::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
	V2/120/BVR/2016 5094 TO 5097	18/AC/RURAL/BVR/RR/2016-17	29.07.2016

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

BHV-EXCUS-000-APP-036-2017-18

आदेश का दिनांक / Date of Order: **27.09.2017** जारी करने की तारीख / Date of issue: **29.09.2017**

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 :-
Vijaykumar & Co.,, Plot No. 138,, Ship Breaking Yard,, Sosiya/Alang,,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) 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

(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 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 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 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) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) 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 अर्ज़ी 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 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 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 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 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 हो 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 पढ़ी 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 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 ::

M/s. Vijay Kumar & Co., Plot No. 138, Ship Breaking Yard, Sosiyo/Alang, District-Bhavnagar (hereinafter referred to as "the appellant") against Order-in-Original No. 18/AC/RURAL/BVR/RR/2016-17 dated 29.07.2016 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise, Rural Division, Bhavnagar (hereinafter referred to as "the lower adjudicating authority").

2. The facts of the case are that the appellant was engaged in the activity of manufacturing of goods and materials obtained by breaking up of ships, boats and other floating structures falling under the chapter heading 8908 to the First Schedule of the Central Excise Tariff Act, 1985. The audit for the period from March-2013 to February-2014 revealed that the appellant had cleared the goods viz. "Piston Rod" and "Tai Rod", from the old ships without payment of central excise duty under non-excisable invoices, by treating them as 'non-excisable goods' instead of classifying under Central Excise Tariff Sub-Heading 7326 9080 of CETA, 1985. A Show Cause Notice No. V.73/03-01/D/Rural/2015-16 dated 03.11.2015 was issued to the appellant demanding central excise duty of Rs. 4,63,861/- under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") on "Piston Rod" and "Tai Rod" classifying them under Sub-Heading 7326 9080 of CETA, 1985 along with interest under Section 11AB of the Act and invoking penalty provisions under Section 11 AC(1)(a) of the Act read with Rule 25 of the Central Excise Rules, 2002. The said SCN was adjudicated vide the impugned order vide which the lower adjudicating authority confirmed central excise duty of Rs. 4,63,861/- under Section 11A(4) of the Act along with the interest thereon under Section 11AA of the Act and imposed penalty Rs. 4,63,861/- under Sections 11AC(1)(a) of the Act.

3. Being aggrieved with the impugned order, the appellant has preferred the present appeal contending interalia that:

3.1 The audit objection so raised is a matter of interpretation of proper classification of the disputed goods therefore there should be no question of fraud, mis-statement, collusion, and suppression of facts. The impugned order has been issued without proper study of the statutory provision as laid down at *Note No. 09 of Section-XV (Base Metal and Articles of Base metal) of the CETA* which clearly lays down and also specifically explains as to which goods and materials generally obtained and derived or generated during the ship breaking activities are considered to be within the ambit of definition of 'manufacture' to decide the excisable goods and chargeability of

excise duty on it. The said Note No. 09 of Section XV of the CETA is as under:

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> *"Note No. 09 :" 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'.".*

3.2 It is undisputed facts that the above said Section-XV contains and covers chapter 72 to 83 *(Base Metal and articles of Base metal)* only and therefore, the question of levy of excise duty by virtue of above Section Note No. 09 is restricted and applicable only to the goods and materials as generated during ship breaking activities and falls within chapter 72 to 83 only, and rest of the goods and materials do not fall within the excise net and thereby there is no levy of excise duty. In the present case, they had cleared the *'Piston/Tai Rod'* as such in form, from board of the vessel and subsequently sold it in same from and condition as engine rood parts as evident from the description depicted in respective commercial invoice issued to the customers. Therefore, the said item is rightly classifiable under chapter heading 8409 9990 of CETA and cannot be considered amounting to manufacture during the ship breaking activities.

3.3 The subject and disputed item *'Piston/Tai Rod'* if delivered in its as such form is always considered a 'non-excisable item' and also clearance of the said item right from 1985 onward is effected as a non-excisable item by the entire unit of SBY: Alang. The department has also not make any amendment or issued any specific circular/instruction which declares that the subject and disputed item falls within the category of excisable goods. They had cleared the subject and disputed item in the month of July-2013 and October-2013 under total five non excisable invoices. They had in fact cleared the *'Piston/Tai Rod'* which were collected as such from work shop and engine room store of the vessel, as such without undergone any further process and were not in form of 'Scrap' as alleged and observed by the department. They had cleared the said items under the CETH 8409 9990 which does not fall within the precinct of Section-XV (Base Metal and Articles of Base Metal) as the said section covers only Chapter-72 to 83 only.

3.4 The CBEC Circular No. *345/61/97-CX., dated 23.10.1997,* though has been issued with reference to the particular issue of reversal of Modvat credit on non-excisable item removed from the ship in the process of breaking. However, the said circular inter alia clearly clarify and provide guideline that as to which goods and materials recovered during the course of ship breaking is considered to be falling within the ambit or net of excisable goods. The above said circular, in other words, clearly

throw a light that the goods and materials recovered during breaking activities of a vessel which are outside the ambit of Section XV of the schedule to the CETA are non-excisable and thereby there is no question of recovery of excise duty on such goods & materials. The Public Notice No. 01/2010 issued by the Additional Commissioner of Central Excise (Tech), Bhavnagar, has provided and enclosed a consolidated and an exhaustive list of excisable items which are generally generated and obtained during the course of dismantling of an old & used vessel and other floating structures. This said list also provides full description of each excisable and dutiable item which generally obtained during breaking activities, with its Tariff Heading/sub-heading for ease of reference and knowledge of general trade engaged in ship breaking industries. The item under reference (i.e. *'Piston/Tai Rod'*) is nowhere found or specified in the said list and the said list consists from chapter No.72 to 81 only.

3.5 It has been alleged that the appellant had manufactured/produced the subject disputed item and suppressed the fact of production. The subject disputed item i. e. *'Piston/Tai Rod'* was never manufactured or produced by them therefore the same should not be considered to be excisable goods. In fact, during the breaking activities of vessel they just collect the subject item from the vessel and then off load it from the board of the vessel and stack it in proper way on their registered plot to display it for selling purpose. At the time of selling it is known in the market as *'Piston/Tai Rod'* only.

3.6 As per the precinct of law before invoking extended or larger period or any penal action upon a company/registered unit or a person, the following three vital, precious and paramount elements should be present in a case which qualify and justify for such action of the authority concerned.

i. Establishment of *mens-rea*

ii. Mala fide intention

iii. Deliberate defiance of law to defraud Govt. revenue.

3.6.1 When all the above vital ingredients are present in a case then invocation of extended period and penal clause is fully justified. There was no any deliberate intention to act in a manner which breaks the provisions of the prevailing statute which ultimately damage the revenue of Government and push the matter for invoking the extended period as well as penal action under excise law. The other important ingredients as depicted and delineated in Section 11 A of the Act for applying extended period as well as imposition of penalty under Section 11 AC of the Act is also absent. This is not a case of removal of excisable goods under the guise of non-excisable goods with fraud, collusion, willful misstatement and suppression of fact with ultimate motive

or with exclusive intention to defraud the Govt. money. The subject SCN/& impugned order is time barred as the department has issued demand after a period of one year from relevant date as envisaged in the Section 11 A of the Act, thereby the impugned OIO needs to be quashed.

3.7 The Board vide Circular No. 5/92-CX.4 dated 13.10.1992 has clearly stated that mere non-declaration or wrongful declaration is not a sufficient and debatable cause and ground for invoking larger period but a positive mis-declaration with intention of evasion of excise duty is absolutely necessary as per decision of Hon'ble Supreme Court of India in the case of M/s. Padmini Products & M/s. Chemphar Drugs. The CBEC Circular No. 312/28/97-CX dated 22.04.97 and No.268/102/96-CX dated 14.11.1996 also provide guideline and necessary instruction to the field staff for uniformity in issuance of SCN. They also relied upon the following decisions in support of their case:

- Arviva Industries (I) Ltd. - 2007 (209) ELT-5 (S.C.)
- Alpanil Industries - 1999 (113) ELT-317 (Tri. - Mum)
- Apollo Tyres Ltd. - 1999 (108) ELT-247 (Tri. - Mum)
- Shree Arun Packaging Corp. - 1997 (94) ELT-195 (Tri. - Delhi)
- Dabur India Ltd. - AIR-1990 (S.C.) 1814
- Kamalashi Finance Corporation – 1991 (55) ELT- 433 (S.C.)

3.8 There is a mistake in the impugned SCN such as Para 6 of the SCN stated that the excise duty of Rs. 4,63,861/- is required to be recovered under sub-section (1) of Section 11A of the Act, whereas Para 8 of the said SCN shows that excise duty has been proposed for recovery under Section 11A(4) of the Act; sub-section (1) of Section 11A of the Act septuplets recovery of central excise duty within a period of one year for any reason other than suppression of facts etc. and hence demand for the period from July, 2013 to October, 2013 is time barred as the SCN issued on 03.11.2015; thus, the SCN issued under sub-section (1) of Section 11A of the Act is hit by limitation; simultaneously Para 8 of the SCN shows that the SCN issued under Section 11A(4) of the Act considering suppression of facts etc. and applied provision of extended period; thus, the issuing authority of the SCN is not sure as to whether the case is of suppression of facts etc. or a simple case of removal of excisable goods without payment of duty.

4. Shri A. H. Oza, Consultant attended personal hearing and reiterated the grounds of appeal and submitted that the goods in question are classifiable under

Chapter 84 and not under Chapter 73 and hence appeal should be allowed. No one appeared from the department on any date of personal hearing.

Findings:

5. I have carefully gone through the facts of the instant case, the impugned order, appeal memorandum and the submissions made by the appellant during the course of personal hearing.

6. The issue to be decided in the present appeal is as to whether *'Piston/Tai Rod'* is classifiable under Tariff Item 8409 9990 or 7326 9080 of the First Schedule to CETA?

6.1 I find that the disputed goods i.e. *'Piston/Tai Rod'*, emerge from ship breaking activity and were cleared as "non-excisable goods" by the appellant. As per Department, *'Piston/Tai Rod'*, obtained from ships, are classifiable under Tariff Item 7326 9080, the relevant portion of Central Excise Tariff is reproduced as below:

Tariff Item	Description of goods	Unit	Rate of duty
(1)	(2)	(3)	(4)
7326	Other articles of iron and steel		
.....	.....		
7326 90	Other		
.....	.....		
7326 9080	Parts of ships, floating structure and vessels (excluding hull, propellers and paddle-wheels)	kg.	12.5%

6.2 It is a fact that *'Piston/Tai Rod'* are cleared to their customers in kg. as per standard unit of weight. The Relevant Extract of present Section Note 9 (Note 7 during 1995-97) pertaining to Section XV of the Central Excise Tariff is reproduced below for reference:

SECTION XV

BASE METALS AND ARTICLES OF BASE METAL

NOTES

7. .....

8. .....

9. *In relation to the products of this Section, the process of obtaining goods and materials by breaking up of ships, boats and other floating structures shall amount to manufacture'.*

6.3 The meaning of "GOODS" as per legal dictionary is - *"**goods** n. items held for sale in the regular course of business."* The goods viz. *'Piston/Tai Rod'* are obtained

from ships and are put to sale in regular course of business. Hence, they qualify for the Section Note No. 9 of Section XV of Central Excise Tariff, the *'Piston/Tai Rod'* obtained from the ships are to be cleared as excisable goods as per the condition laid down in Section Note No. 9 of Section XV of Central Excise Tariff.

6.4 It may also be noted that the subject matter has been discussed in CBEC Circular No. 345/65/97-CX dated 23.10.97, wherein it has been clarified that:

Circular No. 345/61/97-CX., dated 23-10-1997

Subject: Reversal of Modvat credit on non-excisable items removed from the ship in the process of breaking - Regarding.

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 this 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 toModvat 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 are 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. .....

4. .....

5. .....

6.5 In light of above, *'Piston/Tai Rod'* obtained during ship breaks will fall under of Section XV of CETA, 1985. Section XV of the first schedule to the tariff covers 'Base metals and articles of Base metals', i.e. chapters 72 to 83 and when read with the above CBEC Circular dated 23.10.97, *'Piston/Tai Rod'* would not be non-excisable goods but excisable goods and would be chargeable to central excise duty and classification of this under Chapter 84 is not liable. As per Note 9 of Section XV of the CETA, 1985 *'Piston/Tai Rod'* would fall under Section XV. I also find that Tariff Item

"89080000" is for "vessels and other floating structures for breaking up" and not which have emerged after breaking up of vessels.

6.6 I find that the item *'Piston/Tai Rod'*, removed from the ships as scrap, has been sold under standard unit of weight i. e. in KG. and had not undergone any other further process after having been removed of from the ships. There is no submission that these goods have not been sold in 'their original form'. In fact, once the products are falling under Section XV, the removal thereof would naturally fall within the criteria of "manufactured goods" out of ship-breaking and will attract duty accordingly. Hence, for the items classifiable under Chapters under Section XV, if emerging after breaking up of ship, it would be classified accordingly. In the instant case, the lower adjudicating authority has meticulously discussed the classification of *'Piston/Tai Rod'* and held correctly to be falling under the Chapter 73 and not any other Chapter of Section XV of first schedule to the tariff whereas appellant has not been able to put any evidence or reasoning as to why should it be classifiable under 8908 0000 except similarity of name of Piston though excepting that it is not part of Diesel Engine.

6.7 I find that the Ship Breaking was defined as manufacture, by virtue of insertion of Note 7 to Section XV of the Schedule to the Tariff in the Finance Act 1995 and as classified by CBEC Circular dated 23.10.97. The *'Piston/Tai Rod'* is very much classifiable under 7326 9080 as detailed by the lower adjudicating authority in the impugned order. Hence, I am of the view that the lower adjudicating authority has correctly held "Piston Rod" and "Tai Rod" to be classifiable under Tariff Item 7326 9080 of the CETA, 1985. The decisions relied upon by the appellant are in context of parts, accessories or components whereas in the instant case, it is quite evident that "Piston Rod" and "Tai Rod", cleared on weight basis, were no part of any engine but scrap and hence, the same would not be applicable in the instant case. I also find that the appellant has not challenged the fact that the Piston Rods and Tai Rods were recovered from breaking of the ship, as scrap and removed also as scrap on weight basis, thus these items qualify under Section XV of the Schedule to the tariff. I therefore uphold that "Piston Rod" and "Tai Rod" qualify for Section Note No. 9 of Section XV of the Tariff, the same having been obtained during/after ship breaking.

6.8 For above reasons, the confirmation of the demand under Section 11A is upheld. Once liability of payment of Central Excise duty is confirmed, levy of interest will automatically follow. I also find that the appellant was registered and the registered assessee is to be considered to be aware of statutory provisions relating to discharging their duty liability. The appellant has mis-declared the fact of classification of the goods

to the Department. Since, the existence of element of mis-statement is found, the extended time is invokable as has been held in the case of M/s. Neminath Fabrics reported as 2010 (256) ELT 369 (Guj). The duty evasion was detected only during the course of audit, and hence, imposition of penalty under Section 11AC of the Central Excise Act, 1944 is legal and proper.

7. The appellant has pointed out mistake in Para 6 of the impugned SCN, which stated that excise duty of Rs. 4,63,861/- is required to be recovered under sub-section (1) of Section 11A of the Act, whereas Para 8 stated that excise duty has been proposed for recovery under Section 11A(4) of the Act. I find that the issuing authority has clearly described provisions of Section 11A(4)(1) of the Act at Para 7 of the impugned SCN that how the extended period is to be invoked and after that it was proposed to recover central excise duty under Section 11A(4) of the Act. I also find that the present issue involves mis-statement as the appellant had cleared the impugned goods without payment of central excise duty by way of misclassification with intent to evade payment of central excise duty and hence confirmation of demand of duty under proviso to Section 11A(4) is required to be upheld.

8. In view of the above facts and circumstances, I uphold the impugned order confirming duty, interest and penalty and reject the appeal filed by the appellant.

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

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

27/9/2017

(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,
M/s. Vijay Kumar & Co.,
Plot No. 138,
Ship Breaking Yard,
Sosiyo/Alang,
District-Bhavnagar

मे. विजय कुमार एण्ड कंपनी,
प्लॉट नं. १३८, शिप ब्रेकिंग यार्ड,
सोसियों/अलंग,
डिस्ट्रिक्ट-भावनगर.

Copy to:

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2) The Commissioner, GST & Central Excise Commissionerate, Bhavnagar.
3) The Assistant Commissioner, GST & Central Excise Rural Division, Bhavnagar.
4) Guard File.

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सत्यापित,

29/09/2017

आर. पी. शाह,
अधीक्षक (अपील)

22/9/2017

(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,
M/s. Vijay Kumar & Co.,
Plot No. 138,
Ship Breaking Yard,
Sosiyo/Alang,
District-Bhavnagar

मे. विजय कुमार एण्ड कंपनी,
प्लॉट नं. १३८, शिप ब्रेकिंग यार्ड,
सोसियो/अलंग,
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