::प्रधान आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE PRINCIPAL COMMISSIONER (APPEALS), GST & CENTRAL 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 – [illegible] email: [illegible]@gmail.com

[illegible] :-

क	अपील / फाइल संख्या / Appeal / File No. V2/[illegible]/BVR/2017	मूल आदेश सं / O.I.O. No. [illegible]/BVR/[illegible]/2017-18	दिनांक / Date 23-12-2017

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

BHV-EXCUS-000-APP-014-TO-015-2019

आदेश का दिनांक / Date of Order: 24.01.2019 | जारी करने की तारीख / Date of issue: 28.01.2019

कुमार संतोष, प्रधान आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

ग [illegible]
[illegible]
[illegible] Central Excise / ST / GST, [illegible]
[illegible]

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

1. M/s [illegible] Ship Breakers Private Limited Plot No.[illegible] Ship Breaking Yard, [illegible], District - Bhavnagar
2. Mr [illegible] (Director of [illegible] Ship Breakers Private Limited) Plot No.[illegible] Ship Breaking Yard, [illegible], Taluka - [illegible], District - Bhavnagar

[illegible]
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]
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) [illegible]
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) [illegible]
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-(i) above

(iii) [illegible]

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 [illegible] [illegible]

(B) [illegible]

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 [illegible]

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j)

(k)

(l)

(m)

(n)

:: ORDER IN APPEAL ::

The present two appeals have been filed by the Appellants (hereinafter referred to as 'Appellant No.1 & Appellant No.2' as detailed in the Table below) against Order-in-Original No.190/ ADC/ BVR-2/ MC/2017-18 dated 22.12.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner of CGST, Division, Bhavnagar (hereinafter referred to as 'the lower adjudicating authority').

Sr. No.	Appeal No.	Appellant No.	Details of the Appellant
1	V2/558/BVR/2017	Appellant No.1	M/s. Agrasen Ship Breaking Pvt. Ltd. Plot No. 113, Ship Breaking Yard, Sosiya/Alang, Dist.:Bhavnagar
2	V2/559/BVR/2017	Appellant No.2	Shri Pasta Parsg Vora, Director of M/s. Agrasen Ship Breaking Pvt. Ltd. Plot No. 113 Ship Breaking Yard, Sosiya/Alang, Dist.:Bhavnagar

2. The brief facts of the case are that Appellant No.1 is engaged in breaking of imported ships at their Ship Breaking Yard, Alang and availed Cenvat credit on the inputs, capital goods and input services used in or in relation to manufacture of their final products as per the Cenvat Credit Rules, 2004 (hereinafter referred to as the Rules). The Ship imported for breaking purpose contained many parts viz. fuel oil, high speed diesel oil (marine gas oil) Lub. Oil etc. to be used as fuel for the ship. On the basis of information that Appellant No.1 had availed Cenvat credit of the Additional Duty of Customs (CVD) paid on Fuel Oil, H.S.D. & Lub. Oil etc. contained in the ships, an inquiry was initiated. Appellant No. 2, Director of Appellant No.1 produced ER-1 Return for the month of March 2016 and Register of Cenvat Credit Register (Form RG 23A Part-I) for the month of March-2015 alongwith Bill of Entry No. SBY/207/2015-16 dated 24.02.2016 in respect of M.V. EMUVIKA NAREDI. Appellant No. 2 in his statement dated 31.01.2017 stated the oil and fuels were removed in tankers/barges and then sold directly to the registered dealers and/or to the actual users without storing them at their yard; that they took Cenvat Credit equivalent to the total duty paid under C.H. 8908 as provided under the Rules; that they took Cenvat credit on bunker (Fuel Oil, HSD, Lub. Oil) lying inside engine room of the vessels imported by them; that they had taken Cenvat credit in respect of Fuel Oil, HSD, Lub. Oil as the same were falling under Chapter Heading 8908. It was alleged that Appellant No.1 was not entitled

for Cenvat Credit of Rs.4,60,951/- of Additional Duty of Customs (CVD) paid on fuel oil, high speed diesel oil, & Lub. Oil (inside engine room bunker) in as much as the said goods were not used in the process of manufacture of their final excisable goods by breaking of the said ships and directly sold in open market and therefore, the same cannot be considered as 'input' as defined under Rule 2(k) of the Rules.

2.5 Show Cause Notice No. V.73/05-05/DRural/2017-18 dated 14.05.2017 was issued to both Appellants wherein it was proposed to demand and recovery of wrongly availed Cenvat Credit of Rs. 4,60,951/- as per the provisions of Rule 14 (1)(i) of the Rules read with Sub section (4) of Section 11A of the Act. It was also proposed to impose penalty under Rule 15(2) of the Rules read with Section 11AC of the Act upon Appellant No.1 and penalty under Rule 15A of the Rules upon Appellant No. 2. The said Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order wherein he confirmed demand of Cenvat credit of Rs. 4,60,951/- under Rule 14(1)(i) of the Rules read with Section 11A(4) of the Act and also imposed penalty of Rs.4,60,951/- under Rule 15(2) of the Rules read with Section 11AC of the Act upon Appellant No. 1 by giving option of 25% reduced penalty subject to the conditions of Section 11AC and also imposed penalty of Rs. 5,000/- upon Appellant No. 2. The adjudicating authority appropriated Cenvat credit of Rs. 4,60,951/- reversed by Appellant No. 1.

3. Being aggrieved with the impugned order, Appellant No.1 and 2 preferred appeals to set aside the impugned order imposing penalty of Rs.4,60,951/- imposed on Appellant No.1 and penalty of Rs.5,000/- imposed upon Appellant No. 2.

Appellant No.1

3.1 Appellant submitted that they had reversed Cenvat credit of Rs. 3,02,727/- by debiting the Cenvat credit account before its utilization. Therefore, the said amount would amount to credit not having been taken. They relied upon the decision of Hon'ble Supreme Court in case of CCE, Mumbai-II Vs M/s Ramkay Dyeing Ltd. - 2017 (219) E.L.T. 3(SC) = 2017-TIOL-147-SC-CX] and they also relied on Circular No. 858/15/2007-CX dated 08-11-2007 stating that Cenvat credit reversed before utilization would amount to credit not having been taken; that Cenvat Credit of Rs. 1,58,212/- on being pointed out by the Department, was immediately paid by debiting cenvat credit account and through PLA; that mere

was no intention whatsoever to avail inadmissible credit with intention to evade payment of duty; that no fraud, misstatement or suppression of fact can be alleged on the Appellants. That imposition of penalty under Rule 15(2) of the Rules read with Section 11AC of the Act is unwarranted and unsustainable in law.

Appellant No.2

3.2 Appellant no.2 is a director of the company and not acted with any personal motive or benefit and hence, personal penalty imposed is not justified. That since the director had not availed Cenvat Credit he is not liable to imposition of any penalty. That Rule 15A is not applicable in his case; that he relied upon the decision of the Hon'ble Tribunal in the case of Keshav Kumar Tharad reported as 2003(156) ELT 211 (Tri-Kolkata)

4 Personal Hearing was attended by Shri Madhav N. Vadodariya, Advocate on behalf of both Appellants. He reiterated the grounds of appeal and submitted that Appellant No.1 is entitled for Cenvat Credit of goods inside Engine Room of the vessel but even then they have reversed Cenvat credit even before issue of SCN and hence, no penalty was imposable upon Appellant No.1& Appellant No. 2.

5. In written submission dated 25.06.2019, Appellant submitted copy of Bill of Entry to say that they had mistakenly taken credit of entire CVD of Rs.87,25,221/- which includes CVD of Rs.4,60,956/- on the basis of their declaration in their Bill of Entry. However, on being pointed out by the officers they agreed and paid the wrongly availed credit before its utilization; that mere detection during the scrutiny of monthly return does not mean that the cenvat credit has been taken with intention to evade payment of duty unless the department brings out clear facts that the Appellant were having knowledge that credit cannot be taken, still the Appellant chose to avail the same in order to evade payment of duty. No such facts have been narrated in the Show Cause Notice. That extended period of 5 years under the provision of Rule 14(1) of the CCR, 2004 read with Section 11(4) of the Act; is not invokable in the instant case and hence the SCN is time barred and impugned Order is vala and bad in law. Appellant No.2 relied upon decision of the Hon'ble High Court in the case of Ashokkumar H Pujwadiya reported as 2012(281) ELT 388 (Guj) to say that personal penalty was not sustainable on the director of the company.

Findings:

6. And the both Appellants have filed appeal after 20 days beyond normal appeal period of 60 days but within further period of 30 days stating that filing of appeal got delayed as they appointed new consultant due to medical exigencies of their earlier consultant. Since the appeals been filed within further period of 30 days, I condone delay in filing of appeal by both Appellants and proceed to decide these appeals on merits.

7. I have carefully gone through the facts of the case, the impugned order, the Appeal Memorandum, written and oral submissions made by both Appellants. The issue to be decided is as to whether imposition of penalty of Rs.4,60,951/- on Appellant No. 1 & of Rs.5,000/- on Appellant No. 2 is correct or otherwise.

8 I find that Appellant No.1 during the personal hearing submitted that they were eligible for Cenvat Credit of CVD paid on goods inside Engine Room i.e. Fuel Oil, Marine Gas Oil and Lubricating oil, however they reversed on being pointed out and contest the impugned order for imposition of penalty. I find that the dispute in question was clarified by CBEC way back in 1998 vide Circular No. 27/98-Cus. dated 02.12.1998 (issued from F. No. 6/2/2/98-Cus. VI) as under:

> (a) movable goods such as lifting and handling machinery, software, navigational equipment, machine tools, fire fighting equipment form part of vessels normal equipment and hence classified at 89.08.
>
> (b) fuel and oil contained in the vessels machinery and engines can also be regarded as forming integral part of the vessels and hence be classified under Heading 89.08.
>
> (c) Spares 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 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 (under own appropriate headings).

(Emphasis supplied)

5.1 The Hon'ble High Court of Gujarat in case of M/s. Priya Holdings (P) Ltd reported as 2013 (298) ELT 347 (Guj.) has also held that

> *"12. As can be seen from the impugned order, the tribunal, after appreciating the evidence on record, has come to the conclusion that the fuel contained in the engine tanks would form an integral part of the vessel's machinery and engine, and therefore, would fall under sub-para (b), whereas the remaining fuel and oil contained in other tanks would fall within the ambit of sub-para (c), and would be classifiable under their own separate headings."*

5.2 The above views were again affirmed by the Hon'ble Gujarat High Court in case of M/s. J. M. Industries reported as 2014 (302) ELT 382 (Guj.). The Hon'ble CESTAT, Ahmedabad in the case of M/s. A. G. Enterprise 2014 (308) ELT 418 (Tri.-Ahmd.) also held that even fuel stored outside engine room are an integral part of vessel's machinery and to be classified under heading 89.08. The relevant para is re-produced as under:

> *"I heard both sides and perused the case records. The issue involved in all these appeals is as to what should be the classification of HSD/LDO, under the EXIM Policy, which is contained in the fuel tanks of the vessels brought for breaking. As per the CBEC Circular dated 26-4-2013 and the orders passed by Commissioner (Appeals), such fuel needs classification under 27101940 of the Import Policy and is a restricted item to be imported through State Trading Agencies. Appellants, on the other hand, argued that HSD is not separately imported by the appellants and was found contained in the vessel as fuel/ship stores at the time of purchase and no extra price is paid for such fuel. It is observed that DGFT under F. No. IPC/4/5(634)/97/RE-PC-2(A) dated 28-6-2013 has opined that surplus fuel stored in the fuel tanks (whether inside or outside engine room) forms a part of the ship/vessels imported for breaking up and should be considered as integral part of the vessel's machinery and is classifiable under 89.08."*

(Emphasis Supplied)

5.3 The above views of the Hon'ble CESTAT/ High Court were affirmed by the Hon'ble Supreme Court in the case of M/s. M.K. Shipping & Allied Industries Pvt. Ltd. - 2015 (322) E.L.T. A326 (S.C.). The relevant para is re-produced as under:

> "The Appellate Tribunal in its impugned order had held that HSD/LDO available in ship/vessel at the time of its import for breaking up would be classifiable under Heading 89.08 of ITC(HS) as clarified in DGFT Circular F. No. IPC/4/5(634)/97/RE-PC-2(A), dated 28-6-2013 and not under respective heading."

5.4 I find that the intention of the legislature is not to deny Cenvat credit of CVD paid by ship breaking units, at the time of importation of ships for breaking purpose and utilization thereof while paying Central excise duty. CBEC further issued Circular No. 1014/2/2016-CX dated 01.02.2016 clarifying the issues related to credit of CVD paid by the Ship Breakers. To better appreciate facts, contents of the Circular are reproduced below:-

Circular No. 1114/2/2015-CX
Dated the 1st February, 2015

F. No. B11/2/2014-CX.1 (Pt.)
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Custom

New Delhi, dated the 1st February, 2015

To Principal Chief Commissioner/
Chief Commissioner/
Principal Commissioner of
Central Excise and Customs (All)
Web-master (CBEC).
Madam/Sir

Subject: Submission of show cause notice issued in relation to levy of CVD on vessels imported for breaking in the 'Ship-Breaking'

References have been received in the Board from trade and field formations in relation to Judgement of Hon'ble High Court of Gujarat passed in SCA No. 10507 of 1995 filed by M/s Shivam Engineering Company and others reported as [2014 (310) E.L.T. 953 (Guj.)]. A SLP has been filed by the department in Hon'ble Supreme Court against this order.

2. In the said judgement, Hon'ble High Court has held that duty under Central Excise Act, 1944 can be levied, if the article has come into existence as a result of production or manufacture. Articles which are not produced or manufactured cannot be subjected to levy of excise duty. On the import of the article no additional duty can be levied under section 3(1) of the Customs Tariff Act, 1975. Since the vessels and other floating structures for 'breaking-up' are not manufactured in India, no excise duty is leviable and consequently an additional duty under Section 3(1) of the Customs Tariff Act, 1975 can be levied on import of such goods. The reason for such conclusion by Hon'ble High Court is that when articles which are not produced or manufactured cannot be subjected to levy of excise duty, then on the import of the articles no additional duty can be levied under the Customs Tariff Act.

3. In view of above said judgement, trade and following two different positions as enumerated below are being issued Show cause Notices according to the profile they follow:-

(i) Show Cause Notices have been issued to importers who are not paying CVD demanding CVD from them as department has appealed against the order of the Hon'ble High Court of Gujarat.

(ii) Show Cause Notices for wrong availment of CENVAT credit have been issued to those importers who are paying CVD voluntarily and taking CENVAT credit and utilising the same for payment of Central Excise duty liability arising due to breaking of vessels.

4. The problem faced by the trade due to issue of Show Cause Notices in either situation has been examined in Board and it has been decided that all Show Cause Notices issued for non payment of CVD (refer para3(i) above) shall be kept in call book till the SLP filed by the department in the Hon'ble Supreme Court is decided.

5. Show Cause Notice denying Cenvat Credit of CVD paid voluntarily by the importers at the time of import is not warranted. It is well settled position of law that a buyer may avail Cenvat Credit, if supplier has paid duty. In this regard following case law may be referred- CCE vs. CHGA [2010 (252) ELT 335(Del HC DB)], CCE vs Ranbaxy Labs Ltd. [2006(203) ELT 213(P&H HC DB)], Commissioner of Central Excise, Chennai-II vs CEGAT Chennai reported as [2006(202)ELT753(Mad.)]. Credit is accordingly admissible for duty paid voluntarily.

6. Thus, once the importer has paid CVD on import of ship, Cenvat Credit of that CVD cannot be denied for payment of Central Excise duty on breaking of that ship. Show Cause Notices already issued for denying Cenvat Credit may be decided in light of these instructions and in future such Show Cause Notices may not be issued.

7. Also vide Notification No. 1/2016- Central Excise(N.T.), dated 01.02.2016 in the CENVAT Credit Rules, 2004, in rule 3, in sub-rule (1), in clause (vii), the proviso has been omitted.

8. Proviso to rule 3(1)(vii) of CENVAT Credit Rules, 2004 was inserted vide Notification No. 3/2011-Central Excise(NT), dated 1.3.2011. In the breaking of ships, products of section XV (base metals and articles of base metal) are obtained which are deemed to be manufactured as provided in section note 9 of Section XV of the First Schedule to the Central Excise Tariff Act, 1985 On the other hand, a number of used serviceable articles such as pumps, air conditioners, furniture,

kitchen equipment, solar 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. This anomaly was resulting in excess utilization of CENVAT credit. Rule 3 of the CENVAT Credit Rules, 2004 was accordingly 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.

9. Further, amendment to Rule 6 of CENVAT Credit Rules, 2004 was carried out in budget of 2015, to provide that now credit is required to be reversed even for non-excisable goods produced as by-products in the process of manufacture of excisable goods. This amendment has brought non-excisable goods and exempt goods at par and no credit is now available on either of these. The explanation inserted in Rule 6 is as follows:Explanation 3.- For the purpose of this rule, exempted goods or final products as defined in clause (d) and (n) of rule 2 shall include non excisable goods cleared for a consideration from the factory.

10. At present there is a conflict regarding reversal of credit in relation to non-excisable goods which emerge during breaking of ship viz. whether restriction/reversal of credit needs to be done under proviso to rule 3(1)(vii) of CENVAT Credit Rules, 2004 or under rule 6 of CENVAT Credit Rules, 2004. To resolve this conflict, the provision restricting CENVAT credit to 85% under proviso to rule 3(1)(vii) of Cenvat Credit Rule, 2004 has been deleted. Consequently ship breaking units would be entitled to avail 100% credit of the CVD paid with effect from 01.03.2015 and would also be required to follow provisions of rule 6 of CENVAT Credit Rules, 2004 with effect from 01.03.2015. This beneficial amendment of deleting proviso to rule 3(1)(vii) of CENVAT Credit Rules, 2004 has been done retrospectively with effect from 01.03.2015, that is the date from which reversal of Cenvat Credit for non-excisable goods was provided in rule 6 of Cenvat Credit Rules, 2004.

11. Difficulties faced, if any, in implementation of this Circular may be brought to the notice of the Board. Hindi version follows. Yours faithfully

(Santosh Kumar Mishra)
Under Secretary to the Government of India

8.5 In the final Para 31(j) of CBEC Circular covers the issue involved in the present appeal and Board has clarified that Cenvat credit on CVD paid is admissible and the issue is no more res integra. The penalties imposed on both appellants vide the impugned order are set aside.

9. अपीलकर्ताओं द्वारा दर्ज किये गये अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeals filed by the Appellants stand disposed of in above terms

(कुमार संतोष)
महा आयुक्त (अपील्स)

By RPAD
To

1.	M/s Agrasen Ship Breaking Pvt. Ltd. Plot No. 113, Ship Breaking Yard, Sosiya/Alang, Dist: Bhavnagar.	मेसर्स अग्रसेन शिप ब्रेकिंग प्राइवेट लिमिटेड प्लॉट संख्या 113, अलंग शिप ब्रेकिंग यार्ड, सोसिया/अलंग, जिला: भावनगर
2.	Shri Parth Tarag Vora, Director M/s Agrasen Ship Breaking Pvt. Ltd. Plot No. 113, Ship Breaking Yard, Sosiya/Alang, Dist :Bhavnagar.	श्री पार्थ तारंग वोरा, डायरेक्टर मेसर्स अग्रसेन शिप ब्रेकिंग प्राइवेट लिमिटेड, प्लॉट संख्या 113, अलंग शिप ब्रेकिंग यार्ड, सोसिया/अलंग, जिला: भावनगर

Copy to:

1) The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information
2) The Commissioner GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar for necessary action
3) The Assistant Commissioner, GST & Central Excise Division-II, Bhavnagar for further necessary action.
4) Guard File.