IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL WEST ZONAL BENCH, MUMBAI

C/MA(MIS)-58070 to 85072/2018 & C/ROM-93259 to 93261/2017, C/87659 & 87660/2013, C/87536/2013

SEAMEC LTD

Vs

COMMISSIONER OF CUSTOMS (IMPORTS) , MUMBAI

Date of Decision: 27.02.2018

Appellant Rep by: Shri JH Motwani, Adv.
Respondent Rep by: Shri KM Mondal, Special Counsel

CORAM: Ramesh Nair, Member (J)
C J Mathew, Member (T)

Cus - ROM - Appeals were disposed of by the Bench by holding that the three ships, not being conveyance but goods, were required to comply the procedural formalities of import on each entry into India, by approving the classification of the vessels under 8905 9090 against their claim under 8901 with consequential liability to duty and by upholding the confiscation of the three ships with attendant fine in lieu thereof, albeit with a substantial reduction from that imposed by the lower authority - claim of the appellant for fresh determination of duty liability in accordance with section 15 of the Customs Act, 1962 as well as exclusion of liability for the period beyond that barred by limitation with corresponding re-determination of penalty u/s 114A was accepted - Application for rectification of mistake filed *inter alia*on the ground that despite pleading, the Bench had not taken cognizance of the decisions in Hind Offshore Pvt. Ltd. - 2015-TIOL-320-CESTAT-MUM and L&T Sapura Shipping P Ltd..

Held: Tribunal proceeded to discard the primary contention of the appellant that the ships were conveyances and went on to the confirm the classification adopted in the impugned order - It is apparent that while and legal and logical superstructure was elaborated upon, the foundation for ascertaining dutiability was neglected - Definitions in the Customs Act are contextual and strictly intended to bring objects within the radar of customs enforcement, consequently, a general interpretation may not be appropriate - Adjudication order and the Tribunal appear to have skipped the first two steps on the ladder; the ascendance directly to the third is fraught with want of stability - assumption appears that the specialized ship with navigability as a subordinate characteristic, was, as an equipment, incapable of being a conveyance - usually regarded as a mode for transport of people and goods - It would appear that the adjudicating authority has failed to appreciate the sense and implication of the expression 'navigability' which is required to be harmoniously read with the description in that sub-heading instead of being read as the distinction

between that sub-heading and other sub-headings of the Chapter - classification merits fresh determination particularly in the light of the various judicial decisions dealing with import of 'supply vessels' - these issues do not find sufficient coverage in the adjudication order - For the Tribunal to delve into these issues without the assistance of a comprehensive adjudication order would not be equitable to either side - consequently, the restricted remand in the order of the Tribunal dated 6 th December 2017 is enlarged to an open remand - Bench also takes note of the decision of the Delhi High Court in the case of Mangali Impex - *2016-TIOL-877-HC-DEL-CUS* which has been stayed by the Supreme Court - 2016-TIOL-173-SC-CUS - A disposition of the issue on merit against the applicant without touching upon the issue of jurisdiction which, if ultimately in favour of the applicant would saddle them with the detriment that should never have been - On the other hand, such postponement of decision on merits is not to the detriment to the revenue - remanding the matter back to the original authority to await the final order on jurisdiction would best serve the ends of justice - in view thereof, it would be appropriate to set aside the confiscation ordered in the order-in-original - ROM application allowed: CESTAT [para 24, 26, 27, 29 to 33]

Application allowed

Case laws cited:

Hal Offshore Ltd v. Commissioner of Customs (Import), Mumbai - 2012-TIOL-2186-CESTAT-MUM... Para 6

Raj Shipping Agencies Ltd v. Commissioner of Customs (Import), Mumbai - 2015-TIOL-1405-CESTAT-MUM... Para 6

Arcadia Shipping Ltd v. Commissioner of Customs, Ahmedabad [2006 (201) ELT 139 (Tri-Mumbai)... Para 6

Hindustan Ferredo Ltd v. Collector of Central Excise, Bombay - 2002-TIOL-782-SC-MISC... Para 7

Commissioner of Central Excise, Delhi v. Carrier Aircon Ltd - 2006-TIOL-69-SC-CX... Para 7

Noble Asset Co Ltd v. Commissioner of Customs (Preventive), Mumbai - 2006-TIOL-1482-CESTAT-MUM... Para 8

SRF Ltd v. Commissioner of Customs - 2015-TIOL-74-SC-CUS... Para 9

Hind Offshore Pvt Ltd v. Commissioner of Customs (Import), Mumbai - 2015-TIOL-320-CESTAT-MUM... Para 10

Sapura Shipping P Ltd v. Commissioner of Customs (Import), Mumbai - 2016-TIOL-1519-CESTAT-MUM... Para 10

central Excise, Belapur v. RDC Concrete (India) P Ltd - 2011-TIOL-77-SC-CX... Para 14

TS Balaram v. Volkart Brothers - 2002-TIOL-171-SC-IT... Para 14

ITO v. Ashok Textiles- 2002-TIOL-959-SC-IT-LB... Para 14

Commissioner of Central Excise, Calcutta v. A.S.C.U. Ltd - 2002-TIOL-408-SC-CX... Para 14

Deva Metal Powders Pvt Ltd v. Commissioner, Trade Tax, U.P. - 2007-TIOL-221-SC-CT... Para 14

Tribunal in CADCAM Laboratories v. Commissioner of Central Excise Chandigarh - 2014-TIOL-3279-CESTAT-DEL... Para 14

SHS Electronics v. Commissioner of Central Excise Coimbatore [2017 (350) ELT 298 (T)]... Para 14

Commissioner of Central Excise, Vadodara v. Steelco Gujarat Ltd [2004 (163) ELT 403 (SC)]... Para 14

Union of India v, West Coast Paper Mills Ltd - 2004-TIOL-14-SC-LMT-LB... Para 17

Mangali Impex Ltd v. Union of India - 2016-TIOL-877-HC-DEL-CUS... Para 19

Vuppalamritha Magnetic Components Ltd v. Directorate of Revenue Intelligence - 2016-TIOL-2789-HC-AP-CUS... Para 19

Sunil Gupta v. Union of India [2015 (315) ELT 167 (Bom)] = 2014-TIOL-1949-HC-MUM-CUS... Para 19

Sun Polytron Industries Ltd v. Union of India - 2017-TIOL-1139-HC-MUM-CUS... Para 20

Union of India v. VM Salgaonkar & Bros (P) Ltd [1998 (99) ELT 3 (SC)]... Para 22

FINAL ORDER NOS. M/85192-85197/2018

Per: C J Mathew:

Consequent upon order no. A/91168-91170/17 dated 6th December 2017 of the Tribunal in appeal nos. *C/87536/2013, C/8765/2013 & 87660/2013, M/S Seamec Limited* have made this application under section 129B (2) of Customs Act, 1962 seeking rectification of mistakes claimed to be apparent from the r cord.

2. Before taking up the specific prayers in the application, we take note that the appeals were disposed of by holding that the three ships, not being conveyance but goods, were required to comply with procedural formalities of import on each entry into India, by approving the classification of the vessels of the applicant to be under heading no. 89059090 of the First Schedule to the Custom Tariff Act, 1975 against the claim to be classified under heading no. 80 9019000 with consequential liability to duty and by

upholding the confiscation of the three ships under section 111 of Customs Act, 1962 with attendant fine in lieu thereof, albeit with a substantial reduction from that imposed by the lower authority. At the same time, the claim of the appellant for fresh determination of duty liability in accordance with section 15 of Customs Act, 1962 as well as by exclusion of the liability for the period beyond that barred by limitation, with corresponding redetermination of penalty under section 114A of Customs Act, 1962 was accepted.

3. In the context of the disposal supra and the contents of the present application, it may be worthwhile recalling, for the record, the finding on the manifold submissions made during the course of hearing which is

'78 In view of the settled the position of law as stated above and having decided the appeals on the statutory principles as well as first principles of law, further discussions on other citations is considered redundant and not to burden this order, in the fitness of the circumstances of the case and all the pleadings of appellant except bar of limitation is dismissed being devoid of merit.'

4. According to Learned Counsel for applicant, the evident non-consideration of critical submissions apparent in the paragraph supra and the contradiction between the summation and the specific reliefs afforded to the applicant suffices to have the order recalled for allowing the appeal, Furthermore, it is his contention that the circumscribing of the directions to be original authority was not warranted considering the breadth of the issues raised during the course of proceedings which have not been answered to the fullest satisfaction of law.

5. A Miscellaneous Application under rule 28C of the Customs Excise Service Tax Appellant Tribunal (Procedure) Rules, 1982 for advancing an additional ground is also before us for disposal. We shall turn to that presently.

6. The first contention of the applicant is that, in deciding upon the classification in heading no. 89059090 of the First Schedule to Customs Tariff Act, 1975, the Tribunal would have come to a different conclusion had the decisions in *Hal Offshore Ltd v. Commissioner of Customs (Import), Mumbai [2014 (303) ELT 119 (Tri-Mumbai)]* = *2012-TIOL-2186-CESTAT-MUM*, *Raj Shipping Agencies Ltd v. Commissioner of Customs (Import), Mumbai [2015 (329) ELT 913 (Tri-Mumbai)]* = *2015-TIOL-1405-CESTAT-MUM* and *Arcadia Shipping Ltd v. Commissioner of Customs, Ahmedabad [2006 (201) ELT 139 (Tri-Mumbai)]*, as cited by them, been considered. It was conceded by Learned Counsel that the jeopardy in which the decision in re Hal Offshore Limited, owing to admission of the appeal of Revenue in the Hon'ble Supreme Court, had been placed did find mention in the order. Nevertheless, he contends that, notwithstanding the jeopardy, the applicant could be put to irreparable harm should the detriment to them be allowed to continue on this ground alone.

7. That the order of the original authority, for failure to discharge the burden of detailed reasoning as a prelude to disallowing the classification claimed, should have been set aside, based on the decision of the Hon'ble Supreme Court in *Hindustan Ferredo Ltd v. Collector of Central Excise, Bombay [1997 (89) ELT 16 (SC)]*= *2002-TIOL-782-SC-MISC* pleaded by the applicants in the course of the appeal, was another critical cause of flawed finding in the order of Tribunal is an attendant contention of the Learned Counsel. Further, according to him, the arguments of Revenue relying upon end use appeared to have outweighed the plea of the appellant that the fundamental principles of classification, as laid down by the Hon'ble Supreme Court in *Commissioner of Central Excise, Delhi v. Carrier Aircon Ltd [2006 (199) ELT 577 (SC)]* = *2006-TIOL-69-SC-CX*, should be followed to discard the classification adopted by the original authority.

8. Submitting that even this was but an exercise in superfluity had the primary plea of the applicant for declaration of the ships as vessels and, thereby, outside the purview of section 12 of Customs Act, 1962 been taken upon for consideration, Leamed Counsel pointed out that the precedent of *Noble Asset Co Ltd v. Commissioner of Customs (Preventive), Mumbai [2006 (205) ELT 901 (Tri-Mumbai)]* = *2006-TIOL-1482-CESTAT-MUM* should have been followed and, more so, in view of the affirmation by the jurisdictional High Court.

9. The third contention is that their plea for entitlement of concessional duty of 1% under notification no. 1/2011-CE dated 1st March 2011, which is not deniable to them in terms of the decision of the Hon'ble Supreme Court in *SRF Ltd v. Commissioner of Customs [2015 (318) ELT 607 (SC)]* = *2015-TIOL-74-SC-CUS*, not forming a part of the directions to the lower authority is a mistake that requires rectification to prevent miscarriage of justice.

10. The fourthontention of Learned Counsel is that the Tribunal had, in two instances, classified similar vessels under heading no, 8906 which should have guided the decision in the matter of the applicant and, despite pleading, had not been taken cognizance of. These are Hind Offshore Pvt Ltd v. Commissioner of Customs (Import), Mumbai - 2015-TIOL-320-CESTAT-MUM and *Sapura Shipping P Ltd v. Commissioner of Customs (Import), Mumbai [2016 (343) ELT 1144 (Tri-Mumbai)]* = *2016-TIOL-1519-CESTAT-MUM*.

11. That these four submissions, backed by the relevant decisions now place before us, had been made during the hearing is not in doubt. The records bear this out and Learned Special Counsel for Revenue also does not dispute. That the decisions cited were critical for appreciation of the inadequacies in the order of the original authority and would have been demonstrative of the glossing over of some key preliminary issues is also not in doubt. Whether these are within the competence of the Tribunal to consider in an application for rectification of mistakes is the question that must be answered. According to Learned Special Counsel appearing for

Revenue, such determination is beyond the scope of the power of rectification conferred on the Tribunal.

12. A miscellaneous application under section 129B (2) of Customs Act, 1962 is, admittedly, not directed at the other party in the appeal but against the bench that decided upon the matter. That should, in the normal course, rule out any scope for Revenue to put forth its counterpoint to the application and submissions made thereon; nevertheless, assistance to the court is not only welcome but may also be a necessity. Moreover, an outcome that may impact the other party not being ruled provides an added reason for opportunity to be afforded to Revenue for rejoinder. Hence, we take on record the pleas of the Learned Special Counsel canvassing dismissal of the application.

13. Learned Special Counsel urged us to reiterate the final order now assailed; he justified his contention by taking us through the technical specifications of the ships, the nature and scope of the contract with M/S ONGC Ltd and the failure to submit the renovations and reconditioning in the ships to assessment under Customs Act, 1962. Strenuously arguing that the applicant was resorting to this procedure for reargument of the entire appeal which, according to him, is an abuse of the legal process, Mr KM Mondal contends that proper forum for bringing of these issues are the constitutional courts and not the Tribunal.

14. According to Mr KM Mondal, the scope of section 129B (2) of Customs Act, 1962 is restricted inasmuch as its purpose is to enable such mistakes, as are apparent from the record, to be rectified and that any submission that calls for lengthy and complicated arguments to be found acceptable are beyond its purview. Reliance is placed by him on the decision of the Hon'ble Supreme Court in Commissioner of *Central Excise, Belapur v. RDC Concrete (India) P Ltd [2011 (270) ELT 625 (SC)] = 2011-TIOL-77-SC-CX, in TS Balaram v. Volkart Brothers [82 ITR 50 = 1971 (2) SCC 526] = 2002-TIOL-171-SC-IT, ITO v. Ashok Textiles [41 ITR 732] = 2002-TIOL-959-SC-IT-LB, Commissioner of Central Excise, Calcutta v. A.S.C.U. Ltd [2003 (151) ELT 48 (S.C.)] = 2002-TIOL-408-SC-CX, and Deva Metal Powders Pvt Ltd v. Commissioner, Trade Tax, U.P. [2008 (221) ELT 16 (SC)] = 2007-TIOL-221-SC-CT, of the Hon'ble High Court of Allahabad in Quality Exports & Chemicals v. CEGAT, New Delhi [2000 (122) ELT 361 (All)], and of the Tribunal in CADCAM Laboratories v. Commissioner of Central Excise Chandigarh [2015 (317) ELT 388 (T)] = 2014-TIOL-3279-CESTAT-DEL and in SHS Electronics v. Commissioner of Central Excise Coimbatore [2017 (350) ELT 298 (T)] to elucidate his view that the contentions in* the application, as summarized by him, are not to be addressed in the present proceedings. The depriving of power of review otherwise vested in the higher judiciary from the legislative architecture of the Tribunal has, according to him, been very clearly laid down by the Hon'ble Supreme Court in *Commissioner of Central Excise, Vadodara v. Steelco Gujarat Ltd [2004 (163) ELT 403 (SC)],*

15. We are indebted to Mr Mondal for drawing attention to these decisions and appreciate his caution to us from overreaching the boundaries of our powers and authority; we have, thereby, been able to sharpen our thoughts and enabled to formulate our views. Suffice it to say that we shall restrict ourselves only to such contentions that, if any, are apparently mistakes and with consequences that may be irreparable.

16. Addressing himself to the task of highlighting the hollowness of the contentions of the applicant, Mr. Mondal submitted that classification being a mixed question of fact and law, the Tribunal had analyzed the design of the ships and the purposes for which these were intended before discarding the alternate classification claimed by the importer which, according to him, had not even been posited during the hearing. On the issue of valuation, according to him, the apparent mistakes that the application points out, viz., isolating the wrong serial number in notification no. 94/96-Cus dated 16th December 1996, the appropriate sub-section in section 15 of Customs Act, 1962, and the applicable rate of exchange were debatable and, therefore, hardly liable to be categorized as mistakes that are apparent and require rectification. He contends that the question of the applicable additional duty, whether in terms of notification no. 1/2011-CE dated 1st March 2011 or notification no. 89/82-Cus dated 25th March 1982, is also debatable and, hence, not an error. Furthermore, he submits that the Tribunal has recorded detailed findings on the plea of limitation thus

'57. It is an established fact from record that the appellant had never filed any Shipping Bill nor filed Bills of Entry in respect of cost of repair and machinery installed therein and freight and insurance incurred, upon re-import of the vessels from time to time, although filing thereof is mandatory under Section 46 of the Act. The Bills of Entry filed were only in respect of bunker, store and consumables. Such stores and consumables only suffered duty and Revenue has no grievance thereon. But, without the Bills of Entry being filed against the cost of repair and freight as well as insurance incurred, there was escapement of levy of duty, Revenue having lost the duty imposable against reimport on the value of the repair/modification and machinery installed as well as freight and insurance incurred, adjudication was made and resulted with the consequence of adjudication as stated herein before. It was the obligation of the importer in law to file the Bills of Entry under Section 46 of the Act on import as well as re-import under Section 20 of the Act.

58 According to law of Customs on import and re-import, when Bill of Entry is filed in respect of the goods imported, necessary particulars of import are furnished therein for examination by Customs. Descriptions relating to import appearing in the Bill of Entry are required to be verified by the importer as to the truthfulness thereof Customs Authority has been vested with the power to call for the invoice and any other documents related to import of goods covered by the said Bills of Entry to examine truth of the declaration in the Bill of Entry. Appellant failed to file Bills of

Entry in respect reimport of all the three vessels made from to time to examine whether there were any repair/renewal/ modification was done to the vessels and machinery installed if any, installed thereon as well as freight and insurance charges incurred for the to and fro journey undertaken by the vessels. Accordingly, Customs Authority was prevented to know the cost of such repair, cost of installed machines, freight and insurance charges incurred in respect of these vessels when entered into India on re-import. Thereby interest of Customs was prejudiced

59. Appellant pleaded that when vessels were arriving during the impugned period, authorities having taken inventory of the store in the vessel as exhibited by the sample copy of the document at page 81 of the paper book, Volume-VII, it was within their knowledge that vessels have entered into India on re-import. But such plea of appellant is devoid of merit for the reason that appellant failed to discharge its obligation under law to without filling Bills of Entry disclosing value of repair, freight and insurance even though Section 46 of the Act read with Section 20 thereof specifically require the appellant to file Bills of Entry in respect of the repair and renovation cost made to the vessel including freight and insurance incurred and machinery installed, if any, to receive examination of Customs following the mandate of the Notification No. 94/96-Cus dated 16.12.1996 to order for levy, if any imposable. Revenue is correct to submit that the appellant never filed any Bills of Entry in respect of the value of such repair and modifications done to all the three re imported goods i.e. vessels from time to time in absence of any evidence in that regard. '
which forecloses the scope for alleging commission of any mistake.

17. Assailing the exhortation of the applicant to re-consider the discarding of the decision in re Hal Offshore Ltd as a precedent, Mr. Mondal pointed that out to be inapplicable as the vessels concerned in that decision were so categorized owing to the classification certificate issued by the Indian Registry of Shipping implying thereby that those were meant for transporting goods and persons from ports to offshore installations with unrestricted navigation facility and that, in any case, the appeal of Revenue pending before the Hon'ble Supreme Court deprived it of any value as a precedent as laid down by the Hon'ble Supreme Court in Union of India v, ***West Coast Paper Mills Ltd [2004 (164) ELT 375 (SC)] = 2004-TIOL-14-SC-LMT-LB thus***

'once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in Jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit '
18. On the proposition of the applicant that disregard of the decisions of the Tribunal in re Raj Shipping Agencies Ltd, in re Acadia Shipping Ltd, and in

re L&T Sapura Shipping P Ltd was a mistake that ought to be rectified, Mr. Mondal points out the irrelevance of that classification to the present dispute.

19. In the matter of the miscellaneous application seeking to invoke the precedent of various decisions of the Tribunal remanding disputes back to the original authority in the light of the decision of the Hon'ble High Court of Delhi in *Mangali Impex Ltd v. Union of India [2016 (335) ELT 605 (Del)]* = *2016-TIOL-877-HC-DEL-CUS*, Mr. Mondal contended that this had not been raised during the hearing of the appeal and that, while rule 10 of Customs Excise Service Tax Appellant Tribunal (Procedure) Rules, 1982 did empower inclusion of additional grounds during the pendency of appeal, the same cannot be said to be permissible once the appeal has been disposed of. Moreover, according to him, rule 41 of the said Rules was intended for a different purpose and is not to be construed as a source of authority to allow additional grounds in proceedings initiated for rectification of mistakes. Furthermore, according to him, the show cause notices issued in July and August 2012 did not suffer from any infirmity as the Central Board of Excise & Customs had, vide notification no. 44/2011-Cus OIT) dated 6ff July 2011, assigned the functions of 'proper officer' under section 28 of Customs Act, 1962 to the notice issuing authority whereas the decision relied upon pertain to the period prior to 8th April 2011 which the Government of India had attempted to validate by appropriate statutory incorporation that was under challenge. Furthermore, he contends that the decision of the Hon'ble High Court was no longer binding as it had been stayed by the Hon'ble Supreme Court. In addition, according to him, the Hon'ble High Court of Andhra Pradesh in Vuppalamritha *Magnetic Components Ltd v. Directorate of Revenue Intelligence [2017 (345) ELT 161 (AP)* = *2016-TIOL-2789-HC-AP-CUSand the Hon'ble High Court of Bombay, the jurisdictional High Court, in Sunil Gupta v. Union of India [2015 (315) ELT 167 (Bom)]* = *2014-TIOL-1949-HC-MUM-CUS* had taken a contrarian stand thus ruling out its applicability for the present.

20. On the other hand, Learned Counsel, Mr. Jitendra Motwani argued that the jurisdictional High Court had, in deference to the importance of jurisdiction, admitted writ petition in Sun Polytron Industries Ltd v. Union of India [2338/2016] = *2017-TIOL-1139-HC-MUM-CUS* and customs appeal no 53/2016 on grounds that were, in effect, directly contrary to the decision in re Sunil Gupta, and that the Tribunal, in the interests of rendering justice, had, even after reserving orders, permitted the plea of jurisdiction to be raised in a clarificatory hearing. According to him, the invoking of rule 41 of the Rules supra was an appeal to the conscience of the Tribunal owing to the potential for irreparable harm should the issue of jurisdiction be resolved against Revenue by the Hon'ble Supreme Court at a later stage.

21. Having heard the submissions from both sides, we now turn to the records. It would appear that in the appeal against the order of the original

authority fastening duty liability on the ships, the cavil is to the disregard of the rigorous hierarchy of decision enjoined by the Customs Act, 1962. According to them, the hierarchy, commencing with the taxing provision to classify the goods and ascertain the rate of applicable duty - from the tariff and exemption notification through appraisal of the value in accordance with section 14 and culminating in computation of duty liability under section 17, which, according to Constitutional mandate, being restricted to goods, should have examined the scope of coverage under section 46 which does not extend to conveyances.

22. We notice that the original authority had gone on to examine the characteristics of the ships and the contractual context to determine the classification under chapter 89 of the First Schedule to Customs Tariff Act, 1975. Likewise, the Tribunal, too, proceeded to discard the primary contention of the appellant that the ships were conveyances by reference to decision of the Supreme Court in *Union of India v. VM Salgaonkar & Bros (P) Ltd [1998 (99) ELT 3 (SC)]* and, having considered the technical specification as presented by the Learned Special Counsel for Revenue, went on to confirm the classification adopted in the impugned order. It is, therefore, apparent that, while the legal and logical superstructure was elaborated upon, the foundation for ascertaining dutiability was neglected. Undoubtedly, this ascertainment goes to the root of the dispute and a determination of duty liability, without that foundation, jeopardizes the superstructure. This would, undoubtedly, lie within that narrow strait allowed to the Tribunal, in the catena of decisions enumerated on behalf of Revenue, to take up for rectification. It may be worthwhile to tarry awhile to elaborate.

23. Customs Act, 1962 is concerned with taxation of goods and the definition of goods in section 2(22), inter alia, includes vessels and aircraft. So do vessels and aircraft have the unique privilege of inclusion also in the definition of conveyances in section 2(9). Provisions of Customs Act, 1962 assign distinct obligations and status to goods and conveyances. Straddling these two mutually exclusive targets for monitoring and control in the statute, vessels and aircraft occupy a special position; at some point these, undoubtedly, are goods. The crucial issue is whether, as held in the order of the original authority and affirmed by the Tribunal, there is legal support for shifting ships (in this case) between the two definitions; the case of the appellants was that it could not whereas the case of Revenue was that it should. On this wedge balances the validity of levy of duty. This was not examined in the adjudication order and that fatal flaw remained unconsidered in the order of the Tribunal save for a passing reference to the decision in re VM Salgaoncar & Bros (P) Ltd. In this decision, the Hon'ble Supreme Court considered the claim of exemption to 'transhippers' under a notification enabling duty-free imports to 'ocean going vessels' issued under the erstwhile Sea Customs Act, 1878 and the predecessor to the Customs Tariff Act, 1975 and, though incidentally did accord a meaning to 'consumption, held that

'20. We do not think that, in the present case, the question whether a transhipping vessel is an ocean-going vessel, can solely rest on the test of its dominant use to which their owners put them at times. Use may vary from season to season, port to port and also managers to managers. So in this area of understanding use of the article stands down-staged, and the Court must look at to know what actually the commodity is.

21. In the Merchants Shipping Act, 1958, the expression "sea-going vessels " is used and defined it in Section 3(41), like this.

"Sea-going", in relation to a vessel means a vessel proceeding to sea beyond inland waters or beyond waters declared to be smooth or partially smooth waters by the Central Government by notification in official gazette. "

22 Though an endeavour was made before the Tribunal to show that there is a shade of difference between the two words "sea" and "ocean", we are not disposed to attach much emphasis on the nuances in the semantics now. For all practical purposes the words "sea" and "ocean" are two expressions of the same geographical feature concerning the vast body of salt water one side of which appears as horizon from the other. Hence we have no doubt that what is meant by the expression "ocean-going vessels " is not qualitatively different from "sea-going vessels ' indeed the latter may include the former.

23. How an ocean-going vessel is understood in maritime enterprises can now be looked into. In the Shorter Oxford Dictionary, it is shown as "a ship capable of crossing oceans". In the Random House Dictionary, it is shown as "a ship designed and equipped to travel on the open sea In the Collins Dictionary of English Language, it is defined as "a ship suited for the travel on the open sea

24. There is no dispute for the Department that by design and equipment, transhippers are intended to be used mostly to carry the cargo from harbours to the high seas and vice versa. That such transhippers often move into the open sea is also not disputed by the Department. Thus considering the question from all different angles, it is reasonable to take the view that merely because transhippers are used for carrying cargo for loading into the bulk carriers (those being unable to touch the Port) they cannot be excluded from the category of ocean-going vessels. At any rate it has been demonstrated by the Government that it was not very much interested in segregating transhippers from the category of ocean-going vessels as the Government brought out a new notification enveloping all vessels including transhippers within the ambit of ocean-going vessels, almost immediately after pronouncement of the decision in Chowgule & Co. Pvt. Ltd. (supra). That subsequent development on account of its close proximity of time cannot be overlooked as of no impact. '

In the context of that decision, the outcome thereof may not assist in determining that the impugned ships are goods without a deeper scrutiny.

24. Definitions in Customs Act, 1962 are contextual and strictly intended to bring objects within the radar of customs enforcement; consequently, a general interpretation may not be appropriate. The adjudication order, and the Tribunal, appear to have skipped the first two steps on the ladder; the ascendance directly to the third is fraught with want of stability. The assumption appears to have been that the specialized ship, with navigability as a subordinate characteristic, was, as an equipment, incapable of being a conveyance - usually regarded as a mode for transport of people and goods. This conclusion appears to have stemmed from the description in, as well as the notes (including 'explanatory notes') pertaining to, heading no. 8905 of the First Schedule to Customs Tariff Act, 1975 instead of approaching a fitment within this description at the second stage in the hierarchy of decision.

25. Certain obligations devolve on, and certain privileges accrue to, ships as conveyances. These are, statutorily, built into the customs laws of the country. Furthermore, as conveyances, ships regularly traverse that unmarked frontier between the territorial waters, to which the writ of national laws extend, and the watery wilderness of high seas, which acknowledges neither sovereignty nor civilization in its natural state, on their passage. International convention on facilitation of maritime trade govern the treatment accorded to ships crossing from the high seas into the territorial waters. For ships to be accorded recognition as a conveyance on the basis of tariff classification would circumscribe the declared objectives of such conventions. The claim of the importer for coverage under the convention and the statutory provision pertaining to conveyance must be resolved before invoking section 20 or section 12 of Customs Act, 1962. This is conspicuously absent in the order of the adjudicating authority.

26. In considering the submissions of the notice on classification, the adjudicating authority has not paid sufficient attention to the harmonious construction of the descriptions in chapter 89 of the First Schedule to the Customs Tariff Act, 1975. Under the scheme of the tariff, there are certain governing principles: the specific prevailing over the general and the later being more valid than the previous are relevant here. It would appear from the findings of the adjudicating authority that the declaration furnished at the time of filing the bill of entry for the ships, when customs duties were 'nil' and, therefore, susceptible to placement without thought of consequence, weighed heavily. The submissions on behalf of Revenue during the hearing of the appeal also placed emphasis on this and it would appear that the requirement to adjudge the classification on first principles, as espoused on behalf of the appellant, was not accorded sufficient weightage. Moreover, the argument of Revenue during the hearing of the appeal was devoted to the overriding importance of navigability as the basis for classification. We take note that the technical characteristics of the ships were of utmost consideration in approval of the classification arrived at by the adjudicating authority. Chapter 89 covers all manner of vessels: from ships, ocean-going or otherwise, to diverse others. Heading 8905

applies to floating structures intended for specialized use with navigability as a subsidiary feature. This does not imply that navigation is the significant and compelling feature of those vessels that are classifiable under 8901. All the goods enumerated in chapter 89 have some association with the waters and it is only flotsam, jetsam and wrecks that may be deprived entirely of navigability. It would appear that the adjudicating authority has failed to appreciate the sense and implication of the expression 'navigability' which is required to be harmoniously read with the description in that subheading instead of being read as the distinction between that subheading and other subheadings of the chapter. The classification merits fresh determination particularly in the light of the various judicial decisions dealing with import of 'supply vessels.'

27. It would appear from the above that the mistakes in the order of the Tribunal require rectification. These issues do not find sufficient coverage in the adjudication order. For the Tribunal to delve into the details of these without the assistance of a comprehensive adjudication order would not be equitable to either side. The order of the Tribunal has directed the adjudicating authority to subject some of the claims of the applicant to scrutiny for re-computation of duty. It would be in the fitness of things for the two issues of categorization as 'conveyance' or 'goods' on entries after the first import and for classification under the appropriate entry in chapter 89 in the event of the ships being found to be 'goods' on each voyage to be included in the terms of determination by the adjudicating authority. While doing so, the other issues of rate of exchange and appropriateness of the notification pertaining to additional duties of customs are also to be subject to determination. Consequently, the restricted remand in the order of the Tribunal is enlarged to an open remand,

28. There has been an elaborate discussion on the eligibility for remand in accord with other decisions of the Tribunal in which the plea of jurisdiction has been raised. We are conscious that the applicant had not sought relief on this ground during the hearing of the appeal. We take note of the objections of Revenue that an application for rectifying a mistake is not the means for making such a plea. Nevertheless, such ground having been claimed, we have no option but to dispose it off. There is a principle of equity involved. The Tribunal has ample latitude in its functioning to ensure that the ends of justice are served in full measure. It is not far from our minds that the hierarchy of an appellate procedure culminating in the highest court of the land has been established solely for ensuring delivery of justice. It is never too late to for us fulfill that mandate. We take note also of decisions of the Tribunal which have allowed the plea of jurisdiction, which goes to the root of a dispute, to be raised even after hearing was concluded.

29. We take note that the decision of the Hon'ble High Court of Delhi in re Mangali Impex has been stayed by the Hon'ble Supreme Court and that the jurisdictional High Court had, in re Sunil Gupta, approved the competence of officers of Directorate of Revenue Intelligence to take recourse to section

28 of Customs Act, 1962. The jurisdictional High Court, notwithstanding its earlier decision, has seen fit to admit appeals cited by Learned Counsel supra thus giving rise to the possibility of its earlier decision being in jeopardy. Faced as we are, by these crosscurrents of judicial consideration and by the absence of a finality, with the potential of detriment to the non-state stakeholder, we cannot avoid reflecting on irreparable harm that may be caused. We note that the decision of the Hon'ble High Court of Andhra Pradesh in re Vuppalamritha Magnetic Components Ltd, though against the assessee in question, provides the appropriate guidance. The Hon'ble High Court was disinclined to reopen a matter settled in that dispute even though the principle determined by the Hon'ble Supreme Court in a subsequent ruling was contrary to the early settlement for the following reasons:

'14 The contention that all proceedings founded upon a show cause notice that was inherently lacking in jurisdiction, would be non est, null and void, is perhaps right as a simple statement of a proposition of law. But it is not without exceptions. If this theory of nullity and voidity is accepted, all proceedings initiated before 8-4-2011, which have already culminated in orders of adjudication and pursuant to which recoveries have been made, are also to be deemed as non est. Therefore, the Commissionerates of Excise throughout the country can today be flooded with applications for refund of the duty paid in pursuance of the orders of adjudication passed on the basis of such show cause notices. The theory of nullity and voidity cannot be extended to such an extent as to lead to such disastrous consequences.

15. There is also one more aspects It is not the case of the petitioner that they challenged either the impugned show cause notice or the Order-in-Original at the relevant point of time on the ground that the show cause notice was issued by a person not assigned the role of a proper officer. The petitioner had challenged the show cause notice and the order of adjudication on other grounds, which stand rejected up to Supreme Court. Therefore, the principle of finality to litigation would put a seal on the present attempt on the part of the petitioner to reopen the issue all over again.

30. A disposition of the issue on merit against the applicant without touching upon the issue of jurisdiction which, if ultimately in favor the applicant, would saddle them with the detriment that should never have been. On the other hand, such postponement of decision on merit is not to the detriment of Revenue. It is this distinction that has motivated the Tribunal to defer determination of many disputes on merit by remanding the matter back to the original authority to await the final order on jurisdiction. We believe that this would best serve the ends of justice.

31. Taking note of the submission of Mr. Mondal that offices of Directorate of Revenue Intelligence were empowered as on date of issuance of notice leading to this dispute, we find that the dispute before the Hon'ble Supreme Court in re Mangali Impex, as decided by the Hon'ble High Court, covers

notices pertaining to the period prior to the entrustment of powers of 'proper officer' by Central Board of Excise & Customs. Therefore, we have no hesitation in holding that the plea of the applicant for remanding the matter to the original authority till disposal of the dispute on jurisdiction is not to be ignored. As the scope of the remand in the appeal disposed of by *order number no. A]91168-91170/17 dated 6th December 2017* has been converted into an open remand, the consequence of precedent is to direct the original authority to dispose of the matter after the Hon'ble Supreme Court hands down its decision in re Mangali Impex.

32. In view of the above terms of remand, which would require determination of dutiability itself, recourse to section 111 of Customs Act, 1962 is in jeopardy. it would, therefore, be appropriate to set aside the confiscation in the order-in-original.

33. Accordingly, the application for rectification of mistake is allowed to the extent ordered supra and the order no. A/9116891170/17 dated 6th December 2017 of the Tribunal stands appropriately modified.

(Pronounced in Court on 27.02.2018)