



आयुक्त (अभिज्ञ) आ करोंपर अपील करने वाले सेवा कर की अपील बोर्ड
OFFICE OF THE COMMISSIONER GENERAL OF APPEALS IN CUSTOMS & EXCISE



अभिज्ञ सेवा कर की अपील करने वाले सेवा कर की अपील बोर्ड

अपिल करने वाले सेवा कर - Appeal for the Ship Yards

आयुक्त (अभिज्ञ)

तेलंगणा, आ. आ. - 500003, आ. आ. 1-2

100, 1100, 1200, 1300, 1400, 1500, 1600

अभिज्ञ सेवा कर की अपील बोर्ड

अभिज्ञ सेवा कर की अपील बोर्ड Appeal for the Ship Yards	आपिल करने वाले सेवा कर की अपील बोर्ड Appeal for the Ship Yards	दिनांक Date
आयुक्त (अभिज्ञ)	आयुक्त (अभिज्ञ)	15.05.2017

अभिज्ञ सेवा कर की अपील बोर्ड (Appeal for the Ship Yards)

आयुक्त (अभिज्ञ) सेवा कर की अपील बोर्ड - 15-2017-19

आपिल करने वाले सेवा कर की अपील बोर्ड Date of Issue	15.05.2017	आपिल करने वाले सेवा कर की अपील बोर्ड Date of Issue	22.06.2017
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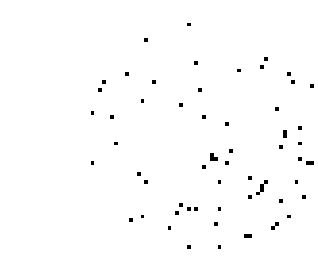
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== ORDER IN APPEAL ==

The present appeal has been filed by M/s. Atanvialone Ship Breakers Pvt. Ltd., Plot No. 68, 6/9 Resolving Yard, Along, Dist: Bhanuagar (hereinafter referred to as 'the appellant') against Order-in-Original No.45/ACRUTALIB/VR/2016-17 dated 13.02.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central Excise, Kura, Bhanuagar (hereinafter referred to as 'the adjudicating authority').

2.1 The facts of the case are that the appellant is availing the benefit of Cenvat Credit as per the Cenvat Credit Rules, 2004. During the Audit by the Central Excise officers for the period from January 2014 to December 2014 noticed that appellant has availed Cenvat Credit amounting to Rs. 9,20,881/- of the Additional duty of Customs i.e. Countervailing Duty (CVD) on the basis of document i.e. worksheet prepared by the appellant themselves. Further, as envisaged under Notification No. 03/2011-CE(MT) dated 01.03.2011, cenvat credit shall not be allowed in excess of 15% of the additional duty of customs paid under sub-section (1) of Section 3 of the Customs Tariff Act, on ships, boats and other floating structures for breaking up falling under tariff item no. 89080000 of the first Schedule to the Customs Tariff Act. The Board wide Circular No. 57/98-Cus., dated 03.07.1998 mentioned that fuel and oil contained in the vessel's machinery and engines can only be regarded as forming integral part of the vessel and to be classifiable along with the vessel under heading no. 88.03. The remaining fuel and oil has to be classified separately in their own appropriate heading. The Audit party noticed that the appellant had already availed CENVAT credit of Rs. 4,65,02,667/- i.e. 65% of the CVD as per restriction contained vide Notification No. 3/2011-CE(MT) dated 01.03.2011 in respect of Bill of Entry No. 38N/13/2014-15 dated 13.08.2014 filed on the import of vessel namely 'THERESA ANTARCTIC' and the same was reflected in the Cenvat credit account in their monthly return for the month of August, 2014. The appellant availed Cenvat credit of Rs. 9,20,881/- of CVD on the basis of worksheet prepared by them in regard of above referred Bill of Entry and has taken credit of duty assessed considering bunker (fuel & oil) contained in the Tank engine room as classified under Chapter 27 (3000). The Appellant has availed credit, keeping reliance upon the High Court judgment (2012;11) TMI 532- Gujarat High Court 2013 (258; ELT347;CUG)-Duties (Goods Control Reference No. 14 of 2004) dated 05.07.2012 in the case of M/s. Piya Holding (P) Ltd wherein the bunkers containing oil were to be treated as part of the vessels' machinery and were classifiable under heading No. 88.03 of the schedule to the Customs Tariff Act, 1975.

2.2 The above observations led to issuance of Show Cause Notice No.V.CE/15-16/Audit II/Additional Commissioner 026/15-16 dated 29.01.2016, which was adjudicated by the lower authority i.e. impugned order, wherein, it confirmed

demand of Central Excise duty of Rs.3,20,881/- Under Section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') along with interest under section 11AA of the Act and Imposed penalty of Rs. 9,20,881/- Under Section 11AD of the Act read with Rule 15(2) of the Central Excise Rules, 2004.

3. Being aggrieved with the impugned order, the appellant has preferred the present appeal contending inter-alia that the impugned order is not proper and legal and the same has been passed by ignoring the provisions of Rule 3(1)(c) of the Central Excise Rules, 2004 read with the settled case laws.

3.1 It is admitted fact that the dispute under reference has been taken place on account of EAR No. A-14117-11 of 30386/2014-15 dated 12/01/2015. In this Audit, it was pointed out that your Appellant had wrongly availed Central Credit of Rs. 9,20,881/- on the basis of improper Centralable documents by contending the provisions of Rule 3(1)(c) of the Central Excise Rules, 2004. The Rule 3 of Central Excise Rules, 2004 provides that valid documents 'Accounts and Returns' for availing Central Credit as provided under the provisions of Rule 2 read with Rule 4 of the Central Excise Rules. The provisions of Rule 3(1)(c) provided for list Centralable documents which reads as;

"a bill of entry; or",

3.2 The Appellant has made the required 'CFMVAT DECLARATION' in compliance of Rule 3 of the Central Excise Rules, 2004 in respect of the goods covered under tariff item 8508 00 00 of the First Schedule to the Customs Tariff Act. Accordingly availed the Central Credit on the "bill input" as defined under Rule 2(k) of the Central Excise Rules, 2004. In the present case, the ship MT Theresa Antarctic has been classified under CET as 86030000. For better understanding reproduced the provisions of erstwhile Rule 3(1)(c) of the Central Excise Rules, 2004 as under:-

"the additional duty leviable under Section 3 of the Customs Tariff Act equivalent to the duty of excise specified under clause (i), (ii), (iii), (iv), (v), (vi) and (vii) provided that CFMVAT credit shall not be allowed in excess of eighty five per cent of the additional duty of customs paid under subsection (1) of Section 3 of the Customs Tariff Act, on ships, boats and other floating structures for breaking up falling under tariff item 8508 00 00 of the First Schedule to the Customs Tariff Act".

3.3 Subsequent to the above factual position, Appellant has noticed the judgement dated 05.07.2012 passed by the Hon'ble High Court of Andhra Pradesh in the case of M/s. Priya Hauling (P) Ltd v. CCE Prevention, reported in 2013 (289) ELT 347 (Gui) wherein it was held that;

Tribunal's finding based on the Book titled "Ship Design and Construction" that Fuel and oil contained in the engine department tanks is always associated and connected with the machinery and engine of the ship which form an integral part of the vessel and hence would be classifiable under Heading No. 89.08 ibid upheld". The department has not filed any Appeal against the said judgment dated 35.07.2012. The department is assessing such duty of customs in respect of quantity of Fuel Oils, Lube Oils containing in inside in the engine room under the tariff item 8909 00 00 of the First Schedule to the Customs Tariff Act. Therefore, your Appellant has reworked out the duty of customs of the said oils by considering the same under the said Tariff Item No. 89.08 of the Customs Tariff Act read with the Central Excise Tariff Act, 1985. The reworking out the customs duty on the said oils has not affected the total customs duty of Rs. 7,08,73,840/- paid vide challan dated 14.03.2014. The eligibility of Cenvat Credit in view of the said order dated 05.17.2012 passed by the Hon'ble High Court of Guj. Ahmedabad has been worked out by considering the legal position that no such duty was levied on such bunkers under the Chapter No. 27 of the Customs Tariff Act, 1975, but was required to be paid by classifying said bunkers under Tariff Item 89.08 of the Customs Tariff Act, 1975. The said worksheet was nothing but "part and parcel of the Bill of Entry". The department had not denied that the amount of Cenvat Credit under dispute had not been paid on the bunkers lying inside in the engine room. Further too, your Appellant has only declared for availing the Cenvat Credit facility in respect of the goods falling under Chapter Heading No. 89.08. The bunkers lying inside the engine room has clearly classified under Chapter Heading No. 89.08 of the Customs Tariff Act read with the Central Excise Tariff Act, 1985. Your Appellant had not wrongly availed the Cenvat Credit, but availed in accordance with the provisions of Rule 2(k), 3 and 8(i)(c) of the Cenvat Credit Rules, 2004. Therefore, the impugned order is not proper and legal. The issue under reference is raised on the basis of the records, returns maintained by your Appellant from line to line. All such particulars were recorded in the respective register of the business carried out by your Appellant. Therefore, your Appellant was not at all liable for penal action under Rule 15(2) of the Cenvat Credit Rules, 2004 read with the provisions of Section 11A(i) of the Central Excise Act, 1944 also SCN issued is time barred.

3.4 The appellant relied upon the following case laws:-

- (a) Maharashtra State Ltd Vs UOI-192 ELT 32(Dum. FC, BE), 2008 (20) ET 451 (SC)
- (b) Kerala State Electric Corp. Vs CCE-1993(34)ELT
- (c) Indian Oil Corp. Ltd. Vs CCE-2006(208)HLT 539
- (d) DCL Electric Ltd. vs CCE Faridabad-1-2015(344) ET 464 (Trib.Chennai)
- (e) CCE Vs CMS Computers-2005(1747) HLT 21 (SC-5 Member Bench)
- (f) S.Kumar Ltd. Vs CCE-1(2007)211ELT 124(CH-61A1)

4. The personal hearing in the matter was fixed on 07.02.2016. Since, the appellant

vide letter dated 09.02.2018 requested to fix another date of personal hearing therefore, next date of personal hearing was fixed on 12.02.2018 and 22.02.2018. But no body from the appellant side attended personal hearing on the given dates. Therefore again as per appellant request letter dated 20.03.2018, further personal hearing opportunity was given on 30.04.2018 but nobody from the appellant side was turned up. Since enough opportunities were given to appellant for personal hearing, but they did not show the same, accordingly I take up this matter as per available record.

5. Subsequently, in pursuance of Board's Notification No.20201/4-C Ex (VT) dated 17.10.2017 read with Board's Order No.05/2017 ST dated 16.11.2017 the instant appeal has been taken on hand for passing Order- in-Appeal.

6. I find that in case of instant appeal, the impugned order was received by the appellant on 15.02.2017 and date of filing of appeal is 02.04.2017. Hence, the appeal was heard filed within the stipulated time period and there is no delay in filing the appeal. The Appellant also paid Rs. 69,075/- (7.5% of duty demand) vide Chalan No. 141 dated 24.03.2017, hence condition of pro-deposit also stand fulfilled.

7. I have gone through the impugned order, appeal memorandum and written submissions made by the appellant. The billed issue to be decided in the present appeal is whether Cenvat Credit of Rs. 9,20,881/- availed by the appellant is correct or otherwise and whether interest thereon and penalty imposed vide impugned order is correct or otherwise?

8. The Appellant has already availed CENVAT Credit of Rs. 4,58,52,367/- i.e. 65% of the CVD as per regulation contained vide Notification No. 3/2011 CE(MT) dated 01.03.2011 in respect of the Bills of Entry No. 839/13/2014-15 dated 13.08.2014 filed on the import of vessel namely "THE BHA Ab. TANKER" and the same was reflected in the CENVAT credit account in their monthly return for the month of August, 2014. However, in addition to above, the Appellant also availed Cenvat Credit of Rs. 4,20,881/- of CVD on the basis of a worksheet prepared by them in respect of above referred Bill of Entry. I find from the said worksheet prepared by the said Appellant that they has taken credit of duty assessed considering bunker (fuel & oil) contained in the Tanks engine room as classified under Ch 27 under their respective sub heading 27100000. The said Appellant has taken such credit keeping reliance upon the judgment [2012 (11) 141 532 - Gujarat High Court - 2012 (104) 211 347 (50)] - CB-Customs (Gst) Central Reference No. 14 of 2014] dated 08.01.2012 pronounced by the Hon'ble High Court of Gujarat at Ahmedabad in the case of M/s. Praga Holding (P) Ltd versus Commissioner of Customs, Proventis, Jamnagar, wherein the bunkers containing oil were to be treated as part of the vessel's machinery and were classifiable under Heading No. 88.09 of the Schedule to the Customs Tariff Act, 1975.

9. In the present case, as per Rule 91(i) of the Central Credit Rules, 2004, the appellant can take Central Credit on a Bill of Entry or on following documents:-

- (d) a certificate issued by an appraiser of customs in respect of goods imported through a Foreign Post Office; or
- (e) a challan evidencing payment of service tax by the person liable to pay service tax under sub-clauses (ii), (iv), (v) and (vi) or clause (3) of sub-rule (1) of rule (2) of the Service Tax Rules, 1994; or
- (f) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of September, 2004; or
- (g) an invoice, bill or challan issued by an input service distributor under rule 4A of the Service Tax Rules, 1994.

Provided that the credit of additional duty of customs levied under sub-section (5) of section 5 of the Customs Tariff Act, 1975 (51 of 1975) shall not be allowed if the invoice or the supplementary invoice, as the case may be, bears an indication to the effect that no credit of the said additional duty shall be admissible.

In the instant case, I find that the Appellant has taken CENVAT credit on the worksheet prepared on the basis of Bill of Entry No. 86Y/37/2014-15 dated 13.08.2014 filed on Import of the vessel namely 'THE REZA ANTALECTIC'. However, in the terms of Rule 9(1) of the CENVAT Credit Rules, 2004, a worksheet prepared by the Noticee is not an admissible document for availing CENVAT Credit. Moreover, the proviso to Section 140 in the Customs Act, 1962 states no amendment of a bill of entry or a billing bill or bill of export shall be so authorized to be amended after the imported goods have been cleared for home consumption except on the basis of documentary evidence which was in existence at the time the goods were cleared. In the instant case the assessed bill of entry has to be the proper document, not a calculation sheet prepared by the Noticee. Therefore, I find that the appellant has wrongly availed CENVAT Credit of Rs. 8,23,891/- and in terms of Rule 9 of the CENVAT Credit Rules, 2004 the contention of the Appellant is not maintainable as they cannot avail the Central Credit on the basis of calculation sheet prepared by them which is not a valid document.

10. Now coming to the second contention of Appellant whereby they are taken such credit keeping reliance upon the judgment [2012 (11) TMI 532 – Gujarat High Court – 2013 (218) E.L.T 347 (Guj.) – CE-Customs (Joint Cases Reference No. 14 of 2004) dated 05.17.2012 pronounced by the Hon'ble High Court of Gujarat at Ahmedabad in the case of M/s. Priya Holding (P) Ltd versus Commissioner of Customs, Freeport, Jamnagar wherein the bunkers containing oil were to be treated as part of the vessel's machinery and were classifiable under Heading No. 88.09 of the Schedule to the Customs Tariff Act 1975. They prepared worksheet and they had taken credit of duty assessed considering bunker (fuel & oil) contained in the Tardis engine room as classified under CH 27 under their respective sub-heading 2710000]. I find that said judgment of Hon'ble High Court of Gujarat pronounced on 05.07.2012 and Bill of Entry No. 86Y/37/2014-15 dated 13.08.2014 filed on the import of vessel namely 'THE REZA

ANTARCTIC after lapse of almost two years of said judgment. The Appellant in Para 9 of their Appeal Memorandum stated that after issuance of the said judgment dated 05.07.2012, the department has started to classify such tanker under Chapter Heading No. 88.00 instead of under Chapter 27 in which Appellant use said duty. Therefore on this ground the Appellant is not eligible to take Concessional Credit or work sheet prepared by them. Moreover, the Appellant already availed 85% of the Concessional Credit of CVD as per restriction contained in the Notification No. 3/2011-CENT; dated 01.03.2011 in respect of the said Bill of Entry. I also find that as per the said High Court judgment, engine room tanks (bunkers) containing oil were to be treated as part of the vessel's machinery and were classifying under Heading No. 84.09 of the Schedule to the Customs Tariff Act, 1944 and no separate duty is leviable thereon. However other tanks containing fuel and oil did not form part of the LDT of the vessel and had to be assessed under their own heading and duty had to be charged accordingly. If appellant has found that Bill of Entry was assessed under wrong classification, they were required to raise objection at the time of assessment and, in spite of doing the same, the Appellant has separate worksheets of their own without getting amended by the Customs and had availed Concessional Credit of CVD on fuel and oil assessed under Chapter 2710000. Further I find that Hon'ble High Court vide above mentioned order dated 05.07.2012 has decided the issue of classification of engine room bunker under Chapter Heading No. 88.00 and not the issue of Concessional Credit. Considering this fact, I find that Concessional Credit is eligible on fuel and oil subject to assessed under heading no. 88.00 only as per the said Hon'ble High Court order. Remaining part of fuel and oil which is not treated as part of the vessel and assessed under sub heading 2710000, the Concessional Credit is not admissible on it.

11. The said Appellant in their defence also contended that demand was issued to them on the basis of Audit report dated 12.05.2015 and Range Superintendent was aware that return filed by them was duly self assessed and pertaining for the month of December 2014, whereas the SCN was issued on 28.01.2012. In view of this factual position SCN was time barred. I find that Appellant availed 85% Concessional Credit of CVD in the month of August 2014 on Bill of Entry No. 8BY1457/2014-15 dated 13.08.2014 filed on the import of vessel namely 'TERESA ANTARCTIC'. Concessional Credit of Rs. 5,20,581/- taken by the Appellant on the basis of work sheet prepared by themselves in the month of December, 2014. This fact came into notice to department after scrutiny of documents by the audit party. Hence, extended period of five years is correctly invoked by the lower adjudicating authority under the proviso to Section 11A (4) of the Central Excise Act, 1944, to recover the credit wrongly availed. I find that the interest at appropriate rate on the amount so recoverable also liable to be recovered from the Appellant under the provisions of Section 11A(A) of the Central Excise Act, 1944 read with Rule 14 of the Concessional Credit Rules 2004. I also find that penal action under the provisions of Section 11AC of the Central Excise Act, 1944 read with Rules 15 of the


Central Credit Rules, 2004 has been correctly taken by the lower adjudicating authority.


12. I have also carefully gone through all the case laws cited by the Appellant and find that none of them are applicable in the present as none of the cases are dealing with wrong availment of CENVAT Credit of fuel lying in the engine room. Therefore, I deny all the contentions made by the Appellant.

13. Due to above reasons, the continuation of the above demand alongwith the interest under Section 114A and the penalty under Section 11AC of the Central Excise Act, 1944 appear logical.

14. In view of the above facts and circumstances, I uphold the entire demand of the impugned order No.45/AC/RURAL/DVR/RRJ2016-17 dated 15.02.2017 confirming the duty, interest and penalty on marks and reject the appeal filed by the appellant.

15. The appeal filed by the appellant stands disposed of in above terms.

સચીવ,

 ડાયરેક્ટર (આવકો),
 સેક્ટર (સેન્ટ્રલ એક્સાઇઝ)


 (P. A. Vasava)
 Commissioner (Appeals) /
 Commissioner
 CGST & Central Excise,
 Kutch (Gandhinagar)

F. No. V.275/BVF/2017

Date: 5.02.2018

By B.P.A.D.

To,
 M/s. Avani Manal or Ship Breakers (P) Ltd.,
 Plot No. 63, Ship Recycling Yard, Alang,
 Dist: Bhavnagar.

Copy to:

- 1) The Principal Chief Commissioner, CGST & Central Excise Ahmedabad.
- 2) The Dy. Asst. Commissioner, Central Excise Kutch Division, Bhavnagar.
- 3) The Dy. / Asst. Commissioner (Ops.), H.O., Bhavnagar - for uploading on website
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