

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

फोन : (0278) 2523627

फैक्स : 0278-25130

By Regd. Post A. D.

No. - V/15-27/Dem/HQ/2013-14

Date of Order: 11.12.2014

Date of Issue: 11.12.2014

Passed by :

HRI V. PADMANABHAN,
Commissioner, Central Excise and Service Tax, Bhavnagar

Order-in-Original No. BVR-EXCUS-000-COM-005-14-15 dated 11.12.2014

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

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 lie to the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi.

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.

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

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 Registrar 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.

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 or 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);

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.

- (a) Proof of payment of duty, penalty etc. should also be attached in original to the form of appeal
- (b) An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

Appeal should bear a Court Fee Stamp Rs.5/-.

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

**M/s. Navyug Ship Breaking Co, Sosiya ,
Bhavnagar**

Subject:

Show Cause Notice No.V/15-27/Demand/HQ/2013-14 dated 31.07.2013 issued to
M/s. Navyug Ship Breaking Co, Sosiya , Bhavnagar

Fact:

M/s Navyug Ship Breaking Co., Plot No 152-153, Ship Breaking Yard, Sosiya, Post Sani, Dist Bhavnagar (hereinafter referred to as "noticee") are engaged in the manufacture of excisable goods viz. Iron & Steel Scrap materials and other ferrous and non ferrous scrap materials falling under Chapter No 72 to 81 of the Schedule to the Central Excise Tariff Act, 1985 obtained by breaking up of ships, boats and other floating structures. The Noticee is holding Central Excise Registration Certificate No.AAFFN0641KXM001 under Rule 9 of the Central Excise Rules 2002 (herein after referred to as "Rules") and are also availing CENVAT Credit facility under the provision of the CENVAT CREDIT RULES, 2004 (hereinafter referred to as "CCR-2004").

During the course of Audit, it was found that the appellant had availed Cenvat Credit to the tune of Rs.4,62,79,253/- (CVD) on the basis of Bill of Entry No SBY/111/2012-13 dated 19.07.2012 which was filed for clearance of imported vessel M.V "BUNGA PELANGI (UA)" in the month of July 2012 and utilized Rs 1,33,25,806/- for payment of Central Excise Duty for the month of July 2012. Whereas, in the subject case, Out of Charge under section 110 of the Customs Act,1962 was given by the competent authority of customs on 20.07.2012. As the noticee had taken Cenvat credit of CVD before 'out of Charge' given by the customs authority, a Show Cause Notice No V/15-27/DEM/HQ/2013-14 dated 21.07.2013 was issued by the competent authority asking them as to why:-

- (i) The Cenvat credit amounting to R. 4,62,79,253/- should not be disallowed during the month of July 2012 under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A(1) of the Central Excise Act, 1944.
- (ii) The interest at the applicable and appropriate rate should not be charged and recovered on the said amount of CENVAT credit erroneously availed, under the provision of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944.
- (iii) Penalty should not be imposed upon them under the provisions of Rule 15A of the CCR-2004.

DEFENSE REPLY

In response to the Show cause Notice the Noticee has put forth a written submission dated 14.08.2013 wherein it has been contented that,

- i) that the vessel was imported for the purpose of breaking and the said input was received in their factory premises on 20.07.2012 on the basis of the permission granted by the proper officer of Customs. Hence they had correctly availed the CENVAT Credit as provided under Rule 3 read with Rule 5 of the CENVAT CREDIT RULES, 2004;
- ii) that their Ship Breaking Yard is situated at Plot No 152/153, SBY Sosiya which is registered under the provisions of Rule 9 of the Central Excise Rules, 2002 for manufacturing excisable goods. The said plot is also used for beaching of the imported vessel which was input for them was to be used for the manufacturing purpose and also duty was also discharged by them.

Therefore, the question of 'Out of Charge' does not arise for availing Cenvat Credit. They availed Cenvat credit on 31.07.2012 i.e they had availed Cenvat Credit on the imported vessel after receipt the same in the factory premises;

- iii) That the ships imported for breaking are always being beached (unloaded) at the plot allotted by the GMB, Bhavnagar. The said plots are legally authorized to use the same for importation and beaching of the vessel for breaking. In the instant case, the clearance and receipt of the inputs are simultaneous at one place. Technically the vessel is under the control of the Custom Authorities but the same is delivered and beached to their factory premises.
- iv) That they have legally availed the Cenvat Credit in respect of input viz M.V BUNGA PELANGIDUA in the circumstances when the ship had beached on 20.07.2012 after following the required Customs formalities ; in lieu of their submissions they rely on the following settled case laws :
1. 2007(218) ELT 414 (Tri Ahmd)- Shiv Ship Breaking V/s Commissioner of Central Excise, Bhavnagar.
 2. Commissioner , C.Excise, Chandigarh V/s Euro Cotspin Ltd-2004 (165) ELT 312 (Tri Delhi)
 3. Eicher Motors Ltd V/s UOI-1999(106)ELT3 (SC)
- v) That since they have legally availed the Cenvat Credit under dispute in accordance with the provisions of the said CCR, 2004 , they have requested to drop the charge of penalty out rightly. They have requested to drop the Show Cause Notice. Also they have desired to be heard in person before deciding the Show Cause Notice.

Personal Hearing:

Personal Hearing in the matter was granted and held on 03.12.2014. Shri V.B Tayal, Partner of the Noticee appeared for the hearing and produced the following case laws and requested to decide the matter in light of these case laws:-

1. 2007(218) ELT 414 (Tri Ahmd)- Shiv Ship Breaking V/s Commissioner of Central Excise, Bhavnagar.
2. BVR-EXCUS-000-APP-19-14-15 dated 26.06.2014 in the case of M/s Navyug Ship Breaking Co, Bhavnagar. (19-2014-15(BVR)SKS/Commr (A)/AHD.

DISCUSSION & FINDINGS

I have carefully gone through the facts of the case, defence reply and the submissions made at the time of personal hearing. I find that the issue to be decided in the present Show Cause Notice is **whether the noticee is eligible to take and utilize the Cenvat credit of CVD paid on the imported vessel before "out of charge" under section 47 of the Customs act,1962 is given by the competent authority of customs?; whether the Noticee is liable to pay interest on the CENVAT Credit availed and utilized by them under the provisions of Section 11 AA of the CER,1944; whether penalty to be imposed on the Noticee under the provisions of Rule 15A of the CCR, 2004.**

4.2 On going through the subject Show cause Notice, I find undisputed fact that the Noticee had availed and utilized CENVAT Credit prior to 'Out of Charge' given by the Customs authority under section 47 of the Customs Act, 1962. I find that the said vessel is an item of the noticee for the manufacture of scrap and other materials obtained during the course of breaking of the vessel. It is also an undisputed fact that the duty of the customs including CVD was paid by the noticee before taking of the Cenvat credit. I also found that the subject vessel was beached at Aland Ship Breaking Yard before taking of the Cenvat credit.

4.3 Before examining the plea of the Noticee, it is pertinent to examine the provisions relating to availment of Cenvat Credit. Rule 4 of the Cenvat Credit Rules, 2004 stipulates that:

RULE 4 Conditions for allowing Cenvat Credit- "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"

4.4 As per the facts emerging from the records, the Noticee had filed the Bill of entry No SBY/111/2012-13 on 19.7.2012 and paid the Custom Duty of Rs 8,63,47,322/- on 19.07.2012. The vessel was beached at the plot of the appellant on 20.07.2012. The appellant availed Cenvat Credit of CVD on 31.07.2012 on the basis of the said Bill of entry. The Out of Custom charge was given to the vessel on 02.08.2012.

4.5 The noticee has contended that they are eligible to take the cenvat credit even before "out of charge" given by the customs authority and in support of their stand they relied upon the order passed by the Hon'ble CESTAT, Ahmedabad in the case of Shiv Ship Breaking Co. reported in 2007 (218) ELT 414(Tri.Ahmd) wherein has been held that,

"we have carefully considered the submissions from both sides. The CVD paid on the ships is not in dispute. The CVD amount which was taken as credit was admittedly paid on 13.09.2004. No objection for beaching of the vessel has been granted by the Customs Officer on 15.09.2004. Under these circumstances, the reasons for the delay in grant of out of charge by the Customs are not explained. Even if delay was justified, it cannot lead to denial of Cenvat Credit on the CVD paid on the vessel. The taking of credit before out of charge is given at the most as technical violation. This violation is caused on account of delay in grant of out of charge by the Department and it cannot take the 'substantial right to Cenvat Credit available to the Noticee, especially, when the customs clearance and receipt of duty paid, inputs in the factory were simultaneous and the very same place, namely, the ship yard"

4.6 In backdrop of the above facts, case law cited by the noticee as well as the relevant provisions of the Cenvat Credit Rules 2004, I find force in the contention of the Noticee. I find that the ratio laid down by the Hon'ble Tribunal is squarely applicable to the facts of the present case. Accordingly, I follow the ratio of the above decision and hold that cenvat credit taken on the basis of subject Bill of Entry before out of charge given by the customs authority can not be denied on technical or procedural ground. So, I hold that the noticee is eligible to take the cenvat credit even before out of charge given by the customs authority under section 47 of the Customs act, 1962. However, as the Noticee has taken the Cenvat Credit before out of charge given by the Customs, I found that there is a procedural lapse on the part of the Noticee and hence, the Noticee is liable for penalty as provided under Rule 15A of the Cenvat Credit Rule, 2004..

Noticee and hence, the Noticee is liable for penalty as provided under Rule 15A of the Cenvat Credit Rule, 2004..

In light of the above discussion, I pass the following Order.

ORDER

- (1) I allow the Cenvat Credit amounting to Rs 4,62,79,253/- taken by the Noticee on the bill of entry no. SBY/111/2012-13 dated 19.04.2012.
- (2) I impose a penalty of Rs 5000/- under Rule 15A of the Cenvat Credit Rule, 2004 upon the Noticee for Technical/procedural Violation.

The subject Show Cause Notice F. No. V/15-27/DEM/HQ/2013-14 dated 31.07.2013 is decided as per the above terms.



(V. Padmanabhan)

Commissioner

Central Excise, Bhavnagar

Date: 11.12.2014

No. V/15-27/DEM/HQ/2013-14

or

BY Registered Post A.D. / HAND DELIVERY

To,
M/s Navyug Ship Breaking Co,
Plot No 152-153, SBY, Sosiya,
Dist Bhavnagar.

Copy submitted to:

- (i) The Chief Commissioner, Central Excise, Ahmedabad Zone.
- (ii) The Assistant Commissioner (Recovery Cell), C.Excise, HQ. Bhavnagar.
- (iii) The Assistant Commissioner, Central Excise, AR-II, SBY, Alang:
- (iv) The Assistant Commissioner, Central Excise, Rural Division, Bhavnagar.
- (v) Guard File.

15/12/2014
TRC