::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: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनाक / Date
	V2/289 & 287/BVR/2017	**01/AC/Rural/BVR/RR/2017-18**	**24.05.2017**

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

BHV-EXCUS-000-APP-267-TO-268-2017-18

आदेश का दिनांक / Date of Order: **28.03.2018** जारी करने की तारीख / Date of issue: **05.04.2018**

Passed by **Dr. Balbir Singh, Additional Director General (Taxpayer Services), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश स. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, डॉ. बलबीर सिंह, अपर महानिदेशक करदाता सेवाएँ, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९४४ की धारा८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज 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, Dr. Balbir Singh, Additional Director General of Taxpayer Services, Ahmedabad Zonal Unit, Ahmedabad 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 आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरनिखित 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 :

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

1.M/s Hariyana Ship Breakers Ltd., Hariyana House, 2nd Floor,2165/A-2, Sanskar Mandal, Bhavnagar
2. Shri. Rajeev Reniwal ,Authorised Person of M/s . Hariyana Ship Breakers Ltd.

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) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
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) वर्गीकरण मूल्यांकन से 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, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

निखिल पे. [illegible]
अधीक्षक (अ.)

(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 दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग 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 सार्वजिनक 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 नियमवाली, 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 माँग ,ब्याज की माँग 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 सार्वजिनक 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 Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench 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 दर्ज 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 दर्ज 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) वित्त अधिनियम, 2014 (वित्त अधिनियम, 1994 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) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (स. 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 मामलो मे, 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, Revison 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 मे, 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 मे या भंडारण मे माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह मे माल के नुकसान के मामले मे।/
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 मे प्रयुक्त कच्चे माल पर अदा की गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले मे, 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 इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा संगतविधि पर या बाद मे 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 मे, 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 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 OIO 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 रकम एक लाख रूपये या उससे कम है तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश मे 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 रूपये 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 मे वर्णित एवं अन्य संबन्धित 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 है । /
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

निदेशक (अपील)
अधीक्षक (अपील)

ORDER-IN-APPEAL

M/s. Hariyana Ship Breakers Ltd., Plot No.14, Ship Breaking Yard, Alang (hereinafter referred to as "the appellant") is engaged in the breaking/dismantling of imported ships. The appellant and Shri Rajiv Raniwal, Authorised Signatory of the appellant had filed appeals against OIO No.01/AC/RURAL/BVR/RR/2017-18 dated 24.05.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise, Rural Division, Bhavnagar (hereinafter referred to as "the adjudicating authorities"). Since, the issue involved in both the appeals are common, the said appeals are being taken up commonly in this single order.

2. Briefly stated, the facts are that:-

(i) the appellant has availed CENVAT credit of the Additional Duty of Customs (CVD) paid on Fuel Oil, Marine Gas Oil (H.S.D. Oil) & Lubricating Oil etc. contained inside Engine Room Bunker in the ships imported by them for breaking purpose, as input;

(ii) As per the Note No. 9 of Section XV of the Schedule 1 appended to the Central Excise Tariff Act, 1985, 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 CENVAT Credit Rules, 2004 so far the process of breaking of ship is concerned;

(iii) As per Rule 3 of the CENVAT Credit Rules, 2004, a manufacturer or producer of final products is allowed to take credit of duties of excise or the additional duty of customs (CVD), paid on any 'input' received in the factory of manufacturer of final products for use in or in relation to the manufacture of final product. As per Rule 2(k) of the CENVAT Credit Rules, 2004, the word 'input' means all goods used in the factory by the manufacturer of the final products but excludes any goods which has no relationship whatsoever with the manufacturer of a final products.

(iv) Shri Rajiv Raniwal, Authorised Signatory of the appellant in his statement dated 17.10.2016 clearly agrees that immediately after beaching of a vessel at their ship breaking plot, all the fuels & oils (Fuel Oil, HSD Oil (MGO) & Lubricating Oil) are removed from the vessel & sold out without storing the same and the same are not used in the process of obtaining goods and materials by breaking up of ship, but are directly sold in the open market. Therefore the same cannot be considered as 'input' as defined under Rule 2(k) of the CENVAT credit Rules, 2004;

(v) As per Explanation III to sub-Rule (3) of Rule 6 of the Cenvat Credit Rules, 2004, no CENVAT Credit shall be taken on duty paid on any goods that are not inputs.

2.2 Accordingly, a SCN dated 27.03.2017 was issued to the appellant proposing for demand of CENVAT Credit of Rs.39,29,390/- under the provisions of Rule 14(1)(i) of CENVAT Credit Rules, 2004 read with Section 11A(4) of Central Excise Act, 1944 and proposing for imposition of penalty under Rule 15(2) of CENVAT Credit Rules, 2004 read with Section 11AC(1)(c) of Central Excise Act, 1944. Said SCN was also issued to Shri Rajiv Raniwal, Authorised Signatory of the appellant proposing for imposition of penalty under Rule 15A of CENVAT Credit Rules, 2004.

3. In the defence submissions made by the appellant and Authorised Signatory of the appellant had largely relied upon how a ship, imported for breaking purpose, are classified in the Bill of Entry filed for clearance thereof, the guidelines contained in the Board's Circular No.37/96-Cus. Dated 03.07.1996 and judgment of the Hon'ble High Court of Gujarat in case of

M/s Priya Holdings Vs. Commissioner of Customs (Prev.), Jamnagar as reported in 2013(288) ELT 347 (Guj.).

4. The adjudicating authority confirmed the demand of CENVAT Credit of Rs.39,29,390/-, made in the aforesaid SCN and imposed equal penalty amounting to Rs.39,29,390/- upon the appellant under Rule 15(2) of CENVAT Credit Rules, 2004 read with Section 11AC(1)(c) of Central Excise Act, 1944, and imposed penalty amounting to Rs.5,000/- upon Shri Rajiv Raniwal, Authorised Signatory of the appellant under Rule 15A of CENVAT Credit Rules, 2004, vide the impugned order dated 24.05.2017.

5. Feeling aggrieved, the appellant and the Authorised Signatory of the appellant have filed the present appeals on the following grounds:-

- Impugned order passed by the adjudicating authority is non-speaking in as much as none of the submissions, made by the Appellant in its written reply dated 03.04.2017 have been considered;
- The appellant also relied upon the Circular No. 37/96-Cus dated 03.07.1996, wherein it was clearly opined that the fuel and oil contained in the vessel's machinery and engines can also be regarded as forming integral part of the vessels and hence classified under heading 8908.
- The appellant also relied upon the decision of the Hon'ble Gujarat High Court in the case of M/s. Priya Holdings Vs. Commr. of Customs, as reported in 2013 (288) ELT 347 (Guj.) wherein it is held that fuel and oil contained in the engine department tanks is always associated and connected with the machinery and engine of the ship, which form an integral part of the ship. Therefore credit is admissible thereon.
- It is also held in the aforesaid decision of the Hon'ble High Court that the mere fact that a separate line item, appears for said fuel and oil in the Bill of Entry filed for their importation, does not change the fact that these items form an integral part of the ship. The classification of these items in 8908 is itself sufficient evidence to show that these items are an integral part of the ship.
- The major input utilized in the ship breaking industry includes "ship used for breaking". The appellant, therefore, in terms of Rule 3 of CENVAT Credit Rules, 2004, availed CENVAT credit on the CVD paid by them on the vessels. These vessels are nothing but an input which is required for the purpose of obtaining goods from dismantling/breaking of ships. The appellant availed credit on the entire value of the ship including the value of the Fuel Oil, HSD Oil & Lubricating Oil stored inside the Engine Room bunker of the vessels being imported.
- The appellant had not availed any CENVAT Credit on the fuel and oil stored outside the engine bunkers. In other words, no credit was availed by the appellant on the CVD levied on the fuel and oil contained in places other than the engine.
- The appellant had availed CENVAT Credit not on fuels and oil, but on the 'ship for breaking purpose', which is classifiable under Tariff Heading 8908 and is a name which collectively describes everything contained in the ship, including fuels and oils contained in the engines room. The process of removal of fuel and oil forms an integral part of the process of breaking up of the ship. Unless oils and fuels are removed from the engine room, one cannot initiate the process of hot cutting of the ship, as the engine room can catch fire in the process of hot cutting. The appellant therefore submits that the process of removing fuel and oil is an integral process of manufacture of metal scrap which is the dutiable final product which emerges from the breaking of ship.

- In view of the above, since there was no contravention of CENVAT Credit Rules, 2004, the penalties upon both the appellants were also not imposable.

6. Personal hearing was also held on 27.02.2018, wherein Shri H.B. Pandya, Consultant appeared on behalf of the appellant & Authorised Signatory of the appellant and reiterated the submissions made in the appeal memorandums.

7. The appeals were filed before the Commissioner (Appeals), Rajkot. The undersigned has been nominated as Commissioner (Appeals) / Appellate Authority as regards to the case of appellant vide Board's Circular No. 208/6/2017-Service Tax dated 17.10.2017 and Board's Order No. 05/2017-Service Tax dated 16.11.2017 issued by the Under Secretary (Service Tax), G.O.I, M.O.F, Department of Revenue, CBEC, Service Tax Wing.

8. I have carefully gone through the facts of case, the grounds mentioned in both the appeals and the submissions made by both the appellants. The question, to be decided in these appeals, are as to whether the appellant is entitled to avail CENVAT Credit on said fuel & Oil, contained inside Engine Room Bunker in the ships imported by them for breaking purpose, as input, and whether penalty can be imposed upon both the appellants, or otherwise.

9. In this regard, I have carefully gone through the Board's Circular No. 37/96-Cus. dated 03.07.1996 issued from F.No. 512/22/89-Cus.VI, which is reproduced below:-

> *"**Subject: Ships & other floating structures imported for breaking up – Classification - Regarding.***
>
> *I am directed to say that doubts have been raised in the context of an audit para regarding classification of (i) movable gears such as lifting and handling machinery, anchors, navigational equipments, machine tools, fire fighting equipment (ii) **bunkers, such as fuel oil, engine oil** and (iii) ship stores, such as spare parts, food stuffs, alcoholic and other beverages imported on board a ship for breaking up. [Para No. 1.01 of the report of the C.& A.G. of India for the year ended 31st March, 1991 (4 of 1992)]. While Department was of the view that the articles are classifiable under Heading 89.08 of the Customs Tariff covering vessel and other floating structure for breaking up. Audit was of the view that these items are not covered by this heading and needs to be classified separately in their respective headings.*
>
> *The issue was referred to World Customs Organization, Brussels, who has opined that:-*
>
> *a) Movable gears such as lifting and handling machinery, anchors, navigational equipment, machine tools, fire fighting equipment and hence classified under Heading 89.08.*
>
> ***b) Fuel and oil contained in the vessel's machinery and engines can also be regarded as forming integral part of the vessels and hence be classified under Heading 89.08.***
>
> *c) Spare parts (such as propellers), whether or not in a new condition and movable articles (furniture, kitchen equipment, table-ware etc.) showing clear evidence of use and which have been formed part of normal equipment of vessels, are classifiable under Heading 89.08.*
>
> ***d) Remaining fuel and oil (other than that mentioned in sub-para) (b) above and other ship stores, including drinks and foodstuff are classifiable separately in their own appropriate headings.***
>
> *The matter was also discussed in a tripartite meeting comprising the Ministry of Law, Justice and Company Affairs, the Office of C & AG of India and the Department of Revenue, where it was decided that opinion expressed by the WCO may be accepted as guidelines for determining the classification of different items imported on board the ship for breaking up. The Board has accepted this decision.*

99

Accordingly in respect of articles referred to in Para 1 you may apply the advice of the WCO as per para 2 above and finalise the pending cases of assessment."

10. I have also gone through the decision pronounced by the **Hon'ble High Court of Gujarat in the case of M/s. Priya Holdings Vs. CC (Prev.), Jamnagar, reported in 2013 (288) ELT 347 (Guj.)** wherein it has been held that *the fuels & oils contained in the engine department tank is always associated and connected with the machinery and engine of the ship which forms an integral part of the ship and would fall within the ambit of sub-para (b) of Paragraph 2 of the aforesaid Board's Circular dated 03.07.1996, and would therefore be classifiable along with the vessel under Heading 8908, whereas the fuel & oil contained in other tanks would be classifiable under their own headings.*

11. In view of the above I find that the fuel and oil contained in the vessel's machinery and engines (inside engine room) are necessarily part of a ship and classifiable under heading 89.08. The ship cannot sail and reach the ship-breaking yard unless the fuel and oil is present on board. What was imported therefore is a ship complete with these fuel and oil which is a part of it. I also find that the fuel oil is not imported separately, but imported as parts of ship stores. When the ship is imported for breaking up, these goods form part of the ship and are therefore part of the inputs.

12. I also find that the fuel & oil is necessarily required to be removed firstly for the purpose of safety and efficient operation, apart from the legal requirement. Accordingly, the ship's tanks containing oil and fuel tank, etc., are emptied and evacuated before breaking up of the vessel commences. Otherwise, in case of no such requirement, the process of breaking up of ship would have been started earlier than the process of empting said fuel & oil from the vessels, or the process of breaking up of ship would have been made simultaneously with the process of empting said fuel & oil from the vessels. In that case too, recovery of fuel & oil would have been the part of the manufacturing process.

13. I also find that the Adjudicating authority has advanced the reasons for his conclusion that the fuel and oil is not an input for the purpose of the activity of ship breaking and therefore the CVD paid on such oils would not be entitled for CENVAT Credit. However, I find that the entire ship has been accorded the status of an input and CVD is also paid on the entire ship, credit of CVD so paid will be available to them as the entire ship participates in the activity of ship breaking (manufacturing activity). The entire ship including the fuel oil is one entity and takes part in manufacturing activities. Therefore, the entire ship has to be considered an input under the provisions of CENVAT Credit Rules, 2004. Said fuel & oil are emerged as a result of manufacturing activity. In this regard, I rely upon the decision pronounced by the Hon'ble CESTAT, Mumbai in the case of CCE, Mumbai-I Vs. M/s. Arya Ship Breaking Corporation, as reported in 2017-TIOL-3608-CESTAT-MUM, wherein the Hon'ble CESTAT held that :-

> *"I find that demand has been raised holding the activity of selling motors, generator,* ***engine, remnant oil*** *etc as trading. Rule 6 has been applied to demand reversal of cenvat credit on input services. It is seen that* ***what the appellants (sic) are purchasing is a ship for the purpose of breaking. The appellants are breaking the ship and as a result certain items are recovered****. The scrap so generated is sold by appellants on payment of central excise duty. Other items generated are sold by them as it is. The items in respect of which demands for revenue under Rule 6 of Cenvat Credit Rules have been made are not purchased by appellants* ***but are part of the ship when it is imported.*** *In this regard,* ***the activity of the appellants cannot be considered as trading activity.****"*

14. The aforesaid decision of Hon'ble CESTAT, Mumbai has also been relied upon in the another decision pronounced by the same bench in the case of M/s. CCE, Mumbai Vs. M/s. Bansal Ship Breakers, as reported in 2018-TIOL-275-CESTAT-MUM. Both the aforesaid

decisions are squarely applicable with the present issue. From both the aforesaid decisions, the following points are emerged:-

(i) what the appellants are purchasing is a ship for the purpose of breaking;

(ii) The appellants are breaking the ship and as a result certain items are recovered;

(iii) The other items are not purchased by appellants but are part of the ship when it is imported;

(iv) the activity of the appellants cannot be considered as trading activity.

15. On comparing the facts involved in both the aforesaid decisions with the facts involved in the present appeal, I find that:-

(i) the appellant had also purchased a ship for the purpose of breaking;

(ii) During the process of breaking up of the ship, certain items including fuel & oil are recovered;

(iii) Fuel & Oil have not been purchased separately by the appellant but are part of the ship when it is imported;

(iv) Since fuel & oil is recovered during the process of breaking of ship, it is part of manufacturing activity.

In view of my aforesaid findings, since fuel & oil is a part of manufacturing activity, the CENVAT Credit thereon can not be denied to the appellant.

16. I find that the matter appears to have its genesis in the circular dated 23.10.1997 of the Ministry of Finance and therefore it is necessary to reproduce it in full:

"In the budget of 1995, ship breaking activity was defined as an activity of manufacture by virtue of Note 7 in Section XV of the Schedule to the Central Excise Tariff Act, 1985. Consequent to these two questions arose:

(i) Whether the items emerging during the course of ship breaking falling outside the ambit of Section XV of the Schedule to the Central Excise Tariff Act, 1985 would be treated as excisable and are chargeable to Central Excise Duty.

(ii) Whether a ship breaker who has paid CVD would be entitled to modvat credit of the entire CVD paid on the ship or credit will have to be restricted to the extent of inputs contained in goods and materials falling under Section XV of the Schedule.

2. Director General of Inspection has conducted a study on this issue and a view has been taken that the goods and materials recovered during the course of ship breaking which are outside the ambit of Section XV of the Schedule to the Central Excise Tariff Act, 1985, are non-excisable goods as there is no entry in the Tariff which describes the act of obtaining these items as an activity of manufacture. Moreover, ***entire ship except ship stores classifiable under 8908 is an input taking part in the activity of ship breaking under Rule 57A of the Central Excise Rules, 1944****.*

Hence, the provisions of Rule 57C of the Central Excise Rules regarding the non-admissibility of Modvat credit of duty paid on inputs going into finished excisable goods which are exempted from payment of duty or chargeable to nil rate of duty will not apply in the case of non-excisable goods.

3. ***Accordingly, I am directed to say that the entire credit will be available in this case and no reversal is warranted****.*

4. Law Ministry has also concurred with the above view.

5. All pending disputes may be resolved in light of aforesaid clarification."

17. In view of the above circular, I find that the Board has by way of this Circular specifically excluded the operation of Rule 57C in respect of this particular activity i.e. ship breaking activity and has gone on to clarify that notwithstanding the status of goods that fall outside the parameters of Section XV including the ones under consideration (non-excisable), the entire quantum of CVD paid on the ship imported for breaking will be available and no reversal is warranted. Once the operation of Rule 57C has been ruled out, I do not find any merit in denying the credit of CVD paid by the appellants on the entire ship, imported them for breaking. Accordingly, the additional duty of customs paid on fuel & oil contained in the ship, which is generally referred to as bunkering stores, would be available to them as CENVAT Credit for utilisation in payment of duty on goods and materials obtained by breaking up the ship.

18. Further, on going through Para 3.1 of the SCN, I find that the appellant has availed CENVAT Credit on fuel & oil, contained inside engine room in the ships imported by them for breaking purpose, as input. It can thus be safely concluded that the appellant have not availed CENVAT Credit on fuel & oil, contained outside engine room. The said facts have also been admitted by Shri Rajeev Raniwal, Authorised Signatory of the appellant vide his statement dated 17.10.2016, which is not disputed by the department in the SCN as well as while passing order by the adjudicating authority. In view of the above all, CENVAT credit on fuel & oil, contained inside engine room cannot be denied to the appellant. In this regard, I also rely upon the decision pronounced by the Hon'ble Tribunal, Mumbai in the case of **Commr. of Cus. Vs. Saibaba Ship Breaking, as reported in 2002 (140) ELT 135 Tri Mumbai, wherein the Hon'ble CESTAT held that** "respondents were not entitled to take credit of the duty paid on the fuel, oil and other oil, food stuffs (**other than the fuel, oil contained in the ship's engine and machinery**)". In the aforesaid decision, the Hon'ble Tribunal had only disallowed the credit taken on the fuel & oil etc. contained outside the engine room. Accordingly, it can be safely concluded that the Hon'ble CESTAT has allowed the CENVAT Credit on the fuel & oil contained inside the engine room.

19. In this regard, I also find that the appellant had availed CENVAT credit @85% of CVD so paid on first two shipments, as per the Proviso to sub-rule 3(1)(vii) of the CENVAT Credit Rules, 2004, as shown below:-

> *"(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v),(vi) and (via);*
>
> *Provided that CENVAT credit shall not be allowed in excess of eighty-five per cent. of the additional duty of customs paid under sub-section (1) of section 3 of the Customs Tariff Act , on ships, boats and other floating structures for breaking up falling under tariff item 8908 00 00 of the First Schedule to the Customs Tariff Act;"*

20. Above-mentioned Proviso has been inserted by Notification No. 3/2011-CE(NT) dated 01.03.2011. The rationale behind restricting CENVAT credit to the extent 85% has been mentioned in Para 7.1(d) of the D.O. Letter F.No. 334/3/2011-TRU dated 28.3.2011 of Joint Secretary (TRU-I), which is reproduced below:

> *"(d) The process of obtaining goods and material mainly melting scrap and re-rollable scrap of steel, by breaking up of ships, boats and other floating structures is deemed to be a process of manufacture in terms of section note 9 of Section XV of the Central Excise Tariff. In the breaking of ships, a number of used serviceable articles such as pumps, air-conditioners, furniture, kitchen equipment, wooden panels etc. are also generated. These are generally sold as second hand goods by ship breaking units but no excise duty is payable as they do not emerge from a manufacturing process.* ***At the same time, ship breaking units are allowed to avail full credit of additional duty of***

customs paid on the ship when it is imported for breaking. *It has been reported by the field formations that this anomaly is resulting in misuse of the CENVAT credit scheme. Accordingly, Rule 3 of the CCR has been amended to prescribe that CENVAT credit shall not be allowed in excess of 85% of the additional duty of customs paid on ships, boats etc. imported for breaking."*

21. In view of the above, I find that in order to offset CVD paid on these items in a lump sum manner, CENVAT credit has been restricted to the extent 85% of CVD paid on the entire value of ship. Said restriction imposed by the government in availment of CENVAT credit to the extent of 85% of CVD paid on the entire value of ship, itself proves that CENVAT Credit on the ship (including ship stores i.e. fuel & oil etc.) is available to the appellant.

22. In view of the above, I find that since the demand is not maintainable, the question of imposition of penalties upon both the appellants under the provisions of Central Excise Act, 1944 and Rules framed there under, does not arise.

23. In view of above, I set aside the impugned OIO and allowed both the appeals.

24. The appeals filed by both the aforesaid appellant stand disposed of in above terms.

(DR. BALBIR SINGH)
ADDITIONAL DIRECTOR GENERAL (DGTS),
AZU, AHMEDABAD.

F.No. V2/287 & 289/BVR/2017 Date : .03.2018

BY RPAD.

To,

1. M/s. Hariyana Ship Breakers Ltd.,
   Plot No.14, Ship Breaking Yard,
   Alang, Gujarat.

2. Shri Rajiv Raniwal, Authorised Signatory,
   M/s. Hariyana Ship Breakers Ltd.,
   Plot No.14, Ship Breaking Yard,
   Alang, Gujarat.

Copy to :

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Commissioner, CGST & Central Excise, Bhavnagar.
3. The Commissioner (Appeals), CGST, Rajkot.
4. The Jurisdictional Deputy / Assistant Commissioner, CGST & Central Excise, Bhavnagar Commissionerate;
5. The Additional / Joint Commissioner , Systems, CGST, Rajkot;
6. Guard File.