bill of Entry is filed in respect of the vessels and import duty is paid, the vessels cease to be foreign going vessels. Therefore, the diesel and other provisions on board the vessel cease to enjoy the benefit of exemption available to such items in stores in foreign going vessel since after filing Bill of Entry on payment of duty, the vessel ceases to be a foreign going vessel and becomes an Indian vessel and therefore the liability of import duty on the provisions/stores in the vessel arises. When the Bill of Entry is filed for the goods, the definition of importer as submitted is relevant. If no Bill of Entry is filed and the goods are imported in contravention of provisions of law, they become smuggled goods. According to Section 2(39) of Customs Act, 1962, “smuggling”, in relation to any goods means any act or omission which will render such goods liable to confiscation under section 111 or section 113 of Customs Act, 1962.” According to the definition of imported goods in Section 2 (25), “imported goods” means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption. In this case, as regards stores on the barge/tugs, they were imported goods till the Bill of Entry was filed in respect of barge/tugs and duty was paid and were allowed out of charge. As soon as the vessel cease to be imported goods and acquire the nature of smuggled goods since the barge/tugs had become part of the land mass of Indian territory and considered to have been brought into India and therefore the stores on board barge/tugs also have to be considered as brought into India without payment of duty and without following the formalities.

9. In this case, the GAPL was the importer of the barge tugs in the eyes of law and therefore there cannot be any dispute about that. Can it be said that an importer of the vessels/barge/tugs, is not the responsible for payment of duty on the stores when a vessel is imported? The answer clearly 'No'. It was claimed by the Id. Counsel for GAPL that the appellant GAPL had filed Bill of Entry since VMML requested them and they did not have IE code. He could not support the same with any evidence in the form of statement of any person or documentary evidence to support this claim. Moreover, the ASL and TSPL have been appointed as agents on record to complete the inward/outward clearance, filing of IGM/EGM, signing off/on crews, husbanding of vessels, inventory of stores of marine spread etc. The claim of GAPL that these agents should have taken the responsibility of filing Bill of Entry for stores, has no basis. Moreover, if GAPL undertakes to file Bill of Entry because VMML did not have IE code in respect of barge/tugs, the same principle would apply to the stores also. If GAPL accepted the liability for the vessels on the ground that IE code was not available, on the same logic, they should have filed Bill of Entry in respect of stores since both stores and vessels were imported simultaneously. Moreover, it was also seen that a certificate was issued signed by the preventive officers and the master of all the barge/tugs, indicating the actual quantity of stores. It is also seen that the certificate also says that the barge/tugs have been converted into costal trade from foreign trade. This would show that the master of the vessel had declared and the Customs officers had verified the quantity of stores on board vessel. Unfortunately, whether IGM was filed in respect of these barge/tugs, could not be clarified by any of the parties to the dispute. In any case, if IGM was filed, it was for the parties to produce, because it is their claim that IGM has been filed. According to the Customs regulations relating to import manifest, the cargo manifest is required to be filed in terms of regulations 3 and it has to be delivered in separate sheets in respect of different categories of a cargo viz. cargo to be landed, unaccompanied goods/barges, goods to be transshipped, and same bottom cargo or retention cargo. Another view that is possible and in our opinion, may be applicable is the fact that the vessels were imported as goods in this case and if they were imported as goods, a Bill of Entry has to be filed for the vessels as well as stores separately as dome in the case of ship brought for breaking. Whatever way we look at the facts and circumstances, the person who holds himself out to be the importer of the barge /tugs is the one who has to think of the stores also since all other persons concerned cannot be found fault with if they assume that having filed the Bill of Entry for the barge/tugs, the same person would file the Bill of Entry for the bunker items also. This is another aspect which would show that not only the Department thought that GAPL was the importer but all the persons concerned with the transactions also thought that GAPL was the party responsible for filing Bill of Entry for stores. It has to be borne in mind that this claim was in respect of diesel subsequently supplied to the barge in respect of which GAPL probably had a better case. It was rightly observed by the Id. Commissioner in the order that once the GAPL filed Bills of Entry of clearance of vessels and paid duty thereon, these vessels lost their identity as foreign going vessels and therefore were not entitled to consumption of such stores without payment of duty. As rightly observed by the Id. Commissioner, the employee of GAPL, whose statements were recorded in the course of investigation. Shri Dinesh Bansal –

Assistant Manager (Finance & Accounts) and Shri Debasis Mitra, General Manager (Constructions) clearly admitted the liability of GAPL to pay duty on the consumables. Shri. P.A. Vasudevan of M/s Shakti Clearing Agency also stated that CHA as well as GAPL were aware of their liability. Shri Henry Jasiraj – Manager (Off - shore), of ASL also stated that duty on bunkers and provisions was to be paid by GAPL. Further, when we look at the contract also, it becomes quite clear that GAPL and VMML had understood that the liability to pay duty would be on GAPL only. As late as on 18.10.2005, in the amendment sheet to the agreement, it was mentioned that the difference between the Customs duty paid for fuel imported against fuel consumed, is required to be adjusted by mutual agreement. If the liability to pay duty on fuel was on VMML, the question of adjustment of quantity used against imported quantity does not arise.

10. Another way to look at the issue is as to how the transactions are dealt with by Customs into India. In both the cases, viz. the provisions present in the stores at the time of filing of Bill of Entry and subsequent to receipt of diesel, there is no dispute that GAPL was aware of their liability, the diesel was transferred to barge under the supervision of Assistant Manager of GAPL; the quantity consumed by the barges/vessels was required to be monitored by GAPL as it emerges from the agreement and therefore the GAPL cannot claim ignorance of quantity received; further, duty is not demanded from the supplier of goods at the time of importation into India; in this case, once the GAPL files Bill of Entry for the vessels, they becomes the receiver of the goods and vessel owners/charterers become the suppliers; in respect of the imported goods, it is receiver of the goods on whom the liability arises. We have already discussed the difference between the imported goods and smuggled goods above. In the light of definition and in the light of practice followed in collection of import duty, it was always the receiver of the goods or the person who holds himself to be out to be the importer/ to be the receiver of the goods, i.e. GAPL who became liable for import duty and no one else. The contract also clearly provides that all the duties, levie other than on erection equipments are to be paid by GAPL only. In fact, the clause 13.10 clearly provides that all taxes, duties, cess, fees, levies etc applicable outside India shall be paid by VMML. Thus, the contract also does not support the caser of the GAPL.

11. As regards the submissions that GAPL did not place any orders, it is answered by definition of importer discussed above. Nowhere, the requirement of an order arises when the GAPL themselves have filed Bills of Entry for barge/tugs. It is the claim of GAPL that the bunkers were directly received by the vessels and therefore GAPL is not responsible, is also not correct in view of the fact emerging from the record that even subsequent receipt of diesel into the barge was under the supervision of Assistant Manager of GAPL. It is also on record that there was correspondence/agreement between the parties and GAPL had been requested to file Bill of Entry and in fact in respect of subsequent receipts of diesel also, Bills of Entry were actually prepared by CHA of GAPL which could not have been done without knowledge of GAPL. This shows that it is not only the Revenue who has taken a view that GAPL is the person who is liable to

pay but also the GAPL itself. It has been recorded by the Id. Commissioner that transfer of fuels and supply of fuels were recorded and signed jointly by the barge Superintendent and the representative of GAPL. In view of the above discussion, we hold that the decision of Id. Commissioner that duty liability on the stores/provisions/bunkers in the barge/vessels amounting to more than Rs. 1.02 Crores is on GAPL, has to be upheld.

12. Another submission was made by GAPL that in this case, conversion of foreign going vessels to coastal vessels has been made by steamer agent of VMML and therefore, they are not liable. For this purpose, they have relied upon Circular No.58/97, dated 06.11.1997, which lays down the procedure for conversion of foreign going vessels to coastal vessels. The same is reproduced below for ready reference : -

"Procedure for collection of duty on ship stores consumed on Board vessel during the coastal run.

1. Whenever vessels in the foreign run revert to coastal trade at any port, the Steamer Agents should present an application, in duplicate, to the Assistant Commissioner concerned, with a copy to the Assistant Commissioner of Customs, Preventive Department, intimating such reversion to coastal trade and requesting for the services of a preventive Officer for inventorying the Bonded stores. The application should also indicate whether the Steamer Agents would like to pay duty on the entire bonded stores carried by the vessel; or, the quantum of bonded stores that they would like to take out for the crew etc. on payment of duty and keep the remaining under Customs seal in terms of Imported Stores (Retention on Board) Regulations, 1963.

2. As per the request of the Steamer Agents, the Preventive Department will take an inventory of the stores. If the request is for taking out only a portion of such stores, the Preventive Officer concerned should supervise the quantity that is taken out and make an inventory of the same. Inventory of the private property of the crew would similarly be taken separately. In regard to the inventory of fuel oil, lubricant, etc., the quantity remaining on board the vessel at the time of reversion would be noted separately for HSD, furnace oil, lubricants, etc.

3. The inventory so taken as well as the PP (Personal Properties) declaration shall be signed by the Master / representative of the Steamer Agents and the Preventive Officer making the inventory as to its correctness. On copy of the inventory and declaration would be kept in the Preventive Department, another copy would be sent to the Import / Export Department and the third copy will be handed over to the Steamer Agents.

4. On receipt of the inventory, the Steamer Agents will prepare the Bill of Entry and file the same in the Department concerned within a period of 5 days.

5. On receipt of the Bill of Entry in the Customs House, the Department concerned will correlate the same with the inventory already sent through the Preventive Department and assessment will be complete within a course of another 5 days and the Bill of Entry will be returned to the Steamer Agents for payment of duty.

6. In the case of fuel oils, samples taken for test by the chemicals laboratory should be forwarded to the laboratory as soon as the inventory is taken, and the result should be obtained by the assessing Department within a period of one week. On the basis of the test results the assessment should be completed as indicated in para 5 above.

7. The Steamer Agents should make arrangement for payment of duty within the next 5 days.

8. The post clearance for the vessel reverting to coastal trade need not be held back pending assessment of the ship stores and payment of duty.

9. In so far as the private property declarations are concerned, one copy will be retained in the Preventive Department, another copy will be given to the Steamer Agents and another to the Master of the vessel. The preventive Department should take a simple guarantee from the Steamer Agents to safeguard the revenue and the baggages are cleared in accordance with the rules when the crew are finally paid off. At the time of reversion to coastal trade, since the crew are not finally paid off, the baggage items will be retained on board after taking an undertaking from the Steamer Agents in the form appended at Annexure – B. This guarantee will be cancelled when the certificate, from the Custom House of the last India port of call, to the effect that all the crew members have retained the baggage items/signed off in the intermediate ports and duly cleared through Customs, is produced by the Steamer Agents.

10. If in another India Port the vessel on the coastal run needs any further bonded stores, then they should make a similar application in the port concerned and pay duty on such stores taken off, on the same lines as indicated above."

13. It was submitted that steamer agent made application with the Assistant Commissioner for conversion. There is no such application anywhere in the records. There is no indication that detailed procedure was followed for conversion of foreign going vessels to coastal vessels as per Customs norms. The only evidence available on record is the declaration of bunkers by the masters of the vessels and the declaration by them that the vessels will be converted to coastal vessels and acknowledgement and verification of the same by Customs officers. Nowhere, Assistant Commissioner is in the picture. Therefore, this defence has no basis at all.

14. Next issue is the duty liability on 1660 MT of diesel subsequently supplied by the owner to the barge/tugs and marine spreads. Employees of GAPL Shri Dinesh Bansal and Shri Debasis Mitra have clearly admitted that the liability was of GAPL to pay the duty on

consumables; Shri P.A. Vasudevan, Power of Attorney holder of CHA, in his statement dated 30.03.2005, stated that the CHA and GAPL were aware that duty on provisions is to be paid by them; in search conducted in the Ahmedabad on 06.02.2005, a copy of Bill of Entry for diesel brought by Tug M/V UCO – XIV was also found with duty calculation; the diesel was received by DLB 600 in the presence of Shri Dinesh Bansal; the fact the GAPL was aware of such receipt of diesel, in barge DLB 600 is evident from the statement of Shri Dinesh Bansal, Shri Debasis Mitra, Shri K.V.V. Prasad and Shri Anil K. Singh. Shri K.V.V. Prasad admitted that he had signed the daily progress report on board barge DLB 600 for the supervising vessels supply of diesel to the barge and these vessels off – loaded the cargo in his presence and this was informed to the higher authorities on the next day. The submission by the Id. Counsel was that the diesel had not been manifested and therefore they were not liable to pay duty. When it was their own understanding as well as understanding as per agreement and when they were getting daily progress report about receipt of the diesels and use etc, his claim is found to be totally untenable. Therefore, taking into consideration that the entire group of barge/tugs consisting of barge DLB 600 and its marine spreads was brought into India as per the contract between GAPL and VMML and were working for GAPL and GAPL had undertaken to pay all the duties, levies, fees etc payable into India, clearly show that GAPL cannot escape from the conclusion that the it was their behest and it was with their knowledge that diesel was imported. It has also been brought out that the diesel was received in the presence of representatives of GAPL. Unlike the case of filing Bill of Entry where the importer is defined, in the case, where the Bill of Entry is not filed, what is required to be seen is who is responsible for import. If GAPL feels that they are not liable to pay duty, the proper course to adopt was to inform the supplier that they will not be filing Bills of Entry. Further, the very fact that GAPL claimed that they had filed Bills of Entry for barge/tugs, since VMML does not have IE code, goes against them since same will apply for the diesel also. Since VMML could not have filed a Bill of Entry, and GAPL was also the port operator and had knowledge that Bill of Entry was to be filed and further a draft Bill of Entry was forwarded to them by the CHA, GAPL cannot escape if the Department comes to the conclusion that they were responsible for bringing diesel into India, transfer of the same into the barge and utilization thereafter and thereby the diesel imported in such a manner becomes liable for confiscation and GAPL can be said to have rendered the diesel liable to confiscation and become liable to pay duty and penalty.

15. Now, we have to consider the liability of GAPL to penalty. As far as the diesel and bunker provisions are concerned, the Commissioner in the impugned order has imposed penalty under Section 114A of Customs Act, 1962. The facts and the analysis of facts made by us above would show that GAPL filed Bills of Entry in respect of barge/tugs but failed to file Bills of Entry in respect of bunkers/stores; it cannot be said that GAPL was not aware of the liability in view of the specific provision in the contract entered into by them with VMML; in respect of barge/tugs, clearly GAPL held themselves out as an importer to the Department and therefore the obvious conclusion would be that GAPL itself has to be considered as an importer of bunkers/stores in barge/tugs; it was the duty

of GAPL to file Bill of Entry and failure to do so is clearly suppression of facts on their part and since they have declared the barge/tugs as goods, failure to declare the bunker/stores in these barge/tugs is clearly a mis-declaration also; the fact that there was a certificate issued by the master of barge/tugs does not help GAPL since that was an obligation to be fulfilled by the master of the vessel when the officers boarded the vessel, wherein he was required to declare the quantity in the tank and stores items to the officers; the fact that the certificate issued by the master countersigned by the preventive officers stating that barge/tugs have been converted into coastal run also, does not help GAPL in view of the fact that conversion of vessels to coastal run was not pursued to its logical end and instead GAPL filed Bills of Entry in respect of barge/tugs thereby making it the case of temporary import for re-export; in such a situation, the declaration made by the master to preventive officers cannot be considered as having been made on behalf of GAPL or by GAPL but can be considered as an obligation of master only; the fact that on behalf of the vessel owner, permissions were taken for coastal trade/run from DG (Shipping) does not automatically mean that such conversion has taken place for the purpose of customs also especially in view of the fact that Bills of Entry were filed for barge/tugs treating them as goods and imported into India; nevertheless if these barge/tugs were to engage in coastal trade/coastal run without DG (Shipping)'s permission, the appropriate action should have been/might have been taken by DG (Shipping) and therefore the fact that the permission was obtained from DG (Shipping) is not obtained from DG (Shipping) or not of any relevance for the purpose of proceedings under Customs Act. Under these circumstances, it has to be held that penalty under Section 114 A has rightly been imposed on GAPL in respect of stores/diesel etc. found in barge/tugs at the time of their importation.

16. As regards the quantity of diesel of 1660 MT, received in barge DLB 600 and transfer to tugs and marine spreads, we have already discussed the issue elaborately. In this case, according to M/s Shakti Clearing Agency, they had given duty filled in Bill of Entry and worksheet for payment of duty and GAPL had even taken a draft. In fact, one of the Bills of Entry was recovered during search operation. It has been observed in the impugned order that the fact the GAPL was aware of illicit import and transfer/transhipment of the diesel is emerging from the statement of Shri Dinesh Bansal, Assistant Manager and Shri Debasis Mitra, General Manager, Shri K.V.V. Prasad, Assistant Manager and Shri Anil K. Singh, Vice President (Marine). Shri K.V.V. Prasad had filed daily progress report and diesel was supplied to the barge. This would show clearly that not only barge/tugs were imported by GAPL but loading of diesel to DLB 600 was supervised and monitored by getting report from their Manager. Further, the agreement also provides that actual quantity imported and actual quantity used will be calculated and suitable adjustment regarding liability to Customs duty will be made as per the amendment carried out to the agreement in October 2005. This would show that even after issue of Show Cause Notice, the understanding between VMML and GAPL was that the duty paid for import will be adjusted after ascertaining the quantity actually consumed. The above observations would show that the GAPL is liable to penalty under Section 114A of Customs Act, 1962 in respect of diesel imported and supplied to barge DLB 600 without payment of duty.

Therefore, the penalty of Rs.2,07,14,520/- imposed on GAPL under Section 114A of Customs Act, 1962 also has to be upheld. However, we find that the Commissioner has not given the details of option available to GAPL to pay duty liability on bunkers/diesel with interest and 25% of the duty towards penalty within 30 days of Communication of the order, which would bring down the penalty to the amount actually paid i.e. 25% of the duty. According to the decision in the case of Swati Chemicals Industries Ltd. – 2009 (248) ELT 421 and upheld by Hon'ble Gujarat High Court in the case of Akash Fashion Prints Pvt. Limited – 2009 (239) ELT 439(Guj.), such option can be extended by the Tribunal and we, accordingly, give the option to GAPL to calculate the duty payable on bunkers/diesel imported with interest and 25% of the duty towards penalty and discharge the same within 30 days from the date of communication of this order. Such discharge of liability would mean that penalty liability of GAPL has been discharged in full. We make it clear that if the duty, interest and penalty to the extent of 25 % of the duty are not paid within 30 days from the date of communication of this order, penalty under Section 114 A of Customs Act, 1962 shall be Rs.2,07,14,520/-.

17. The next issue which is required to be considered is the liability of barge/tugs imported for project work and the tug which supplied the diesel to DLB 600 subsequently for confiscation. The owners of the vessels have argued that no notice was issued to them and therefore the confiscation is not sustainable. For this purpose, the advocates relied upon the decision in the case of Contischepers Schiifahrts-Gesselschaft MBH & Co. – 2001 (137) ELT 482 (Tri-Mumbai), to submit that failure to give a Show Cause Notice to the owner of the vessel would mean that the vessel cannot be confiscated. Para 31 to 33 of the said judgment are relevant and are reproduced below.

> "31. We have earlier held that the Act of non-declaration of 4 containers in the manifest was a technical error. On this ground, we would have taken a very lenient view of confiscation of the vessel, but we find that there is a very serious lacuna in the show-cause Notice.
>
> 32. Section 124 of the Act is very specific and reads as under :
>
> "No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods of such person –
>
> (a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;
>
> (b) is given an opportunity of making a representation in writing within such reasonable time and may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and
>
> (c) is given reasonable opportunity of being heard in the matter :

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral."

33. For any confiscation to be adjudged, it is necessary that the "owner" (emphasis supplied) should be given a show-cause Notice. The owners of the Vessel are Conti-Schepers-gessellchaft mb H & Co. as mentioned in para 13 above. They have filed an appeal in that capacity. However, they have not been named as a Noticee in the Show-cause Notice. In view of the grave legal infirmity in the show-cause Notice, the orders of confiscation of the vessel do not survive and are set aside. Curiously, this infirmity was not brought to the notice of the learned Commissioner. No arguments have been made by the counsel before us, on this ground, although in the ground of appeal, this grievance was made."

18. It can be seen that according to Section 115 (2) of Customs Act, 1962, a vessel used in smuggling of goods is liable to confiscation unless the owner proves that it was so used without his knowledge. This would clearly show that the owner of the vessel has to be given an opportunity of advancing his arguments before a vessel is held to be liable to confiscation. It has to be noted that it is not only the owner but his agent has also been included in the Section. If the owner is able to show that smuggling took place without his or his agent's knowledge, the vessel cannot be confiscated. The master of vessel is also included. But, the main person who is required to show this is the owner and since the owner has been specifically included in Section 115 and the words used are owner himself, his agent and a person in-charge of the vessel. It is not 'or' but 'and'. Moreover, Section 124, as reproduced in the order cited above, clearly provides that unless the owner of the goods is given a notice in writing, confiscation cannot be made. It has to be noted that Section 124 does not speaks of importer but owner. Under these circumstances, since no notice has been given to the owners of the vessels and VMML is only a charterer of the vessel and GAPL is only an importer, the confiscation of the vessels has to be set aside on the technical ground of failure to issue Show Cause Notice to the owners of the vessels. It was argued by Ld. A.R. that there was a confusion as to who is the owner of the vessel. However, this is not correct in view of the fact that the agreement and the fact before the Department were very clear and clearly showing that VMML was only in charterer. Both M/s Great Offshore Ltd, M/s UCO Marine Contracting WLL & Co. have not been issued specific notices. It was informed during the hearing that they had approached Hon'ble High Court of Gujarat for release of vessels and they had obtained specific permission for hearing before the Tribunal. In view of the above, the confiscation of the vessels and redemption fine imposed for redeeming the same are not sustainable and are accordingly set aside.

19. As regards 866.57 MT of diesel, lub oil, paints grease etc, valued at Rs.3,29,85,395/- the same have been confiscated and allowed to be re-deemed on payment of fine of Rs.35 lakhs. On this issue, in the grounds of appeal, there is no contention that redemption fine should not have been imposed. Since all other contentions regarding duty liability on bunker/diesels and duty liability on vessels fixed on GAPL have been upheld even

though the same were vehemently contested, in view of the fact that this issue has not been contested and has been treated as corollary of the main issue of duty liability of bunkers/diesels which has been held against GAPL, the redemption fine imposed in respect of diesel etc has also to be upheld. The total value of the goods (bunkers/diesels) is Rs.3,29,85,395/- and having regard to the facts and circumstances of the case, the redemption fine cannot be said to be excessive.

20. M/s ASL, Mumbai and M/s TSPL, Gandhidham have been imposed with penalty of Rs.10 lakhs each. These were the agent and sub-agents respectively of VMML and were responsible for fulfilling of all obligations relating to barge/tugs. The fact that one of the vessel was caught transferring the diesel to a fishing boat and the fact that the diesel was transferred to barge DLB 600 even before a proper Bill of Entry was filed and cleared, would clearly show that the sub-agent, M/s TSPL did not fulfill their statutory obligations cast on them as agents of the charterer. The attempted transfer of diesel to a fishing boat would clearly reflect the fact that the charterer and the agents were party to diversion of diesel to fishing boat engaged in shipping within Indian territorial water without payment of duty. There was an obligation on their part also to ensure that Bills of Entry are filed in respect of bunkers of the vessel of GAPL before the vessels were put to use. It has to be noted that it was the charterer who was doing the project work and therefore was using diesel and bunkers within India. Obviously, Bills of Entry were not filed and no duty was paid, use of such bunker/diesel by the charterer also would make him an active partner in evasion of duty. Under these circumstances, we consider that the sub-agent is liable to penalty. Having regard to the volume of transactions, and the consideration that the subagent could have received, we consider that the penalty of Rs.10 lakhs may be harsh and therefore we reduce the penalty on M/s Taurus Shipping Pvt. Ltd. Gandhidham to Rs.2 lakhs only (Rupees Two Lakhs only). As regards M/s ASL, there is nothing on record to show that they were party to omissions and commissions of the subagent. In the absence of direct involvement, we consider that the penalty on M/s ASL is to be set aside.

21. As regards M/s Shakti Clearing Agency, the CHA of GAPL, we find that Bills of Entry were filed in respect of vessels and they were following the instructions given to them regarding filing of Bills of Entry in respect of bunkers/diesel also. No evidence has been brought out to show that they deliberately abetted in importation of bunkers/diesel without payment of duty and its utilization. Therefore, the benefit of doubt has to be extended to them.

22. As regards VMML, the charterer had supplied diesel and the diesel was transferred to barge DLB 600 without payment of duty and without ensuring that Bill of Entry was filed. The fact that GAPL was informed to file Bill of Enty and was required to file Bill of Entry, does not help the charterer since the diesel should have been unloaded only after the Bill of Entry was filed and duty was paid. The fact that diesel was transferred to barge DLB 600 and the vessels were allowed to utilize with bunker/diesel, and no Bill of Entry has been filed and no duty has been paid on bunkers would go against the appellant. According to Section 87 of Customs Act, 1962, the imported stores can be consumed

without payment of duty as stores only during the period when such vessel is a foreign going vessel. Section 86 permits the stores imported in a vessel to remain on board while it is into India subject to provisions of Section 87. A combined reading of Section 86 and 87 would show that VMML should have ensured that the duty was paid on bunkers and diesel before the barge/tugs were put to use. If the liability to pay duty was on GAPL, before using the goods which are not duty paid, it was the duty of VMML to ensure that duty was paid by GAPL or by itself. Further, the fact that the diesel was attempted to be transferred to a fishing boat and was caught in such an act, would show that VMML clearly intended to divert diesel to fishing boat without payment of duty and are in profit. Under these circumstances, penalty of Rs.10 lakhs imposed on VMML, in our opinion, is sustainable and has to be upheld.

23. Penalties have also been imposed on employee, masters, seamen of the parties. We feel that unless it is shown that the employee were the partners in the crime and benefited there from and were not following the direction of the employer or they were in league with employer in doing mischief, it would not be appropriate to impose penalty on the employees. Further, we also find that the Commissioner has recorded summary findings against all the employees and has imposed penalties. In view of the fact that penalties have been imposed on the companies/firms involved wherever applicable and there is no detailed discussion of the rule of the employee and determination of penalty, in our opinion, it is sufficient to meet the ends of justice; we set aside the penalties imposed on the employees, who are in appeal.

24. In the result, the order of the Commissioner that : -

i) Customs duty of Rs.1,02,98,597/- with interest as applicable is to be paid by M/s Gujarat Adani Port Ltd. is upheld.

ii) Duty of Rs.1,04,15,923/- with interest as applicable payable on 1660 MTs of diesel confirmed against M/s Gujarat Adani Port Ltd. is upheld.

iii) Confiscation of 866.570 MT of Diesel, Lub Oil, Hydraulic Oil, Paints, Grease etc, totally valued at Rs. 3,29,85,395/- is upheld and imposition of redemption fine of Rs.35 lakhs in lieu of confiscation against M/s Gujarat Adani Port Ltd is upheld.

iv) Confiscation of vessels, Barge DLB 600, Tug Gal Ross Sea, Tug UCO-XIV, Tug Claudine, Tug Neptune Star, Tug AHT Jabbar, is set aside with consequential relief to the appellants who have executed bond/bank guarantee/paid redemption fine/paid for provisional release.

v) Penalty of Rs.2,03,14,520/- imposed on M/s Gujarat Adani Port Ltd. under Section 114A of Customs Act, 1962 is upheld.

vi) If the duties demanded interest as applicable and 25% of duties demanded towards penalty are deposited within 30 days from the date of communication of this order, the penalty under Section 114A shall stand reduced to 25%. If the amount already deposited is not sufficient to meet the above requirement of pre-deposit, M/s Gujarat Adani Port Ltd. shall ensure that the full amount is paid within 30 days from the date of communication of this order, so that reduced penalty benefit would be available.

vii) Penalties imposed against the appellants as detailed below are upheld to the extent indicated against their names.

M/s Tauras Shipping Ltd.	Rs.2 Lakhs only
M/s Valentine Maritime (Mauritius) Ltd.	Rs.10 Lakhs only

viii) Penalties imposed on all other appellants are set aside.

(Pronounced in Court on 8.11.12)