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::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot – 360 001

Tele Fax No. 0281 – 2477952/2441142

Email: cevappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/90/BVR/2017	40/AC/Rural/BVR/RR/2016-17	31.01.2017

ख अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-250-2017-18

आदेश का दिनांक / Date of Order:	28.03.2018	जारी करने की तारीख / Date of issue:	02.04.2018

Passed by **Shri Sunil Kumar Singh, Commissioner, CGST & Central Excise, Gandhinagar.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री सुनील कुमार सिंह ,आयुक्त, केंद्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क,, गांधीनगर, को वित्त अधिनियम १९४४ की धारा८५, केंद्रीय उत्पाद शुल्क , अधिनियम १९४४ की धारा ३५ के अंतर्गत दायर की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Sunil Kumar Singh, Commissioner, CGST & Central Excise, Gandhinagar, has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयकत/ संयुक्त आयक्त/ उपायक्त/ सहायक आयक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम/ भावनगर द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham/ Bhavnagar :

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants &** Respondent :-

M/s Sunrail Impex P. Ltd, Plot Np. 68, Ship Breaking Yard, Alang Dist : Bhavnagar

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) वित्त अधिनियम, १९४४ की धारा ३५B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to: -

(i) अपीलीय न्यायाधिकरण के सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, 2nd द्वितीय तल, बहुमाली भवन असावा अहमदाबाद-३८०००४ को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bahumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

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(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दायर किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग ,ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग ,ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lacks rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the branch of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दायर की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दायर करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre deposit payable would be subject to a ceiling of Rs. 10 Crores.

Under Central Excise and Service Tax, "Duty Demanded" shall include :

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है।
/
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा सैनायाविधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR.6 चैलन की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the O.I.O and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न डिमांड एक लाख रुपये या उससे कम है तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न डिमांड एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

ORDER IN APPEAL

The subject appeal no. 90/BVR/2017 is filed by M/s Saumil Impex Pvt. Ltd., Plot No.68, Ship Breaking Yard, Alang (hereinafter referred to as 'the appellant') against Order in Original No. 40/AC/RURAL/BVR/RR/2016-17 dated 31.01.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central Excise, Rural Division Bhavnagar (hereinafter referred to as 'adjudicating authority').

2. The facts of the case in brief are that the appellant were engaged in breaking / dismantling of ships imported for breaking purpose at the Ship Breaking Yard, Alang. They availed Cenvat credit on the inputs, capital goods and inputs services used in or in relation to manufacture of their final products as per Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR-04')

3. An importer of a ship for breaking purpose files a Bill of Entry in respect of ship imported by him with the jurisdictional Customs Authority declaring therein separately the quantities and values of (i) Fuel Oil, HSD Oil (M.G.O.), Lub. Oil, (ii) other consumable articles like food, beverages, toiletries etc. and (iii) the 'Ship For Breaking Purpose' [excluding the goods & materials separately declared as mentioned at (i) & (ii)] and customs duty is accordingly assessed thereon. As per Note 9 to Section XV of the Central Excise Tariff Act, 1985 (hereinafter CETA, 1985), the goods & material, except those covered under Section XV (Ch.72 to 83), even though obtained by breaking up of ships are considered as 'non excisable goods'. As per the provisions of Rule 3 read with Rule 2 of CCR-04, an importer of a ship (ship-breaking unit) is allowed to avail Cenvat credit of the Additional Customs Duty (CVD) paid only on the 'ship for breaking purpose' out of the three items declared separately in the Bill of Entry filed by them as mentioned hereinabove. As per above Chapter Note 9, the goods and materials covered under Chapter 72 to 83 obtained by process of breaking up of a ship can only be considered as the 'excisable goods' as defined under Section 2 (d) of the Act as well as the 'final products' as defined under Rule 2 (h) of the CCR-04.

3.1 As per proviso to Clause (vii) of Rule 3(1) of the CCR,2004, Cenvat credit was not allowed in excess of eighty five percent of the additional duty of customs (CVD) paid on ships imported for breaking purpose. However, the said proviso was omitted with effect from 1-3-2015 vide Notification No .01/2016-C. Ex. (N.T.) dated 1-2-2016. Thus, full Cenvat credit of the additional duty of Customs (CVD) paid on ships imported for breaking purpose was available to the importer of ship for breaking purpose with effect from 1-3-2015.

3.2 During inquiry proceedings, it was found that the appellant had availed Cenvat credit of the Additional Duty of Customs (CVD) paid on Fuel Oil, M. G. O. (H.S.D. Oil) & Lub. Oil etc. contained in the ships imported by them for breaking purpose. A statement of Shri Bhavin Surendra Shah, Director of the appellant firm was also recorded on 29.03.2016, wherein he interalia stated that they had taken and utilized the Cenvat credit of Rs.22,18,930/- against CVD paid on said items by them, relying upon the order passed by High Court of Gujarat in the case of M/s Priya Holding (P) Ltd.-2013 (288) ELT 347 (Guj).

3.3 During investigation, the credit of Rs. 22,18,930/- taken against Bill of Entry No. SBY/249/2014-15 dated 4.3.2015 and against Bill of Entry No. SBY/252/2014-15 dated 5.3.2015 and utilized by the appellant was found wrong on the ground that the said goods, viz. Fuel Oil, M. G. O. (H.S.D. Oil) & Lubricant Oil etc., were not used in the process of manufacture of their final excisable products by breaking of the said ships and directly sold to open market therefore the same cannot be considered as 'input' as defined under Rule 2 (k) of the CCR. Subsequently, the appellant had also debited an amount of Rs.22,18,930/-, under protest, on 31.03.2016.

4. Accordingly, SCN was issued to appellant for recovery of inadmissible Cenvat Credit of Rs.22,18,930/- with interest under Rule 14 of CCR-04 read with Section 11A(4) and Section 11AA of the CEA, 1944 and appropriation of the same against payment made by appellant under protest. The SCN also proposed penal action against appellant as well as against director of appellant.

5. The adjudicating authority vide impugned order confirmed the demand of Cenvat Credit of Rs.22,18,930/- with interest and order for appropriation of the amount of Rs.22,18,930/- already paid by vacating the protest made by appellant. He also imposed penalty of Rs.22,18,930/- under the provision of Rule 15(2) of CCR-04 read with Section 11AC of the Act and also imposed penalty of Rs.5,000/- on the Director of the appellant.

6. Aggrieved with the impugned order, the appellant has filed present appeal on the following grounds:

(i) The adjudicating authority has made a substantial error to examine the meritorious and land mark judgement issued by the Hon. High Court of Gujarat, Ahmedabad in the case of *M/s. Priya Holdings (P) Ltd V/s. CC, (P) Jamnagar referred at 2013 (288) ELT-347 (Guj)* and issued the subject OIO without considering and discussing the written reply as well as various dictums cited by the appellant. Based on the above decision of Court, the appellant had decided to avail Cenvat credit on the C. V. duty paid in respect of bunkers/fuel stored in the inside tanks of engine

room department being it is now considered as an integral part of the vessels and assessed to duty with the vessel under the chapter heading/sub-heading No. 89.08 of the CTA/CETA. Hence, the OIO is liable to be discharged promptly to main judicial discipline.

(ii) The Hon. High Court as stated above while delivering its final decision in the case of M/s. Priya Holdings Pvt. Ltd has categorically held that the oil/fuel stored in the inside engine room tanks is attached with the vessel's machineries and also an integrated part of the vessel and therefore to be classified under CTH 89.08 and assessed to Customs duty accordingly. Therefore, the appellant has acted according to the provision of the statute and also in terms of the above pronouncement of the Hon. High Court of Gujarat and therefore no action against the appellant is warranted. The department's proposal is therefore appears against the law and subject SCN needs to be set aside promptly simultaneously Cenvat credit so availed and subsequently reversed may be ordered to be credited back in our Cenvat credit accounts.

(iii) The Cenvat Credit paid on the quantity of balance fuel stored inside tanks of engine room department of ship cannot be denied by the department merely on the ground that the same is not being used as an 'INPUT' in breaking activities of vessel and to produce excisable goods. Once the Customs authority has assessed the additional duty of Customs on the imported item/goods and the same has been paid as evidenced by the Bill of Entry, the manufacturer using such input is eligible to take Cenvat Credit of such duty assessed and paid and can also utilized the said credit and it is not open to the Excise authority having jurisdiction over the manufacturer to deny such Cenvat credit on the ground that such duty assessed and paid at the port of import was not to be availed as Cenvat credit. They relied upon following case laws in their above contention:

(a) Daniel Measurement Solutions P. Ltd v CCE-2014 (300) ELT 104

(b) Kerala State Electronic Corporation v CCE - 1996 (84) ELT 44:

(iv) It cannot be open to the Government of India to retain on the one hand, the said portion of the CVD on the imported fuel/bunkers and simultaneously to deny on the other hand the availment of Cenvat Credit of such duty on the ground that the said quantity of bunker/fuel is not being utilized anywhere to manufacture excisable final products of the unit.

(v) The allegation of ***suppression of facts*** of availment of CVD paid on the fuel oil, HSD (MGO), Lub Oil is misconceived and totally untenable in law and far from the truth because prior to taking Cenvat credit, they had declared their clear intention on the body of the subject Bill of entry that

'they intend to avail Cenvat credit on the CV duty paid by them on the vessel'. The appellant believes that it is the mistake of the departmental officer who appears totally failed to detect such availment at the time of scrutiny of monthly or periodical returns. Therefore, the vital element of suppression of facts for applying extended period to recover said amount of Cenvat credit is also not found present or justified in this case. Hence the demand is time-barred as the same had been issued after normal period of 1 year.

(vi) The department has made a palpable error to impose penalty on the appellant under Section 15 (2) of the CCR read with Section 11 AC of the Act as the said Section is attracted only in a case where there is contravention or transgression of any provisions of the CCR & Act where there is vital element e.g. fraud, collusion, willful mis-statement and suppression of facts are proved with documentary evidences by the department. In the present case the impugned OIO has failed to specify any provision of the CCR-04, the Rules and the Act which according to the department the appellant has intentionally contravened.

(vii) Accordingly, the appellant requested to set aside the impugned order and directing the respondent authority to allow re-credit of the amount of cenvat credit which was reversed by them and also not to initiate any coercive action to recover the amount of penalty imposed on the appellant till the date of final decision of the present appeal.

7. A personal hearing in the matter was fixed on 30.01.2018. However, the appellant seek adjournment and requested to fix another date of hearing after 10.02.2018. Accordingly, next date for personal hearing was fixed on 22.02.2018. However, the appellant did not appear for personal hearing. Another date of hearing was fixed on 16.03.2018 which was which was attended by Shri A, H. Oza, an authorized representative of the appellant. During P.H., he stated that penalty under 11AC is not imposable as there is no suppression involved.

8. I find that the appellant has already paid entire amount of disputed Cenvat credit, hence no further deposit is required to be made by them under Section 35F(i) of the Central Excise Act, 1944.

9. I have carefully gone through the impugned order passed by the adjudicating authority, the submissions made by the appellant in the appeal memorandum as well as submission made by the authorized representative at the time of personal hearing. I find that the limited issues to be decided in the

appeal are (i) Whether adjudicating authority has correctly held that the Cenvat credit of Rs. 22,18,930/- /-, availed on items such as Fuel Oil, High Speed Diesel Oil (Marine Gas Oils) & Lub. Oil, contained in the ships imported by them for breaking purpose was inadmissible to the appellant? (ii) Whether extended period was invokable in the present case? and (iii) Whether penalty was correctly imposed by adjudicating authority on appellant?

10. It is observed that Note 9 to Section XV (Base Metals and Articles of Base Metal) of the Schedule 1 appended to the Central Excise Tariff Act, 1985 covers all the goods falling under Chapter 72 to Chapter 83 of the Act ibid. Note 9 of Section XV explains that 'in relation to the products of this section, the process of obtaining goods and materials by breaking up of ships, boats and other floating structure shall amount to manufacture'. Therefore, it is undoubtedly cleared from the definition of Rule 2(h) of CCR-04 that for ship-breaking, goods and materials obtained by process of braking of ship, boats or other floating structure can only be considered as 'excisable goods'. Rule 2(h) of the Cenvat Credit Rules, 2004 defines that "'finished products' means excisable goods manufactured or produced from input, or using input service." Further, Rule 3 of the CCR-04 states that a manufacturer or producer of final products or a provider of output service is allowed to take credit of duties of excise paid on input or input service and received by the manufacturer for use in, or in relation to, the manufacture of final product. Further, as defined under Rule 2(k) of CCR-04, 'input" means all goods used in the factory by the manufacture of the final product but excludes any goods which have no relationship whatsoever with the manufacture of a final product. From this definition, it is clear that the item which is not used in the factory by manufacture of final product cannot be considered as 'input' as defined under Rule 2(k) of CCR-03 and as such Cenvat credit of duty, paid on such item, will not be available to the assessee under Rule 3 of CCR-04 because it is not used in or in relation to manufacture of final product.

10.1 In the present case, it is observed that the appellant had imported two Vessels 'THAI HARVEST' & 'PUNTO ROSSO' and filed Bill of Entry No. SBY/249/2014-15 for 'THAI HARVEST' and Bill of Entry No. SBY/252/2014-15 for 'PUNTO ROSSO' for clearance thereof wherein on the first page they declared description of goods as Fuel Oil, Marine Gas Oil (HSD), Lubricating Oil (inside Engine Room Bunker) etc. and their quantity, value, basic customs duty, additional duty of customs (CVD). On the third page of these Bill of Entries, they had declared description of goods as 'M.V. Thai Harvest' for breaking' and 'M.V. Punto Rosso' for breaking' respectively and also declared their value, basic customs duty, CVD etc. They took cenvat credit of Rs.13,30,252/- paid against Fuel Oil, HSD, Lub. Oil etc in respect of Bill of Entry No. SBY/249/2014-

15 and cenvat credit of Rs.8,88,678/- against Fuel Oil, HSD, Lub. Oil etc in respect of Bill of Entry No. SBY/252/2014-15. It is further observed that the appellant after beaching the ship at their ship breaking plot, removed all the fuels & oils, first and sold out without storing the same in their premises. Therefore, it is quite evident that the same were not at all used in the process of obtaining goods and materials by breaking up of ship. This fact had also been confirmed by Shri Bhavin Surendra Shah, Director of appellant in his statement dated 29.03.2016 wherein he, while answering question no. 5, stated that after the beaching of the vessel at their plot, they get permission from the GMB for removal of fuels & oils and other inflammable items and after removal of all the oil & fuels out of the ship, they apply to GPCB for permission of the de-contamination of the ship and after de-contamination they again applied to the GMB for cutting permission. Hence, it is clear from the above facts that the Fuel Oil, Marine Gas Oil etc. did not form part of input eligible for availing cenvat credit, in term of Rule 3 of the CCR-04, as the same were not used in or in relation to the manufacture of final product i.e. goods and material obtained by breaking of ship. Further, the said items were covered under exclusion category of goods as defined under Rule 3 of CCR-04 which had no relationship whatsoever with the manufacture of a final product.

10.2 It is further observed that the appellant has placed reliance upon the judgement of Hon'ble High Court of Gujarat in the case of M/s Priya Holding -2013 (288)ELT 347 (Guj). I find the adjudicating authority has correctly observed that the said judgement is not applicable to the present case as the same is related to customs assessment which has no applicability in the cases related to central excise. Further I find that present case is squarely covered by the decision of Hon'ble Tribunal, WZB, Mumbai passed in the case of CCE, Rajkot vs. Saibaba Ship Breaking Corporation as reported at 2002 (140) ELT 135 (Tri-Mumbai) wherein the Tribunal has held that fuel oil and food stuff on board ship are not inputs required directly or indirectly or in relation to manufacture of scrap emerging from breaking of ship as scrap can emerge without these being present hence additional customs duty paid on such fuel oil and food stuff cannot be availed of as modvat credit under erstwhile Rule 57A of Central Excise Act, 1944.

10.3 The appellant has further argued that the assessment in their case is still provisional, hence the demand and subsequent confirmation of cenvat credit so availed on CV duty is untenable. They relied upon the certain case laws. In this regard, I find that the adjudicating authority has correctly held that the provisional assessment was with regard to Bill of Entry filed by the appellant with the customs authority and has no implication on the excise.

Further, case laws cited by the appellant have no implication in the present case.

10.4 In view of above discussion, I hold that the appellant is not entitled for the cenvat credit of Rs.22,18,930/-, availed by them against Fuel Oil, Marine Gas Oil (HSD), Lub. Oil (Inside Engine Room Bunkers) etc.

11. Regarding applicability of extended period, I find that the adjudicating authority has held that the appellant had suppressed the facts from the department that Fuel Oil, Marine Gas Oil (HSD), Lub Oil etc. on which Cenvat credit were taken as inputs, were not used in or in relation to manufacture of their final product. On the other hand, the appellant has argued that they had declared in their Bill of Entries, filed at the time of import of the ship before Customs Authority, that they intended to avail Cenvat credit on the CV Duty paid by them on the vessel hence they prior to taking cenvat credit declared their clear intention on the body of the subject Bill of Entry regarding availment of credit. It is observed that monthly ER-1 returns, filed before the jurisdiction central excise office, reflect only the figures of Opening Balance, Cenvat Credit Taken & Utilized and Closing Balance. Except filing of ER-1 return electronically, no other paper/document is required to be submitted by an assessee to the jurisdictional central excise office. In the present case also, the appellant had filed their monthly return electronically. Apart from this, no other paper or document were given by them to excise authority. Hence on the basis of monthly returns filed by the appellant it cannot be ascertained whether the goods against which they had taken credit were used in the manufacture of their final excisable products and further the cenvat credit were admissible to them on such goods as per the provisions of the CCR-04 or otherwise. It is only when investigation was carried out against the appellant, the facts of non utilization of such goods, viz. Fuel Oil, HSD (M.G.O.) & Lub. Oil, in the manufacture of their finished excisable goods had been come to the notice of the department. Hence, I find that the adjudicating authority has correctly held that the element of suppression of fact in the present case is available to invoke extended period of limitation. In view of the above, I hold that demand is correctly confirmed by adjudicating authority under Section 11A(4) of the Central Excise Act, 1944 by invoking extended period of five years.

12. Regarding imposition of penalty under Rule 15(2) of CCR-04 read with Section 11AC of the Central Excise Act, 1944, it is observed that the charge of wrong availment of Cenvat credit has already been proved and further the element of suppression of facts are clearly available in the present case, hence, the adjudicating authority has correctly imposed penalty equal to

demand of Cenvat credit of Rs.22,18,930/-. Accordingly, I uphold the penalty imposed on appellant.

13. In view of the foregoing discussion and findings, I uphold the impugned order and dismiss the appeal filed by M/s Saumil Impex Pvt. Ltd., Ship Breaking Yard, Alang.

14. The appeal filed by the appellant stand disposed of in above terms.

28.3.18

(Sunil Kumar Singh)
Commissioner (Appeals)/
Commissioner,
CGST & Central Excise,
Gandhinagar

By Regd. Post AD
F. No.: V2/90/BVR/2017

Date: 28.03.2018

To,

1. M/s Saumil Impex Pvt. Ltd.,
   Plot No.68, Ship Breaking Yard,
   Alang

Copy to:
(1) The Chief Commissioner, CGST & Central Excise, Ahmedabad.
(2) The Commissioner (Appeals), CGST & Gentral Excise, Rajkot
(3) The Commissioner, CGST & Central Excise, Bhavnagar
(4) The Assistant Commissioner, CGST & C. Ex., Rural Division, Bhavnagar
(5) The Assistant Commissioner (Systems), CGST, Rajkot.
(6) The Superintendent, CGST & Central Excise AR-II, SBY Alang.
(7) PA to Commissioner of CGST & Central Excise, Gandhinagar.
(8) Guard file.