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::आयुक्त (अपील) 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

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/16/EA2/BVR/2016 4321 to 4325	**BHV-EXCUS-OOO-JC-011-16-17**	**20.05.2016**

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

BHV-EXCUS-000-APP-033-2017-18

आदेश का दिनांक / Date of Order: **11.09.2017** जारी करने की तारीख / Date of issue: **12.09.2017**

कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। 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 :

घ अपीलकर्ता **& प्रतिवादी** का नाम एवं पता /Name&Address of the Appellants & **Respondent** :-
Pipavav Shipyard Ltd., Part Survey No.42,, Post - Ucchaiya,.Taluka - Rajula,Amreli,

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 असावी 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

(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/-.

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(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 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) 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 माग 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 "माग 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 अर्ज़ी एवं अपील को लागू नहीं होगे।/
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 में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, 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 इयूटी 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 समयावधि 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 प्रतिया 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 प्रतिया 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 रुपये या उससे कम है तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम 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 in 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 आदेशो 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 पढी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण 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 संबन्धित मामलों को सम्मिलित करने वाले नियमो 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 प्रावधानो 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

:: ORDER-IN-APPEAL ::

The Commissioner, Central Excise & Service Tax, Bhavnagar (hereinafter referred to as 'the appellant-department') has filed the present appeal against the Order-In-Original No. BHV-EXCUS-000-JC-011-2016-17 dated 20.05.2016 (hereinafter referred to as "the impugned order") passed by the Joint Commissioner, Central Excise & Service Tax, Bhavnagar (hereinafter referred to as "the lower adjudicating authority") in the case of M/s. Pipavav Shipyard Ltd., Part Survey No. 42, Post-Ucchaiya, Via-Rajula, District – Amreli – 365 560 (hereinafter referred to as 'the respondent').

2. The facts of the case are that the respondent is a 100% EOU, engaged in ship building and repairing activity from the duty free imported raw materials and capital goods. The respondent is registered with Central Excise department and also is having warehousing license for warehousing of duty free material and to manufacture under bond under Section 58 and Section 65 of the Customs Act, 1962, for which they have filed B-17 Bond with the jurisdictional Central Excise officer.

2.1 Based on intelligence, DRI officers initiated inquiry, which revealed that the respondent had illicitly removed duty free imported raw materials valued at Rs. 1,78,08,644/- under Notification No. 52/2003-Cus. dated 31.03.2003 to their sister unit, namely M/s. Pipavav Shipyard Ltd., SEZ unit, without obtaining permission from the Central Excise authorities and without filing any documents for such sale/transfer. Therefore, SCN No. DRI/AZU/JRU-60/2012 dated 25.03.2013 was issued to the respondent proposing to confiscate the said goods under Section 111(j) & (o) of the Customs Act, 1962 for violation of conditions of Notification No. 52/2003-Cus. dated 31.03.2003; demanding Customs duty of Rs. 41,27,865/- under Section 28(4) of the Act along with interest under Section 28AA of the Act and imposing penalty under Section 112(a) & Section 114A of the Act. The adjudicating authority, vide impugned order, dropped proceedings initiated under the said SCN dated 25.03.2013, holding that the SCN become *infructuous* in light of the fact that the respondent had requested jurisdictional Assistant Commissioner of Central Excise, who vide Order No. 2/AC/Rural/BVR/2011-12 dated 25.04.2011 allowed to clear the goods subject to payment of duty, which was challenged by the respondent before Commissioner (Appeals-III), Central Excise, Ahmedabad, who vide Order-In-Appeal No. 56/2011(BVR)/Dsing/Commr.(A)/Ahd. dated 06.07.2011 set aside the Order dated 25.04.2011, and this order attained finality.

3. Being aggrieved by the impugned order, the appellant-department filed the present appeal, *interalia*, on the following grounds:-

(i) The adjudicating authority mis-interpreted the findings of the Order-In-Appeal dated 06.07.2011. The Commissioner (Appeals) had made reference to the clause 4(i) of Para 1 of Notification No. 52/2003-Cus., wherein it is permitted that the capital goods

manufactured in the unit to be taken to any other unit in a Special Economic Zone, or to other export-oriented undertaking, or EHTP unit or STP unit, as the case may be, without payment of duty for the purpose of manufacture and export there from or for use within the unit subject to maintenance of proper accounts by both the receiving and supplying units. In the instant case, no proper accounts were maintained by the units.

(ii) The Respondent without any permission from the concerned Central Excise authorities and without filing any documents, stored the raw materials in the premises of PSL, SEZ without filing any Bill of Entry at the SEZ end. The said facts were admitted by Shri Dharmesh B. Shah, Manager of Regulatory Affairs of the Respondent in his statement dated 12.04.2010. He has also stated that they had requested vide letter dated 24.11.2009 to the then Commissioner of Central Excise, Bhavnagar for sale of equipment to their SEZ unit but permission was not granted to them for said transfer/sale; that the said goods were removed on 14.03.2010; that they had filed an intimation to regularize their mistake on 08.04.2010 with Range Superintendent of Central Excise, Mahuva, for temporary transfer of the said equipments for testing in terms of condition No. 4(iii) of Notification No. 52/2003-Cus dated 31.03.2003, as amended; that he also admitted that 5 challans in Annexure-II all dated 10.04.2010 were fabricated and he also made entries in the Returnable Materials Register (Part-I) which were not true and this was done willfully to cover the said unauthorized transfer of the impugned goods from PSL (EOU unit) to PSL, SEZ unit. The specified officer of PSL, SEZ vide letter dated 12.04.2010 confirmed that the subject goods were laying at the SEZ premises at the material time and that no Bill of Entry had been filed for movement of the said materials and also that their officer was not aware about arrival of the said goods in SEZ. The above facts clearly indicate that the condition of Notification No. 52/2003-Cus dated 31.03.2003 was breached by the Respondent. The order No. 02/AC/Rural/BVR/2011-12 dated 25.04.2011 passed by the Asstt. Commissioner of Central Excise, Rural Division is altogether on a different issue and has no relevance to the present case.

(iii) The procedural lapses and breach done intentionally should not be condoned, because if such lapses condoned than it would be difficult for the department to get compliance with the procedural rules which are framed with a definite object in mind and therefore, such rules cannot be allowed to be bypassed without the defaulter suffering any detriment. Even though no duty element is involved in as much as the subject goods were used in SEZ, but violation has been done by not following the proper procedure and accordingly the adjudicating authority should have invoked penal provisions.

4. The Respondent vide their application dated 07.10.2016 submitted Memorandum of Cross Objections, wherein it has been submitted as under:-

(i) The Commissioner (Appeals), Central Excise, Rajkot is the proper officer for appeals for the purpose of Central Excise Act, 1944 as per Notification No. 27/2014-

CE(NT) dated 16.09.2014 and not for the Customs Act, 1962, Therefore, Commissioner (Appeals), Central Excise, Rajkot has no locus standi to pass an order under section 128A(3) of the Customs Act, 1962 on the appeal filed under the Customs Act, 1962.

(ii) The appeal has been filed by the department against the impugned order in Form EA-2 under Section 35E(4) of the Central Excise Act, 1944 whereas according to the Authorization letter dated 19.08.2016 of the Commissioner, impugned appeal has been preferred under Section 129D(2) of the Customs Act, 1962. It is also facts on record that impugned SCN dated 25.03.2013 was issued under the Customs Act, 1962 and not under the Central Excise Act, 1944; that the impugned appeal has been erroneously filed in Form EA-2 even after making reference to provisions of Section 129D(2) of the Act, whereas it was required to be filed in Form CA-2 in terms of Section 129D(4) of the Act read with Rule 4 of the Customs (Appeals) Rules, 1982, as amended.

(iii) The impugned order was communicated to the Commissioner on 20.05.2016, whereas direction and authorization is signed on 19.08.2016 i.e. on last day. So, it is respectfully submitted to call for original file and dispatch register of RRA Section of Central Excise Commissionerate, Bhavnagar to ascertain exact date of order on note sheet, date of dispatch of the order to the Assistant commissioner, Central Excise, Rural Division, Bhavnagar for verifying exact date of direction cum authorization, dispatch date and date of receipt of such direction by Division office within the meaning under Section 129D(3) of the Customs Act, 1962.

(iv) The goods covered in the impugned appeal were also covered under Speaking Order No. 02/AC/Rural/BVR/2011-12 dated 25.04.2011 and the Commissioner (Appeals)'s earlier Order-In-Appeal No. 56/2001/(BVR)Dsing/ Commr(A)/Ahd dated 06.07.2011 wherein it was held that permission to clear the goods to SEZ without payment of duty should not be denied so long as there is no mis-use of the permission so far granted. The department had then preferred an appeal against the said order and Hon'ble CESTAT vide Order No. A/11170/WZB/AHD/2013 dated 27.08.2013 has rejected the appeal as it was not filed within the prescribed time limit. The said order of CESTAT was accepted by the department as also admitted in the impugned appeal and therefore, it had attained finality. The impugned order based on decision of higher appellate forum cannot be challenged.

(v) The Commissioner (Appeals) in his Order-In-Appeal dated 06.07.2011 not only referred clause 4(i) of Para 1 of Notification No. 52/2003-Cus. but also referred Para 6.15 of FTP 2009-10 and held that FTP permits removal of raw materials from EOU to SEZ unit, which is deemed export and hence permission for removal of raw materials to SEZ should not be denied. He also found that Board's Circular No. 91/2002-Cus. dated 20.12.2002 clarified that unutilized goods may be allowed to be transferred to other EPZ units. When permission was not granted by the Assistant Commissioner how one can file

any documents. Therefore, no reliance can be placed only on portion of said clause 4(i) of Para 1 of Notification No. 52/2003-Cus. Since permission was not granted to remove without payment of duty by the Assistant Commissioner but was granted by the Commissioner (Appeals), no penalty can be imposed for not maintaining proper accounts as ultimately goods were returned to EOU after approval of the Development Commissioner, KASEZ dated 03.05.2010. The said equipments were fitted in the vessel Golden Such and Golden Bull and both the vessels have been exported under Shipping Bills.

(vi) The contention that the Speaking Order of Asstt. Commr. dated 25.04.2011 was altogether on a different issue and has no relevance to the present case is misleading. It is submitted that application for sale/transfer of surplus goods from EOU to its own SEZ unit (in terms of Noti.No. 52/2003-Cus dated 01.03.2003 read with relevant provisions of FTP/HBP) was made by the respondent on 24.11.2009 and thereafter numerous correspondence was exchanged by the respondent with the departmental authorities. The said application was finally rejected by the Asstt. Commr. vide his Order-In-Original dated 25.04.2011, which was set aside by Commissioner (Appeals) vide his Order-In-Appeal dated 06.07.2011. It also included the goods involved in this case for which DRI had issued instant notice dated 25.03.2013 and adjudicated upon by the adjudicating authority vide impugned order. Therefore, appeal filed by the appellant-department is unsustainable and fallacious.

(vii) It is submitted that even otherwise, impugned appeal is devoid of merits. The object of the appeal is to contest that the adjudicating authority, while passing the impugned order, has erred in not invoking penal provision for alleged illicit removal of certain goods from EOU to its SEZ unit on temporary basis. Appellant has, however, not disputed the said order so far as Joint Commissioner has not ordered confiscation of the goods and that no duty/interest was leviable on the disputed goods. It was stated that, it has been acknowledged by the appellant-department that the goods were not liable to confiscation and there was only procedural lapse, no penalty is imposable under Section 112(a) of the Customs Act, 1962. The disputed goods were not seized by DRI or SEZ authorities at any stage, though the same were available at the time of investigation by DRI. Similarly, as per Section 114A at the relevant time penalty equal to duty not levied or short levied can be imposed only when duty is determined under Section 28(8) of the Customs Act. It has been admitted in the present appeal that no duty element was there as the subject goods were used in SEZ. Therefore, no penalty can be imposed on them under Section 114A *ibid*. It is settled position of law that no penalty can be imposed for technical violations. The appellant relied on Hon'ble Supreme Court's judgment in the case of Hindustan Steel Ltd. reported as 1978 (2) ELT (J 159)(SC).

(viii) It is not a case that no accounts were maintained by them or that by back dating few documents they evaded customs duty. However, even if such charge is

considered to be true for sake of argument, no penalty can still be imposed on it particularly when penalty was not proposed to be imposed for non-maintenance of records under any residuary Section of the Act. There was no procedural lapse on their part as the then Commissioner (Appeals) in the aforesaid Order-In-Appeal dated 06.07.2011 had condoned lapse if any.

(ix) The investigation for alleged offence was initiated by DRI in April, 2010. However, long before that they had requested jurisdictional Central Excise authorities (in November, 2009), for allowing transfer/sale of surplus capital goods and other materials including the goods covered in this appeal after obtaining approval for such removal from the Deputy Development Officer, KASEZ vide his letter No. KASEZ/100% EOU/II/39/2005-06/Vol.I dated 27.10.2009. The department has ignored the matter on frivolous objections/queries and such attitude of the department had forced them to remove disputed goods to their SEZ unit, that too for testing purpose, awaiting permission with a view to avoid undue delay in manufacturing of ships to be exported.

(x) As per provisions of Section 128A(3) of the Customs Act, 1962, reasonable opportunity of showing cause against the proposed order enhancing penalty is required to be given to the appellant i.e. person filing cross objection. Therefore, it is prayed that copy of such proposed order if any may please be made available for showing cause against such order before imposing any penalty.

5. Personal hearing in the matter was attended by Shri P.D. Rachchh, Advocate, who reiterated his submissions made in the Memorandum of Cross Objections dated 07.10.2016 and submitted that department has not come in appeal for duty but for penalty whereas no penalty is imposable on them as they had sought permission, which was rejected by the department causing them to come to Commissioner (Appeals) who allowed. Following that, the adjudicating authority has dropped proceedings as department did not go in appeal against the order dated 06.07.2011 of Commissioner (Appeals). It was submitted that the department had invoked Section 112(a) and Section 114A of the Customs Act, 1962 in the SCN, for imposing penalty; that Section 112(a) is not applicable in this case; that Section 114A is also not applicable as there is no duty demanded in this case in the impugned order.

Findings:-

6. I have carefully gone through the facts of the case, impugned order, grounds of appeal and submissions made by the appellant. I find that the issue to be decided in the present appeal is whether in the facts and circumstances of the case, the penalty imposed under Section 112(a) or Section 114A of the Customs Act, 1962 for alleged removal of materials from the premises of the respondent to SEZ unit, without obtaining any permission from the jurisdictional Central Excise authority and without filing any documents is imposable or not.

7. Before proceeding to the main issue, I would like to discuss the argument of the respondent that the Commissioner (Appeals), Central Excise, Rajkot is not the proper officer for deciding this appeal as because as per Notification No. 27/2014-CE(NT) dated 16.09.2014, the Commissioner (Appeals), Central Excise, Rajkot has no locus standi to pass an order under Section 128A(3) of the Customs Act, 1962. I find that the impugned order has been passed by the Joint Commissioner of Central Excise, Bhavnagar. The respondent did not raise plea before him that he can't adjudicate the SCN for which impugned order has been passed. The respondent had not raised such plea before the then Commissioner (Appeals-III), Central Excise, Ahmedabad, before whom they had preferred appeal against Order-In-Original No. 02/AC/Rural/BVR/2011-12 dated 25.04.2011 passed by the then Assistant Commissioner, Central Excise, Bhavnagar. The respondent even now has not disputed the administrative control of jurisdictional Central Excise officer over their unit. The department has filed appeal against the impugned order passed by the Joint Commissioner of Central Excise, Bhavnagar as the lower adjudicating authority. Hence, I find that the department has rightly filed appeal as per provisions of Section 35(1) of the Central Excise Act, 1944, which states that *"Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals)"*. I also find that as per Notification No. 27/2014-CE(NT) dated 16.09.2014, amended vide Notification No. 24/2015-CE(NT) dated 07.12.2015 issued by the Central Government read with Trade Notice No. 01/2015(CR) dated 15.12.2015 issued by the Chief Commissioner, Central Excise, Ahmedabad Zone, Ahmedabad, the Commissioner (Appeals), Central Excise, Rajkot has jurisdiction over the Central Excise assessees registered with Central Excise Commissionerates of Rajkot, Bhavnagar and Kutch (Gandhidham) and appeals filed against the orders passed by Central Excise officers lower in rank than Commissioner of Central Excise, Bhavnagar will lie with Commissioner of Central Excise (Appeals), Rajkot. Therefore the argument of the appellant is devoid of merits and I reject their plea. Now, I proceed to decide the appeal filed by the department on merits.

8. I find that the appellant-department has contended that the order No. 02/AC/Rural/BVR/2011-12 dated 25.04.2011 passed by the Asstt. Commissioner of Central Excise, Rural Division is altogether on a different issue and has no relevance to the present case; that the adjudicating authority has mis-interpreted the findings of the Order-In-Appeal dated 06.07.2011. I find from the facts of the case that the respondent had sought for permission vide their letters dated 24.11.2009 and dated 07.12.2009, for removal of certain goods to their SEZ unit without payment of duty, which included disputed goods. The said permission was denied by the Assistant Commissioner, Central Excise, Rural Division, Bhavnagar vide Order dated 25.04.2011, which was appealed before the then Commissioner (Appeals-III), Central Excise at Rajkot who vide order dated 06.07.2011 held that denial of permission for removal of goods without payment of duty from EOU to SEZ is not in accordance with the provisions of Notification No. 52/2003-Cus., Board's Circular No.

91/2002-Cus. dated 20.12.2002 and Para 6.15 of FTP 2009-10. It is also on record that the said order dated 06.07.2011 issued by the then Commissioner (Appeals-III), Central Excise at Rajkot has attained finality. Therefore, I find that the adjudicating authority has correctly relied on the order dated 06.07.2011 passed by the then Commissioner (Appeals-III), Central Excise at Rajkot, as the same is squarely applicable to the present case and this contention of the appellant-department is devoid of merits.

8.1. The appellant-department has also contended that no duty on goods is involved in as much as the subject goods were used in SEZ, but violation has been done by not following the proper procedure and accordingly, the adjudicating authority should have invoked penal provisions. I find that the appellant-department has preferred appeal with limited objective for imposition of penalty on the respondent..

8.2. I find that the adjudicating authority vide impugned order dropped the proceedings initiated under SCN No. DRI/AZU/JRU-60/2012 dated 25.03.2013. The said SCN had proposed imposition of penalty under Section 112(a) & Section 114A of the Customs Act, 1962. For the sake of easy reference,, both Section are reproduced below:-

> ***Section 112:*** *Penalty for improper importation of goods, etc. – Any person,*
>
> *(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, ...*
>
> **Section 114A:** Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined :

8.3. I find that Penalty under Section 112(a) can be imposed only if the goods are liable to confiscation under Section 111 of Customs Act, 1962. I find that the appeal has been preferred by the appellant-department for invoking penal provisions for not following proper procedure for removal of goods by the respondent to their SEZ unit and non-confiscation of the goods has not been contested at all. I also find that the goods were not available for confiscation at the time of investigation conducted by DRI officers and hence the goods transferred/removed to their SEZ unit had not been placed under seizure. Therefore, no penalty under Section 112(a) of the Customs Act, 1962 can be imposed upon the Respondent.

8.4 I also find that Section 114A of the Customs Act, 1962 provides that where non/short payment of Customs duty by reason of suppression of facts or collusion or willful misstatement has been established and determined, the penalty equal to duty so determined is required to be imposed. Since, the goods were transferred/removed from EOU to SEZ unit, which is considered to be "deemed export" as per provisions of Foreign Trade Policy, the question of levy of Customs duty does not arise. Therefore, no penalty under Section 114A of the Customs Act, 1962 can be imposed on the respondent.

8.5 Therefore, I find that penalty cannot be imposed on the respondent either under Section 112(a) or under Section 114A of the Customs Act, 1962.

9. In view of above facts, I find no reason to interfere with the impugned order and, I uphold the impugned order and reject the appeal.

९.१. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9.1. The appeal filed by the appellant stands disposed off in the above terms.

11/9/2017

(कुमार संतोष)
आयुक्त (अपील्स)

By Speed Post

To,

(i) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.	(i) आयुक्त, वस्तु एवं सेवा कर एवं के.उ.शु., भावनगर आयुक्तालय, भावनगर
(ii) M/s. Pipavav Shipyard Ltd., Part Survey No. 42, Post-Ucchaiya, Via-Rajula, District – Amreli – 365 560	(ii) मे. पिपावाव शिपयार्ड लिमिटेड, पार्ट सर्वे न. ४२, पो. उच्चाइया, वाया - राजुला, डिस्ट्रिक्ट - अमरेली - ३६५ ५६०

Copy to:

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.

(2) The Joint Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.

3) The Assistant Commissioner, GST & Central Excise, Rural Division, Bhavnagar.

4) Guard File.

8. I also find that Section 114A of the Customs Act, 1962 provides that where non/short payment of Customs duty by reason of suppression of facts or collusion or willful misstatement has been established and determined, the penalty equal to duty so determined is required to be imposed. Since, the goods were transferred/removed from EOU to SEZ unit, which is considered to be "deemed export" as per provisions of Foreign Trade Policy, the question of levy of Customs duty does not arise. Therefore, no penalty under Section 114A of the Customs Act, 1962 can be imposed on the respondent.

8.5 Therefore, I find that penalty cannot be imposed on the respondent either under Section 112(a) or under Section 114A of the Customs Act, 1962.

9. In view of above facts, I find no reason to interfere with the impugned order and, I uphold the impugned order and reject the appeal

९.१. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9.1. The appeal filed by the appellant stands disposed on in the above terms.

सत्यापित.

आर. एन. मीणा, अधीक्षक (अपील)

11/9/2017

(कुमार संतोष)
आयुक्त (अपील्स)

By Speed Post

To,

(i) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.	(i) आयुक्त, वस्तु एवं सेवा कर एवं के.उ.शु., भावनगर आयुक्तालय, भावनगर
(ii) M/s. Pipavav Shipyard Ltd., Part Survey No. 42, Post-Ucchaiya, Via-Rajula, District – Amreli – 365 560	(ii) मे. पिपावाव शिपयार्ड लिमिटेड, पार्ट सर्वे न. ४२, पो. उच्चाइया, वाया - राजुला, डिस्ट्रिक्ट - अमरेली - ३६५ ५६०

Copy to:

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(2) The Joint Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.

3) The Assistant Commissioner, GST & Central Excise, Rural Division, Bhavnagar.

4) Guard File.