कार्यालय आयुक्त केंद्रीय उत्पाद शुल्क एवं सेवाकर
**OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX**
प्लाट न. ६७-७६ / बी-१ "सिद्धि सदन" बिल्डिंग
**PLOT NO. 67-76/B-1, "SIDDHI SADAN" BUILDING,**
नारायणभाई उपाध्याय मार्ग, भावनगर - ३६४ - ००१
**NARAYAN UPADHYAY MARG, BHAVNAGAR-364 001.**

फ़ोन : **(0278) 2523627** फैक्स : **0278-2513086**

रजिस्टर्ड डाक पावती द्वारा
**By Regd. Post A. D.**

फ़ाइल् स. - V/15-82/Dem/HQ/2010-11 आदेश की तारीख : 31.07.2014.
F. No. - V/15-82/Dem/HQ/2010-11 Date of Order : 31.07.2014.

जारी करने की तारीख : 11.08.2014.
Date of Issue : 11.08.2014

पारितकर्ता,

श्री नवनीत गोयल.

आयुक्त केंद्रीय उत्पाद शुल्क एवं सेवाकर, भावनगर
Passed by,
**SHRI NAVNEET GOEL**
**Commissioner, Central Excise and Service Tax, Bhavnagar.**

मूल आदेश स.: **BHV-EXCUS-000-COM-002-14-15 DT 31-07-2014**
**Order-in-Original No.: BHV-EXCUS-000-COM-002-14-15 DT 31-07-2014**

1. This copy of order is granted free of charges for private use of the person(s) to whom it is issued and sent.

2. Any person(s) deeming himself aggrieved by this Order may appeal against this order to The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad, O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad, in terms of the provision of Section 35B(1)(a) of the Central Excise Act, 1944. If the case covered under the category specified in Section 35B(1) (Proviso) (a) to (d), i.e. Loss, Rebate, Export under Bond, duty credit cases, the Revision application shall lies to the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi.

3. The Appeal should be filed in form EA.-3. It shall be signed by the person as specified in Rule 3(2) of the Central Excise (Appeals) Rules, 2001.

4. The appeal should be filed within three months from the date of communication of this order. (Section 35B of the Central Excise Act, 1944).

5. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (One of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate. The appeal shall be presented in person to the Register or sent by Registered Post addressed to the Registrar. But the date of receipt in office of the said Registrar in time or otherwise will be the relevant date for the purposes of limitation of time.

6. The Fee is required to be paid as under through a cross Bank Draft in favour of the Assistant Registrar of Bench of the Tribunal on a branch of any Nationalized Bank located at the place where the Bench is situated and it shall be attached to the form of appeal.

(a) Where the amount of duty and interest demanded and penalty is levied is more than ₹50,00,000/- (Rupees Fifty Lakhs), ₹ 10,000/- (Rupees Ten Thousand);

(b) Where the amount of duty and interest demanded and penalty levied is more than ₹5,00,000/- (Rupees Five Lakhs) but not exceeding ₹ 50,00,000/- (Rupees Fifty Lakhs), ₹ 5,000/-(Rupees Five Thousand);

(c) Where the amount of duty and interest demanded and penalty levied is ₹ 5,00,000/- (Rupees Five Lakhs) or less, ₹ 1,000/-(Rupees One Thousand);

7. The Copy of this order attached therein should bear a Court fee stamp of 50 paise as prescribed under schedule 1 of Article 6 of the Court fee stamp Act, 1970.

8. Proof of payment of duty, penalty etc. should also be attached in original to the form of appeal.

9. Appeal should bear a Court Fee Stamp ₹ 5/-.

10. Please refer to the Central Excise (Appeals) Rules, 2001 and the CEGAT, Procedure Rules, 1982 for complete details.

To,

M/s. Pipava Shipyard Limited (100% EOU),
Now Pipava Defence and Offshore Engineering Co. Ltd.,
Post Ucchaiya, Taluka – Rajula,
District - Amreli-365 560.

Subject: Show Cause Notice F. No. V/15-82/Dem/HQ/2010-11 dated 25.02.2011.

**BRIEF FACTS OF THE CASE**

M/s Pipavav Shipyard Limited (100% EOU), (presently known as Pipava Defence and Offshore Engineering Co. Ltd) Pipavav Port, Post Ucchaiya, Taluka Rajula, District Amreli (hereinafter referred to as "Noticee") were engaged in the manufacturing of Ships falling under CETH No. 89.01 at Pipavav Port and having Central Excise Registration No. AABCP1491LXM001. The said Noticee was availing CENVAT credit on inputs, capital goods and input services in terms of the provisions of the CENVAT Credit Rules, 2004 (hereinafter referred to as "CCR-2004").

2. The noticee was 100% Export Oriented Unit established vide Letter of Permission F. No. KASEZ/100%EOU/II/39/2005-06 dated 04.04.2006 issued by the Development Commissioner, Kandla Special Economic Zone, Ministry of Commerce, Gandhidham.

3. The noticee had filed monthly returns for the period from February, 2010 to September, 2010 in the form of ER-2 declaring that they had availed CENVAT Credit as per the following details.

| S. No. | Month | Amount of CENVAT Credit availed (Rs.) | | | Total CENVAT Credit availed (Rs.) |
|---|---|---|---|---|---|
| | | Inputs Rs. | Capital Goods Rs. | Input Services Rs. | |
| 1. | February, 2010 | Nil | 30,70,068/- | 4,33,92,201/- | 4,64,62,269/- |
| 2. | March, 2010 | Nil | 76,617/- | 2,26,14,923/- | 2,26,91,540/- |
| 3. | April, 2010 | 41,316/- | 76,76,025/- | Nil | 77,17,341/- |
| 4. | May, 2010 | Nil | 10,07,716/- | 63,33,577/- | 73,41,293/- |
| 5. | June, 2010 | Nil | 6,85,715/- | 19,78,074/- | 26,63,789/- |
| 6. | July, 2010 | Nil | 5,02,773/- | 2,35,68,292/- | 2,40,71,065/- |
| 7. | August, 2010 | 12,621/- | 3,22,353/- | 29,51,375/- | 32,86,349/- |
| 8. | September, 2010 | Nil | 442/- | 34,04,936/- | 34,05,378/- |
| | **Total** | **53,937/-** | **1,33,41,709/-** | **10,42,43,378/-** | **11,76,39,024/-** |

4. It appeared that the final product intended to be manufactured by the noticee was ship falling under CETH 8901 2000, 8901 3000 and 8901 9000 chargeable to "Nil" rate of duty.

5. It appeared that noticee had availed CENVAT Credit on capital goods and on inputs for manufacturing of certain other capital goods viz. Goliath Crane etc within the factory of production. Further, the noticee had also availed CENVAT credit on the "Input Service" as described in the documents listed in Annexure-III to the show cause notice. However, it appeared that, as per the provisions of Sub-rule 4 of Rule 6 of the CCR, 2004, the said noticee was not eligible to avail CENVAT credit on the said goods & services as the final product i.e. ship was chargeable to "NIL" rate of duty by tariff itself. Thus, it appeared that the CENVAT credit taken by the noticee in contravention of Rule 6 of the Cenvat Credit Rules,

2004 amounting to Rs. 11,76,39,024/- for the period from February, 2010 to September, 2010 was required to be recovered under the provisions of Rule 14 of the CCR, 2004 read with Section 11A of the Central Excise Act, 1944 along with interest as provided under Section 11AB of the Central Excise Act, 1944.

6. On scrutiny of the documents as listed in Annexure-I of the SCN, it was observed that the Cenvat credit available was Rs. 60,074/- (Rs. 58,347/- Cenvat + Rs. 1,154/- Education Cess + Rs. 573/- Secondary and Higher Education Cess) whereas in the ER-2 returns, the noticee had taken the amount of Cenvat Credit of Rs. 53,937/-. Thus, there was difference of Rs. 6,137/-.

7. On scrutiny of the documents as listed in Annexure-II of the SCN, it was observed that the Cenvat credit available as per these documents was Rs 1,33,35,549/- whereas in the ER-2 returns, the noticee had taken the amount of Cenvat Credit of Rs. 1,33,41,709/-. Thus excess Cenvat credit of Rs. 6,160/- taken without any documents was appeared to be recovered under the provisions of Rule 14 of the CCR, 2004.

8. Whereas, further on scrutiny of the documents listed in Annexure-II of the SCN, it was observed that the noticee had taken Cenvat credit on TMT bar/H Beam/MS Angle/RAIL/FPR module for the manufacture of "dry dock". The dry dock was not covered in the definition of "input" or "capital goods" and hence Cenvat credit taken on these items (pointed out in remarks of the Annexure-II) appeared to be recoverable under the provisions of Rule 14 of the CCR-2004.

9. On scrutiny of the documents as listed in Annexure-II & Annexure-III of the SCN, it appeared that (as per "Remark column" of the Annexure-II & III) the noticee had taken excess Cenvat credit (more Cenvat credit taken than available in the invoice) which is legally not correct and is required to be recovered under the provisions of Rule 14 of the CCR, 2004.

10. Whereas, on scrutiny of the Annexure-II & III of the SCN (as per "Remarks" column of the Annexure-II & III), it appeared that the noticee had taken cenvat credit showing adjustment of less credit availed earlier. But on being asked as to how a less credit taken by the noticee, they could not explain the matter and hence such credit was required to be recovered under the provisions of Rule 14 of the CCR, 2004.

11. Whereas, on scrutiny of the Annexure - II & III of the SCN (as per "Remarks" column of the Annexure - II & III), it appeared that the noticee had taken Cenvat credit on the xerox copy of the invoices i.e without original duty paying documents as pointed out in "Remarks" column of the Annexure - II & III

and thereby contravened the provisions of Sub rule (1) of Rule 9 of the Cenvat Credit Rules, 2004.

12. It appeared that the said noticee had availed CENVAT Credit on capital goods, inputs and input service for fabrication of Goliath Crane, Jib Crane, Gantry Crane, EOT Crane etc. Since the goods produced within the factory of production were basically not the excisable goods being immovable in nature and the same appeared recoverable under the provisions of Rule 14 of the CCR, 2004.

13. Rule 7 of the Cenvat Credit Rules, 2004 provided that the input service distributor may distribute the Cenvat credit in respect of the Service Tax paid on the input service to its manufacturing units or units providing output service subject to the following conditions:

(a) the credit distributed against a document referred to in Rule 9 does not exceed the amount of service tax paid thereon; or
(b) credit of Service Tax attributable to service use in a unit exclusively engaged in manufacture of exempted goods or providing of exempted service shall not be distributed.

14. Whereas, it appeared that the noticee was engaged in the manufacture of ship which is exempted from Central Excise duty as discussed above in para 7. As such, the unit cannot distribute and take the Cenvat credit in respect of Service Tax paid on the input service. However, the noticee had taken Cenvat credit on the basis of invoices issued by the "Input Service Distributor" (as per "Remarks" column of the Annexure-III) as defined under Rule 2 (m) of the Cenvat Credit Rules, 2004 and had thereby contravened the provisions of Rule 7 of the Cenvat Credit Rules, 2004 and hence, such Cenvat credit taken by the noticee did not appear to be admissible on this ground in addition to other grounds discussed above.

15. The act on the part of said noticee as discussed in the above paras resulted into contravention of the provisions of Rule 6, Rule 7 and Rule 9 of the CCR, 2004 and therefore, the CENVAT Credit totally amounting to Rs. 11,76,39,024/- appeared to be recoverable under Rule 14 of the CCR-2004 read with provisions of Section 11A of the Central Excise Act, 1944 along with interest as provided under Section 11AB of the Central Excise Act, 1944. It also appeared that the noticee rendered themselves liable for penalty as provided under Rule 15 of the CCR, 2004 as it appeared that it was the sole intention of the said noticee to avail the CENVAT credit and to encash by way of filing refund claim for which they were not eligible.

16. Therefore the noticee was called upon to Show Cause to the Commissioner, Central Excise, Bhavnagar by show cause notice F.No.V/15-82/Dem/HQ/20101-11 dated 24.302.2011 as to why:-

(i) The CENVAT Credit amounting to Rs. 11,76,39,024/- ( Rupees eleven crores, seventy six lakhs, thirty nine thousand and twenty four only) (inclusive of Basic Excise Duty, Education Cess and Secondary and Higher Education Cess) should not be denied and recovered from it under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of Central Excise Act, 1944 for reasons narrated in the above paras.

(ii) Interest under Rule 14 of the CCR, 2004 read with Section 11AB of the Central Excise Act, 1944 should not be charged and recovered from it;

(iii) Penalty under Rule 15 of the CCR-2004 should not be imposed upon it for the contravention of provisions of Rule 6, Rule 7 and Rule 9 of the Cenvat Credit Rules, 2004.

17.1 The noticee filed their defence reply vide letter dated 18.04.2012 wherein they submitted that the fact that they were also registered as service provider under the category of 'ship management service'/ship repair service' had been lost sight while issuing the notice. Since they provided output service, the noticee submitted that, rule 6(1) and 6(4) were not applicable. The noticee submitted that the input services in question had been used entirely for setting up a shipyard which was necessary for rendering the output service of ship repair.

17.2 The noticee submitted that since they were 100% EOU, the provisions of rule 6(1),6(2),6(3) and 6(4) were not applicable. Reproducing the provisions of rule 6(6), the noticee argued that credit could not be denied in respect of the goods exported under bond. They relied upon the decision in the case of Repro India Ltd-2009(235) ELT.614 (Bom) in this regard.

17.3 The noticee denied the allegation in the notice that cenvat credit had been availed without original documents. They submitted that the cenvat credit was taken on the original documents available with them and requested for verification of the same.

17.4 Regarding the proposal to deny cenvat credit taken on the goods utilized for fabrication of cranes, the noticee submitted that Cenvat Credit Rules did not contain any bar against availment of cenvat on goods which were used for manufacture/fabrication of capital goods which ultimately became immovable/embedded to the earth. The noticee contended that concept of goods movable or not was relevant only for determination of the duty and not eligibility of cenvat credit. They relied upon the decisions in the case of ***United Phospherous***

***Ltd-2002(15)ELT.650, Mahalaxmi Glass Works-1999(113)ELT.358, Nava Bharat Ferro Alloys-2004 (166)ELT.72 and KCP Ltd-2009 (237) ELT.500.***

18.1 The noticee submitted further reply on 13.06.2013 wherein they repeated the earlier submissions that they were also providing taxable services and that provisions of rule 6(1) to (4) of CCR 2004 were not applicable to goods exported under bond. They further submitted that even the conditions of notification No.42/2001-CE (N.T) as amended by Notification No.24/2010-CE (N.T) excluded the goods cleared by a 100% EOU.

18.2 The noticee further submitted that it was held by various decisions that EOU was entitled to cenvat credit and refund under rule 5 of CCR 2004. They relied upon the decision in the cases of ***Drish Shoes Ltd-2010(254)ELT.417 (HP), Repro India Ltd-2009 (235) ELT.614 (Bom), ANZ International-2009 (233) ELT.40 (Kar), Neo Foods Pvt. Ltd-2009 (242)ELT.562 (Tri.-Bang).***The noticee also drew attention to Board's clarification by Circular No.928/18/2010-CX dated 28.06.2010 wherein it is clarified that exports from 100% EOU have been specifically excluded from the purview of amendment in Notification No.42/2001-CE (NT) where the exempted goods were not allowed to export under bond.

18.3 The noticee submitted that availment of cenvat credit of Rs.53,937/- for the month of June 2010 instead of Rs.60,074/- was clerical mistake and through oversight the credit as capital goods instead of inputs. They submitted that excess availment of Rs.6137/- as alleged in the notice was due to above clerical mistake.

18.4 The noticee submitted that for manufacture of ship as well as provision of 'Management, Maintenance & Repair' service of ship 'dry dock' was must and therefore the TMT bars, HTF wires, MS pipes etc were used for construction of 'Dry Dock' would become their inputs. They argued that Hon'ble Supreme Court in the case of Scientific Engineering House Ltd Vs Commissioner of Income tax reported in 1986 (1) SCC-11 wherein it was held that a dry dock was a plant and that every part of dry dock played an essential role in ship building. They also relied upon the decisions in the cases of ***Bhushan Steel-2008 (223) ELT.571 (Tri-Mum), LG Hotline Glass Ltd.-2007 (210)ELT.69 (Tri.Del), Lloyd Steel Industries Ltd-2007 (211) ELT.275 (Tri.Mum) and Aditya Cement-2008 (251) ELT.362 (Raj)***

18.5 The noticee admitted the excess availment of cenvat credit of Rs.310/- in December 2008 (Sl. No.293 of Annexure-II of the SCN), Rs.106561/- in May 2010 (Sl.No.110 of Annexure-II of the SCN), Rs.56,362/- in June 2009 (Sl. No.238 of Annexure-III of the SCN), Rs.10,094/- in July 2009 (Sl. No.357 of Annexure-III of SCN), Rs.16,480/- in May 2009 (Sl.No.773 of Annexure-III of SCN), Rs.120/- in January 2010 (Sl.No.64 of Annexure-III), Rs.7540/- in January

2010 (Sl.No.67 of Annexure-III), Rs.6405/- in January 2010 (Sl.No.251 of Annexure-III), Rs.72/- in May 2010 (Sl.No.320 of Annexure-III) and Rs.40/- in July 2010 (Sl.No.493 of Annexure-III). The total amount of Rs.2,03,984/- availed in excess was reversed on 15.05.2013.

18.6 Regarding the allegation that cenvat credit being taken on the basis of photo copy of invoices, the noticee submitted that for minor procedural lapses the substantive benefit could not be denied. They relied upon the decisions in the case of ***DNH Shippers-2009 (244) ELT.65, Eveready Industries India-2007 (219) ELT.333, Tata Iron & Steel Co.-2008 (228) ELT.224, Jindal Photos-2009 (240)ELT.278, Kataria Wires-2009 (241) ELT.31 (MP).***

18.7 The noticee submitted that rule 7(B) of CCR 2004 did not prohibit availment of manufacturer or provider of service on the basis of invoice issued by Input Service Distributor (ISD).

19. The decision of case was kept in abeyance as in identical situation the matter was pending before Hon'ble High Court of Gujarat in SCA No.14289/2008. As per order dated 21.03.2013 of Hon'ble High Court, the petition was disposed as withdrawn. Thereafter the case was taken out of call book and the proceedings of adjudication were continued. Personal hearing was held on 06.09.2013 by my predecessor when Shri Vishal Agrawal, and Shri P.D. Rachchh, Advocates, Shri Hemant Patel and Shri Dharmesh Shah appeared. They reiterated their written submission. Due to change in the adjudicating authority, opportunity for personal hearing was again given to the noticee. Accordingly personal hearing was again held on 28.02.2014 when Shri Vishal Agrawal, and Ms Dimple Gohil, Advocates, Shri Hemant Patel and Shri Dharmesh Shah of the noticee appeared before me and they were heard. They reiterated the written submissions and requested two weeks time for filing submission along with relevant documents. Thereafter, by letter dated 20.03.2014 the noticee submitted a summary of their submissions.

## DISCUSSION AND FINDINGS

20. I have carefully gone through the facts of the case on record and various submissions of the noticee. On recapitulating, I find that the notice proceeded to deny cenvat credit on two main grounds. First, the credit on inputs and capital goods has been availed for construction of 'Dry Dock' which is not covered under the definition of 'inputs' or 'capital goods' under CCR 2004. Second, the finished goods manufactured by the noticee are 'ships', falling under heading 8901 of the First Schedule to the Central Excise Tariff Act 1985, which are exempted from Central Excise duty and hence no credit of cenvat shall be available in view of rule 6(1) of CCR 2004. Besides there are allegations that excess credit has been

availed than the credit available in invoices and credit has been availed on the basis of photo copies of invoices. I am discussing the different issues on by one in the following paragraphs.

21.1 First of all I take up the issue as to whether cenvat credit shall be eligible for construction of 'Dry Dock' or not. The noticee had availed cenvat credit of Rs. 1,33,41,709/-, as listed in Annexure-II of the SCN, on TMT bar / H Beam / MS Angle / RAIL / FPR module for the manufacture of "dry dock". These credits were availed as capital goods by the noticee. Therefore it is pertinent to look into the definition of capital goods given in the rules. The definition of 'capital goods' at rule 2(a) of CCR 2004 at the relevant time reads as under:

*(a) "capital goods" means:-*

*(A) the following goods, namely:-*
- *(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;*
- *(ii) pollution control equipment;*
- *(iii) components, spares and accessories of the goods specified at (i) and (ii);*
- *(iv) moulds and dies, jigs and fixtures;*
- *(v) refractories and refractory materials;*
- *(vi) tubes and pipes and fittings thereof; and*
- *(vii) storage tank, used-*
  - *(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or*
  - *(2) for providing output service;*

*(B) motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-clauses (f), (n), (o), (zr), (zzp), (zzt) and (zzw) of clause (105) of section 65 of the Finance Act;*

The definition of '*input*' reads as under:

*(k) "input" means -*
- *(i) all goods used in the factory by the manufacturer of the final product; or*
- *(ii) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products; or*
- *(iii) all goods used for generation of electricity or steam for captive use; or*
- *(iv) all goods used for providing any output service;*

*but excludes -*

*(A) light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol;*

*(B) any goods used for -*
- *(a) construction or execution of works contract of a building or a civil structure or a part thereof; or*
- *(b) laying of foundation or making of structures for support of capital goods,*

*except for the provision of service portion in the execution of a works contract or construction service as listed under clause (b) of section 66E of the Act;*

*(C) capital goods except when used as parts or components in the manufacture of a final product;*

*(D) motor vehicles;*

*(E) any goods, such as food items, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee; and*

*(F) any goods which have no relationship whatsoever with the manufacture of a final product.*

***Explanation.*** *- For the purpose of this clause, "free warranty" means a warranty provided by the manufacturer, the value of which is included in the price of the final product and is not charged separately from the customer*

21.2 From the above, it is evident that definition of 'capital goods' primarily includes machinery items; components, spares and accessories of the same; and a few other things which have been specifically added such as pollution control equipment; moulds, dies etc.; refractories; tubes and pipes and fittings thereof; and storage tank. The moulds, dies, refractories, tubes and tank have been specifically added as they would not get classified and included as machinery items but the rule makers in their wisdom have specifically and additionally included these perhaps considering their functional utility to the manufacturing process. By specifically including these items, credit in respect of duty paid on such items has been allowed which would not otherwise get coverage under the term 'capital goods'. Secondly, credit of duty paid on inputs used in the manufacture of such specifically listed items has also been allowed. I have noted that factory shed, building, foundation and structures (in the manufacture of which the impugned goods namely TMT bar / H Beam / MS Angle / RAIL / FPR module etc are used) have not been specifically listed under the definition of 'capital goods' or 'inputs'.

21.3 The submission of the noticee is that Cenvat Credit Rules did not contain any bar against availment of cenvat on goods which were used for manufacture/fabrication of capital goods which ultimately became immovable/embedded to the earth. Their argument is that 'Dry Dock' is their capital goods and hence the materials used for manufacture of such capital goods becomes their input. I have examined this argument also. In order to consider 'Dry Dock' as 'capital goods' first it should fall under chapter 82, 84, 85 or 90 of Central Excise Tariff Act, 1985 as defined under rule 2(a) ibid. The definition states that 'capital goods' means "the following goods, namely" after which a list of goods has been provided. Mainly all goods falling in the machinery chapters of the Tariff have been specified in the list as also components, spares and accessories of such goods. A few additional items have also been specially included in the list such as pollution control equipment, moulds and dies, refractories, tubes and pipes, and storage tank. I find that 'Dry Dock' is not an excisable goods falling under any of the above chapters and it is not specifically included in the definition. On the contrary 'dry dock' is a structure used for the construction, maintenance, and repair of ships, boats, and other watercraft. Wikipedia, the free encyclopedia describes 'dry dock' as under:

*A **drydock** (also commonly **dry dock**) is a narrow basin or vessel that can be flooded to allow a load to be floated in, then drained to allow that load to come to*

*rest on a dry platform. Drydocks are used for the construction, maintenance, and repair of ships, boats, and other watercraft.*

From the above it is evident that dry dock is a civil structure where the ships, boats and other water going vessels are constructed or repaired or maintained. I also find that the noticee, in the written submission, taking reliance in the judgment of Hon'ble Supreme Court in the case of Scientific Engineering House Ltd Vs Commissioner of Income tax reported in 1986 (1) SCC-11, contended that a dry dock is a plant. If that is so, it cannot be considered as capital goods and no credit is eligible for construction of a plant. Cenvat credit under CCR 2004 is allowable only on the inputs and capital goods used for manufacture of finished goods. It has never been the intention of the legislature to allow cenvat credit on construction of plant.

21.4 I find that the said goods namely TMT bar / H Beam / MS Angle / RAIL / FPR module etc are specifically excluded from the definition of 'inputs' also. An explanation has been inserted in Rule 2 of the Cenvat Credit Rules, 2004 by Notification No.16/2009-C.E. (N.T.) so as to clarify that 'inputs' which are eligible for availing Cenvat credit shall not include cement, angles, channels, CTD or TMT bar and other items used for construction of shed, building or structure for support of capital goods.

21.5 In the same way, the inputs and input services used for fabrication of Goliath Crane, Jib Crane, Gantry Crane, EOT Crane etc would have been eligible for cenvat. Larger Bench of CESTAT in the case of ***Vandana Global Ltd***-2010 (253) E.L.T. 440 (Tri. - LB) held that foundations and supporting structures embedded to earth cannot be qualified as capital goods. In the said decision it is held as under:

> ***41.*** *Keeping in view the scheme of the Act and the Cenvat Credit Rules, we are of the opinion that the phrases 'capital assets' and 'capital goods' cannot be held to be synonymous. The phrase capital goods has been defined in the Cenvat Credit Rules enumerating a number of goods. Obviously, the said definition of 'capital goods' has to be adopted while interpreting the rules for the purposes of granting and denying of credit. The phrase 'capital assets' has a wider meaning and it would certainly include capital goods and other assets' such as immovable property in the form of building etc. Once this distinction is appreciated, it is easy to see that foundations and supporting structures embedded to earth may be categorized as capital assets but would not qualify to be capital goods in terms of the definition contained in the Cenvat Credit Rules.*

21.6 In view of the above discussion and following the ratio of Larger Bench decision, I hold that cenvat credit on inputs and capital goods is not available for construction of 'Dry Dock' and for fabrication of Goliath Crane, Jib Crane, Gantry Crane, EOT Crane etc. The case laws of ***United Phospherous Ltd-2002(150)ELT.650, Mahalaxmi Glass Works-1999(113)ELT.358, Nava Bharat Ferro Alloys-2004 (166)ELT.72 and KCP Ltd-2009 (237) ELT.500*** relied upon

by the noticee are delivered before the amendment of rule 2(a) and rule 2(k) and in view of the legal provision settled by Larger Bench decision of ***Global Ltd (supra),*** the said case laws are distinguishable.

21.7 On perusal of the Annexure-I and II of the SCN I find that the cenvat credit has been availed on raw materials like TMT bars. These items are specifically excluded from the definition of inputs 'inputs' by the explanation inserted in Rule 2 of the Cenvat Credit Rules, 2004 by Notification No.16/2009-C.E. (N.T.) which clarified that 'inputs' which are eligible for availing Cenvat credit shall not include cement, angles, channels, CTD or TMT bar and other items used for construction of shed, building or structure for support of capital goods. These goods are not included in the definition of 'capital goods' also. In view of the above decision of Larger Bench of Tribunal and the definition of inputs and capital goods, the cenvat credit of Rs.60,074/- and Rs. 1,33,35,549/- as per Annexure-I and II of the SCN stand denied.

22.1 Now coming to the second issue that the finished goods manufactured by the noticee are 'ships', falling under heading 8901 of the First Schedule to the Central Excise Tariff Act 1985, which are exempted from Central Excise duty and hence no credit of cenvat shall be available in view of rule 6(1) of CCR 2004. In this regard I find that the final product manufactured by the noticee are ships, Tankers and other vessels falling under CETH 8901 of the Central Excise Tariff Act 1985. All the goods falling under Tariff Heading 8901 were attracting "Nil" rate of duty by the Tariff itself at the relevant time.

22.1 As per the provisions of Sub-rule (1) of Rule 6 of the CCR, 2004, CENVAT credit shall not be eligible on the inputs and input services used in the manufacture of exempted goods. Similarly as per the provision of sub-rule (4) of rule 6 ibid, cenvat credit on capital goods used exclusively for manufacture of exempted goods shall not be eligible. The provisions rule 6 is reproduced below:

***Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.-*** *(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2).*

***Provided*** *that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.*

*(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the*

*quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.*

*(4) No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year.*

*(6) The provision of sub-rules (1), (2), (3) and (4)shall not be applicable in case the excisable goods removed without payment of duty are either –*

*(i) to (iva)……..*

*(v) cleared for export under bond in terms of the provision of Central Excise Rules,2002; or*

22.2 The noticee's argument that provisions of rule 6(1) to (4) of CCR 2004 were not applicable to goods exported under bond is not acceptable. The noticee has relied upon the decision in the cases of ***Drish Shoes Ltd-2010(254)ELT.417 (HP), Repro India Ltd-2009 (235) ELT.614 (Bom), ANZ International-2009 (233) ELT.40 (Kar), Neo Foods Pvt. Ltd-2009 (242)ELT.562 (Tri.-Bang).*** In this regard, I find that the conditions of notification No.42/2001-CE (N.T) were amended by the **Notification No.24/2010-CE (N.T) dated 26.05.2010** to the following extent;

> *" In the said Notification, in paragraph 1, after condition (iii) the following condition shall be inserted namely :-*
> *(iv) that export of excisable goods which are chargeable to nil rate of duty or are wholly exempted from payment of duty, other than goods cleared by a hundred percent export-oriented undertaking, shall not be allowed under this notification."*

22.3 In context of the said amending notification, the Board vide **Circular No. 928/18/2010-CX dated 28.06.2010,** clarified that if the goods are exempted from payment of excise duty, in that case the goods cannot be exported under bond for the reason that bond is executed only when goods are liable for payment of excise duty, there is no question of exporting under bond if the final products themselves exempted or non excisable. The circular stated ;

> *"In view of the above, an amendment to the conditions for exporting under bond the Notification No. 42/2001-Ce (NT0 dated 26.06.2001, has been notified through Noti. No, 24/2010-CE(NT) dated 26.05.2010, where in goods which are exempted from payment of duty or chargeable to nil rate of duty, have been disallowed to be exported under bond. Since, 100% EOUS are also required to export the goods under bond, in terms of Customs and Excise Notifications, the exports from 100% EOU s have been specifically excluded from the purview of this amendment."*

From the combined reading of the above Notification and Circular, it emerges that the said notification is of clarificatory nature, which reflects the intention of the legislature that the bond is only required to be furnished with the department where there is duty liability on the exported goods. The intention of the legislature comes out that it never intended to allow the exempted goods or nil rate of duty goods under bond. If the intention of the Government was to give benefit of cenvat to the exempted or nil rate duty export goods, the units other than EOUs would also have been allowed to export Nil duty/exempted goods under bond. But this is not the case. The exclusion to EOUs was perhaps given because the EOUs function under different set up and bond is required in terms of different Customs and other Excise Notification. The circular therefore permits EOUs to clear Nil duty and exempted goods under bond. This was only a procedural facility. It can not override the basics of cenvat scheme. The primary object of the Cenvat Scheme is to avoid cascading effect of duty payments. Cenvat is basically a duty-collecting procedure, which aims at allowing relief to manufacturer on the duty element born by him in respect of the inputs used by him. Thus the very object of this scheme is utilization of credit allowed towards payment of duty on any of the final products in relation to manufacture of which, such inputs were intended to be used in accordance with the provisions of rules. Therefore, if the duty on final product is Nil, credit of such inputs which are used in manufacture of goods and cleared under Nil rate of duty can not be taken. The noticee has cited various decisions in this context. However I find that these were pronounced before coming this amending Notification No.24/2010 w.e.f 26.05.2010. As already stated above the aim of Government appears to be that bond is only required to be furnished with the department when there is duty liability on the exported goods. The Export Oriented Undertakings under EOU Scheme may clear their exempted/nil rate duty for the purpose of various Customs and Excise Notifications. In the case of ***Collector of Central Excise, Bombay-I v. M/s Parle Exports (P) Ltd., 1988(038)ELT0741 , Hon'ble Supreme Court of India*** has held that :

> *"According to the tradition of our law, primacy is to be given to the text in which the intention of the law-giver has been expressed. Cross refers to Blackstoneâ€™s observations that the fairest and most rational method to interpret the will of the law-maker is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context the subject matter, the effects and consequences, or the spirit and reason of the law."*

22.4 The above notification merely clarifies the position and makes explicit what was implicit. In other words clarificatory statute would be retrospective in nature. ***In Justice G.P. Singh's (Sixth Edition 1996) 'Principles of Statutory Interpretation',*** it is contended that;

"An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the constitution came into force, the amending Act also will be part of the existing law."

22.5 In the instant case, in view of the above, I find that since the final product i.e. ship was chargeable to "NIL" rate of duty by tariff itself, the CENVAT credit taken by the noticee in contravention of Rule 6 of the Cenvat Credit Rules, 2004 amounting to **Rs. 11,76,39,024/-** for the period from February, 2010 to September, 2010 is recoverable under the provisions of Rule 14 of the CCR, 2004 read with Section 11A of the Central Excise Act, 1944 along with interest as provided under Section 11AB of the Central Excise Act, 1944.

23.1 Further Rule 7 of the Cenvat Credit Rules, 2004 provided that the input service distributor may distribute the Cenvat credit in respect of the Service Tax paid on the input service to its manufacturing units or units providing output service subject to the following conditions:

(a) the credit distributed against a document referred to in Rule 9 does not exceed the amount of service tax paid thereon; or
(b) credit of Service Tax attributable to service use in a unit exclusively engaged in manufacture of exempted goods or providing of exempted service shall not be distributed.

23.2 Since the goods manufactured by the notice is exempted from Central Excise duty as discussed above, they cannot distribute and take the Cenvat credit in respect of Service Tax paid on the input service. Therefore the Cenvat credit taken on the basis of invoices issued by the "Input Service Distributor" (as per "Remarks" column of the Annexure-III) as defined under Rule 2 (m) of the Cenvat Credit Rules, 2004 is in contravention of the provisions of Rule 7 of the Cenvat Credit Rules, 2004. The Cenvat credit taken by the noticee is not admissible on this ground in addition to other grounds discussed above.

24. Regarding the allegation of availment of excess credit, I find that the noticee has admitted the excess availment of cenvat credit of Rs.2,03,984/- and reversed the same on 15.05.2013. Therefore I confirm the demand on this count.

25.1 Regarding the credit availed on the basis of photocopy of invoices I find that the noticee has not submitted documents either before me or before the

jurisdictional Central Excise officer. From the perusal of the documents prescribed under rule 9(1) of CCR 2004 for availing cenvat credit it is evident that cenvat credit is eligible on the basis of invoices of manufacturer, registered dealer or service provider or an input service distributor. Since the assessee claimed that they had produced invoices before the Range Officer, a reference was made to the concerned Division office. The Superintendent (Adj), Rural Division, Bhavnagar in his letter dated 21.05.2014 (received on 03.06.2014 by fax) reported that SCN has been issued after verification by Range Office and wherever original copy of invoice was not produced the same has been incorporated in the remarks column of Annexure-III.

25.2 In this regard I find that the CENVAT Credit scheme adopted and operationalized in India is based on the Tax Credit method which relies upon sanctity of the documents. That is why certain documents have been prescribed statutorily for availing of the credit. If those documents are not submitted, there is no vested right accruing to the assessee for taking the credit.

25.2 The argument that credit can be taken even when there are procedural infraction is not acceptable for the reason that the Apex Court in the case of *Hari Chand Sri Gopal* - 2010-95-SC-CX-LB and in *Indian Oil Corporation Ltd.* **2012-TIOL-04-SC-CX** held that in order to claim the benefit under the law, substantial compliance is not enough and the procedures prescribed in the statute should be mandatorily followed.

25.3 This ratio prevails over the case laws relied upon by the appellant. Therefore, I hold that the appellant was ineligible to take CENVAT Credit on the strength of documents which are not statutorily prescribed.

25.4 I also rely upon the decision of Hon'ble Tribunal in the case of DSM Sugar-2013 (287) ELT.236 (Tri.-Del) wherein it is held that;

> *6. As regards Cenvat credit taken on the basis of photocopies of the invoices, though Rule 9(1) of Cenvat Credit Rules, does not mention that the invoice/bill or challan has to be the original, if Cenvat credit is allowed on the basis of photocopies without any check, credit can be taken more than once on the basis of the same invoices. Therefore, Cenvat credit cannot be allowed on the basis of photocopy of invoices/bill or challan*

25.5 In the above premises I disallow cenvat credit of **Rs. 2,16,84,277/-** availed on the photocopy of invoices.

26. As regards to imposition of penalty, I find that the said assessee was engaged in manufacturing of ship building activities which are chargeable to "Nil" rate of duty by virtue of schedule to the Central Excise Tariff Act, 1985 and accordingly becomes exempted good in view of the provisions of CCR, 2004. However the said assessee has wrongly taken Cenvat Credit in contravention of

various provisions of Cenvat Credit Rules, 2004. The act on the part of the said assessee as discussed in the foregoing paras, resulted in to non payment/non reversal of huge amount of duty i.e. Rs. 11,76,39,024/-. I find that the said assessee has evaded huge amount of revenue without applying the basic object of the law and this act of the assessee rendered themselves for imposition of penalty as provided under Rule-15 of the said Rules on higher side. Regarding the question of charging interest, I find that interest is statutory liability following every short-payment or non-payment of duty and wrong availment or wrong utilization of cenvat credit. Therefore there is no escape from the liability envisaged under statute for the assessee. Accordingly I hold that the assessee is liable for penalty under rule 15 of CCR 2004 and interest is chargeable under rule 14 read with Section 11AA/11AB of Central Excise Act, 1944.

27. In view of the above, I pass the following order

**ORDER**

(i) I disallow cenvat credit of Rs. 11,76,39,024/- (Rupees Eleven Crores, Seventy Six Lakhs, Thirty Nine Thousand and Twenty Four only) (inclusive of Basic Excise Duty, Education Cess and Secondary and Higher Education Cess) and order for recovery under rule 14 of the CCR 2004. The excess credit of Rs.2,03,984/- already reversed stand appropriated against the said amount ordered for recovery.

(ii) I order for recovery of interest under rule 14 of CCR 2004 read with Section 11AB of the Central Excise Act, 1944.

(iii) I impose penalty of 11,76,39,024/- (Rupees eleven crores, seventy six lakhs, thirty nine thousand and twenty four only)under rule 15 of CCR 2004.

(NAVNEET GOEL)
Commissioner
Central Excise, Bhavnagar

BY Regd. Post A.D./ Hand Delivery
F. No. V/15-82/Dem/HQ/2010-11 Date: 31.07.2014
To
M/s Pipavav Shipyard Limited (100% EOU),
Now Pipava Defence and Offshore Engineering Co. Ltd
Post Ucchaiya, Taluka Rajula;
District Amreli-365560.

Copy to:-
(1) The Chief Commissioner, Central Excise, Ahmedabad Zone
(2)Assistant Commissioner, Central Excise, Rural Division, Bhavnagar.
(3) Superintendent, Central Excise, AR-Mahuva, Rural Division, Bhavnagar.
(4) Guard File.