

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/15-05/DEM/HQ/2011-12

Date of order: 27.08.2012

Date of issue: 27.08.2012

Passed by Shri Harcharan Singh, Additional Commissioner.

Order-in-Original No.25/ADC/BVR/2012-13

Any person(s) deeming himself aggrieved by this order may appeal against this order 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 of the order 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 No. V/15-05/DEM/HQ/2011-12 dated 27.12.2011.

Brief facts:

2.1 M/s K. P. G. Enterprise, Plot No. 91, Ship Breaking Yard, Alang, Post Office Manar, District Bhavnagar (hereinafter referred to as "Noticee") are holding Central Excise Registration bearing No. AADFK2216KXM001 and is availing Cenvat credit of duty paid on inputs / capital goods and input services received by it to be used in or in relation to manufacture of final products under the provisions of Cenvat Credit Rules, 2004. The final products are ferrous and non-ferrous articles falling under Chapter 72 to 81 of the First Schedule to the Central Excise Tariff Act, 1985 as obtained during the breaking activities of old vessels. The Noticee is availing Cenvat credit of Additional duty of customs leviable under Section 3 of the Customs Tariff Act, 1975 equivalent to the duty of excise as specified under Rule 3 (vii) of the Cenvat Credit Rules, 2004 on principal input i. e. imported vessels on the strength of import Bill of Entry.

2.2 During the course of scrutiny of ER-1 for the month of March, 2011 filed before Superintendent, Central Excise, AR-II SBY Alang, it was observed that the Noticee had availed Cenvat credit in respect of Additional duty of customs paid on importation of vessel namely M. V. SEA WAY amounting to Rs. 1,85,28,818/- (Rs. 1,79,89,144/- Basic Customs duty + 3,59,783/- Edu Cess +Rs.1,79,891/- She Cess).

2.3 Scrutiny of the records revealed that the above said vessel was imported by the Noticee for breaking purpose during the month of February, 2011 and was cleared through Customs authority, Bhavnagar vide Bill of Entry No. SBY/319/2010-11 and was assessed provisionally on 24.02.2011 whereas the vessel was actually beached in the factory premises i. e. Plot on 03.03.2011 and the out of charge to the said vessel was given on 07.03.2011 by the proper officer of Customs.

2.4 The Government of India while presenting Union Budget 2011-12 had proposed to amend provisions of the existing Cenvat Credit Rules, 2004. By virtue of Notification No. 03/2011-CE (NT) dated 01.03.2011, Rule 3 has been amended by insertion of proviso with effect from 1st day of March 2011 as follows:

“Provided that CENVAT Credit shall not be allowed in excess of eighty-five per cent of the additional duty of Customs paid under sub-section (1) of the Section 3 of the Customs Tariff Act on ships, boats and other floating structures for breaking up falling under Tariff item 8908 00 00 of the First Schedule to the Customs Tariff Act.”

The plain reading of above insertion of proviso in Rule 3 is that the availment of Cenvat credit in respect of the additional duty of customs paid on ships, boats and other floating structure imported for breaking purpose has been restricted upto 85 % of the total additional duty paid on with effect from 01.03.2011.

2.5 In the present case, the Noticee had imported the subject vessel in the month of February, 2011 at Alang and the vessel was actually beached in factory premises i. e. plot on 03.03.2011 and the Noticee had availed Cenvat credit of full amount of additional duty of customs paid on the said vessel during the month of March, 2011 which was contrary to the provisions of Rule 3 of Cenvat Credit Rules, 2004 read with Notification No. 03/2011-CE (NT) dated 01.03.2011 resulting in Noticee availing excess credit to the tune of Rs. 27,79,323/- (i.e. 15 %) (Rs. 26,98,372/- Basic customs duty + Rs. 53,967/- Edu cess + Rs. 26,984/- She cess) which was required to be recovered from the Noticee under the provisions of Section 11A of the Central Excise Act, 1944 read with Rule 14 of the Cenvat Credit Rules, 2004.

2.6 Therefore, Show Cause Notice No. V/15-05/DEM/HQ/2011-12 dated 27.12.2011 was issued to the Noticee by Additional Commissioner, Central Excise Commissionerate, Bhavnagar proposing following actions:

- I. Recovery of Cenvat credit of Rs. 27,79,323/- (Rs 26,98,372/- Basic customs duty + Rs 53,967/- Edu cess + Rs 26,984/- She cess) under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944 and Notification No. 03/2011-CE (NT) dated 01.03.2011;
- II. Recovery of interest at the applicable and appropriate rate on the above amount of Cenvat credit wrongly availed under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944 ;
- III. Imposition of penalty under provisions of Rule 15(1) of the Cenvat Credit Rules, 2004.

2.7 Defence reply and personal hearing:

Advocate, M/s V. B. Sheth & Co, Rajkot on behalf of the Noticee filed a written submission dated 23.01.2012 as under:

- i. Show Cause Notice under consideration is bad in law and is liable to be set aside in as much as the credit availed by them is correctly and is not liable to be recovered.
- ii. The Noticee is engaged in the business of breaking up of ship and by virtue of Tariff entry only, the said activity is treated as manufacture and the input for such activity is ships or boats etc. The ship under consideration, an input was received by the Noticee in the month of February only and can very well be said to be an input received within the premises and accordingly was eligible for credit immediately on arrival into the Indian territory. In view of this fact the observation made in para 4 of the Show Cause Notice is improper and unjustified and therefore is liable to be withdrawn. In any case, the issue under consideration is settled by the honourable Commissioner(A), Rajkot and therefore, the proceedings are liable to be dropped.
- iii. **The very fact that the Noticee has correctly availed the credit, the recovery of interest as proposed is also improper an unjustified and therefore is liable to be set**

aside. Since issue involves interpretation of the relevant provision, the penalty proceedings initiated is liable to be dropped and requested for opportunity of being heard.

- iv. Shri Paresh Sheth, Advocate appeared on behalf of the Noticee on 03.08.2012 and filed written reply and also requested to allow 15 days' time for filing written submission.

Shri Paresh Sheth, Advocate submitted written submission dated 03.08.2012 which are as under:

- i. Department has proposed to restrict the credit availed on the ground that the restriction was imposed vide Notification No. 03/2011-CE(NT) dated 01.03.2011. The only ground raised by the department for the purpose of such rejection is that the ship had actually beached on 03.03.2011 and out of charge was given only on 07.03.2011.
- ii. Department has not considered the fact that the respective Bill of Entry was assessed in the month of February and the duty payable thereon is also paid in the month of February. The No Objection for beaching of the vessel is also issued by the respective Superintendent on 23.02.2011. The respective officers of Gujarat Pollution Control Board had also boarded the ship and have recommended the beaching permission on 22.02.2011 which itself proves beyond doubt that the said ship was imported in the Indian territory and was in possession of the Noticee and therefore, it can very well be said that the Noticee has received the input and is eligible for credit of duty on the said date only.
- iii. In any case, the respective ship had completed the import formalities and merely because the beaching permission as well as out of charge was given after certain period, it cannot be said that the said ship was not in possession of the Noticee and was not received by them and hence, the credit as claimed is correctly claimed and the Notice under consideration is liable to be set aside.

They enclosed copy of No Objection Certificate given by Range Superintendent and also Gujarat Pollution Control Board dated 23.02.2011 and 22.02.2011 respectively and relied on the following citations.

Shiv Ship Breaking Co. Vs CCE 2007-218-ELT-4144(Trib-Ahd).Baijnath Melaram Vs CCE 2008 (09) LCX-207. Rishi ship Breaker, Bhavnagar Order-in-Appeal No.61/2011(BVR)/RBT/Commr(A)/Raj.

- iv. They submitted that the issue under consideration involves interpretation of the relevant provision and hence, the penalty proceedings initiated is improper and unjustified and is liable to be set aside and consequently the interest proposed to be recovered is also improper and unjustified.
- v. It is well settled proposition of law that when the issue covers interpretation, then no penalty is liable to be imposed. In any case, the Noticee has not availed any credit which is wrong or in contravention of any of the provisions of the rules and hence, the provisions of Rule 15(1) invoked is bad in law and is liable to be set aside and finally requested to drop the proceedings.

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 holding Central Excise Registration No. AADFK2216KXM001 and is availing Cenvat credit of duty paid on inputs and input services received by them to be used in or in relation to manufacture of their final products in terms of provisions of Cenvat Credit Rules, 2004. The Noticee has availed Cenvat credit of additional duty of customs leviable under Section 3 of the

Customs Tariff Act, 1975 equivalent to the duty of excise on their principal inputs i. e. imported vessel.

3.2 During the course of scrutiny of Monthly Return in the form of ER-1 for the month of March, 2011 filed with the jurisdictional Range Superintendent, it was observed that the Noticee had availed Cenvat credit of Additional duty of customs paid on their imported vessel namely M. V. SEA WAY No. 6 amounting to Rs.1,85,28,818/- (Rs.1,79,89,144/- Basic duty + Rs.3,59,783/- Edu cess + Rs. 1,79,891/- She cess). The subject vessel was imported by the Noticee for breaking purpose in the month of February, 2011 and was got cleared through Customs, Bhavnagar under Bill of Entry No. SBY/319/2010 dated 23.02.2011 which was provisionally assessed on 24.02.2011 and the vessel was actually beached in the factory premises i. e. plot on 03.03.2011 and out of charge of customs was given on 07.03.2011 by the proper officer of Customs, Bhavnagar. The Noticee paid the duty on importation of subject vessel on 28.02.2011 vide Challan No. IMP-SBY/562/2010-11 dated 24.02.2011. On perusal of Show Cause Notice dated 27.12.2011, it is the charge of the department that the subject vessel was beached in the factory premises i.e. plot on 03.03.2011 and out of charge was given on 07.03.2011 by the Proper Officer of Customs.

For better appreciation of provisions for availing Cenvat credit, Rule 3 and 4 of the Cenvat Credit Rules, 2004 are reproduced as under :

3. CENVAT credit. – (1) a manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of –

- (i) ----
- (ii) ----
- (iii) ----
- (iv) ----
- (v) ----
- (vi) ----
- (via) ----

(vii) the additional duty leviable under section 3 of Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v), (vi) and (via) ;

- (viii) ----
- (ix) ----
- (x) ----
- (xa) ----
- (xi) ----

Paid on (i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004 ; and
(ii) ----

4. Conditions for allowing CENVAT credit. – (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service.

From the above statute, it is clear that the manufacturer or the producer is allowed to take Cenvat credit of duties as specified in sub-section (1) of Section 3 of the Cenvat Credit Rules, 2004 which are paid on any input received in the factory of manufacture of final product. Further, Rule 4 of the said rules states that the Cenvat credit of input may be taken immediately on receipt of the inputs in the factory. Further, Noticee's Plot No. 91, Ship Breaking Yard, Alang is a registered premises under the Central Excise Act, 1944 and is customs area where the breaking up activities of vessel is carried out. The customs authority grants No Objection Certificate after payment of duty and the Gujarat Maritime Board, a state body is granting permission to beach the vessel on the plot.

3.2 Now coming to the receipt of input, I find from the records of the case that the relevant Bill of Entry No. SBY/319/2010-10 dated 23.02.2011 was assessed provisionally on 24.02.2011 and the vessel was actually beached in the factory premises of the Noticee on 03.03.2011 and out of charge was accorded on 07.03.2011 by the proper officer of customs. These facts are

undisputed by the Noticee. As per Rule 4 of the Cenvat Credit Rules, 2004 which lays down the conditions for allowing Cenvat credit states that Cenvat credit in respect of input may be taken immediately on receipt of the input in the factory of the manufacturer. In the present case, I find that the subject vessel was beached on the factory premises i.e. plot on 03.03.2011 which the relevant date of receipt of the Noticee's input i.e. vessel and the Noticee became entitled to avail the Cenvat credit of additional duty of customs and other duties specified in Rule 3(1) of the Cenvat Credit Rules, 2004. Meanwhile, the Government amended the provisions Cenvat credit rules by way of Notification No. 3/2011-CE(NT) dated 01.03.2011 which came into force on 01.03.2011 and restricted the Cenvat credit of additional duty of Customs to 85% instead of 100% on ships, boats and other floating structures for breaking up and falling under CETH 8908 00 00 as such the vessel was beached after amendment of Rule 3 of Cenvat Credit Rules, 2004 i. e. insertion of proviso to clause (vii) of Rule 3 (1) of the said Rules, 2004. As a result, the Noticee was entitled to avail Cenvat credit only to the extent of 85% of the additional duty of customs as specified in clause (vii) of Rule 3(1) of the Cenvat Credit Rules, 2004.

3.3 The Noticee has relied on the decision of Tribunal, Ahmedabad in case of Shiv Ship Breaking Co., Vs CCE reported in 2007-218-ELT-414 (Trib-Ahd) wherein the Hon'ble Tribunal had decided the issue of utilisation of Cenvat credit during the period from 16.09.2004 to 13.10.2004 where the out of charge was given by the customs on 14.10.2004. The facts of this decision are not relevant to the present case as the issue is receipt of input vessel in the Noticee's premises i. e. plot which was on 03.03.2011 after the amendment to Rule 3 of the Cenvat Credit Rules, 2004 and condition of allowing Cenvat credit under Rule 4 of the Rules.

3.4 The Noticee has further relied upon the decision of Baijnath Melaran versus CCE reported in 2008 (09) LCX-207 where Hon'ble Tribunal has decided that the Cenvat credit of CVD taken on the date of assessment of bill of entry but before passing out of charge order by customs is not deniable. The decision in this case is also not helpful to the facts of the present case which involves the date of actual receipt of input vessel in the factory premises of the Noticee. As discussed above, the beaching of the vessel took place on 03.03.2011 which is the receipt of input is governed under provisions of Rule 4 of the Cenvat Credit Rules, 2004 which lay down that the Cenvat credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service. The Noticee became entitled to take the Cenvat credit of additional duty of customs on 03.03.2011 in terms of Rule 4 of the Rules and to the extent as provided in Rule 3(1)(vii) of the Cenvat credit Rules, 2004 as it stood amended on 01.03.2011.

3.5 The Noticee had relied on the decision of Commissioner, Central Excise (Appeals) in Order-in-Appeal No. 61/2011(BVR)/RBT/Commr(A)/Raj in case of Rishi Ship Breaker, Bhavnagar. In this case, the input vessel was beached on 25.02.2011, customs duties were paid on 22.02.2011 and out of customs charge was passed on 04.03.2011 i. e. the input vessel was received in the factory premises i. e. plot of the importer before the amendment to Rule 3 of the Cenvat Credit Rules, 2004 while in the present case, the relevant date of receipt of input vessel is decisive for the purpose of availment of Cenvat credit in terms of Rule 4 of the Rules. In the present case, the vessel was beached on 03.03.2011 after the amendment of Rule 3(1)(vii) of the Rules and the Noticee became entitled to avail the Cenvat credit of duties paid from 03.03.2011. Therefore, the reliance placed on the said decision of Commissioner, Central Excise (Appeals) is not squarely applicable to the circumstances of the case before me.

3.6 In terms of Rule 3 of the Cenvat Credit Rules, 2004 which stood amended by virtue of Notification No. 03/2011-CE(NT) dated 01.03.2011 and came into force from 01.03.2011 and restricted the availment of Cenvat Credit of additional duty of customs paid under Section 3(1) of the Customs Tariff Act, 1975 to the extent of 85% instead of 100% on ships, boats and other floating structures for breaking up falling under CETH 8908 00 00. The subject input vessel M. V. SEA WAY was beached on 03.03.2011 and according to the provisions of Rule 4 of Cenvat Credit Rules, 2004, the crucial date of receipt of input is 03.03.2011. Further, it is on the record that customs has passed out of charge to subject vessel only on 07.03.2011. Therefore, the Noticee was entitled to avail the Cenvat credit of additional duty of customs(CVD) to the extent of 85% of the said additional duty so paid on the subject vessel in terms of amended provisions of Rule 3(1) (vii) of the Cenvat Credit Rules, 2004 w. e. f. 01.03.2011.

3.7 In view of foregoing discussions, the Noticee is liable to pay interest at applicable rate on the wrong availment of excess Cenvat credit of 15 % under the provisions of Section 11AB of the Central Excise Act, 1944.

3.7 The Noticee is also liable for penal action as provided under Rule 15 of the Cenvat Credit Rules, 2004 as the Noticee has wrongly availed 15 % excess Cenvat credit of the additional duty of customs paid contrary to the provisions of Rule 3 (1) (vii) of Cenvat Credit Rules, 2004 as it stood amended w.e.f. 01.03.2011.

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

ORDER

1. I confirm the CENVAT Credit amount of Rs 27,79,323/- (Rupees Twenty seven lacs, seventy nine thousand, three hundred and twenty three only) (Rs. 26,98,372/- Basic duty + Rs. 53,967/- Edu. cess + Rs. 26,984/- Sec. Higher Edu. Cess) (15% of total Cenvat credit of Rs. 1,85,28,818/-) availed wrongly on input vessel M. V. SEA WAY under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944 read with Notification No. 03/2011-CE (NT) dated 01.03.2011.
2. In addition to the above confirmed CENVAT credit of Rs.27,79,323/-, the Noticee shall pay interest on the said amount as provided under Section 11AB of the Central Excise Act, 1944.
3. I impose penalty of Rs 27,79,323/- (Rupees Twenty seven lacs, seventy nine thousand, three hundred and twenty three only) under the provisions of Rule 15 of the CENVAT Credit Rules, 2004.

sc/1

(HARCHARAN SINGH)
ADDL.COMMISSINER

To,
M/s K. P. G. Enterprise,
Plot No. 91,
Ship Breaking Yard,
Alang,
Post: Manar,
District Bhavnagar.

Copy to:-

1. Assistant Commissioner, Central Excise, Rural Division, Bhavnagar.
2. Superintendent of Central Excise, AR-II -SBY
3. Alang.
4. Guard file.

RdR
27/8/2012
ADDL. COMMISSIONER