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Appeal / File No.	O.I.O. No.	Date
[illegible]	[illegible]	[illegible]

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

BHV-EXCUS-000-APP-167-TO-168-2018-19

आदेश का दिनांक / Date of Order:	06.07.2018	जारी करने की तारीख / Date of issue:	09.07.2018

कुमार संतोष, [illegible]

Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

A. [illegible]

[illegible]

D. अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellants & Respondent :-

1. M/s Ashwin Corporation, Plot No. 77, Ship Breaking Yard Alang, Dist. Bhavnagar

2. Shri Vishnukumar Gupta, Authorised signatory of M/s Ashwin Corporation.

[illegible]

[illegible]

(A) [illegible]

[illegible]

(i) [illegible]

[illegible]

(ii) [illegible]

[illegible]

(iii) [illegible]

[illegible]

(B) [illegible]

[illegible]

(i) [illegible]

(j) [illegible]

(k) [illegible]

(l) [illegible]

(m) [illegible]

(n) [illegible]

(o) [illegible]

(p) [illegible]

(q) [illegible]

(r) [illegible]

:: 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. 05/AC/Rural/BVR/R&S/2017-18 dated 11.05.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner of Central Excise, Rural Division, Bhavnagar (hereinafter referred to as "the lower adjudicating authority"):

Sr. No.	Appeal No.	Appellant No.	Details of the Appellant
1	V2/108/BVR/2017	Appellant No.1	M/s [illegible] Corporation, Plot No. 77, Ship Breaking Yard, Alang, Dist. Bhavnagar.
2	V2/109/BVR/2017	Appellant No.2	Shri Mehulkumar Gupta, Authorized Signatory of M/s [illegible] Corporation, Plot No. 77, Ship Breaking Yard, Alang, Dist. Bhavnagar.

2. The brief facts of the case are that Appellant No. 1 is engaged in breaking/ dismantling of ships imported for breaking purpose at their plot at the Ship Breaking Yard, Alang holding Central Excise Registration No. AAAFA[illegible] 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"). Ships imported for breaking purpose normally contained many items viz. fuel oil, high speed diesel oil (marine gas oil), Lub. 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 a ship. 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, HSD Oil (MGO), Lub. Oil, (ii) other consumable articles like food, beverages, toiletries etc. and (iii) the "Ship For Breaking Purpose" (excluding the goods and materials separately declared as mentioned at (i) & (ii)) and customs duty is accordingly assessed thereon.

2.1 Note No. 9 to Section XV of the Schedule I 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 I 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 'the 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 As per Rule 3 of the Rules, a manufacturer or producer of final products is allowed to take credit of duties of excise of the additional duty of customs (CVD) paid on any "input" received by the manufacturer for use in, or in relation to, the manufacture of final products. As per proviso to Clause (vii) of Sub-rule (1) of Rule 3 of the Rules, Cenvat credit was not allowed in excess of eighty five percent of the additional duty of customs (CVD) paid on ships imported for breaking purpose. However, the said proviso was omitted with effect from 01.03.2015 vide Notification No. 01/2016-C.E. (N.T.) dated 01.02.2016. Thus, full Cenvat credit of the additional duty of Customs (CVD) paid on ships imported for breaking purpose was available to the importer of ships for breaking purpose w.e.f. 01.03.2015

2.3 On the basis of information that Appellant No. 1 has availed Cenvat credit of the Additional Duty of Customs (CVD) paid on Fuel Oil, M.G.O. (H.S.D. Oil) & Lub. Oil etc. contained in the ships imported by them for breaking purpose, an inquiry was initiated. Appellant No. 2, authorized signatory of Appellant No. 1 produced the relevant documents viz. ER-1 returns for the month of February-2016 to August-2016 and ledger of Cenvat Credit Register (Form RG 23A Part-II) for the months from February-2016 to August-2016 alongwith Bill of Entry No. 5297/199/2015-16 dated 19.02.2016 in respect of M.V. GIANT VISION and B.E. No. 5297/14/2016-17 dated 11.04.2016 in respect of ship M.V. CARIBE PEARL and a statement dated 25.11.2016 of Appellant No. 2 was also recorded. Appellant No. 2 in his statement stated that as per the factory act, they were not allowed to store oil and fuels at the yard and hence oil and fuels were removed in tankers/barrels and then sold directly to the registered dealers and/or to the actual users; that they took Cenvat Credit equivalent to 100% of the total duty paid under CTH 8908 as provided under the Rules; that they taken the credit on bunker (Fuel Oil/ Marine Gas Oil (HSD), Lub Oil) lying inside engine room in respect of vessels imported by them and had utilized the same during February and April, 2016; that they had taken credit of Cenvat credit in respect of Fuel Oil/ Marine Gas Oil, Lub. Oil as the same was filed under Chapter heading 8908.

Appellant No. 1 vide letter dated 25.11.2016 informed that they had used part quantity of HSD Oil Imported per vessels MV Orient Vision and MV Caribe Pearl and submitted copies of "FUEL CONSUMPTION VOYC" as well as log of operating of D. G. Set, Winches, Cranes etc. at their plot.

2.4 The following observations were made by the investigation:

(i) As per the Note No. 9 to Section XV (Chapter 72 to 83) of the Schedule I appended to the Customs Tariff Act, 1975, the goods and materials obtained by process of breaking up of ships can only be considered as the 'consumable goods' as defined under section 2(d) of the Act as well as the 'final products' as defined under Rule 2(f) of the Rules so far process of breaking of ship is concerned.

(ii) 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 such 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.

(iii) Appellant No. 2 in his statement dated 26.11.2016 agreed that immediately after reaching of a vessel at their ship breaking plot, all the fuels and oils are removed from the vessel and sold out without storing the same and without using it (except a few quantity of HSD Oil used as fuel for operating of D. G. Set, Winches, Cranes etc. at their ship breaking plot) in the process of obtaining goods and materials by breaking up of ship.

(iv) From ER-1 returns filed by Appellant No. 1, it cannot be ascertained whether the Cenvat credit taken were admissible or not as per the provisions of Rules in as much as ER-1 return depicts only the figures of opening balance, Cenvat credit taken and utilized and closing balance.

(v) Appellant No. 1 had taken Cenvat credit of the Additional Duty of Customs (CVD) paid on 'Fuel Oil, High Speed Diesel' (HSD) for running of supporting tug

fact that the same were not used in the process of obtaining excisable goods and materials by breaking up of ship and these facts were noticed only at the time of investigation.

(vi) As per Rule 9(5) of the Rules, a manufacturer of final product is required to maintain proper record for the receipt, disposal, consumption and inventory of the input and the burden of proof regarding the admissibility of Cenvat credit shall lie upon the manufacturer taking such credit.

(vii) As per Explanation III to sub-rule (3) of Rule 3 of the Rules, no Cenvat credit shall be taken on duty or tax paid on any goods and services that are not inputs or input services.

(viii) Therefore, Cenvat Credit of Rs. 17,30,253/- taken by Appellant No. 1 of Additional Duty of Customs (CVD) paid on fuel oil, high speed diesel oil (H.S.D.) & Lub. Oil (inside engine room bunker) was wrong inasmuch 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 to open market therefore the same cannot be considered as inputs as defined under Rule 2(k) of the Rules.

2.3 Show Cause Notice No. V.73/[illegible]/Rural/2016-17 dated 20.06.2017 was issued to both Appellants wherein it was proposed to demand and recovery of wrongly availed Cenvat Credit of Rs. 17,30,253/- as per the provisions of Rule 14(1)(ii) of the Rules read with Sub-section (4) of Section 11A of the Act from Appellant No. 1. 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. 17,30,253/- under Rule 14(1)(ii) of the Rules read with Section 11A(4) of the Act and also imposed penalty of Rs. 17,30,253/- 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.

3. Being aggrieved with the impugned order, Appellant No. 1 and 2 preferred these appeals on various grounds as under:

3.1 The impugned order is not proper or legal as same has been passed in 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(a), 2(b) of the Rules and Section Note No. 2 of Section XV of the Central Excise Tariff Act, 1985. The Inf Input was the imported goods which have been classified under Central Excise Tariff item No. 8906.00.00 for the purpose of levy of CVD under the 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 on 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 that the goods classified by the Customs Department under Chapter 27 is not the input and not availed Cenvat credit or CVD paid in respect of such oils/bunkers classified under Chapter 27 and thus they correctly availed the Cenvat credit under Rule.

3.2 The disputed goods have been classified under CETH 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 04.07.2013 read with the DFCT's letter dated 26.06.2013 and further read with the assessment of Bills of Entry assessed by the proper Customs Officers that at the time of presenting the Bill of Entry, Appellant No. 1 has declared that they would avail Cenvat credit on the goods falling under CETH 8908.00.00 and proper Customs Officer assessed the duty accordingly including the said CVD; that the goods falling under CETH 8908.00.00 are the Inf Input as specified under Rule 2(k)(iv) of the Rules which consist the duty of excise on such goods as specified under clause (b), (c), (d), (e), (f), (g) and (ga) levied under various Acts and thus they correctly availed the Cenvat credit under Rule as it was reversed under protest due to heavy pressure of the Department.

3.3 The adjudicating authority erred in holding at Para 3.2 of the impugned order that Appellant No. 1 had availed Cenvat Credit to the extent of 85% of CVD in respect of the imported goods declared in Bill of entry wherein Appellant No. 1 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 the adjudicating authority erred at para 3.4 of the impugned order by relying upon Circular No. 37/2006-Cus. dated 10.07.2006

which was pending but ready to audit covering the issue of levy of Customs Duty on the basis of Light Displacement Tonnage (LDT) of the ship imported for breaking; that Hon'ble Gujarat High Court in order dated 05.07.2017 has held that such fuel oils are not 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; that findings recorded by the lower adjudicating authority at para 3.5.4 of the impugned order is not correct as the duties of customs and duty of Central Excise are levied on the imported goods specified in the respective tariff Act so far as the levy of CVD is concerned; that levy of duties always depend upon the goods specified in the said Tariff Acts and the Cenvat credit is depending upon the levy of Central Excise duty and levy of CVD on the specified goods as specified in the Customs Tariff Act; that the adjudicating authority has wrongly applied the Rule 9(2) of the Rules.

3.4 The ships had been imported as is where basis with everything on board; that bunkers are forms an integral part of the vessel and accordingly, classified under 8908, the 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 defined under Section Note No. 9 of Section XV of the Central Excise Tariff Act, 1985 cannot be started; that in their case input is the goods falling under Chapter 8908 of Central Excise Tariff read with the provisions of Section 3(1) of the Customs Tariff Act, 1975, pertaining to levy 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 as 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 not true 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 rely on judgment reported as 2016 (334) ELT 344 (Tri.-Mumbai) in case of ABC International Ltd.

3.5 The adjudicating authority has tried to challenge the duty already determined by the proper Customs Officer so far as the assessment of CVD is concerned; that findings of the lower adjudicating authority at para 3.5.5 of the impugned order are not correct inasmuch 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 inasmuch 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 20.10.1997 has clearly held that removal of oils except ship store 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 oils from the board of the ship is directly nexus with the manufacturing activities; that the statement of the partner of Appellant No. 1 has misconstrued by the adjudicating authority; that meaning of "use" is to be understood technically looking to the manufacturing process; that the 'manufacture' includes series of processes which are incidental or ancillary to the completion of manufacture process; that manufacture involves series of "processes"; that the process in manufacture or in relation to manufacture implies not only the 'production' but the various stages through which the raw material is subjected to change by different operations'; that they rely on judgment in case of Rajasthan Chemical Works reported as 1991 (55) ELT 444 (SC); that the adjudicating authority erred in recording findings at para 3.5.6, 3.5.7 of the impugned order.

3.6 The lower adjudicating authority erred in relying on judgment of [illegible] Ship Breaking Corporation which is not applicable however judgment reported at 2009 (240) E.L.T. 135 (Tri. Mumbai) is applicable in this case; that as an evidence they refer to Bill of Entry No. SBY/75/2015-16 dated 26.05.2015 filed by M/s. Ghanshyam Gokalchand Ship Breakers, Plot No. 38, SBY, Alang classifying remaining bunkers under the engine room or outside the engine room but the proper Customs Officer has classified such oils lying inside the engine room under Central Excise Tariff No. 8908.00.00 and assessing officer has passed a remark on the body of the said Bill of Entry dated 26.06.2015 as "Re-assessed as bunkers contained in the outside tanks classifiable under respective heading in terms of Circular No. 37/96-Customs dated 03.07.96"; that the Hon'ble CESTAT Order No. A/11210-11310/2017 dated 08.07.2017 which has been confirmed by Hon'ble Supreme Court have held that surplus bunkers classifiable under 89.08 of the ITC (HS), however, classification of same goods under Customs Tariff Act is sel

domain of customs authorities and therefore, outside the bunkers provisionally assessed under Ch. 72 of CTH."

4.4 They had not suppressed any facts and circumstances as they had declared the intention for availing the Cenvat credit on the goods classified under Central Excise Tariff No. 8908.00.00 at the time of presenting the bills of entry; that department was well aware that ship breaking units have availed the Cenvat credit; that present issue was pertaining to the interpretation of law which was decided by the Customs Department in their favour; that they rely on Circular No. 1014/2/2016-CX dated 01.02.2016; that at the time of recording of statement of Appellant No. 2, said Circular was in existence which implies that subject Show Cause Notice was wrongly issued to impose penalty; that Appellant No. 2 was not liable for penalty under Rule 15A as the Department was well aware with the issue under dispute since the issuance of said Circular dated 01.02.2016; that the adjudicating authority has passed the impugned order in gross violation of judicial discipline as held in judgment reported at 2017 (346) ELT 481 (Tri. Ahmd.) in case of Shalu Synthetics Pvt. Ltd.; that penalty under Section 11AC of the Act is not imposable if the issue is relating to interpretation of the provisions of the Act; that they rely on judgment reported as 2004 (163) ELT 14 (CESTAT), 2005 (184) ELT 61 (CESTAT).

4. Personal Hearing in the matter was attended by Shri [illegible], Consultant on behalf of both Appellant No. 1 & 2 and reiterated the grounds of the appeals and submitted that he is not to add or modify any submission made therein.

Findings:

5. I have carefully gone through the facts of the case, the impugned order, the Appeal Memoranda and written submissions made by both Appellants. The issue to be decided is as to whether:

(i) Cenvat Credit of Rs. [illegible] taken by Appellant No. 1 [illegible] is correct or required to be recovered from Appellant No. 1;

(ii) Imposition of penalty on Appellant No. 1 & Appellant No. 2 is correct or otherwise.

6. I find that the crux of the issue is that the Department is of the view that Cenvat Credit of Additional Duty of Customs (CVD) paid on fuel oil, high speed diesel oil (H.S.D.) & Lub. Oil (inside engine room bunker) availed by the

Appellant No. 1 was not available to the Service Tax Service were 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 thus same cannot be considered as 'input' as defined under Rule 2(k) of the Rules.

6.1 It is on record that as per the Note No. 9 to Section XV (Chapter 72 to 83) of the schedule to 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(f) of the Rules so far process of breaking a 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. Inspection or 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. The Appellant No. 2 in his statement dated 25.11.2010 deposed that immediately after beaching of a vessel at their ship breaking plot, all the fuels and oil were removed from the vessel and sold out without storing the same and without using it (except a few quantity of HSD Oil used as fuel for operating of D. G. Set, Winches, Cranes etc. at their ship breaking plot) in the process of obtaining goods and materials by breaking up of ship.

6.2 On the other hand contention of the Appellant No. 1 is that 'input' was the imported goods classified under Central Excise Tariff 8905.9000 for the purpose of levy of CVD being an 'integral part' of the vessel that while 'flag bills' of entry they have declared that they would avail Cenvat credit of CVD. That CBEC vide Circular dated 28.11.1997 has clearly held that entire ship except stores are classifiable under 8905 is an input taking part in the activity of ship breaking under Rule 57A of the Central Excise Rules, 1944; that ship that goods are classifiable under Central Excise Tariff 8905.9000 and automatically owing the oils from the ship is directly relate with the manufacturing activities; that the oil obtained/recovered from the vessel is to be termed as non-excisable

goods, but the same are to be termed as by products emerged during carrying out manufacturing process; that as an evidence they refer to Bill of Entry No. SBY/75/2015-16 dated 26.06.2015 filed by M/s. Ghanshyam [illegible] Ship Breakers, Plot No. 08, SBY, Alang; the proper Customs Officer has classified such oils lying inside the engine room under Central Excise Tariff No. 8908.00.00 and assessing officer has passed a remark on the body of the said Bill of Entry dated 26.06.2015 as "Re-assessed as bunkers contained in the outside tanks classifiable under respective Heading, in terms of Circular No. 37/96-Customs dated 03.07.96; that the Hon'ble CESTAT Order No. A/11610-11619/2014 dated 08.07.2014 which has been confirmed by Hon'ble Supreme Court have held that surplus bunkers classifiable under 89.08 of the CETA; however, classification of same goods under Customs Tariff Act is sole domain of customs authorities and therefore, outside the purview provisionally assessed under chapter 27; that CBEC has clarified the issue by way of Circular No. 1014/2/2016-CX dated 01.02.2016.

6.3 And that the dispute in question was clarified by CBEC way back vide Circular No. 37/96-Cus, dated 03.07.1996 issued from F. No. 512/22/85-Cus. VII as under:

(a) movable gears such as lifting and handling machinery, anchors, navigational equipment, machine tools, fire fighting 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.

(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 in their own appropriate headings.

6.4.1 Hon'ble High Court of Gujarat in case of M/s. Priya Holdings (P) Ltd reported as 2013 (288) ELT 347 (Guj.) has held that –

"17. 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 engines 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 (d) and would be classifiable under their own separate headings."

6.3.2 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 416 (Tri.-Ahmd.) 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 part is reproduced as under:

> "7. 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 bought for breaking. As per the CBEC Circular dated [illegible] and the orders passed by Commissioner (Appeals) such fuel needs classification under [illegible] the Import Policy and is a restricted item to be imported through State Trading Agencies. [illegible] on the other hand, argued that HSD is not [illegible] and was found on board the vessels as bunker fuel stores at the time of purchase [illegible]. It is also said that DGFT [illegible] No. [illegible] dated [illegible] 2013 [illegible] bunker fuel stored in the fuel tanks (whether inside or outside engine room) to be a part of the ship/vessel imported for breaking up and should be [illegible] integral part of the vessel's machinery [illegible]."

(Emphasis supplied)

6.3.3 The above views of the Hon'ble CESTAT/ High Court were affirmed by the Hon'ble Supreme Court reported as M.R. Shipping & Allied Industries Pvt. Ltd. - 2015 (322) E.L.T. A226 (S.C.). Thus, it is without doubt that the fuel stored outside engine room form part & parcel of ship/vessels imported for breaking and are classifiable under Heading 89.08 only.

6.4 In view of above, fuel and oil contained in the vessel's machinery and engines (inside or outside 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 is 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 are imported as part of ship stores. Therefore, I hold that when the ship was imported for breaking up, the fuels and 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 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 No. 1. Therefore, I do not find any merit in denying Cenvat Credit of CVD paid by Appellant No. 1 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 were having Central Excise registration for removal of goods obtained during breaking up of ships and they have been paying Central Excise duty accordingly. Thus, CVD is charged and collected in lieu of Central Excise duty irrespective of the fact that the ship 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 input 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 units 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. [illegible]
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
New Delhi, dated the 1st February, 2016

To Principal Chief Commissioners/
Chief Commissioners/
Principal Commissioners/
Central Excise and Customs (All)
Webmaster, CBEC

Madam/Sir,

Subject: [illegible] of show cause notices issued in relation to levy of CVD on vessels imported for breaking in the Ship Breaking [illegible].

References have been received in the Board from trade and field formations in the wake of the judgement of Hon'ble High Court of Gujarat passed in SCA No. [illegible] filed by M/s Shyam Engineering Company and others reported as [illegible]. A SLP has been filed by the department in Hon'ble Supreme Court against this order.

2. In the said judgement, the Hon'ble High Court has held that only when excise duty is leviable on an article, the article has come into existence as a result of a process of manufacture. Articles which are not produced or manufactured cannot be subjected to any excise duty and on the import of the articles, 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, 1975 can be levied on import of such goods. The reason for such conclusion by Hon'ble High Court is that when similar articles which are not produced or manufactured in India are not liable 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 judgement, 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 [illegible] the department has appealed against the order of the Hon'ble High Court of Gujarat.

(ii) Show Cause Notices for reversing/denying 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.

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 in the manner of (i) [illegible] may 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 a well settled legal position that [illegible] Cenvat Credit, if supplier has paid duty [illegible] following case laws may be referred [illegible] CESTAT 2006 (206) ELT 733 (Tri-DEL), CCE vs Ranbaxy Labs Ltd. 2006 (203) ELT 213 (P&H HC 2006), Commissioner of Central Excise, Chennai [illegible] vs CESTAT [illegible] 2006 (203) ELT [illegible] (Mad HC). [illegible]

6. Thus, once the importer has paid CVD on import of ship, Cenvat credit of this 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 01.03.2016 in the CENVAT Credit Rules, 2004, in rule 3, in sub-rule (1), in clause (vii), the provision has been omitted.

8. Proviso to rule 3(1)(vii) of CENVAT Credit Rules, 2004 was inserted vide notification No. [illegible] Central Excise (NT) dated [illegible] considering [illegible] of base metals and [illegible] of base metals 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/reusable articles such as pumps, air conditioners, [illegible] are also generated. These are generally sold as second hand goods [illegible] regardless of [illegible] from a manufacturing process. At the same time, ship breakers [illegible] 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 ship, boats [illegible] imported for breaking.

9. Further, amendment in Rule 6 of CENVAT Credit Rules, 2004 was carried out in budget of 2015 to provide that [illegible] non-excisable goods [illegible] exempted goods. This amendment has brought non-excisable goods and exempted goods at par and no credit is now available on either

of them. The Explanation inserted in Rule 6 is as follows: Explanation 1 - For the purpose of this rule, exempted goods or final products as defined in clauses (d) and (6) 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 [illegible] which [illegible] whether the reversal of credit needs to be done under [illegible] of CENVAT Credit Rules, 2004 or under rule 6 of CENVAT Credit Rules, 2004. To resolve the conflict, the provision restricting the CENVAT credit to [illegible] under proviso to rule [illegible] of Cenvat Credit Rules, 2004 has been deleted. Consequently [illegible] with effect from 01.03.2015 it 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 [illegible] 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 the 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 8(ii) clearly covers the issue involved in the present appeal. CBEC has also mentioned that [illegible] only for Show Cause Notices issued for denial of Cenvat credit of CVD by mentioning that

"(b) Show Cause Notices demanding Cenvat Credit of CVD paid voluntarily by the importers at the time of import is not warranted. It is settled legal position in law that [illegible] credit [illegible]. In this regard following case law may be referred: [illegible] CESTAT 2006 (202) ELT 753 (Mad. H.C. DB), CCE vs Rainbow Labs Ltd. [2006 (203) ELT [illegible] H.C DB)], Commissioner of Central Excise, Chennai-II vs CESTAT, Chennai reported as 2006 (202) ELT 753 (Mad.)]. Credit is accordingly admissible for duty paid voluntarily.

(c) Thus, even if the importer has paid CVD at the time of import, Cenvat credit of that CVD cannot be denied [illegible]. Show Cause Notices already issued for denying Cenvat Credit may be decided [illegible] these instructions and in future such Show Cause Notices may not be issued."

8. Therefore, the issue is no more res-integra in terms of above position clarified by CBEC vide said Circular dated [illegible] 2016. Thus, I find that the demand of recovery of Cenvat credit is not sustainable. Since demand itself is not sustainable, questions of paying interest and imposition of penalties on both the appellants are also not warranted. Since [illegible] is being held by me in this order

that the impugned order is not sustainable in law, it is liable to be set aside. Accordingly, I allow the appeals filed by M/s. The Appellants and set aside the impugned order.

8. [illegible]

8.1 The appeals filed by the Appellants stand disposed off in above terms.

(कुमार संतोष)
आयुक्त (अपील्स)

By RPAD

To,

1. M/s. Ashwin Corporation, Plot No. 77, Ship Breaking Yard, Alang, Dist.:Bhavnagar.	[illegible]
2. Shri Visvanikumar Gupta, Authorised signatory of M/s. Ashwin Corporation, Plot No. 77, Ship Breaking Yard, Alang, Dist.:Bhavnagar.	[illegible]

Copy for information and necessary action to:

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