OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. 6776/B 1 'SIDDHI SADAN' BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR 364 001.

F. No.V/15-94/Dem/HQ/2009

Date of order: 13.08.2012
Date of issue : 14.08.2012

Passed by Shri Harcharan Singh, Additional Commissioner.

Order-in-Original No. 24/ADC/BVR/2012-13

Any person(s) deeming himself aggrieved by this order may appeal against this ordr to the Commissioner Central Excise (Appeals), Rajkot, Central Excise Bhavan, Race Course, Ring Road, Rajkot-360001 within 60 days from the date of its communication. The appeal should bear a Court fee stamp of Rs. 2.50 paise only.

The appeal should be filed in Form EA-1 in duplicate as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the Appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2002.

- It should be accompanied with the following :
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy or the other must bear a court fee stamp of Rs. 2.50 paise as per Schedule I to Article of the Court Fee Stamp Act, 1870.

Sub:- Show Cause |Notice F.V/15-35/Dem/HQ/2010-11 dated 18.04.2011.

Brief facts:

2.1 M/s Dalkan Ship Breaking Ltd, Plot No. 56, Ship Breaking Yard, Alang (hereinafter referred to as 'Noticee') are engaged in ship breaking activities and manufacturing of goods and materials obtained by breaking up of ships, boats and other floating structures etc falling under the respective Tariff headings to the First Schedule to the Central Excise Tariff Act, 1985 as amended. The Noticee is holding Central Excise Registration No. AAACD1926BXM001 for the manufacture of the goods under Rule 9 of the Central Excise Rules, 2002 (hereinafter referred to as the 'Rules'), The Noticee is availing the facility of CENVAT Credit under the provisions of Cenvat Credit Rules, 2004 (hereinafter referred to as the 'CCR, 2004').

2.2 On scrutiny of records, it was observed that Noticee had imported a vessel namely 'M. V. TZENI' weighing 6762 LDT for breaking, purchased at US $ 33,27,760/- as per MOA dated 15.09.2008 which was reduced to US $ 21,63,044/- as per mutual agreement with the seller vide Addendum No. 2 dated 16.10.2008 to MOA dated 15.09.2008. The Noticee filed Bill of Entry No. SBY/98/2008-09 dated 20.10.2008 declaring value of US $ 33,27,760/- and the vessel was cleared on payment of total duty amounting to Rs. 3,25,94,146/-. The Noticee availed Cenvat Credit amounting to Rs.2,34,13,822/- in the month of November, 2008 in respect of countervailing duty paid.

2.3 The Noticee vide letter dated 30.09.2009 informed Superintendent, Central Excise, AR-I, Alang that they had claimed a Refund of Rs. 1,14,08,835/- in respect of excess import duty paid and it further informed that they had reversed Rs 83,26,790/- on 3.9.2009 which was a part of refund claim of Rs.1,14,08,835/-.

2.4 Audit Team, Central Excise, Hqrs, Bhavnagar in Final Audit Report No. 19/2010-11 dated 30.04.2010 observed that the Noticee had himself reversed amount of Additional duty of Customs of Rs 83,26,790/- but had not paid interest leviable thereon under the provision of Rule

14 of Cenvat Credit Rules, 2004 read with Circular No. 897/17/2009 dated 3.9.2009. Therefore, how Cause Notice No. V/15-35/Dem/HQ/2010-11 dated 18.04.2011 was issued by the Additional Commissioner, Central Excise Commissionerate, Bhavnagar proposing the following actions :

a. Recovery of interest @ 13% p.a. amounting to Rs 9,46,060/- (Rs Nine lacs, forty six thousand and sixty only) for the period from 20.10.2008 to 03.09.2009 on the reversal amount of Rs. 83,26,790/- under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of Central Excise Act, 1944 ;

b. Imposition of penalty under Rule 15A of Cenvat Credit Rules, 2004.

2.5 Defence reply :

Noticee filed a written reply dated 12.1.2011 mainly submitting as under:

a) They had imported a vessel namely M.V. TZENI for breaking purpose and filed a Bill of Entry on 20.10.2008. The vessel weighing 672 LDT was purchased for US $ 21,63,044/- as per mutual agreement made with the seller vide Addendum No. 2 dated 16.10.2008. However, the customs authority had asked to pay import duty on the value of US $ 33,27,760/- and not on amended value of US $ 21,63,044/-. Hence, they have paid total import duty of Rs 3,25,94,146/- under protest. However, considering the transaction value of US $ 21,63,044/-, the import duty of Rs 1,14,08,835/- was excess paid by them under protest and final assessment of their subject Bill of Entry has been made by the Assistant Commissioner, Custom Division, Bhavnagar vide Final Assessment Order No. 05/SBY/2010-11 dated 23.9.2010. The said final assessment has been challenged by them and the matter is pending with CESTAT, Western Zonal Bench at Ahmedabad.

b) Due to mistake of their clerk, they have taken Cenvat Credit of CVD and cess paid thereon involved in total import duty of Rs. 3,25,94,146/- in the month of November, 2008. They submitted that since they have claimed the refund of excess paid import duties of Rs 1,14,08,835/-, they have reversed Rs 80,84,262/- of Additional Duty (CVD) plus Rs 1,61,685/- of Education Cess plus Rs 80,843/- of Higher & Secondary Education Cess on 3.9.2009 which are the part of their refund claim amount of Rs. 1,14,08,835/- in their Cenvat Credit account on 3.9.2009. Therefore, they have not taken the Cenvat credit wrongly which was reversed on 3.9.2009 and on which demand of interest was made vide show cause notice in the question. They submitted that if their refund claim is not passed, they will take the above Cenvat credit which was reversed on 3.9.2009.

c) With reference to para 5 of the show cause notice, they submitted that the statutory requirement of Rule 14 of the Rules is a manufacturer has taken or utilised duty credit wrongly. Rule 14 has to be read down to mean that where Cenvat credit has been taken and utilised wrongly, interest shall be payable on such credit. They have not taken the Cenvat credit wrongly, they have reversed the same as they have filed a refund claim before the custom authority.

d) With reference to para 4 (correct 6) of the show cause notice, they submitted that interest is leviable if duty of excise has not been levied or paid. The supreme Court had held in the case of Pratibha Processors Vs Union of India in 1996(88) ELT 12 (SC) that interest was compensatory in character and was imposed on an assessee who had withheld payment of any tax as and when it was due and payable. In their case, there was neither any duty of excise was to be levied nor to be paid. Similarly, there was no such case that they have withheld payment of any duty which was due and payable. They further submitted that no liability of payment of any excise duty arose when an assessee availed Cenvat credit. The liability to pay duty arises only at the time of utilisation and they have not utilised the Cenvat credit amount at any time which was reversed by them. Therefore, interest is not payable on the amount of Cenvat credit availed of and not utilised.

e) With reference to para 5 (correct 7) of show cause notice, they submitted that Rule 14 of the Rules deals with recovery of wrong credits taken or utilised by a Cenvat beneficiary.

It deals with recovery of erroneous refunds. They have not contravened any provisions of Rule 14 of the Rules. They have not taken Cenvat credit wrongly but correctly. However, to obtain the refund from the Customs authority they had reversed the same.

f) With reference to para 6 (correct 8) of show cause notice, they submitted that no amount as demanded in the show cause notice is required to be payable or recoverable from them. They specifically submitted that no amount of interest is payable by them or recoverable from them. They stated that if they did not succeed to obtain the refund claim from custom authority, they will take the Cenvat credit again which was reversed by them. They also submitted that there was neither case of levy of interest amount nor any case for imposition of penalty as they have not contravened any provisions of Rule 14 of the Rules as charged against them and hence they are not liable for any penalty.

Finally, they submitted that the show cause notice may be dropped and requested to be heard in person.

2.6 Personal hearing :

Shri Sarju Mehta, M/s S. S. M. & Co, Chartered Accountant, Ahmedabad on behalf of the Noticee appeared for personal hearing on 27.02.2012 and submitted written submission and requested that the case may be kept pending since appeal filed is pending in Cestat, Ahmedbad.

The contention of written submission is as under :

a) Their client have submitted their reply dated 12.12.2012. This is a case on neither the levy of wrong availment of Cenvat credit nor levy of levy of any interest and nor any case for imposing penalty as our client has taken Cenvat credit correctly and fulfilled all the requirements under Cenvat Credit Rules, 2004.

b) There is no mention in show cause notice that which of the Rules was contravened by their client and in the absence of that their client is not liable for penalty.

c) There is neither any evidence against their client regarding contravention of any Rules nor any discussion in the show cause notice, therefore, not liable for penalty.

d) Since no specific clause or sub-rule or Rule was mentioned in the show cause notice, their client is not liable for penalty under Rule 15A of the Cenvat Credit Rules, 2004.

e) They relied on the judgement of the Hon'ble Tribunal in the case of CCE Vs Premier Mills Ltd, reported in 2008 (231) ELT 105 (Tri- Chennai) in which it was held that – excess credit availed by assessee owing to system error–inadmissible credit reversed once error came to notice even before issue of show cause notice–Assessee not having knowingly indulged in unauthorised availment of Cenvat credit, penalty and interest not warranted. Finally, they requested to drop the penal action proposed in the show cause notice.

3 Discussion and findings :

3.1 I have gone through the facts of the case, defence reply filed by the Noticee and all the relevant documents placed in the file. On going through the facts of the case, I find that the Noticee is engaged in the activities of breaking of ships and manufacturing of goods and materials obtained by such breaking of ships. The Noticee is holding Central Excise Registration and is also availing facility of Cenvat Credit under the provisions of Cenvat Credit Rules, 2004.

3.2 The Noticee had imported the subject vessel at purchase price of US $ 33,27,760/- as per MOA dated 15.09.2008. Subsequently purchase price was reduced to US $ 21,63,044/- as per Addendum No. 2 dated 16.10.2008 to MOA dated 15.09.2008. Bill of Entry No. SBY/98/2008-09 dated 20.10.2008 was assessed accepting the value of US $ 33,27,760/-, Noticee accordingly availed Cenvat credit of additional duty of customs amounting to Rs 2,34,13,822/- in the month of November, 2008 under the provisions of Cenvat Credit Rules, 2004. The Noticee had filed a

refund claim of Rs 1,14,08,835/- before customs authority in respect of paid in excess with reference to reduced price of vessel of US $ 21,63,044/-. The Bill of Entry was finally assessed by proper officer vide Final Assessment Order No. 05/SBY/2010 dated 23.09.2010 rejecting the reduced value of the vessel.

3.3 Since, the Noticee had filed a refund claim of Rs 1,14,08,835/- for the differential customs duty including additional duty of customs on claiming the reduction in price of the subject vessel, the Noticee has reversed an amount of Rs 83,26,790/- (CVD Rs 80,84,262/- Edu. Cess Rs 1,61,685/-+ HSE Cess Rs. 80,843/-) on 03.09.2009. The said amount of Cenvat credit is not utilised in RG 23 A Part II Account.

3.4 The Department's case is for demanding the interest @ 13% of Rs 9,46,060/- for the period from 20.10.2008 to 03.09.2009 on the reversal amount of Cenvat credit of Rs. 83,26,790/- under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944 and penalty under Rule 15A of the said Rules. Rule 14 of the said Rules provides for recovery of Cenvat credit which has been taken or utilised wrongly along with the interest under section 11A and 11AB of the Central Excise Act, 1944. The Noticee has argued that they have not utilised the Cenvat credit amount at any time which was reversed by them. I find from the records i. e. RG 23 A Part II Account that the Noticee has not utilised amount of Rs 83,26,790/-, therefore the provision of recovery as provided in Rule 14 is not attracted. Accordingly interest thereon is also not recoverable as proposed in the show cause notice dated 18.04.2011. In the result, the penal action as provided under Rule 15A of the Cenvat Credit Rules, 2004 is not attracted.

In view of the above facts, evidences, discussion and findings, I pass the following orders.

ORDER

1) I drop the proceedings proposed in Show Cause Notice No.V/15-35/Dem/HQ/2010-11 dated 18.04.2011.

Sd/-

(HARCHARAN SINGH)
ADDL.COMMISSIONER

To,
M/s Dalkan Ship Breaking Ltd.,
Plot No. 56,
Ship Breaking Yard,
Alang.

Copy to :

1. Assistant Commissioner, Central Excise, Rural Division, Bhavnagar.
2. Superintendent, Central Excise, AR-1, Ship Breaking Yard, Alang.
3. Guard.

14/8/2012
ADDL.COMMISSIONER