





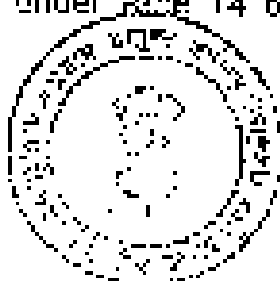
ORDER-IN-APPEAL

M/s NBIA Iron and Steel Trading Pvt Ltd. Alang, Bhavnagar having Central Excise Registration No. AAACH7420CXM002 (hereinafter referred to as "Appellant") filed Appeal No. V2/161/BVR/2018-19 against Order-in-Original No. 1/AC/BVR-2/BVR/MC/2018-19 dated 27.4.2018 (hereinafter referred to as 'impugned order') passed by the Asst. Commissioner, Central GST & Central Excise, Bhavnagar-2 Division, Bhavnagar Commissionerate (hereinafter referred to as "lower adjudicating authority").

2. The brief facts of the case are that the Appellant was engaged in manufacture of various Ferrous and non Ferrous Articles falling under Chapter 72 to 81 of the Central Excise Tariff Act, 1985 obtained by breaking old and used imported ships. The Appellant had imported vessel "BUKITA OMEGA" vide Bill of Entry dated 21.7.2011, which was assessed provisionally on 24.2.2011. The vessel was beached in the ship breaking plot of the Appellant on 24.02.2011. After completion of Customs formalities, 'Out of Customs Charge' was given by the Customs Authority on 3.3.2011.

2.1 During scrutiny of ER 1 Return for the month of February, 2011, it was found by the jurisdictional Range Superintendent that the Appellant had availed Cenvat credit of whole of Additional Duty of Customs (CVD) paid on imported vessel "BUKITA OMEGA" amounting to Rs. 1,15,34,225/-. As per proviso inserted in Rule 3(1) of the Cenvat Credit Rules, 2004 (hereinafter referred to as "CCR,2004") vide Notification No. 3/2011-CE(NT) dated 1.7.2011, Cenvat credit is allowed only upto 85% of Additional Duty of Customs paid on ships, boats and other floating structures for breaking up falling under Tariff item 89080000. It appeared to the Commissionerate that the Appellant had wrongly availed Cenvat credit of Rs. 17,30,135/- in excess of 85% of CVD.

2.3 Show Cause Notice No. V/15-39/HQ/Denn/2011-t2 dated 8.2.2012 was issued to the Appellant calling them to show cause as to why Cenvat credit of Rs. 17,30,135/- should not be disallowed and recovered from them under Rule 14 of CCR,2004 read with Section 11A of the Central



*(Signature)*

Excise Act, 1944 (hereinafter referred to as "Act") along with interest under Rule 14 *ibid* read with Section 11AB of the Act and imposing imposition of penalty under Rule 15(i) of CCR, 2004.

2.4 The above Show Cause Notice was adjudicated vide the impugned order which disallowed Cenvat credit of Rs. 17,30,135/- and ordered for its recovery along with interest under Rule 14 of CCR, 2004. The impugned order also imposed penalty of Rs. 17,30,135/- on the Appellant under Rule 15(i) of CCR, 2004.

3. Being aggrieved with the impugned order, the Appellant has preferred appeal on various grounds, *inter alia*, as below :-

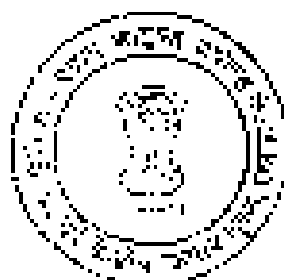
(i) The impugned order is non-speaking and non-reasoned order as the adjudicating authority has not dealt with the pleas raised by the Appellant.

(ii) They had filed Bill of Entry for clearance of imported vessel "BUKHIA OMEGA" on 21.02.2011 and after its assessment by Customs, the CVD was paid on 21.02.2011. Thereafter, vessel was beached at the registered plot of the Appellant on 24.02.2011 and they immediately availed Cenvat credit of CVD in their Cenvat account; that they had taken all reasonable steps before taking Cenvat credit on inputs; that permission for clearance of vessel for breaking was received late due to pending work of destroying wireless by the Customs Officers; that to consider that in absence of such permission, the Cenvat credit is not available is not correct; that it is settled position of law that when duty paid nature of input is not in doubt, Cenvat credit cannot be denied.

(iii) Bill of entry is a specific document under Rule 9(1)(c) of CCR, 2004 for taking Cenvat credit and there is no restrictions that Cenvat credit cannot be taken without 'out of Customs charge' embarkment on Bill of Entry;

(iv) The Adjudicating authority erred in observing that right from arrival of the said vessel till its out of Customs charge given, the said vessel remained in the custody of the Gujarat Maritime Board (GMB) and the appellant became its owner only after 3.3.2011 and hence, the Appellant

*[Signature]*



should have availed Cenvat credit only on or after 3.3.2011 i.e. date on which out of Customs charge given. The adjudicating authority failed to observe that Gujarat Maritime Board is not custodian of Alang/Sosiyo Ship breaking yard as Alang/Sosiyo is not a port and that Alang/Sosiyo Ship breaking yard has been declared as landing place only for ships imported for breaking up; that the shipbreaker is custodian of the goods; that the Appellant has correctly taken 100% Cenvat credit as the Custom clearance and receipt of duty paid inputs in the factory were simultaneous and at the very same place i.e. their plot in shipyard. The Appellant has correctly availed 100% of Cenvat credit of CVD amounting to Rs. 1,15,34,725/- and relied upon case law of *M/S Shiv Ship Breaking Company- 2007 (218) E.L.T. 414 (Tri Amul)*

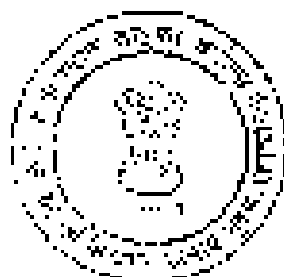
(v) Regarding imposition of penalty under Rule 15(1), the appellant submits that there is no intention on part of the Appellant to defraud Revenue to evade payment of duty and hence, the Appellant is not liable to penalty.

4. Personal Hearing was fixed in the case on 17.4.2019, 22.5.2019, and 4.6.2019, however, the Appellant did not appear on any of the above dates but sent written submission vide letter dated 3.6.2019, wherein the grounds of appeal are reiterated and requested to set aside the impugned order and allow their appeal.

#### Discussion & Findings:

5. I find that the Appellant has complied with the provisions of Section 35F of the Act by depositing Rs. 1,29,760/- @7.5% of Rs. 17,30,135/- vide Challan No. 00/24 dated 27.7.2018, as declared by them in Appeal Memorandum.

5.1 I also find that the Appellant has filed application for condonation of delay of 28 days in filing appeal which state that they had received the impugned order on 3.5.2018 but could file appeal only on 30.7.2018. They requested to condone delay of 28 days in filing appeal on the grounds that their consultant firm was busy in reply work related to Income Tax and hence, they could not file appeal within time limit of 60 days. Considering



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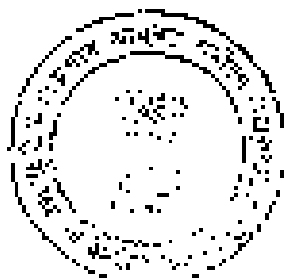
that delay is within further period of 30 days as provided under proviso to Section 35(1) of the Act, I condone delay of 28 days in filing of this appeal and take up this appeal for decision on merits.

6. I have carefully gone through the facts of the case, the impugned order and the grounds of appeal submitted by the appellant in the memorandum of appeal. The issue to be decided is whether the Appellant has rightly availed Cenvat credit ₹1093 of CVD in respect of import of vessel "BUKHTA OMEGA" vide Bill of Entry dated 21.2.2011 or otherwise.

7. On going through the records, I find that the Appellant imported vessel "BUKHTA OMEGA" vide Bill of Entry dated 21.2.2011, which was assessed provisionally on 21.2.2011 and vessel was beached in the ship breaking plot of the Appellant on 24.02.2011. The vessel was given 'Out of Customs Charge' by the Customs Authority on 3.3.2011. The Appellant availed Cenvat credit of Additional Duty of Customs of Rs. 1,19,34,275/- paid on the said vessel. The lower adjudicating authority disallowed Cenvat credit in excess of 85% of Additional Duty of Customs amounting to Rs. 17,30,115/- on the ground that as per proviso inserted in Rule 3(1) of CCR, 2004 vide Notification No. 3/2011-CE(M.) dated 1.3.2011, Cenvat credit is allowed only upto 85% of Additional Duty of Customs paid on ships, boats and other floating structures for breaking up falling under Tariff item 89080000. The Appellant has contended that they had filed Bill of Entry on 21.2.2011 and after payment of Customs duty on 21.2.2011, the vessel was beached at their registered plot at Ship Breaking Yard on 24.02.2011 and hence, the appellant was eligible to avail full Cenvat credit being duty paid on said vessel was received by the Appellant in their registered premises; that Bill of entry is a specified document under Rule 9(1)(c) of CCR, 2004 for taking Cenvat credit and there is no restriction that Cenvat credit cannot be taken without 'out of Customs charge' endorsement on Bill of Entry and relied upon case laws of Shiv Ship Breaking Company- 2007 (218) F.L.T. 414 (Tri Kamdi).

7.1 I find that issue involved in the present case is to determine relevant date when the appellant can avail Cenvat credit of Additional Duty of Customs paid on import of vessel, whether relevant date is when

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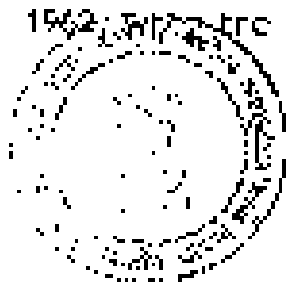
the ship beached in the plot of the Appellant on 24.2.2011 or when 'Out of Customs Charge' was given on 3.3.2011. It is not disputed that the Bill of Entry dated 21.2.2011 filed by the Appellant was assessed provisionally on 21.2.2011 and returned to the Appellant for payment of Duty. After payment of duty, the vessel was beached in the ship breaking plot of the Appellant on 24.2.2011. The vessel was given 'Out of Customs Charge' by the Customs Authority on 3.3.2011. I find it is pertinent to examine the provisions of Rule 4(1) of CCR, 2004, which governs conditions for allowing Cenvat credit, which are reproduced as under:

**"RULE 4. Conditions for allowing CENVAT credit.** (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory or the manufacturer or in the premises of the provider of output service or in the premises of the job worker, in case goods are sent directly to the job worker on the direction of the manufacturer or the provider of output service, as the case may be.:"

(Emphasis supplied)

7.2 I find that the Appellant was engaged in the manufacture of Ferrous and non-Ferrous Articles obtained by breaking old and used ships. Thus, subject vessel imported by the Appellant was input for them. Further, ship breaking plot of the Appellant registered under Central Excise was situated within the jurisdiction of the Customs area. So, when the vessel is beached in the ship breaking plot, it effectively means that vessel i.e. input has reached in the factory premises. In the present case, when the vessel was beached on 24.2.2011 in the ship breaking plot of the Appellant, it would mean that vessel i.e. input was received by the Appellant in their factory premises on 24.2.2011. By virtue of Rule 4(1) of CCR, 2004 supra, the Appellant became eligible to avail full Cenvat credit or Additional duty of Customs on 24.2.2011 i.e. date of beaching of the vessel in their ship breaking plot. Consequently, proviso inserted in Rule 3(3) of 'CCR, 2004' vide Notification No. 3/2011-CE(MT) dated 1.3.2011 restricting availment of 85% of Cenvat credit or CYD will not be applicable in respect of Vessel "BUKHTA OMEGA" imported by the Appellant.

7.3 I also find that the lower adjudicating authority has erroneously considered date when 'Out of Customs Charge' was given as the relevant date for availing Cenvat credit. As per Section 47 of the Customs Act, 1962, when the Importer pays applicable Customs duty and completes all



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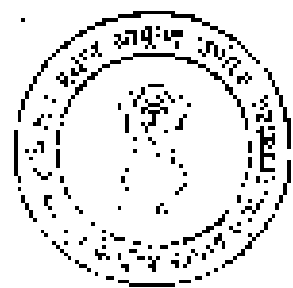
Import formalities, when goods are allowed to be cleared for home consumption. In the present case, the goods i.e., vessel was not be cleared for home consumption since, ship breaking plot itself was factory. I also find that 'Out of Customs Charge' has nothing to do with availment of Cenvat credit as there is no such restrictive conditions prescribed in Rule 4(1) of CCR, 2004 for allowing Cenvat credit. It is on record that the vessel was beached in the ship breaking plot of the Appellant on 24.2.2011 after Bill of Entry was duly processed and payment of duty and 'Out of Customs Charge' was given on 22.2.2011. The delay occurred in giving 'Out of Customs Charge' should not be a reason to deny substantial right of the Appellant to avail Cenvat credit when it became due on 24.2.2011. I rely on the Order passed by the Hon'ble CESTAT, Ahmedabad passed in the case of Shiv Ship breaking Co. recorded as 2007 (218) ELI 414 (Tri. Ahm), wherein it has been held that,

76. We have carefully considered the submissions from both sides. The CVD paid on the ship is not in dispute. The CVD amount which was taken as credit was admittedly paid on 23-9-2004. No objection for beaching of the vessel has been granted by the Customs Officers on 13-9-2004. Under these circumstances, the reason for the delay in grant of out of charge by the Customs is not explained. Even if the delay was justified, it cannot lead to denial of Cenvat credit on the CVD paid on the vessel. The taking of credit before out of charge is given is at the most, a technical violation. This technical violation is caused due to the delay in grant of out of charge by the Department and it cannot take away the substantial right to Cenvat credit due to the appellant, especially, when the customs clearance and release of the duty paid inputs is the factory vessel simultaneous and at the very same place, namely, the shipyard.

77. Since the credit has been rightly taken, there is nothing irregular in utilization of Cenvat credit amounting to Rs. 3,89,351/- hence 14-10-11." (Emphasis supplied)

8. In view of above, I hold that the appellant has rightly availed Cenvat credit of 100% of Additional Duty of Customs and demand of Cenvat credit of Rs. 17,30,135/- under Rule 14 of CCR, 2004, interest on this demand and penalty imposed under Rule 15 of CCR, 2004 are required to be set aside.

*(Signature)*





9. In view of above, I set aside the impugned order and allow the appeal.

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

9.1 The appeal filed by the Appellant is disposed off as above.

लक्ष्मी



मित्तल शर्मा  
अपीलकर्ता

श्री. राजेश कुमार  
[कुमार सिंह]

प्रधान आयुक्त (अपीलकर्ता)

By R.P.A.D.

To,  
M/s NBM Iron and Steel Trading  
Pvt Ltd,  
Plot No. 61, Ship breaking yard,  
Mang.  
District Bhavnagar.

सेवा में,  
श्री. एनबीएम आयरन एवं स्टील ट्रेडिंग  
प्राइवेट लिमिटेड,  
प्लॉट नं. 61, शिप ब्रेकिंग यार्ड, अमरावती,  
जिला भावनगर;

ध्यान :-

- 1) प्रधान मुख्य आयुक्त, परंतु यह सेवा कर एवं केंद्रीय उत्पाद शुल्क, मुंबई में जमा कराया जायेगा।
  - 2) आयुक्त, वस्तु एवं सेवा कर एवं केंद्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
  - 3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केंद्रीय उत्पाद शुल्क, भावनगर-2 मण्डल, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
- 4) गैर फाइल।

