::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE 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 – 2477952/2441142 Email: [illegible]

रजिस्टर्ड डाक ए.डी. द्वारा :-

क अपील / फ़ाइल संख्या / Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date:
V2/…/BVR/2019	…/2019-20 Refund	…/2019

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

BHV-EXCUS-000-APP-24?-2019

आदेश का दिनांक / Date of Order	31.10.2019	जारी करने की तारीख / Date of Issue:	06.11.2019

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot

ग [illegible]
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot/Jamnagar/Gandhidham :

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

M/s. Lakshmi Steel Rolling Mills (Unit-II), Plot No. 51, Ship Breaking Yard, Alang, Bhavnagar, Gujarat

[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-1(a) 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 Rs. 1,000/-, Rs. 5000/-, Rs. 10,000/- [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 Rs. 1000/- [illegible]

(a) केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 1994 के नियम 9(1) के साथ पठित वित्त अधिनियम, 1994 की धारा 86 की उपधारा (1) के अधीन निर्धारित प्रपत्र में इस आदेश-अपील की प्रति सहायक आयुक्त/उपायुक्त/संयुक्त आयुक्त, केन्द्रीय उत्पाद शुल्क/सेवा कर मंडल/प्रभाग को अपील दायर करने के लिए अधिकृत अधिकारी को भेजी जानी चाहिए।

The appeal under sub-section (1) read with rule 9(1) of the Central Excise (Appeals) Rules, 1994 shall be filed in Form EA-1 as prescribed under Rule 9(1) of the Central Excise (Appeals) Rules, 1994 and shall be accompanied by a copy of order of Assistant/Deputy/Joint Commissioner, Central Excise/Service Tax Division/Range to which the Appellant is subordinate.

(b) अपील पूर्वक, केन्द्रीय उत्पाद शुल्क की धारा 35एफ के अंतर्गत वित्तीय (संख्या-2) अधिनियम, 2014 (2014 की संख्या 46) की धारा 112 के अनुसार, वर्तमान में निर्धारित अपीलीय शुल्क [जहां शुल्क या शुल्क एवं दंड विवाद में है या दंड लगाया गया है] 5 लाख रुपये या कम, 5 लाख रुपये से ऊपर किन्तु 50 लाख रुपये तक, 50 लाख रुपये से ऊपर, के रूप में है, इस आदेश के प्रति अपील प्राधिकरण [सीमा शुल्क, केन्द्रीय उत्पाद शुल्क तथा सेवा कर अपीलीय न्यायाधिकरण (सिस्टेट) के समक्ष अपील करने के लिए केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35बी/35इ के अंतर्गत निर्धारित फार्म सी.ए.-3 में चार प्रतियों में होनी चाहिए और उसमें उस आदेश की चार प्रतियां संलग्न की जानी चाहिए जिसके विरुद्ध अपील की गई है (उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए) और अपील ज्ञापन में उठाए गए प्रत्येक विवाद्यक के संबंध में संक्षिप्त बयान होना चाहिए।

For an appeal to be filed before the Tribunal under Section 35B/35E of the Central Excise Act, 1944 within three months from the date of the communication of this order, the appeal amount in dispute, or penalty, where penalty alone is in dispute, as the case may be, is Rs. 5 Lakh or less, more than Rs. 5 Lakh but not exceeding Rs. 50 Lakh, more than Rs. 50 Lakh, in the form of the Tribunal as prescribed under Section 35B/35E of the Central Excise Act, 1944 read with Section 112 of the Finance (No.2) Act, 2014 (No. 46 of 2014).

(c) अपील करने योग्य निर्णय/आदेश :
Decision/order appealable to Commissioner (Appeals) :

इस आदेश की पुनरीक्षणयोग्य विस्तारितीकरण खातरी के संबंध में उत्पाद शुल्क अधिनियम की धारा 35इ के अंतर्गत वित्तीय (संख्या-2) अधिनियम, 2014 की धारा 109 द्वारा संशोधित [वित्त अधिनियम, 1994 की धारा 84 के अंतर्गत सेवा कर के संबंध में] वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत, वित्त मंत्रालय, वित्तीय सेवा विभाग, संसद मार्ग, नई दिल्ली 110001 को विनिर्दिष्ट प्राधिकारी को पुनरीक्षण आवेदन प्रस्तुत किया जाएगा।

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 Central Excise Act, 1944 in respect of the matter relating to Revisionary Demand in Section 109 of the Finance (No.2) Act, 2014 [in respect of service tax under Section 86 of the Finance Act, 1994].

(d) यदि माल के किसी नुकसान के मामले में, जहां नुकसान विनिर्माण प्रक्रम में या किसी कारखाने से भंडार या अन्य परिसर में या किसी शुल्क-चुकता माल के किसी अन्य परिदान के दौरान, किसी व्यक्ति या किसी माल पर हो उसके नुकसान के मामले में।

In case of loss of goods, where the loss occurs in the process of manufacture or in a factory or in a warehouse or in any other premises or in transit of duty paid goods to any person or on any goods.

(e) शुल्क के भुगतान किए बिना भंडार से निर्यात किए गए माल के विनिर्माण में प्रयुक्त माल के मामले में उत्पाद शुल्क नियमावली, 2002 के नियम 18 के अधीन निर्यात किए गए माल के मामले में।

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(f) सेनवैट जमा नियमावली, 2004 के नियम 3 के अधीन सेनवैट जमा की अनुमति के संबंध में।

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of the Cenvat Credit Rules, 2004.

(g) उपरोक्त आवेदन की दो प्रतियां प्रपत्र EA-8 में, जो कि केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के उपनियम (2) के अंतर्गत निर्धारित है, इस आदेश के दिनांक से पांच माह के भीतर की जानी चाहिए। उपरोक्त आवेदन के साथ केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35एफ के अंतर्गत निर्धारित फीस का भुगतान किया जाना चाहिए। यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान अलग से किया जाना चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule 9(2) of the Central Excise (Appeals) Rules, 2001 within five months from the date of the order sought to be appealed against. The prescribed fee under Section 35F of the Central Excise Act, 1944 shall be paid under the Head of Account of the CIC and C.S. Account Head under which the duty amount is paid. In case of the order covers a number 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 Commissioner (Appeals) or the one application to the Tribunal is filed to avoid scriptoria work if excising the same.

(h) उच्च अपील प्राधिकारी के समक्ष अपील दायर करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए वित्त मंत्रालय वित्तीय सेवा विभाग के वेबसाइट www.dor.gov.in का संदर्भ लिया जा सकता है।

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the website www.dor.gov.in of the Ministry of Finance, Department of Revenue.

(i) अपील प्राधिकारी को अपील प्रस्तुत करते समय शुल्क की मांग एवं लगाए गए जुर्माने का 10% जमा करना है, बशर्ते कि इस धारा के अंतर्गत देय जमा राशि अधिकतम दस करोड़ रुपये तक सीमित है, बशर्ते कि इस धारा के प्रावधान वित्तीय (संख्या-2) अधिनियम, 2014 (2014 की संख्या 46) के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष लंबित किसी अपील को लागू नहीं होंगे।

An appeal against this order shall lie before the Appellate 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 crore.

(j) वित्त अधिनियम, 1994 की धारा 83 के अंतर्गत लगाई गई सेवा कर से संबंधित मामलों को वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 के प्रावधान लागू किए गए हैं।

In view of Central Excise and Service Tax Tribunal (Procedure) Rules, 2024 dated 26.06.2024 [G.S.R. 452(E)] and Circular No. 1079/09/2024-CX dated 16.08.2024 [F.No. 390/Misc/163/2024-JC], all appeals pending before the Commissioner (Appeals) as on 26.06.2024 shall stand transferred to the Tribunal and appeals pending before the Tribunal as on 26.06.2024 shall be heard by the Bench of the Tribunal.

(k) समस्त संबंधित परिपत्रों/अधिसूचनाओं :
Revision applications to Government of India :

इस आदेश की पुनरीक्षणयोग्य विस्तारितीकरण खातरी के संबंध में उत्पाद शुल्क अधिनियम की धारा 35इ के अंतर्गत वित्तीय (संख्या-2) अधिनियम, 2014 की धारा 109 द्वारा संशोधित [वित्त अधिनियम, 1994 की धारा 84 के अंतर्गत सेवा कर के संबंध में] वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत, वित्त मंत्रालय, वित्तीय सेवा विभाग, संसद मार्ग, नई दिल्ली 110001 को विनिर्दिष्ट प्राधिकारी को पुनरीक्षण आवेदन प्रस्तुत किया जाएगा।

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 Central Excise Act, 1944 in respect of the matter relating to Revisionary Demand in Section 109 of the Finance (No.2) Act, 2014 [in respect of service tax under Section 86 of the Finance Act, 1994].

(l) यदि माल के किसी नुकसान के मामले में, जहां नुकसान विनिर्माण प्रक्रम में या किसी कारखाने से भंडार या अन्य परिसर में या किसी शुल्क-चुकता माल के किसी अन्य परिदान के दौरान, किसी व्यक्ति या किसी माल पर हो उसके नुकसान के मामले में।

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(m) शुल्क के भुगतान किए बिना भंडार से निर्यात किए गए माल के विनिर्माण में प्रयुक्त माल के मामले में उत्पाद शुल्क नियमावली, 2002 के नियम 18 के अधीन निर्यात किए गए माल के मामले में।

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(n) सेनवैट जमा नियमावली, 2004 के नियम 3 के अधीन सेनवैट जमा की अनुमति के संबंध में।

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of the Cenvat Credit Rules, 2004.

(o) उपरोक्त आवेदन की दो प्रतियां प्रपत्र EA-8 में, जो कि केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के उपनियम (2) के अंतर्गत निर्धारित है, इस आदेश के दिनांक से पांच माह के भीतर की जानी चाहिए। उपरोक्त आवेदन के साथ केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35एफ के अंतर्गत निर्धारित फीस का भुगतान किया जाना चाहिए। यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान अलग से किया जाना चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule 9(2) of the Central Excise (Appeals) Rules, 2001 within five months from the date of the order sought to be appealed against. The prescribed fee under Section 35F of the Central Excise Act, 1944 shall be paid under the Head of Account of the CIC and C.S. Account Head under which the duty amount is paid. In case of the order covers a number 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 Commissioner (Appeals) or the one application to the Tribunal is filed to avoid scriptoria work if excising the same.

(p) उच्च अपील प्राधिकारी के समक्ष अपील दायर करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए वित्त मंत्रालय वित्तीय सेवा विभाग के वेबसाइट www.dor.gov.in का संदर्भ लिया जा सकता है।

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the website www.dor.gov.in of the Ministry of Finance, Department of Revenue.

(q) अपील प्राधिकारी को अपील प्रस्तुत करते समय शुल्क की मांग एवं लगाए गए जुर्माने का 10% जमा करना है, बशर्ते कि इस धारा के अंतर्गत देय जमा राशि अधिकतम दस करोड़ रुपये तक सीमित है, बशर्ते कि इस धारा के प्रावधान वित्तीय (संख्या-2) अधिनियम, 2014 (2014 की संख्या 46) के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष लंबित किसी अपील को लागू नहीं होंगे।

An appeal against this order shall lie before the Appellate 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 crore.

(r) वित्त अधिनियम, 1994 की धारा 83 के अंतर्गत लगाई गई सेवा कर से संबंधित मामलों को वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 के प्रावधान लागू किए गए हैं।

In view of Central Excise and Service Tax Tribunal (Procedure) Rules, 2024 dated 26.06.2024 [G.S.R. 452(E)] and Circular No. 1079/09/2024-CX dated 16.08.2024 [F.No. 390/Misc/163/2024-JC], all appeals pending before the Commissioner (Appeals) as on 26.06.2024 shall stand transferred to the Tribunal and appeals pending before the Tribunal as on 26.06.2024 shall be heard by the Bench of the Tribunal.

:: ORDER IN APPEAL ::

M/s. Laxmi Steel Rolling Mills (Unit-II), Plot No. 57, Ship Breaking Yard, Alang, Dist : Bhavnagar (hereinafter referred to as 'Appellant') has filed the present appeal against Order-In-Original No 01/DC/BVR-2/NS/2019-20/Refund dtd 10.04.2019 (hereinafter referred to as 'the impugned order'), passed by the Deputy Commissioner, Central Goods & Service Tax Division, Bhavnagar – 2 (hereinafter referred to as 'the adjudicating authority').

2. The facts of the case are that Appellant holding Central Excise Registration No. AAAFL7115LXM001 was engaged in breaking of ships imported for breaking purpose at their plot at the 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 Cenvat Credit Rules, 2004 (hereinafter referred to as 'Rules'). Ships imported for breaking purpose contained many items viz. Fuel Oil, Marine Gas Oil (HSD), Lubricating Oil etc to be used as fuel for the ship or for generation of electricity as well as other foods, beverages, toiletries and other articles to be consumed by the crew on board. An importer of a ship for breaking purpose file Bill of Entry in respect of ship imported by him with the jurisdictional Customs Authority declaring therein separately the quantities and values of (i) Fuel Oil, Marine Gas Oil (HSD), Lubricating Oil (ii) other consumable articles like food, beverages, toiletries etc and (iii) 'Ship For Breaking Purpose' [excluding the goods and material separately declared as mentioned at (i) & (ii)] and Customs Duty is accordingly assessed thereon.

2.1 Note No. 4 to Section XV of the Schedule 1 appended to the Central Excise Tariff Act, 1985 reads as "In relation to the products of this Section, the process of obtaining goods and materials by breaking up of ships, boats and floating structure shall amount to 'manufacture'". Thus, process of obtaining all the goods and materials covered under the Section XV (Chapter 72 to 83) of the Schedule 1 appended to the Central Excise Tariff by breaking up of ships are considered as manufacturing activities and all such goods and materials obtained by such process are considered as 'excisable goods' being subject to levy of duties of Excise as per Section 2(d) of the Central Excise Act, 1944 (hereinafter referred to as 'Act'). However, the goods and materials, except those covered under Section XV (Chapter 72 to 83), even though obtained by breaking up of ships are considered as non-excisable goods.

2.2 On the basis of such facts the [illegible] wrongly availed Cenvat credit of Additional Duty of Customs (CVD) paid on Fuel Oil, Marine Gas Oil (HSD) & Lubricating Oil etc. contained in the [illegible] by them for breaking purpose. the said credit was reversed by them [illegible] under protest.

2.3 It was alleged that Cenvat credit of Additional Duty of Customs (CVD) paid on Fuel Oil, Marine Gas Oil (HSD) & Lubricating Oil (inside engine room bunker) was not admissible to Appellant since the said goods were not used in the process of manufacture of their final excisable goods by breaking of the said ships and were directly sold in open market post breaking, the same cannot be considered as 'input' as defined under Rule 2(k) of the Rules.

2.4 As the appellate authority had allowed such Cenvat Credit on such resulted Input / Goods in another [illegible] imposed by the appellant, the appellant filed refund application for Rs. 25,19,215/-. The adjudicating authority had issued Show Cause Notice No V.15(18)-70/Refund/Lakshmi/2018-19 dated 14.3.2019 issued to Appellant calling them to show cause as to why refund of Cenvat Credit amounting to Rs. 25,19,215/- should not be rejected under the provisions of Section 11B of the Central Excise Act, 1944 read with Section 142(6)(a) of the CGST Act, 2017.

2.5 The said Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who held that Fuel Oil, Marine Gas Oil & Lubricating Oil were not used, directly or indirectly, in or in relation to the process of obtaining goods by breaking up the ship and hence the same cannot be considered as 'input'. In terms of Rule 3 of the Rules and consequently Cenvat credit of Additional Duty of Customs paid on Fuel Oil, Marine Gas Oil & Lubricating Oil is not admissible to Appellant. The adjudicating authority rejected refund claim of Rs. 25,19,215/- under the provisions of Section 11B of the Central Excise Act, 1944 read with Section 142(6)(a) of the CGST Act, 2017.

3. Being aggrieved with the impugned order, Appellant have preferred this appeal on the various grounds as under:

(i) The impugned order is not proper and legal as same has been passed by gross violation of provisions of the Rules as well as provisions of Customs Tariff Act read with Central Excise Tariff Act; that they rely on provisions of Section 3(1) of the Customs Tariff Act, 1975, Rule 2(k), Rule 2(h), Rule 2(d) of the Rules; the 'said input was the imported goods which have been classified under Central Excise Tariff Item No. 8908.00.00 for the purpose of levy of CVD under the

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provisions of Section 3(1) of the Customs Tariff Act, 1975; that the provisional assessment of the said goods has been done by the proper customs officer by classifying the bunkers under the provisions of the Central Excise Tariff Item No 8908.00.00 of the Central Excise Tariff Act, 1985 as far as the levy of CVD is concerned in respect of the bunkers lying in inside the engine room;

(ii) The disputed goods have been classified under CETSH 8908.00.00 being an integral part of the vessel which has been clarified by the Hon'ble High Court of Gujarat in their order dated 05.07.2012 read with the DFGT's letter dated 26.08.2013 and further read with the assessment of Bills of Entry assessed by the proper Customs Officer, that at the time of presenting the Bill of Entry, Appellant had declared that they would avail Cenvat credit on the goods falling under CETSH 8908.00.00 and proper Customs Officer assessed the duty accordingly including the said CVD; that the goods falling under CETSH 8908.00.00 are the ldit input as specified under Rule 3(1)(vii) of the Rules which consist the duty of excise on such goods as specified under clause (i), (ii), (iii), (iv), (v), (vi) and (via) levied under various Acts and thus they correctly availed the Cenvat credit under dispute which was reversed under protest due to heavy pressure of the Department.

(iii) The adjudicating authority erred in holding that Appellant had availed Cenvat Credit of CVD in respect of the imported goods declared in bill of entry whereas Appellant had clearly declared that they would avail 100% CVD as Cenvat credit under Rule 3(1) of the Rules in respect of the imported goods classified under CETSH No. 8908.00.00; that Hon'ble Gujarat High Course in order dated 05.07.2012 has held that such fuel oils are the integral part of the vessel and classified under chapter 8908.00.00 of the Customs Tariff Act, 1975; that Rule 3(1) of the Rules, allow such Cenvat credit of such duties paid in accordance with the 1st schedule to the Central Excise Tariff Act read with the Rule 3(1)(vii) of the Rules; that since the specified duty under Rule 3(1)(vii) of the Rules has been paid, they had correctly availed the Cenvat credit.

(iv) The ship had been imported as is where basis with everything on board; that bunkers are terms as 'integral part of the vessel' and accordingly, classified under 8908; that as per Hon'ble Supreme Court's guideline, the stock of bunkers lying on board of the ships imported for breaking are immediately required to be removed from board of the ships to avoid fatal accident and enable to carry out the smooth activities of breaking of ships by using oxygen gas/ LPG gas; that without removing such oils from the board of vessel, manufacturing activities as

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defined under Section Note No. 3 [illegible] of the Central Excise Tariff Act, 1985 cannot be stated that [illegible] goods falling under Chapter 8908 of Central Excise Tariff Act, [illegible] provisions of Section 3(1) of the Customs Tariff Act, 1975, particularly [illegible] of CVD which is specified for availment of Cenvat Credit under Rule 3(1) of the Rules, that such use is to be interpreted with reference to the goods classified under Central Excise Tariff No. 8908.00.00 i.e. the ships imported for breaking up only and not the disputed goods alone as the same has been classified under the said item by the Customs and Central Excise Department; that it is apparent that they had not used the goods covered under Chapter 8908.00.00 of the Customs Tariff Act, 1975/Central Excise Tariff Act, 1985; that they have relied upon [illegible] reported as 2016 (335) NFLT 344 (Tri.-Mumbai) in case of Alcon Instruments Ltd.

(v) The adjudicating authority [illegible] to challenge the duty already determined by the proper Customs Officer, [illegible] as the assessment of CVD is concerned; that findings of the lower adjudicating authority are not correct in as much as they had clearly established that the CVD paid under the provisions of the Section 3(1) of the Customs Tariff Act, 1975 is clearly applicable for availment of Cenvat Credit as provided under Rule 3(1) of the Rules in as much as such rate of CVD has been determined as per the rate of duty as shown against Central Excise Tariff 8908.00.00; that the CBEC Vide Circular dated 29.10.1997 has clearly held that "entire ship except [illegible] are classifiable under 8908 is an input taking part in the activity of ship breaking under Rule 57A of the Central Excise Rules, 1944, that removing [illegible] on board of the ship is directly nexus with the manufacturing activities.

4 Personal hearing in the matter was attended to by Shri N.K. Maru and Shri U.H. Qureshi, Consultants, Customs, Excise, Service Tax and Customs, who reiterated Grounds of Appeal and submitted that their appeal may be decided on the basis of above facts and legal position.

5. I have carefully gone through the facts of the case, the impugned order, the Appeal Memoranda and written submission made by the Appellant. The issue to be decided is whether adjudicating authority had correctly rejected refund or otherwise.

6. I find that the crux of the issue is whether Cenvat Credit of Additional Duty of Customs (CVD) paid on Fuel Oil, Marine Gas Oil (HSD) & Lubricating Oil availed by Appellant was admissible to them in the context that the same were

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not used in the process of manufacture of final excisable products by breaking the ships but were directly taken out and sold in open market and whether the same can be considered as 'input' as defined under Rule 2(k) of the Rules.

8.1 It is on record that as per the Note No. 9 to Section XV (Chapter 72 to 83) of the Schedule I appended to the Central Excise Tariff Act, 1985, the goods and materials obtained by process of breaking up of ships can only be considered as the 'excisable goods' as defined under Section 2(d) of the Act as well as the 'final products' as defined under Rule 2(h) of the Rules so far process of breaking of ship is concerned. As per Rule 3 of the Rules, a manufacturer or producer of final products is allowed to take credit of duties of excise or the Additional Duty of Customs (CVD) paid on any 'input' received in the factory of manufacture of final products for use in, or in relation to, the manufacture of final products. As per Rule 2(k) of the Rules, the word 'input' means all goods used in the factory by the manufacturer of the final products but excludes any goods which have no relationship whatsoever with the manufacture of final products irrespective of classification of the goods under Central Excise or Customs Tariff and whether any goods can be considered as 'input' or not depends on its usage in the process of manufacture of their final products.

8.2 Appellant's contention is that the said 'input' was the imported goods classified under Central Excise Tariff 8908.00.00 for the purpose of levy of CVD being an integral part of the vessel; that while filing bills of entry they have declared that they would avail Cenvat credit of CVD; that CBEC vide Circular dated 28.10.1997 has clearly held that entire ship except ship stores are classifiable under 8908 and is an input taking part in the activity of ship breaking under Rule 57A of the Central Excise Rules, 1944; that disputed goods are classifiable under Central Excise Tariff 8908.00.00 and obtaining/removing the oils from the ship has direct nexus with the manufacturing activities.

8.3 I find that the dispute in question was clarified by CBEC vide Circular No. 37/96 Cus. dated 03.07.1996 (issued from F. No. 512/22/96-Cus. VI) as under:

> *(a) movable assets such as lifting and handling machinery, anchors, navigational equipment, machine tools, firefighting equipment form part of vessel's normal equipment and hence classified u/h 89.08.*
>
> *(b) Fuel and oil contained in the vessel's machinery and engines can also be regarded as forming integral part of the vessels and hence be classified under heading 89.08.*

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(b) Spares parts (such as ...) which are not in a new condition and movable articles ... consignment, crockeryware etc.) should be classifiable ... (i) above (being part of normal equipment of vessel) ... ship breaking Co.

(c) Remaining fuel oil ... mentioned in sub-para (b) above and other ship stores ... is classifiable separately in their own ...

6.3.1 The Hon'ble High Court ... in case of M/s. Priya Holdings (P) Ltd. reported at 2013 (288) E.L.T. ... held that,

"12. As can be seen from ... the Tribunal, after appreciating the evidence ... came to the conclusion that the fuel contained in the engine ... was an integral part of the vessel's machinery and engine ... would fall under sub-para (b) whereas the remaining fuel ... used in other tanks would fall within the ambit of sub-para (c) ... be classifiable under their own separate headings."

6.3.2 The above ... was ... Hon'ble Gujarat High Court in case of M/s. J. M. Industries reported at ... 2014 (221) E.L.T. 380 (Guj.). The Hon'ble CESTAT, Ahmedabad in the case of M/s. A. ... Enterprise 2014 (308) ELT 418 (Tri.-Ahmd.) held that even fuel stored ... engine room are an integral part of vessel's machinery and ... be classified under heading 89.08. The relevant para is re-produced as under.

"4. I heard both sides and perused the records. The issue involved in all these appeals is as to what should be the classification of HSD Oil under the EXIM policy, which is put ashore in the fuel tanks of the vessels brought for breaking. As per the ... dated 26.7.2013 and the orders passed by Commissioner (Appeals), such fuel needs classification under 27101040 of the Import Policy as a restricted item to be imported through State Trading Agencies. ... on the other hand, argued that HSD is not separately imported ... and was found contained in the vessel as ... at the time of purchase and no extra price is paid for such fuel. It is contended that DGFT under F. No. (FC)/(5)(624)/97/EC-PC-2(A), dated 30-6-2012 has opined that surplus fuel stored in the fuel tanks (which are ... outside engine room) forms a part of the ship/vessels imported for breaking up and should be considered as integrated part of the vessel's machinery and is classifiable under 89.05."

6.3.3 The above views of the Hon'ble CESTAT/ High Court were affirmed by the Hon'ble Supreme Court in the case of M/s. Shipping & Allied Industries Pvt Ltd. reported as 2015 (322) E.L.T. A378 (S.C.) has also upheld the final order of High Court wherein it was held that HSD Oil 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(884)/97/BZ/PC-2(A), dated 26.6.2013 and not under respective heading.

6.3.4 Thus, it is beyond doubt that the fuel stored in ship inside engine room form part & parcel of the ship/vessels imported for breaking and are classifiable under Heading 89.08.

6.4 In view of above, fuel and oil contained in the vessel's machinery and engines (inside engine room) are necessarily part of a ship and classifiable under Heading 89.08. The ship cannot sail and reach the ship breaking yard unless the fuel and oil are present on board. Further, fuel and oil are also required on board for generation of electricity for consumption for operations carried out by the ships. What is imported, therefore, is a ship with fuel and oil, which are integral part of it. It is on record that the fuels and oil had not been imported separately, in this case but imported as part of ship stores. Therefore, I hold that when the ship imported for breaking up, the fuels & oils available on ship even as stores form part of the ship and are, therefore inputs.

6.5 It is a common practice that fuel and oil are necessarily required to be removed firstly for the purpose of safety and efficient operation. Therefore, fuel and oil available on board of ship are removed and evacuated for effective and hazardless breaking of the ship. The process of breaking up of ship starts with removing of fuel and oils from the ship as well as other removable articles. Therefore, removal of oil is nothing but initial part of manufacturing process and all the goods including fuel and oils are inputs for the purpose of ship breaking unit. Therefore, CVD paid and availed as Cenvat credit is nothing but CVD paid and availed on inputs for manufacturing process i.e. ship breaking carried out by Appellant. Therefore, I do not find any merit in denying Cenvat Credit of CVD paid by Appellant on the entire ship, imported for breaking. Accordingly, Additional Duty of Customs paid on fuel and oil contained on board of ship is available to them as Cenvat credit for utilization in payment of duty on the goods and material obtained by breaking up of ship.

6.6 It is pertinent to mention here that ships are imported into India for breaking purpose and charged with Customs duty based on the value decided by the seller and the buyer through Memorandum of Agreement based on Light Displacement Tonnage (i.e. L.D.T.) The ship includes fuel and oils, foods stuff, beverages and other removal items used for running of ship. Apart from Customs

duty. Additional Duty of Customs (CVD) is also charged and collected under the belief that Central Excise duty payable on like goods as manufactured in India. The ship breaking units are also having Central Excise registration for removal of goods obtained during breaking up of ships and they pay Central Excise duty accordingly. Thus, CVD charged and collected in lieu of Central Excise duty irrespective of fact that the same is not manufactured by the ship breaking unit but imported with the ship for breaking purpose. Therefore, the entire ship including items on board are inputs for the purpose of Central Excise duty payable by the ship breaking units while removing the same and they pay Central Excise duty as well. Thus, CVD paid at the time of importation of ships is part and parcel of duty element which is available to the ship breaking unit as Cenvat credit and they can utilize the same while discharging their Central Excise duty on the items removed from breaking of ship as well as removal items available on ship including fuels and oils.

7. I find that the intention of the legislature is not to deny Cenvat credit of CVD paid by ship breaking unit at the time of payment of Customs duty and utilization thereof while paying Central Excise duty. Therefore, CBEC issued Circular No. 1014/2/2016-CX dated 01.02.2016 which is re-produced below for ready reference.

Circular No.-1014/2/2016-CX
Dated the 1st February, 2016

F. No. 6/1/2014-CX.3 (Pt.)
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs

New Delhi, dated the 1st February, 2016

To Principal Chief Commissioner/
Chief Commissioner/
Principal Commissioner of
Central Excise and Customs (All)

Web-master, CBEC

Madam/Sir,

Subject: Inclusion of show cause notices issued in relation to levy of CVD on vessels imported for breaking in the "Call-Book"-reg.

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. 19607 of 1995 filed by M/s Shivam Engineering Company and others reported as [2014-TIOL-1563-HC-AHM-CUS]. A SLP has been filed by the department in Hon'ble Supreme Court against this order.

2. In the said judgment, 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 like 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 no additional duty under Section 3(1) of the Customs Tariff Act, 1955 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 like articles no additional duty can be levied under the Customs Tariff Act.

3. In view of above said judgment, trade are following two different practices as enumerated below and are being issued Show cause Notices according to the practice 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 utilizing 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 para 3(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 in law

that a buyer may avail Cenvat Credit, if supplier has paid duty. In this regard following case law may be referred- CCE vs. CF(SA) 2006 (202) ELT 753(Mad HC DB), CCE vs Ranbaxy Labs Ltd. [2006(203) ELT 213(P&H HC DB)], Commissioner of Central Excise, Chennai-I vs CESTAT, Chennai reported as [2006(202)ELT.753(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(N.T.), 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, wooden panels etc. are also generated. These are generally sold as second hand goods by ship breaking units but no excise duty is payable as they do not emerge from a manufacturing process. At the same time ship breaking units are allowed to avail full credit of additional duty of customs paid on the ship when it is imported for breaking. 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 90% of the additional duty of customs paid on ships, boats etc. imported for breaking;

9 Further, amendment in 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 them. The explanation inserted in Rule 6 is as follows: Explanation1- For the purpose of this rule exempted goods or final products as defined in clause (d) and (h) 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(5)(ii) of CENVAT Credit Rules, 2004 or under rule 6 of CENVAT Credit Rules, 2004. To resolve the conflict, the provision restricting CENVAT credit to 85% under proviso to rule 3(5)(ii) 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 but 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(5)(ii) 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

7.1 Para 3(i) clearly covers the issue involved in the present appeal. CBEC has also mentioned the remedy for Show Cause Notices issued for denial of Cenvat credit of CVD by mentioning that:

"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 in law that a buyer may avail Cenvat Credit if supplier has paid duty. In this regard following case law may be referred- CCE vs. CEGAT [2006 (202) ELT 753(Mad HC DB)], CCE vs Ranbaxy Labs Ltd. [2005(203) ELT 213(P&H) HC Del], Commissioner of Central Excise, Chennai-I vs. CEGAT, Chennai reported as [2005(202)ELT.753(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."

[Emphasis Supplied]

8. Therefore, the issue is no more res-integra in view of Board's Circular dated 01.02.2016. Accordingly, I set aside the impugned order and allow the appeal filed by the Appellant

9 अपीलकर्ताओं द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeal filed by the Appellant stand disposed off in above terms.

(Gopi Nath)
Commissioner (Appeals)

By Speed Post

To

1. M/s. Laxmi Steel Rolling Mills (Unit-II)
   Plot No. 57, Ship Breaking Yard, Alang,
   Dist Bhavnagar

Copy to:

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for information please.
2) The Commissioner, GST & Centre. Excise, Bhavnagar Commissionerate. Bhavnagar for necessary action
3) The Asst Commissioner, GST & Central Excise, Bhavnagar 2 for necessary action.
4) Guard File