Brief facts of the case:

M/s. Trinetra Cement Ltd., 93, Santhome High Road, Karapagam Avenue, Raja Annamaliapuram, Chennai-600 028, having IEC Code number – 0388198362 (hereinafter referred to as the 'said noticee' for the sake of brevity) are importing Coal from South Africa. The said noticee had classified the coal imported by them under CTH 27011920 claiming the same as 'Steam coal' and paid only 1% Additional duty leviable under Sub-Section (1) of Section 3 of the Customs Tariff Act 1975(CVD) claiming the exemption Notification 12/2012-Cus. dated 17.03.2012 (Sr. No. 123). Intelligence collated and developed by the officers of DRI, Ahmedabad indicated that certain importers were importing Coal having the calorific value greater than 5,833 KCal/Kg and the coal imported by them fell in the category of Bituminous coal chargeable to duty @ 5% Basic Customs Duty (BCD) under the notification no: 12/2012-Cus. dated 17.03.2012 (Sr. No. 124) and 6% Additional duty leviable under Sub-Section (1) of Section 3 of the Customs Tariff Act 1975 (CVD) as in terms of the Central Excise Tariff.

2.1 The Coal is classified under Chapter 27 of the First Schedule to the Customs Tariff Act 1975. The relevant text of the same is re-produced hereunder:

2701	***COAL; BRIQUETTES, OVOIDS AND SIMILAR SOLID FUELS MANUFACTURED FROM COAL.***	
	- Coal, whether or not pulverised, but not agglomerated:	
2701 11 00	*- -*	*Anthracite*
2701 12 00	*- -*	*Bituminous coal*
2701 19	*- -*	*Other coal:*
2701 19 10	*- - -*	*Coking Coal*
2701 19 20	*- - -*	*Steam Coal*
2701 19 90	*- - -*	*Other*
2701 20	*-*	*Briquettes, ovoids and similar solid fuels manufactured from coal:*

3. Further, sub-heading note (2) of the Chapter 27 specifically provides that for the purposes of sub-heading 2701 12 "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg.

4.1 From the scrutiny of the import documents submitted by the said noticee, it transpired that they have imported "Steam Non-coking Coal in Bulk' having Calorific value 3688 Kcal/Kg and 5539 Kcal/Kg from South Africa at Kandla Port. The details of these imports are detailed in paragraph 4.1 of the Show Cause Notice.

4.2 It transpired from the import documents that the said noticee has classified the coal imported by them under Customs Tariff Item 27011920 as Steam Coal and availed the exemption of Customs Duty under exemption Notification No. 12/2012-Cus dated 17.03.2012 (Sr. No. 123) in their imports after 17.03.2012.

4.3 Further, it also transpired from the import documents that the said noticee are importing Coal at Kandla Port and during the scrutiny of documents it is also observed that the Coal imported vide various Bills of Entry were assessed provisionally.

5.1 The analysis reports of the shipments of coal in respect of the said noticee indicated that the Gross Calorific Value of the Coal imported was 5539 Kcal/Kg (ADB Basis) and the Volatile matter exceeds 14% (ADB) the details of which are tabulated in Annexure-B annexed to the Show Cause Notice.

6. The relevant legal provisions in so far as they relate to the facts and circumstances of the subject imports are as follows (emphasis supplied):-

6.1 The <u>Customs Act, 1962</u>

(i) ***Section 2(39) – "Smuggling"*** *in relation to any goods, means any act or omission which render such goods liable to confiscation under Section 111 or Section 113 of the Customs Act, 1962.*

(ii) ***Section 12.*** *(1)* ***Dutiable goods. -*** *Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from India.*

(iii) ***Section15 (1). Date for determination of rate of duty and tariff valuation of imported goods.*** *The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force, -*

(a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse under section 68, on the date on which a ***bill of entry for home consumption in respect of such goods is presented under that section;***

(c) in the case of any other goods, on the date of payment of duty:

***(iv) Section 28** – **Recovery of duties not levied or short-levied or erroneously refunded**–*

(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been short levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of, -

(i) his own ascertainment of the duty; or

(ii) the duty ascertained by the proper officer,

the amount of duty along with the interest payable thereon under Section 28AA or the amount of interest which has not been so paid or part-paid.

(v) Section 28AA: Interest on delayed payment of duty:

(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(2) Interest at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,—

(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 151A; and

(b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.".

(vi) Section 46: Entry of goods on importation. - *(1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form:*

Provided that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

.....
.....
....."

(4) The importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

(vii) Section 111 –Confiscation of improperly imported goods, etc. - *The following goods brought from a place outside India shall be liable to confiscation :*

……..

……..

(d) *any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force.*

- ***<u>any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods</u>***

under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;

……..."

(viii) Section 112- Penalty for improper importation of goods, etc. – *Any person* ***-(a)*** *- who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or*

(b) *who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111, shall be liable to penalty. .....*

(ix) Section 114A – Penalty for short levy or non levy of duty in certain cases -*: -where duty has not been levied short levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful misstatement or suppression of facts, the person who is liable to pay duty or interest as the case may be as determined under sub-section (8) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined.*

6.2 Exemption and Effective Rate of Basic and Additional Duty for specified goods of Chs. 1 to 99 [Notification 12/2012-Cus. Dated 17.03.2012]:

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

Notification
No.12 /2012 –Customs

New Delhi, dated the 17 th March, 2012

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002 Published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 118(E) dated the 1st March, 2002, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the

case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India,-

(a) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate specified in the corresponding entry in column (4) of the said Table;

(b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act 1975 (51 of 1975) as is in excess of the additional duty rate specified in the corresponding entry in column (5) of the said Table, subject to any of the conditions, specified in the Annexure to this notification, the condition number of which is mentioned in the corresponding entry in column (6) of said table:

(The relevant portion of the said Notification is reproduced here below)

S. No.	*Chapter or Heading or Sub-heading or tariff item*	*Description of goods*	*Standard rate*	*Additional duty rate*	*Condition No.*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*
122	*2701*	*Coking coal* *Explanation - For the purpose of this exemption, "Coking coal" means coal having mean reflectance of more than 0.60 and Swelling Index or Crucible Swelling Number of 1 and above*	*NIL*	-	-
123	*27011920*	*Steam Coal*	*NIL*	*1%*	-
124	*2701 11 00, 2701 12 00, 2701 19*	*All goods other than those specified at S. Nos. 122 and 123 above*	*5%*	-	-

6.3 **Chapter Sub-Heading Note 2 to the Chapter 27 as given under:**

CHAPTER 27

Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes

SUB-HEADING Notes :

2. For the purposes of sub-heading 2701 12 "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg.

6.4 **The Foreign Trade (Development and Regulation) Act, 1992**

(i) Section 3(2) –The Central Government may also, by order published in the Official Gazette, make provision for prohibiting, restricting, or otherwise regulating, in all cases and subject to such exceptions, if any, as may be made by or under the order, the import or export of goods.

(ii) Section 3(3) - all goods to which any order under sub section (2) applies shall be deemed to be goods the imports or exports of which has been prohibited under section 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly.

(iii) Section 11: Contravention of provision of this Act, rules, orders and exports and import policy: - No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made there under and the export and import policy for the time being in force.

6.5 ***FOREIGN TRADE (REGULATION) RULES, 1993***

Rule: 11. Declaration as to value and quality of imported goods-

On the importation into, or exportation out of, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act 1962, state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of such Bill of Entry or Shipping Bill or any other documents.

7.1 Scrutiny of the various documents/records of the said noticee indicated that they have imported coal having Volatile Matter higher than 14% and Gross Calorific Value greater than 5833 Kcal/Kg. The said noticee was classifying the coal imported by them under Customs Tariff Item 27011920 and availing the exemption of Customs Duty under Sr. No: 123 of the Notification No. 12/2012-Cus dated 17.03.2012 for their imports with effect from 17.03.2012. As the revenue implication on account of mis-classification arose only in the wake of Notification No. 12/2012-Cus dated 17.03.2012, the evidence discussed in the Show Cause Notice covered the period commencing from 17.03.2012.

7.2 The Sub-heading note (2) of the Chapter 27 of the First Schedule to the Customs Tariff Act 1975, defines "bituminous coal" as coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg.

7.3 Further, as per the literature 'Coal Production and Preparation Report' downloaded from the website https://www.eia.gov/cneaf/coal/page/surveys/ eia7ainst.pdf, it is clear that dry, mineral-matter free basis means total moisture and mineral matter have been removed and moist, mineral-matter free basis means the natural inherent moisture is present but mineral matter has been removed and moist coal does not include visible water on the surface and the Volatile Matter (on dry, mineral-matter-free basis) & Gross Calorific Value(on moist, mineral-matter-free basis) can be derived by applying the following Formulae:-

Dry, mineral-matter free fixed carbon percentage
= 100 (FC – 0.15S) / (100 – (M + 1.08A + 0.55S))

Dry, mineral-matter free volatile matter percentage
= 100 – (Dry, mineral-matter free FC)

Moist, mineral-matter free Btu content
= 100 (Btu – 50S) / (100 – (1.08A + 0.55S))

Where,

Btu = gross calorific value per pound;

FC = fixed carbon content percentage by weight;

M = moisture content percentage by weight;

A = ash content percentage by weight; and

S = sulfur content percentage by weight.

*Btu = 1.80 * kcal/kg*

7.3.1 The values of Ash content, Sulphur content and Btu are to be applied on Air Dry Basis (ADB) as confirmed by Joint Director, Customs and central Revenue Control Laboratory (CRCL) vide letter F. No: JNCH/T.O./2012-12 dated 07.03.2013.

7.3.2 The values of fixed carbon content and ash content used in above formulae have not been adjusted for SO3 free basis (as prescribed by ASTM 388). In this regard reliance was placed on the conclusion put forth in the report titled 'SULFUR RETENTION IN BITUMINOUS COAL ASH' by O.W. Rees et al. In the said report it has been concluded that 'very little sulfur is retained in bituminous coal ash resulting from higher temperature combustion in industrial or power plant installations'. Apart from above, in the body of the above report, it is noted that the the amount of sulfur retention in coal ash is a function (effect) of ashing temperature. As the ashing temperature rises the sulfur content in ash decreases. It reaches zero at higher temperatures (usually >1000 deg Celsius). It can also be concluded from the said report that even at the relatively lower temperatures (say 800 deg Celsius – which is usually laboratory ashing temperature) the percentage of sulfur content in ash is negligible (to the tune of 5% on an average). Thus the effect of non-adjustment (with reference to SO3) of values of fixed carbon content and ash content in bituminous coal would be negligible on both volatile matter (on dry, mineral matter free basis) and calorific value limit (on moist, mineral matter free basis), and hence would hardly impinge adversely on the interest of the importers. In any case, the calorific values in respect of coal consignments covered in the show cause notice are not so very close to the figure of 5833 kcal/kg, nor their volatile matter content percentage so very close to 14%, and hence ignoring the negligible presence of SO3 will be of no consequence as far as the classification of the impugned coal and duty liability thereon are concerned.

8. A reference was made by DRI, vide a letter F. No: DRI/AZU/INT-01/2013 dated 05.03.2013 to the Joint Director, Customs and central Revenue Control Laboratory (CRCL) to ascertain whether the aforesaid formulae can be applied as such in calculation of the

volatile matter limit (on a dry, mineral-matter-free basis) and the calorific value limit (on a moist, mineral-matter-free basis) in case of Coal imported into India.

9**.** The Joint Director, Customs Laboratory, Jawaharlal Nehru Customs House, Nhava Sheva, Raigad, Maharashtra vide a letter F. No: JNCH/T.O./2012-12 dated 07.03.2013 confirmed the applicability of the said formulae to the coal imported. It was also confirmed that the values of Ash content, Sulphur content and Btu are to be applied on Air Dry Basis (ADB).

10.1 The said noticee has imported Coal from South Africa under various Bills of Entry at Kandla Port describing them as "Steam Non-Coking Coal in Bulk". The Certificates of Sampling & Analysis of Shipment of Coal for each vessel submitted by the said noticee indicated that the Coal imported were having Gross Calorific Value 5833 Kcal/Kg. Simultaneously, the Volatile Matter is more than 14%. But, the Gross Calorific Value and the Volatile Matter in these analysis reports are on Air Dry Basis (ADB) conditions, whereas as per Sub-heading Note 2 to Chapter 27 of the Customs Tariff the volatile matter limit should be on a dry, mineral-matter-free basis and a calorific value limit should be on a moist, mineral-matter-free basis. The formulae to calculate the Volatile Matter (on dry, mineral-matter-free basis) & Gross Calorific Value (on moist, mineral-matter-free basis) are given below:

'Dry, mineral-matter-free fixed carbon percentage' = $\frac{100\ (FC - 0.15S)}{100 - (M + 1.08A + 0.55S)}$

'Dry, mineral-matter-free volatile matter percentage' =100 – (Dry, mineral-matter-free FC)

'Moist, mineral-matter-free Btu content' = $\frac{100\ (Btu - 50S)}{100 - (1.08A + 0.55S)}$

Btu=Gross calorific value per pound.

S= Sulphur content percent by weight

A= Ash content percent by weight.

(1 Kcal/Kg = 1.800001 Btu/Lb.)

10.2 On the basis of above said formula the Volatile Matter (VM) (on dry, mineral-matter-free basis) & Gross Calorific Value (GCV) (on moist, mineral-matter-free basis) are calculated.

11. The Certificate of Sampling & Analysis of shipment of coal, for Reference No.201203-0071 dated 05.03.2012, show GCV as less than 5833 Kcal/Kg. (ADB basis) in respect of the test conducted by M/s. Inspectorate M&L (Pvt.) Ltd. on a Sample drawn from the cargo of 48913 MTs of coal described by the Exporter as Steam Coal (non-coking) in Bulk loaded at Richards Bay Coal Terminal on board the vessel M.V. Faneromeni.

12. The analysis report appended in the said Certificate indicated the Coal was having Gross Calorific Value 5539 (Air Dry Basis) and the Volatile Matter 22.6% (Air Dry Basis). On applying the above formulae, the Gross Calorific Value (on moist, mineral-matter-free basis) worked out to be 7623 Kcal/Kg. as against Gross Calorific Value 5539 (Air Dry Basis).

12. The classification of the goods under Customs Tariff is governed by principles as set out in 'The General Rules for the Interpretation of Import Tariff'. Rule 1 of The General Rules for the Interpretation of Import Tariff clearly stipulates that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. Further, the Rule 6 of The General Rules for the Interpretation of Import Tariff states that 'for legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related sub-heading Notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.'

13. The Sub-heading note (2) of the Chapter 27 specifically provides that for the purposes of sub-heading 2701 12, "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg. The coal imported by the said noticee had volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and the calorific value limits (on a moist, mineral-matter-free basis) greater than 5833 kcal/kg. Hence the said coal is classifiable under Customs tariff heading 2701 1200 instead of CTH 2701 1920 as Steam Coal.

15. The structure of chapter heading no: 2701 is reproduced below once again for convenience.

2701 COAL; BRIQUETTES, OVOIDS AND SIMILAR SOLID FUELS MANUFACTURED FROM COAL.

		- Coal, whether or not pulverised, but not agglomerated:
2701 11 00	*- -*	*Anthracite*
2701 12 00	*- -*	*Bituminous coal*
2701 19	*- -*	*Other coal:*
2701 19 10	*- - -*	*Coking Coal*
2701 19 20	*- - -*	*Steam Coal*
2701 1990	*- - -*	*Other*
2701 20	*-*	*Briquettes, ovoids and similar solid fuels manufactured from coal:*

14.2 As is evident from the above structure, only that coal which does not get covered under the category of anthracite coal of Customs tariff heading (CTH) 27011100 and Bituminous Coal of CTH 27011200 can go in the category of 'Other Coal' of CTH 2701.19. The 'Other Coal' of CTH 2701.19 is then divided into Coking Coal CTH 2701 19 10, Steam Coal CTH 2701 19 20 and other CTH 2701 1990. It has been abundantly brought out without any doubt that the impugned coal categorically and unambiguously satisfies the requirements stipulated for its classification under CTH 27011200 as 'Bituminous Coal' and therefore it gets classified there (i.e. under CTH 27011200) and as a consequence it cannot be covered under the category of 'Other Coal' of CTH 2701 19 and therefore its classification under CTH 27011920 is completely out of question because coal which is not covered under 2701 19 cannot be covered under 27010920. This is so self evident that any further elaboration on this point will be a futile exercise in tautology.

16.1 The Notification No:12/2012-Cus dated 17.03.2012, exempts the specified goods when imported into India:-

(a) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate specified in the corresponding;
(b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act 1975 (51 of

1975) as is in excess of the additional duty rate specified in the corresponding entry subject to any of the conditions, specified:

The relevant portion of the table appended to the notification reads as under:

S. No.	Chapter or Heading or sub– heading or tariff item	Description of goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
123.	27011920	Steam Coal	Nil	1%	-
124.	2701 11 00, 2701 12 00, 2701 19	All goods other than those specified at S. Nos. 122 and 123 above.	5%	-	-

16.2 Since the impugned coal imported by the said noticee appeared to be classifiable under CTH 2701 12 00, the same is not eligible for exemption in terms of Sr. No: 123 of the said notification and hence is leviable to duty @ 5% Basic Customs Duty in accordance with the Sr. No: 124 of the Notification no: 12/2012 dated 17.03.2012 and 6% Additional duty (CVD) leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act 1975.

17.1 In terms of Section 46 (4) of Customs Act, 1962, the importer is required to make a declaration as to truth of the contents of the bills of entry submitted for assessment of Customs duty. The said noticee have wrongly declared the coal imported by them as 'Steam Non-Coking Coal' (As detailed in Annexure-A) in as much as they were fully aware that the said Coal ordered by them were having Gross Calorific Value in excess of 5833 Kcal/Kg and the percentage of Volatile matter in excess of 14%. The Certificate of Sampling & Analysis received from the overseas supplier and on the basis of the formula the GCV was found to be more than 5833 Kcal/Kg (m,mmf) and Volatile Matter in excess of 14%. The said noticee were aware that the sub-heading note (2) to the Chapter 27 of the Customs Tariff categorically mentioned that for the purposes of sub-heading 2701 12 "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5833 Kcal/kg. Despite of the same they chose to declare their goods as "steam coal"

classifiable under CTH 27011920 to wrongly claim the benefit of exemption applicable to the 'Steam Coal' under Notification No. 12/2012-Cus dated 17.03.2012 (Sr.No.:123).

17.2 Thus it appeared that the said noticee has contravened the provisions of sub section (4) of Section 46 of the Customs Act, 1962, in as much as, they had mis-declared the goods imported as "Indonesian Steam Non-Coking Coal in Bulk" in the declaration form of Bill of Entry filed under the provisions of Section 46(4) of the Customs Act 1962 and mis-classified the goods under Customs tariff heading 27011920, in order to avail the exemption available in the Notification 12/2012-Cus. dated 17.03.2012 against the Sr. No. 123. This constituted an offence of the nature covered in Section 111(m) of the Customs Act, 1962. Accordingly the impugned goods as detailed in the Annexure–B of the Show Cause Notice are liable to confiscation under Section 111(m) of the Customs Act, 1962.

17.3 Further, in terms of Rule 11 of the Foreign Trade (Regulation) Rules, 1993, on the importation into, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bills of Entry or the Shipping Bills or any other documents prescribed under the Customs Act 1962, state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of such Bill of Entry or Shipping Bill or any other documents. In the instant case the importers the said noticee has failed to declare the true description of the products imported as 'Bituminous Coal' and has hence contravened the provisions of Rule 11 of the Foreign Trade (Regulation) Rules, 1993 and Rule 14 of the Rules ibid in as much as the said noticee knew that the declarations made by them was false with regard to the description of the Coal imported by them. The contraventions of the provisions of the Foreign Trade (Development and Regulation) Act, Foreign Trade (Regulation) Rules and Export and Import policy is a prohibition of the nature as described under the Section 11 of the Foreign Trade (Development and Regulation) Act, 1992. Now, in terms of Section 3(3) of the Act ibid the prohibitions are deemed to be a prohibition

under the Section 11 of the Customs Act 1962. In terms of the Section 111 (d) of the Customs Act, 1962 any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force is liable to confiscation. Thus it appears that the impugned goods as detailed in the Annexure-A to this notice are liable to confiscation under Section 111(d) of the Act ibid.

17.4 Further, on account of the above said acts of omission and commission, which have rendered the impugned goods liable to confiscation under the provisions of Section 111(d) and 111(m) of the Customs Act 1962, the said noticee is also liable for penalty under Section 112(a) of the Act ibid.

17.5 From the foregoing, it also appeared that the said noticee has mis-declared and (mis) classified the impugned goods under CTH 2701 1920 (instead of their correct classification under CTH 2701 1200) in their Bills of Entry and thereby wrongly availed the benefit of the exemption Notification 12/2012-Cus dated 17.03.2012 (Sr. No. 123) and paid duty (only CVD) @ 1% ad valorem instead of paying BCD @ 5% in terms of Notification 12/2012-Cus dated 17.03.2012 (Sr. No. 124) and CVD @ 6% ad valorem leviable under sub-section (1) of Section 3 of the Customs Tariff Act, 1975, which led to short levy of Customs duty in respect of the two Bills of Entry mentioned in Annexure-A to the Show Cause Notice, which were provisionally assessed. Hence differential duty of Rs.1,17,20,8810 on the 20000 MTS of impugned coal imported by the said noticee at Kandla Port under the Bills of entry detailed in Annexure-A to the Show Cause Notice is liable to be recovered from them under Section 28(1) of the Customs Act, 1962 alongwith the applicable rate of interest under Section 28AA ibid.

18. In view of the above, the said noticee, M/s. Trinetra Cement Ltd., was issued a Show Cause Notice bearing S/10-63/Trinetra/Gr.I/2012-13, dated 08.05.2013, calling upon them to show cause to the Commissioner of Customs, Kandla as to why:-

(i) Their claim for classification of impugned goods (as detailed in Annexure A) under Customs Tariff item / heading 270119 20, should not be rejected and why the same should not be re-

classified under Customs Tariff item/heading 2701 1200 of the First Schedule to the Customs Tariff Act, 1975;

(ii) The Bills of entry as detailed in Annexure-A, which were provisionally assessed should not be finally assessed under as per the correct classification i.e. under Customs tariff Item/heading 27011200 of the First Schedule to the Customs Tariff Act, 1975, and the duty be recovered from them under Section 18(2) of the Customs Act, 1962 and in terms of the bond executed during the provisional assessment.

(iii) The 20000 MTs, imported Coal valued at Rs.11,04,79,860/- as detailed in Annexure –A should not be confiscated / held liable for confiscation under the provisions of Section 111(d) and 111(m) of the Customs Act,1962;

(iv) The differential Customs duty amounting to Rs.1,17,20,810/-, on the 20000 MTs, of imported impugned Coal as detailed in Annexure-A, should not be demanded and recovered from them under Section 28(1) of the Customs Act, 1962;

(v) Interest should not be recovered from them on the said differential Customs Duty, as at (iv) above, under Section 28AA of the Customs Act, 1962.

(vi) Penalty should not be imposed on them under Section 112(a) of the Customs Act, 1962.

Defence Submissions:

18. The said noticee in their written reply dated, received on 03.12.2013, to the Show Cause Notice, has denied and disputed the allegations levelled against them in the present Show Cause Notice. Further they have, inter-alia, submitted that:

- Steam coal is not a separate head under the ASTM and ASTM classification of coal is based on the physical properties and chemical composition of the coal whereas steam coal is not a category of coal, the classification of which is based on its chemical composition or physical characteristics. Classification of coal as steam coal is an end use based classification.

- The term "steam coal" has not been defined in the Tariff. It has been consistently held that in the absence of a statutory definition, a tariff entry was to be interpreted in trade parlance. Reliance is placed on the judgements/decisions in South Bihar Sugar Mills Ltd v. Union of India 1978 (2) ELT 336; Commissioner of Sales Tax , Madhya Pradesh v. Jaswant Singh Charan Singh AIR 1967 SC 1454 and Ramavatar Budhaiprasad v. Assistant Sales Tax Officer (1962) 1 SCR 279.

- In the common/trade parlance, coal which is imported by the Noticee is known as 'steam coal; that when the trade community which deals with coal recognizes the goods in issue as "steam coal", the classification of such goods must be based on the trade recognition of the goods in the absence of any statutory definition of the term.

- In the light of the various technical literaturtes, it becomes clear that bituminous coal is generally recognized to be used in generation of steam electric power and that any coal that is used to raise steam is called steam coal and that there cannot be any distinction between bituminous coal and steam coal; that while the categorization of coal into anthracite coal, bituminous coal, etc. is based on aging/rank, classification of coal as coking coal, steam coal, etc. is based on use to which the coal is put to. In other words, coal which is called steam coal since it is used for steam raising in power plants may also be anthracite, bituminous or sub-bituminous coal in rank.

- Steam coal by its very description is a specific entry which is to be preferred over the general entry of bituminous coal; that 'Bituminous coal' is definitely wider and general in nature than 'steam coal' because 'bituminous coal' may be coking coal or steam coal based on its quality and the use to which it is put to; that only that coal which is bituminous but not steam coal would get classified as 'Bituminous coal'.

- It is a settled principle of interpretation that specific entry is to be preferred over general entry. Rule 3 (a) of the General Rules of Interpretation, clearly provides that specific entry would prevail over general entry.

- It is understood that 'coking coal' always has a calorific value of greater than 5833 Kl/kg and it is either anthracite or bituminous

in ranking. Anthracite coal has a very high calorific value much greater than 5833 Kcal/kg and volatile matter of less than 14%; that any interpretation which makes a part of the statute a dead letter is to be avoided. Reference is invited in this regard to a decision of the CESTAT in the case of Swarup Fibre Industries Ltd v. Collector of Central Excise 1990 (48) ELT 118 (Tri.Del.) wherein it was held that a classification which would render a sub-heading of the Tariff nugatory was not acceptable.

- It is an undisputed fact that the Noticee had been importing coal for the use in power generation for a long time and copy of sample bill of entry for past imports of the coal is also submitted. It is submitted that the Noticee had been importing the same kind of coal ever since the first import, as the coal which is required to operate the power plant of the Noticee remains the same. This is so as the machinery and process used by the Noticee can use only this kind of coal. Even an inadvertent use of another type of coal can damage the equipments/machinery of the Noticee as well as the cement produced. Therefore, the Noticee has been very careful in ensuring that the same kind of coal is received by them. It is submitted that the test reports of the various imports made by the Noticee clearly establishes that the coal imported by the Noticee throughout is of the same kind and have the same properties and characteristics. It is not the case of the department that the coal imported by the Noticee vide the bill of entry in issue is different from the coal imported by the Noticee during the past periods.

- As the Noticee was importing the coal for generation of steam, keeping in mind its end use and also in tune with the description given in the High-Sea Sale Invoice, the Noticee correctly declared the description of goods as 'Steaming (Non-Coking) coal'. The classification claimed by the Noticee is in tune with the long established practice of the Noticee. It is submitted that the classification claimed by the Noticee is correct to the best of their belief and understanding of the law and has been in practice for a long period. If any exemptions were available at the time of importation, the Noticee has claimed the exemption. However, the Department has not raised any objection on the classification of the goods till the exemption was granted for steam coal vide Notification no. 12/2012-Cus dated 17.03.2012. It is submitted

that the objection raised by the Department is a result of the exemption granted under the said notification to steam coal. Therefore, the allegation of the Department that the Noticee has been mis-declaring the imported coal is a prejudiced allegation.

- Penalty under Section 112(a) is leviable on a person only if he does or omits to do any act that would render the goods liable for confiscation under Section 111 ibid. As already submitted supra the goods are not liable for confiscation and hence the question of imposition of penalty under Section 112 (a) of the Act does not arise.

- The case involves interpretations of the provisions of the Customs Act, 1962, Customs Valuation Rules as well as Customs Tariff Act, 1975; that the noticees acted in bonafide belief. It has been held by the Hon'ble Customs, Excise & Service Tax Appellate Tribunal in a large number of cases that no penalty is imposable in cases involving interpretation of the statutory provisions.

Personal Hearing:

19. The Personal Hearing in the matter was fixed 03.01.2014, which was adjourned to 11.02.2014, 25.02.2014 and finally to 07.03.2014, on the request of the noticee. For the Personal Hearing held on 07.03.2014, Shri S.P.Meyyappan, Assistant Vice-President (Material) appeared on behalf of the said noticee, and reiterated the written submissions and pleaded to drop the Show Cause Notice in view of the said submissions.

Discussion & Findings:

20.1 I have carefully gone through the records of the case, including the Show Cause Notice dated 08.05.2013, the written submissions dated 03.12.2013, as well as the oral submissions made during the course of Personal Hearing.

20.2 I find that the following main issues are involved in the subject Show Cause Notice, which is required to be decided:-

1. The correct classification of the product under the schedule to the Customs Tariff Act, 1975, in respect of the Coal imported by the said noticee, as detailed in Annexure-A to the Show Cause Notice.

2. Whether the Bills of entry as detailed in Annexure-A is required to be finalized under Section 18(2) of the Customs Act, 1962, on the basis of classification Customs tariff heading 27011200.

3. Whether 20000 MTs, imported Coal valued at Rs.11,04,79,860/- as detailed in Annexure-A to the Show Cause Notice, imported by the said noticee, though not available physically, is liable for confiscation under the provisions of Sections 111 (d) and 111(m) of the Customs Act, 1962.

4. Whether the differential Customs Duty payable on finalization, is required to be determined as Rs.1,17,20,810/- under Section 18(2) of the Customs Act, 1962, and the duty so determined is required to be recovered from the said noticee.

5. Whether the said noticee is liable to pay interest involved on the said differential Customs Duty amounting to Rs.1,17,20,810/- at the applicable rate under the provisions of Section 18 (3) of the Customs Act, 1962.

6. Whether the said noticee is liable for penal action, under Section 112(a) of the Customs Act, 1962.

21. After having framed the main issues to be decided, now I proceed to deal with each of the issues individually, herein below:

(1) The correct classification of the product, Coal imported by the said noticee, as detailed in Annexure-A to the Show Cause Notice, under the schedule to the Customs Tariff Act, 1975.

****

22.1 At the outset, it is pertinent to mention that, the issue before me for decision is not regarding classification of various types of coal, its uses and characteristics etc. In this case, it is an undisputed fact that the coal under consideration is imported and that duty is leviable on such imported coal vis-à-vis grant of exemption, if any. For this purpose, one of the important steps in assessing the duty payable is the classification of goods under the Schedule to the Customs Tariff Act. Thus, the crux of the issue in this case, around which all the above five issues are revolved, which I am required to decide, is regarding the classification of the Coal imported by the said noticee, **within the**

ambit of the Schedule to the Customs Tariff Act, 1975, for the purpose of levying of duty/deciding the eligibility for exemption.

22.2 In view of the above, the main issue before me for decision is whether the 'Coal' imported by the said noticee, falls under the category of 'Steam Coal' as declared by the said noticee, or is 'Bituminous Coal', as alleged in the Show Cause Notice, within the ambit of the Schedule to the Customs Act, 1975, in order to decide the eligibility of exemption or otherwise under Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012.

22.3 Now coming to the above said aspect in respect of the imported Coal under consideration, I am of the view that before proceeding for classification of an entity, it is absolutely essential to determine, 'what is the entity under classification dispute?' After such determination, a suitable heading or sub-heading in the tariff is to be located and then the same has to be considered, in light of Statutory Rules for Interpretation, the Section Notes and the Chapter Notes in the Tariff, to establish the proposed heading for classifying the entity would be appropriate or not. Thus, the goods are required to be classified taking into consideration the scope of headings/subheadings, related Section Notes, Chapter Notes and the General Interpretative Rules.

23.1 I find that the whole issue of whether the goods imported by the said noticee, is entitled for exemption from duty in terms of Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012, has cropped up in the light of the Sub-heading Note 2 of Chapter 27 of the Schedule to Customs Tariff Act, 1975. Therefore, the issue is to be examined and considered in the light of the said Sub-heading Note 2 of Chapter 27, which reads as "For the purposes of sub-heading 2701 12, "bituminous coal" means *coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg*."

23.2 I find that the Show Cause Notice has been issued proposing the classification of the imported Coal under CTH 2701 1200 as 'Bituminous Coal', only in respect of those imports, where the volatile matter limit (on a dry, mineral-matter-free basis) exceeds 14% and calorific value limit (on a moist, mineral-matter-free basis) is equal to or

greater than 5,833 kcal/kg. Further, the Show Cause Notice does cover those bills of entry where the calorific value limit and the GCV is less than the above prescribed limit, which means that the same has been accepted as 'Steam Coal" falling under CTH 27011990. The above fact has not been disputed by the said noticee. **Thus, I am proceeding to decide the case on the said facts and on the premises that the Coal imported by the said noticee is having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg. and as a consequence whether the said Coal is eligible for exemption under Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012.**

23.3 For proper appreciation, the classification and duty structure of Coal as per the First Schedule of the Customs Tariff, is as under:

Tariff Item	**Description of goods**	**Rate of Duty**				**Remarks**
		Standard		**Effective**		
		BCD	**CVD**	**BCD**	**CVD**	
2701	**Coal; Briquettes, Ovoids and similar solid fuels manufactured from Coal** - Coal whether or not pulverized, but not agglomerated:					Effective rate of Basic Customs Duty (BCD) as per Notfn. No.12/2012-Cus. dt. 17.03.2012.
2701 11 00	- - Anthracite	10%	6%	5%	6%	
2701 12 00	- - Bituminous Coal	55%	6%	5%	6%	
2701 19	-- Other Coal:					
2701 19 10	- - - Coking Coal	10%	6%	0%	6%	
2701 19 20	- - - Steam Coal	10%	6%	0%	1%	
2701 19 90	- - - Others	10%	6%	5%	6%	

From the above Notification No.012/2012-Cus. dated 17.03.2012, it can be seen that the effective rate of duty for Bituminous Coal is 5% BCD + 6% CVD, as against Nil BCD + 1% CVD for Steam Coal.

23.4 As regards the definition of the above listed Coal under various headings/sub-headings are concerned, only two types of Coals have been defined under Chapter 27. These two definitions pertain to "Anthracite" and "Bituminous Coal", which are as under:

1. For the purposes of sub-heading 2701 11 "anthracite" means *coal having a volatile matter limit (on a dry, mineral-matter-free basis) not exceeding 14%*'.
2. For the purposes of sub-heading 2701 12, "bituminous coal" means *coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg*.

23.5 From a reading of the above definition, it evolves that all Coal with a volatile matter limit (on a dry, mineral-matter-free basis) not exceeding 14% are to be classified as 'Anthracite', irrespective of the calorific value. However, the coal with a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% will be classified as 'Bituminous Coal' if the calorific value limit (on a moist, mineral-matter-free basis) is equal to or greater than 5,833 kcal/kg and in other case, where the caloric value limit is less than 5,833 kcal/kg, the same would be classified as 'Other Coal'. 'Other Coal' amongst others includes 'Steam Coal'. As such, the issue under consideration whether imported coal is Steam Coal or Bituminous Coal, is to be decided in the light of the above Chapter Notes and the General Interpretative Rules. Also, it is to be seen whether the headings/sub-headings of the imported coal can be arrived at by applying Rule 1 of the General Interpretative Rules or whether the other Rules from 2 to 6 ibid are to be applied sequentially.

23.6 The expression "Bituminous Coal" is defined under Sub Heading Note 2 of the Chapter 27 of the Customs Tariff Act, 1975. As per the Sub Heading Note 2 of the Chapter 27 of the Customs Tariff Act, 1975, "bituminous coal" means coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than

5,833 kcal/kg. From the above, it is quite evident that the coal which possesses volatile matter value (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg is to be treated as "Bituminous Coal". On the other hand, it is worth mentioning that there is no specific definition of Steam coal, falling under Chapter Sub Heading No. 27011920.

23.7 The meaning of the terms "dry, mineral-matter-free basis" and "moist, mineral-matter-free basis" has been detailed in the Show Cause Notice. Accordingly, I gone through the literature 'Coal Production and Preparation Report (Instructions) **-** U.S. Department of Energy, Energy Information, Administration' available on website https:/www.eia.gov/cneaf Coal/page/surveys/ eia7ainst.pdf, referred to in the Show Cause Notice. In the said report, it is stated that '*dry, mineral-matter free basis'* means that the total moisture and mineral matter have been removed from the Coal sample and '*moist, mineral-matter free basis'* means as though the natural inherent moisture is present but mineral matter has been removed from the Coal sample and moist Coal does not include visible water on the surface. Wherever the data in respect of Volatile Matter (VM) and Gross Calorific Value (GCV) is expressed on 'As Received Basis'(ARB) or 'Air Dry Basis'(ADB) or 'Dry Basis', the same needs to be converted into percentage value of Volatile Matter on 'dry, mineral-matter-free' basis and the Calorific Value on 'moist, mineral-matter-free basis'. For this, the literature available on the website of 'U.S. Department of Energy, Energy Information, Administration' which gives the formula (as detailed above), using which the Fixed Carbon (%) and Volatile Matter (%) both on dry, mineral-matter-free basis and Gross Calorific Value (Kcal/Kg) on moist, mineral-matter-free basis can be derived. The said formula is already detailed in the Show Cause Notice has hence not repeated. In this case, amongst others reliance is also placed on the above report of U.S. Department of Energy, Energy Information, and Administration.

23.8 I further find that the Joint Director, Customs Laboratory, Jawaharlal Nehru Customs House, Nhava Sheva, Raigad vide letter F.No.JNCH/T.O./2012-13 dt.07.03.2013 confirmed the applicability of the above mentioned formulae available on the website of 'U.S. Department of Energy, Energy Information, Administration' in calculating volatile matter limit of Coal (on a dry, mineral-matter-free

basis) and a calorific value limit of Coal (on a moist, mineral-matter-free basis) to coal imported into India. He also confirmed that the values of Ash content, Sulphur content etc. are to be applied on Air Dry Basis (ADB).

24.1 As per the General Rules for the interpretation of the Import Tariff, it can be seen that classification shall be determined according to the terms of Headings and any relative Sections or Chapter Notes and provided such heading or Notes do not otherwise require, then by applying the Interpretative Notes 2, 3, 4, 5 and 6. In this case, 'Bituminous Coal' coal has been defined under Sub-heading Note 2 of Chapter 27 of CTA, 1975. In conformity with the Note, the Volatile Matter, calculated on dry, mineral-matter-free basis, for all the imported shipments is in excess of 14%. (whether ADB/ARB) and calorific value for all these consignments on moist, mineral-matter-free basis, is in excess of 5,833 Kcal/Kg. in respect of the Coal imported and covered by the Show Cause Notice. The Coal imported in these shipments confirms to the definition of 'Bituminous Coal' given in Sub-heading Note 2 of Chapter 27.

24.2 In terms of Rule 1 of the General Interpretative Rules, the titles of Sections, Chapters and Sub-chapters are provided for ease of reference only; **for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes** and, provided such headings or Notes do not otherwise require. Thus, this is the first Rule to be considered in classifying any product. For practical purposes, we may break this rule down into 2 parts:

1) The words in the Section and Chapter titles are to be used as guidelines ONLY to point the way to the area of the Tariff in which the product to be classified is likely to be found. Articles may be included in or excluded from a Section or Chapter even though the titles might lead one to believe otherwise.

2) Classification is determined by the words (terms) in the Headings (the first four numbers) and the Section and Chapter Notes that apply to them unless the terms of the heading and the notes say otherwise. **In other words, if the goods to be classified are covered by the words in a heading and the Section and**

Chapter Notes do not exclude classification in that heading, the heading applies.

24.3 In the light of the above, for the imported coal under consideration, I have to find a Heading/Sub-heading that is worded in such a way so as to include the product in question, by referring to the Section and Chapter Notes, to see if the product is mentioned specifically, as being included or excluded. As already discussed, in this case Sub-Heading Note No.2 of Chapter 27 defines the parameters to be satisfied for classification as 'Bituminous Coal'. In conformity with the Note the Volatile Matter, calculated on dry, mineral-matter-free basis, for all the shipments covered by the Show Cause Notice, is in excess of 14%. (whether ADB/ARB) and calorific value for all these consignments on moist, mineral-matter-free basis, is in excess of 5,833 Kcal/Kg. In view of this, the Coal imported in these shipments confirms to the definition of 'Bituminous Coal' given in Sub-heading Note 2 of Chapter 27.

24.4 As regards the classification of imported Coal under Chapter Sub-heading 27011920, as Steam Coal, is concerned, it is clear that the same is grouped under the Heading 'Other Coal' falling after the Anthracite and Bituminous Coal. Therefore, this heading covers only those Coals which are other than and do not fall within the above stated definition of Anthracite and Bituminous Coal. In respect of the imported Coal covered by the Show Cause Notice, the same satisfies the parameters for Chapter Sub-heading 27011200 and clearly answer to the description of 'Bituminous Coal' as per the definite definition assigned to the said Coal by Sub-heading Note 2 of Chapter 27. Thus, when the concerned goods fall under the definition of Chapter Sub-heading 27011200, the question or even the need for referring to the entry of the same goods in Chapter Sub-heading 27011920 does not arise. Such a need would have arisen if there was a doubt about the classification of goods under Chapter Sub-heading 27011200. In this case since the classification of the product can be arrived at an appropriate Tariff Heading/Sub-heading, by applying Rule 1 of the General Interpretative Rules itself, I find no reason for referring to the other interpretative Rules i.e. from 2 to 6 ibid.

24.5 The Hon'ble Supreme Court in the case of Owal Agro Mills Ltd. reported in 1993 (66) ELT-37 (SC) has held that where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute. The relevant paragraph 7 of the said judgement is reproduced below, which speaks for itself and is squarely applicable in this case:

> *7. " ……Where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute. The court would interpret them as they stand. The object and purpose has to be gathered from such words themselves. Words should not be regarded as being surplus nor be rendered otiose. Strictly speaking there is no place in such cases for interpretation or construction except where the words of statute admit of two meanings. The safer and more correct course to deal with a question of construction of statute is to take the words themselves and arrive, if possible, at their meaning, without, in the first place, reference to cases or theories of construction. ……..."*

24.6 The Customs Tariff Act is broadly based on the system of classification from the International Convention called the Brussels' Convention on the Harmonised Commodity Description and Coding System (Harmonised System of Nomenclature). HSN is a safe guide for the purpose of deciding issues of classification. In the present case, the HSN explanatory notes to Chapter 27 categorically state that "bituminous coal" means coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg. The Hon'ble Supreme Court in the case of Phil Corporation Ltd. Vs. CCE, Goa reported in 2008 (223) E.L.T. 9 (S.C.) has held that HSN is a safe guide for deciding issue of classification. The relevant paragraph 13 of the said judgement is reproduced below.

> ***"13.****The learned Additional Solicitor General also placed reliance on the judgment of this court in Collector of Central Excise, Shillong v. Wood Craft Products Ltd. - (1995) 3 S.C.C. 454. This court in paragraph 12 of the said judgment observed as under :-*
>
> *"Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. This being the*

expressly acknowledged basis of the structure of the Central Excise Tariff in the Act and the tariff classification made therein, in case of any doubt the HSN is a safe guide for ascertaining the true meaning of any expression used in the Act.""

24.7 **In this case, a particular definition has been assigned to the word 'Bituminous Coal' in the statue. The very definitions set forth and define the key term used in the statute. These definitions are important because they suggest the legislative intend for a term to have a specific meaning that might differ in important ways from its common usage. The definitions so given in the Chapter Notes/Section notes of the Tariff are to avoid ambiguity and to explicitly define the terms used in that statute.** In this case, when the imported Coal is having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg., in terms of the definition given in the Sub-heading note, which is part of the statue, the coal so imported can be called as 'Bituminous Coal' only and not by any other name. As a consequence, the appropriate Chapter Sub-heading of this 'Bituminous Coal' will be 27011200 only.

25.1 As for the relevance of the Chapter Notes, for deciding the classification of the product, and subsequently its eligibility or otherwise for any exemption by way of notifications, I find that classification is to be determined only on the basis of description of the heading, read with relevant section or chapter notes. Since, these chapter notes are part of the Act itself; they have full statutory legal backing. It is a settled legal position that the Section Notes and Chapter Notes have an overriding force over the respective headings and sub-headings. This finds support in the decision of the Hon'ble Tribunal in the cases of Saurashtra Chemicals Vs CC – 1986 (23) ELT 283 (CEGAT); Tractors and Farm Ltd. Vs CC – 1986 (25) ELT 235 (CEGAT); Tracks Parts Corpn. Vs CCE - 1992 (57) ELT 98 (CEGAT) and Calcutta Steel Industries Vs CCE - 1991 (54) ELT 90 (CEGAT).

25.2 In the case of Fenner India Ltd. Vs CCE – 1995 (97) ELT 8 (SC), the Hon'ble Supreme Court has observed that tariff schedule would be determined on terms of headings and or any relevant section or chapter notes. In Sanghvi Swiss Refills Pvt. Ltd. case reported in 1997 (94) ELT 644 (CEGAT), it was held that section notes and chapter

notes, being statutory in nature, have precedence over functional test and commercial parlance for purposes of classification. **From the above judgements/decision it flows that, in this case, the product imported being Bituminous Coal, in terms of Sub-heading Note 2 of Chapter 27, the said imported Coal will not be eligible for exemption under Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012.**

26.1 It is not the case in the Show Cause Notice, that whether the product imported is Coal or not and for what purpose the same is imported. The issue is whether the Coal imported is 'Steam Coal or 'Bituminous Coal', for the determining the eligibility of exemption or otherwise, in terms of Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012. In this regard, I find that, as already discussed, as per the Sub-Heading Note 2 to Chapter 27, the Coal having Volatile Matter, calculated on dry, mineral-matter-free basis, for all the imported shipments is in excess of 14%. (whether ADB/ARB) and calorific value for all these consignments on moist, mineral-matter-free basis, is in excess of 5,833 Kcal/Kg. is defined as 'Bituminous Coal'. Further, there is no dispute regarding the fact that the Show Cause Notice has been issued proposing the classification of the imported Coal under CTH 2701 1200 as 'Bituminous Coal', only in respect of those Bills of entry, where the volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg in respect of the imported coal. **Thus, in this case, where the words of the statute i.e. Sub-heading Notes are plain and clear, there is no room or scope for applying any other interpretation than the one given in the statute.**

26.2 **In view of the Sub-heading Note 2 of Chapter 27 of the Schedule to Customs Tariff Act, 1975; by applying Rule 1 of the General Interpretative Rules and by relying on the legal position in such cases settled by the Apex Court, it is quite evident that the Coal imported by the said noticee, is none other than 'Bituminous Coal' falling under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975 and in no way can be considered as "Steam Coal" falling under Chapter Sub-heading 27011990 ibid. As such, the exemption under Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012, as**

claimed by the said noticee will not be available to the imported Coal covered by the Show Cause Notice.

27. The said noticee in their written submissions as well as during the course of personal hearing has advanced many arguments to justify that the imported coal, covered by the Show Cause Notice, clearly falls under the category of 'Steam Coal', classifiable under Chapter Sub-heading 27011920 of the Schedule to the Customs Tariff Act, 1975. As such, I proceed to discuss those contentions one by one, which have not been dealt with by me from paragraph 22.1 to 27, for which titles broadly based on those contentions, have been assigned. In other words, the issue raised by the said noticee, which has already been covered by the discussions above, is not taken up again for discussion.

The term 'Steam Coal' given in the Tariff should be interpreted in the commercial sense or in common trade parlance:

28.1 The contention of the said noticee is that the term "steam coal" has not been defined in the Tariff; that it has been consistently held that in the absence of a statutory definition, a tariff entry was to be interpreted in trade parlance. Reliance is placed on the judgements/decisions in South Bihar Sugar Mills Ltd v. Union of India 1978 (2) ELT 336; Commissioner of Sales Tax , Madhya Pradesh v. Jaswant Singh Charan Singh AIR 1967 SC 1454 and Ramavatar Budhaiprasad v. Assistant Sales Tax Officer (1962) 1 SCR 279; that in the common/trade parlance, coal which is imported by them is known as 'steam coal; that when the trade community which deals with coal recognizes the goods in issue as "steam coal", the classification of such goods must be based on the trade recognition of the goods in the absence of any statutory definition of the term.

28.2 I find that in respect of the description of the entries under Heading No.2701, the market nomenclature was adopted only for entries at '8' digit level of sub-heading 2701 19, whereas for other entries viz., 27011100 and 27011200, it was with reference to the definitions mentioned in the Chapter Sub-Heading Notes. **It is now a well settled principle of law that the trade or commercial nomenclature comes into play only when the product description occurs by itself in a Tariff entry and there is no conflict between Tariff entry and any other entry requiring reconciling and harmonizing that tariff entry with any other entry.**

28.3 The Hon'ble Supreme Court in the case of CCE, Delhi Vs. Connaught Plaza Restaurant (P) Ltd. - 2012 (286) E.L.T. 321 (S.C.) in paragraph 15 of the said judgement has held "According to the rules of interpretation for the First Schedule to the Tariff Act, mentioned in Section 2 of the Tariff Act, classification of an excisable goods shall be determined according to the terms of the headings and any corresponding chapter or section notes. Where these are not clearly determinative of classification, the same shall be effected according to Rules 3, 4 and 5 of the general rules of interpretation. **However, it is also a well known principle that in the absence of any statutory definitions,** excisable goods mentioned in tariff entries are construed according to the common parlance understanding of such goods." (emphasis supplied)

28.4 Further the Hon'ble Apex Court in the case of CCE, Bhubaneshwar Vs. Champdany Industries Ltd. - 2009 (241) E.L.T. 481 (S.C.) had observed that "In *Collector of Central Excise, Hyderabad* v. *Fenoplast (P) Ltd. (II)* - 1994 (72) E.L.T. 513 (S.C.), a three-Judge Bench of this Court held that while interpreting statutes like the Excise Tax Acts or Sales Tax Acts where the primary object is to raise revenue and for such purpose the various products and goods are classified, the common parlance test can be accepted, if any term or expression is not properly defined in the Act **"if any term or expression has been defined in the enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the enactment the meaning of the term in common parlance or commercial parlance has to be adopted".** (emphasis supplied).

28.5 In the Oswal Agro Mills Ltd. case - 1993 (66) E.L.T. 37 (S.C.), the Hon'ble Supreme Court has emphasized that."……Where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute. The court would interpret them as they stand. The object and purpose has to be gathered from such words themselves. Words should not be regarded as being surplus nor be rendered otiose. Strictly speaking there is no place in such cases for interpretation or construction except where the words of statute admit of two meanings. The safer and more correct course to deal with a question of construction of statute is to take the

words themselves and arrive, if possible, at their meaning, without, in the first place, reference to cases or theories of construction. ……..”

28.6 Finally, with regard to the question of applying common/market parlance test, the proposition of law has been laid down by the Hon’ble Supreme Court in the case of Akbar Badruddin Jiwani Vs. Collector of Customs - 1990 (047) ELT 014 (SC) in the following words:

> *“**36.**In deciding this question the first thing that requires to be noted is that Entry No. 25.15 refers specifically not only to marble but also to other calcareous stones whereas Entry No. 62 refers to the restricted item marble only. It does not refer to any other stones such as ecaussine, travertine or other calcareous monumental or building stone of a certain specific gravity. Therefore, on a plain reading of these two Entries it is apparent that travertine, ecaussine and other calcareous monumental or building stones are not intended to be included in `marble’ as referred to in Entry No. 62 of Appendix 2 as a restricted item. Moreover, the calcareous stone as mentioned in ITC Schedule has to be taken in scientific and technical sense as therein the said stone has been described as of an apparent specific gravity of 2.5 or more. Therefore, the word `marble’ has to be interpreted, in our considered opinion, in the scientific or technical sense and not in the sense as commercially understood or as meant in the trade parlance.* ***There is no doubt that the general principle of interpretation of Tariff Entries occurring in a text statute is of a commercial nomenclature and understanding between persons in the trade but it is also a settled legal position that the said doctrine of commercial nomenclature or trade understanding should be departed from in a case where the statutory content in which the Tariff Entry appears, requires such a departure. In other words, in cases where the application of commercial meaning or trade nomenclature runs counter to the statutory context in which the said word was used then the said principle of interpretation should not be applied.*** *Trade meaning or commercial nomenclature would be applicable if a particular product description occurs by itself in a Tariff Entry and there is no conflict between the Tariff Entry and*

any other entry requiring to reconcile and harmonise that Tariff Entry with any other Entry." (emphasis supplied).

28.7 From the above, it is quite evident that it has become the law of the land for the purpose of classification of goods is **that only in the absence of any statutory definitions, the common parlance understanding of such goods should be applied and that the classification of goods shall be determined according to the terms of the Headings and any corresponding Chapter or Section notes.** In this case, Sub-heading Note 2 of Chapter 27 in unambiguous terms defines what "Bituminous Coal" is. Thus, when a clear definition is available in statute, in respect of the coal imported by the said noticee, I find no reason why it should be called and classified as 'Steam Coal'. As such, I do not find any merit in contention of the said noticee and they cannot take shelter for classifying the coal imported by them as 'Steam Coal', under the name of common/commercial/market parlance, which deserves to be rejected. Further, their argument that **where there is Statutory definition,** an item given in the Tariff should be interpreted in the commercial sense or in common trade parlance is nothing but mis-leading, in view of the discussions above.

Classification of Steam Coal based on end use of the Coal:

29.1 Another argument of the said noticee for classifying the goods as Steam Coal is that having regard to the popular meaning of the term 'Steam Coal', due consideration must be given to the end use of the coal as in the instant case, the classification of coal would be significantly affected by the end use; that coal akin to bituminous coal, if capable of generating steam and is actually used for the same, would be classifiable as Steam Coal. Coming to this contention, I have already clearly stated that that the issue before me for decision is not regarding a study on various types of coal, its uses and characteristics etc. The issue in this case is regarding the classification of the Coal imported by the said noticee, **within the ambit of the Schedule to the Customs Tariff Act, 1975,** for the purpose of levying of duty/deciding the eligibility for exemption. Thus what is required to be seen is whether the end use rule can be applied for classification, when specific statutory definition is available for that particular product.

29.2 On careful consideration of this argument, I find that end-use, by itself, would not change the nature of the commodity. It is a well settled legal position that end use of the product cannot determine the classification of the product, which is supposed to be determined on a bare reading of the Tariff entries read with Chapter Notes/Section notes alone. Not once does the Show Cause Notice allege that the reason for classifying the product as Bituminous Coal is based on its end use. The said proposal is in the light of Sub-heading Note 2 to Chapter 27. When a commodity fall within a tariff entry by virtue of the purpose for which it is put to (sic. produced), the end use to which the product is put to, cannot determine the classification of that product. Further, the non-Statutory Rule for Classification i.e., the end use Rule cannot be applied, as a stand alone Rule.

29.3 The Hon'ble Supreme Court had laid to rest the issue regarding end use of a product for the purpose of classification, if statutory rules are available. The Apex Court in the case of Indian Aluminium Cables Ltd. Vs. Union of India, reported in 1985 (21) E.L.T. 3 (S.C.) has held that **"The process of manufacture of a product and the end use to which it is put, cannot necessarily be determinative of the classification of that product under a fiscal schedule like the Central Excise Tariff. What is more important is whether the broad description of the article fits in which the expression used in the Tariff.** The aluminium wire rods, whether obtained by the extrusion process, the conventional process or by process are still aluminium wire rods. The process of manufacture is bound to undergo transformation with the advancement in science and technology. The name of the end product may, by reason of the new technological processes, change, but the basic nature and article may answer the same description." (emphasis supplied)

29.4 Further, the Hon'ble Supreme Court in the case of CCE, Delhi Vs. Carrier Aircon Ltd. - 2006 (199) E.L.T. 577 (S.C.), referring to the judgement in the case of Indian Aluminium Cables Ltd. (supra) has held that **when a commodity falls within a tariff entry by virtue of the purpose for which it is put to, the end use to which the product is put to, cannot determine the classification of that product.** The relevant paragraph 15 of the said judgement is reproduced below, which is squarely applicable to this case.

> ***"15.*** *End use to which the product is put to by itself cannot be determinative of the classification of the product. See Indian Aluminium Cables Ltd. v. Union of India and Others, 1985 (3) S.C.C. 284. There are a number of factors which have to be taken into consideration for determining the classification of a product. For the purposes of classification the relevant factors inter alia are statutory fiscal entry, the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to, the end use to which the product is put to, cannot determine the classification of that product."*

29.5 To conclude this issue of End Use, I reproduce the relevant paragraph 33 of the judgement of the Hon'ble Supreme Court in the case of CCE Vs. Wockhardt Life Sciences Ltd. reported in 2012 (277) E.L.T. 299 (S.C.):

> ***33.*** *A commodity cannot be classified in a residuary entry, in the presence of a specific entry, even if such specific entry requires the product to be understood in the technical sense [see Akbar Badrudin v. Collector of Customs, 1990 (2) SCC 203 = 1990 (47) E.L.T. 161 (S.C.); Commissioner of Customs v. G.C. Jain, 2011 (12) SCC 713 = 2011 (269) E.L.T. 307 (S.C.)]. A residuary entry can be taken refuge of only in the absence of a specific entry; that is to say, the latter will always prevail over the former [see C.C.E. v Jayant Oil Mills, 1989 (3) SCC 343 = 1989 (40) E.L.T. 287 (S.C.); H.P.L. Chemicals v. C.C.E, 2006 (5) SCC 208 = 2006 (197) E.L.T. 324 (S.C.); Western India Plywoods v. Collector of Customs, 2005 (12) SCC 731 = 2005 (188) E.L.T. 365 (S.C.); C.C.E. v. Carrier Aircon, 2006 (5) SCC 596 = 2006 (199) E.L.T. 577 (S.C.)]. In C.C.E. v. Carrier Aircon, 2006 (5) SCC 596 = 2006 (199) E.L.T. 577 (S.C.), this Court held :*
>
> *"14.....There are a number of factors which have to be taken into consideration for determining the classification of a product. For the purposes of classification, the relevant factors inter alia are statutory fiscal entry, the basis character, function and use of the goods. When a commodity fall within a tariff entry by virtue of the purpose for which it is put to (sic. produced), the end use to which the product is put to, cannot determine the classification of that product."*

29.6 In my opinion, the said noticee is entitled to call the imported coal by any name they wish. But for the purpose of classification in the Custom Tariff Act, the definition and name given by the statue is required to be considered. In view of the discussions, I am clearly of opinion that in the state of the evidence before me, no

reasonable person could come to the conclusion that the imported coal under consideration would not come under Bituminous Coal. **The basis of the reason with regard to the end-use of the article is absolutely irrelevant in the context of the entry where there is no reference to the use or adaptation of the article.** In view of this, I do not find any merit in the contention of the said noticee, which is required to be rejected summarily.

Specific Entry prevails over General Entry:

30. The said noticee in support of their contention that the coal imported by them is steam coal has relied upon decisions of the Hon'ble Supreme Court wherein the universal principle had been laid down that specific entry prevails over general entry and that classification which is more specific has to be preferred over the one which is not specific or general in nature. I do not find any merit in this argument, since I have dealt in length regarding the classification of the coal imported by the said noticee, vis-à-vis the interpretative rules, and how it can be termed as Bituminous Coal. Thus, the argument on this count has been answered to. As such, I find that the facts of the above cited case laws have not relevance to the facts of the issue under consideration.

Classification of Steam Coal is an established practice with the departmental authorities:

31.1 The said noticee has also argued that reclassification sought by the Show Cause Notice cannot be sustained since the said noticee has been importing the said goods over a period of years and the Department has never objected to the classification of the goods.

31.2 As for the above said contention, I find that the contention that the department has never objected to the classification of the goods as Steam Coal, is not tenable in as much as, intelligence gathered by Directorate of Revenue Intelligence (DRI) revealed that several importers across India who were engaged in import of coal are mis-classifying the "Bituminous Coal" imported by them as "Steam Coal" and were availing irregular benefit of Customs Duty Exemption available only to 'Steam Coal' under Notification No.12/2012-Cus. dt.17.03.2012 (Sl.No.123). The issue has been taken up at National Level and Show Cause Notice has been issued to all such importers. In the instant case also, the Show Cause Notice has been issued to the said noticee on the same aspect to recover the differential duty.

Consequently, the issue has been taken up for adjudication as per law in vogue.

31.3 It is a settled legal position, as held by the Hon'ble Supreme Court in the case of Plasmac Machine Mfg. Co. Ltd. Vs. CCE - 1991 (51) E.L.T. 161 (S.C.), that there could be no estoppel against a statute. In terms of the said judgement, if according to law, the Coal imported by the said noticee is Bituminous Coal under CTH 27011200, the fact that the department had earlier approved their classification as Steam Coal under 27011920, will not estop it from revising that classification to one under under CTH 27011200 of the Schedule to Customs Tariff Act, 1975.

31.4 Further, the contention of the noticee that the Show Cause Notice was issued only after 17.03.2012, i.e. after granting of exemption to Steam Coal, also does not have any merit. The Hon'ble Supreme Court in case of Collector of Central Excise, Hyderabad v. Fenoplast (P) Ltd. (II) - 1994 (72) E.L.T. 513 (S.C.), has held that while interpreting statutes like the Excise Tax Acts or Sales Tax Acts, the primary object is to raise revenue. In this case also the department has every authority to see whether the importer is rightly claiming the exemption or otherwise. If it is noticed that the classification of the goods are not proper, on account of which there is loss to the exchequer, nothing prevents the department from plugging such loss in the public interest, even at a later stage. Here the only difference is that the SCN has been issued not to raise revenue, but to plug the loss of revenue. In this case, the question of the loss of revenue started only from the date of issuance of notification which granted the exemption, and hence Show Cause Notice has been issued at the appropriate stage.

Conversion Method used to arrive at the formula:

32.1 On the above aspect, the noticee has relied upon various literatures to substantiate their claim that the coal imported by them is steam coal only and that the department has used incorrect formula for arriving at the conclusion that the coal imported is bituminous.

32.2 I find that the above contention of the noticee is factually incorrect, in as much the Certificate of Sampling & Analysis of Shipment of Coal in respect of test conducted by various independent inspecting agencies at various Load Ports that the volatile matter limit of the coal

imported by the said noticee exceeds 14% and also the calorific value of the said coal (on a moist, mineral-matter-free basis) as well as per the certificate was found to be greater than 5,833 kcal/kg.

32.3 The said noticee has not brought out any documentary evidence in support of their claim that the formula adopted by the Department is incorrect. It is a well settled position of law that once the department has educed evidence regarding the allegation made in the Show Cause Notice, and then the onus to prove otherwise is on the said noticee. There is no dispute regarding the fact that volatile matter limit of the coal imported by the said noticee exceeds 14% and also the calorific value of the said coal (on a moist, mineral-matter-free basis) as well as per the certificate GCV was found to be greater than 5,833 kcal/kg. This fact has very well been accepted by the noticee and has never challenged the Certificate of Sampling & Analysis of Shipment of various agencies during their stated ten years of import of the Coal.

32.4 Not withstanding the above, I find that as regards the application of the formula in this case, it would be necessary and imperative to understand the technicalities of the relevant terms, namely, as-received basis (ARB), air-dried basis (ADB), inherent moisture, total moisture, moist, mineral-matter-free basis, gross calorific value and net calorific value. The international trade in coal resolves around mutually accepted Certificates of Sampling and Analysis and/or Certificates of Quality usually issued by independent accredited testing and certifying agencies, which are commonly known as load port certificates or discharge port certificates. All these certificates are taking the coal for sampling, testing and certification of quality either on as-received basis (ARB) or air-dried basis (ADB) or dry basis (DB). However, in the context of Indian Customs Tariff and classification thereof the two primary criteria i.e. volatile matter content and calorific value content are neither on ADB nor on ARB/DB. The two parameters that are to be adopted are ‘a dry, mineral matter free basis’ and ‘a moist, mineral matter free basis’ respectively. These load port certificates clearly mention that they have adopted ASTM standards for the purpose of sampling and analysis and the test results generated on the basis of the said ASTM standards are based on (i) Total moisture is based on as received basis (ii) Inherent moisture is based on air dried basis (iii) gross calorific value is based on air dried basis and (iv) other parameters such as ash, volatile matter, fixed carbon sulphur are based

on air dried basis. The arguments at a latter stage questioning the authenticity of the certificates, when the said noticee themselves are relying on the load port certificates, which are based on ASTM standards, are devoid of any merits, which is nothing but an afterthought.

32.5 As far as the formulae adopted for arriving at the two parameters, as well as regarding the terms as-received basis (ARB), air-dried basis (ADB), inherent moisture, total moisture, moist, mineral-matter-free basis, gross calorific value and net calorific value and have examined the basis of calculations therein, I had referred to various literatures, including para 3.1.2. of ASTM D3180-07; Coal Conversion Statistics of World Coal Association; Coal Marketing International; Wikepedia, ASTM-D121-01; para 9.1 of ASTM D388-12 etc., wherein all the details in this regard, are available.

32.6 After going through the said literatures, I am of the clear view that as per the international standards, accepted all over the world, including India, coals are ranked/classified on mineral-matter-free basis, dry or moist, depending on the parameters that applies, by applying the ASTM D3180-07. The parameters, either volatile matter (of fixed carbon) or gross calorific values, are commonly reported by laboratories on the as received, dry-and-ash-free basis but as per the technical literatures published by ASTM, these reported **values must be converted to the mineral-matter-free basis** for ranking purposes.

33. Finally, regarding the contention that the demand pertaining to CVD is revenue neutral, since they are eligible for CENVAT Credit, is a hypothetical one, since for become eligible for the CENVAT credit, the first and foremost role on the part of the said noticee is to pay duty, since CENVAT credit is the credit of duty paid. Further, the eligibility for the same is to be decided afterwards, as for becoming eligible they have to fulfil the conditions prescribed under the CENVAT Credit Rules. As such, I do not find any merit in this contention also.

34. In view of foregoing discussions and the evidence before me, **I hold that the Coal imported by the said noticee, as detailed in Annexure A to the Show Cause Notice, is nothing but Bituminous Coal, classifiable under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975, as**

proposed in the Show Cause Notice. Accordingly, classification of the said Coal as Steam Coal, under Chapter Sub-heading 27011920, as claimed by the said noticee is hereby rejected. Consequently, I also hold that the said noticee is not eligible to avail the benefit of exemption prescribed under Sl. No.123 of Notification No.12/2012-Cus dt.17.03.2012.

2. Whether the Bills of entry as detailed in Annexure-A is required to be finalized under Section 18(2) of the Customs Act, 1962, on the basis of classification Customs tariff heading 27011200.

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35.1 As discussed above, I have held that the Coal imported by the said noticee as detailed in Annexure-A to the Show Cause Notice is Bituminous Coal, and as a consequence the said noticee is not eligible for the benefit of exemption Sr. No. 123 of Notification No.12/2012-Cus dt.17.03.2012, which is applicable for steam coal only. Accordingly, the said noticee was required to pay duty for Bituminous Coal as per Sr. No. 124 of Notification No.12/2012-Cus dt.17.03.2012.

35.2 I Further find that both the Bills of entry covered by the Show Cause Notice, as detailed in Annexure-A to the Show Cause Notice have been assessed provisionally. **Accordingly, the assessment in respect of those two Bills of entry detailed Annexure-A to the Show Cause Notice, which were provisionally assessed, now stands finalized and concluded on the basis of the above discussion and findings. Accordingly, the Customs duty ought to have been paid by the said noticee on the basis of classification under Customs tariff heading 27011200 is hereby computed at Rs.1,38,88,752/-** under Section 18(2) of the Customs Act, 1962.

3. Whether 20000 MTs, imported Coal valued at Rs.11,04,79,860/- as detailed in Annexure-A to the Show Cause Notice, imported by the said noticee, though not available physically, is liable for confiscation under the provisions of Sections 111 (d) and 111(m) of the Customs Act, 1962.

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36.1 In this case, as already discussed and decided by me, the coal imported by the said noticee, as detailed in Annexure-B to the Show Cause Notice, is Bituminous Coal, classifiable under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975.

However, for the purpose of claiming exemption, the said noticee has declared the same as Steam Coal and classified it under Chapter Sub-heading 27011920 ibid. The said noticee has declared the imported goods as Steam Coal, in spite of the fact that they were fully aware that the coal imported by them falls within the parameters prescribed in respect of Bituminous Coal in the light of Sub-heading Note 2 to Chapter 27. Since the noticee had wrongly claimed and availed the benefit of exemption under Sr. No. 123 of Notification No.12/2012-Cus dt.17.03.2012 which in turn led to less payment of BCD as well as CVD of Rs.1,17,20,860/- on the 'Bituminous Coal' by considering the same as 'Steam Coal', they have violated the provisions of Section 46 (4) of the Customs Act, 1962. Accordingly, the said imported goods are liable for confiscation, under Section 111(m) of the Customs Act, 1962. This contravention and or violation falls within the purview of the nature of offence prescribed under Section 111(m) of the Customs Act, 1962. Thus, the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962.

36.2 I also find that the noticee has also contravened the provisions of Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 (as detailed in the Show Cause Notice) and for this, the goods are liable for confiscation under Section 111(d) of the Customs Act, 1962. I also find no substance in the contention of the noticee that there is no mis-declaration of the imported Coal, on their part, since classification of Bituminous Coal in the name of Steam Coal, clearly falls under the category of mis-declaration.

36.3 The noticee has contended they have not misdeclared the goods in as much as since there is no prohibition for the goods imported, the provisions of Section 111 (d) of the Act does not attract. I find that the noticee for Bituminous Coal, has declared the same as Steam Coal. This is nothing but mis-classification and consequently mis-declaration. In my view, mis-declaration has been defined in a plethora of decisions, which means representing something or declaring something which is not true with or without intention to evade payment of duty. Further, it is a settled law that mis-declaration means not declaring something or making an incorrect declaration about something, which he is required to declare under the law. This definition has a direct connection in this case.

36.4 The other contention is that the goods were not prohibited and therefore, the confiscation of goods under Section 111 (d) is without authority of law. It is now a well settled position of law that **any restriction on import or export is to an extent a prohibition.** In this connection, I would like to reproduce the judgement of the Hon'ble Supreme Court of India in the case of *Sheikh Mohd Omer* v. *C.C.* reported in 1983 (13) E.L.T. 1439 (S.C.), which speaks for itself.

> *This takes us to the question whether by importing the mare "14. "Jury Maid" the appellant contravened Section 114(d) read with Section 125 of the Act. It was urged on behalf of the applicant that expression "prohibition" in Section 111(d) must be considered as a total prohibition and that expression does not bring within its fold the restrictions imposed by clause 3 of the Import Control Order, 1955. According to the learned counsel for the appellant clause 3 of that order deals with the restrictions of import of certain goods. Such a restriction cannot be considered as a prohibition under Section 111(d) of the Act. While elaborating his argument the learned Counsel invited our attention to the fact that while Section 111(d) of the Act uses the word "prohibition", Section 3 of the Imports and Exports (Control) Act, 1947 as that statute deals with "restrictions or otherwise controlling" separately from prohibitions. We are not impressed with this argument. What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition.* ***The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947 uses three different expressions "prohibiting", "restricting" or "otherwise controlling" we cannot cut down the amplitude of the word "any prohibition" in section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition.*** *From Item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But none the less the prohibition continues."* (emphasis supplied).

36.5 In the instant case the said noticee has failed to declare the true description of the products imported as 'Bituminous Coal' and has hence contravened the provisions of Rule 11 of the Foreign Trade (Regulation) Rules, 1993 and Rule 14 of the Rules ibid. The contraventions of the provisions of the Foreign Trade (Development and Regulation) Act, Foreign Trade (Regulation) Rules and Export and import policy is a prohibition of the nature as described under the Section 11 of the Foreign Trade (Development and Regulation) Act, 1992. Further in terms of Section 3(3) of the Act ibid, the prohibitions are deemed to be a prohibition under the Section 11 of the Customs Act

1962. In terms of the Section 111 (d) of the Customs Act, 1962 any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force is liable to confiscation. Thus, acts constituting offences under Section 11 of Foreign Trade (Development and Regulation) Act, 1992, as discussed above, will be prohibitions imposed by that Act and will, by definition come within the ambit of the phrase "or any other law for the time being in force" appearing in Section 11 of the Customs Act, 1962 and thus the goods will be liable to confiscation under Section 111(d) ibid.

36.6 **Therefore, I hold that the 20000 MTs. of Coal imported by the said noticee with wrong classification and with inappropriate description, totally valued at Rs.11,04,79,860/- as detailed in Annexure-A to the Show Cause Notice, are liable for confiscation under Section 111(m) and Section 111(d) of the Customs Act, 1962. However, since the impugned goods are not available for confiscation, as the same have already been cleared, I refrain from imposing redemption fine in lieu of confiscation.**

4. Whether the differential Customs Duty amounting to Rs.1,17,20,810/- as detailed in Annexure-B to the Show Cause Notice, is to be demanded and recovered from the said noticee under Section 18(2) of the Customs Act, 1962.

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37.1 As discussed above, I have already held that the Coal imported by the said noticee as detailed in Annexure-A to the Show Cause Notice is Bituminous Coal, and as a consequence the said noticee is not eligible for the benefit of exemption Sr. No. 123 of Notification No.12/2012-Cus dt.17.03.2012, which is applicable for steam coal. Further, the two Bills of entry as detailed in Annexure-A, which had been provisionally assessed have been finalised by me. Accordingly, they are required to pay duty for Bituminous Coal as per Sr. No. 124 of Notification No.12/2012-Cus dt.17.03.2012. I find from the records that the said noticee had paid duty of Rs.21,67,942/- on the quantity of 20000 MTS of coal imported by them declaring as Steam Coal, by availing benefit of Sr. No. 123 of Notification No.12/2012-Cus dt.17.03.2012. Since, the noticee is held not eligible for the said exemption, I have computed the duty payable by them as

Rs.1,38,88,752/-, on the basis of the correct classification of the coal imported by them, i.e. as per Sr. No. 124 of Notification No.12/2012-Cus dt.17.03.2012. Thus, the noticee is required to pay the differential duty of Rs.1,17,20,810/-, as detailed in Annexure-A to the Show Cause Notice, demanded vide the Show Cause Notice.

37.2 In view of the above, **I hold that the said noticee is liable to pay the differential duty amounting to Rs.1,17,20,810/- on finalization of assessment, under Section 18(2) of the Customs Act, 1962, and the said differential duty is to be recovered from them.**

5. Whether the said noticee is liable to pay interest involved on the said differential Customs Duty amounting to Rs.1,17,20,810/- at the applicable rate under the provisions of Section 18(3) of the Customs Act, 1962.

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38.1 In terms of Section 18(3) of the Customs Act, 1962, the importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order. In this case, four (4) Bills of entry detailed in Annexure-B to the Show Cause Notice, which had been provisionally assessed, has now vide this Order been finalized and concluded and accordingly differential duty of Rs.6,83,55,330/- involved in the said four bills of entry has been demanded.

38.2 Accordingly, the said noticee, in terms of Section 18(3) ibid is liable to pay the interest on the said amount of Rs.1,17,20,810/-. In view of this, **I hold that the said noticee is liable to pay interest involved on the amount of Rs.1,17,20,810/- under the provisions of Section 18(3) of the Customs Act, 1962.**

6. Whether the said noticee is liable for penal action, under Section 112(a) of the Customs Act, 1962:

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39. As regards, imposition of penalty on the noticee under Section 112(a) of the Customs Act, 1962, since it has been held that the impugned 'Coal" as detailed in Annexure-B to the Show Cause Notice are liable for confiscation under Section 111(m) and 111(d) ibid of the Customs Act, 1962, **I, hold that the penalty under Section 112 (a) ibid is attracted on the importer. However, since the**

issue involved in this case being of technical nature regarding classification and availment of benefit of a notification, I take a lenient view while imposing the penalty.

40.1 As for the reliance placed by the noticee on various decisions/judgement in support of their contention, I am of the view that the conclusions arrived may be true in those cases, but the same cannot be extended to other case (s) without looking to the hard realities and specific facts of each case. Those decisions / judgments were delivered in a different context and under different facts and circumstances, which cannot be made applicable in the facts and circumstances of this case. Further, these would have been relevant had there been any doubt for taking a decision regarding the classification of the coal imported and covered by the Show Cause Notice. As such, there would not have even a need for referring to those decision/judgements.

40.2 While applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind. The Hon'ble Supreme Court in the case of CCE, Calcutta Vs Alnoori Tobacco Products [2004 (170) ELT 135 (SC)] has stressed the need to discuss, how the facts of decision relied upon fit factual situation of a given case and to exercise caution while applying the ratio of one case to another. This has been reiterated by the Hon'ble Supreme Court in its judgment in the case of Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)], wherein it has been observed that one additional or different fact may make difference between conclusion in two cases; and so, disposal of cases by blindly placing reliance on a decision is not proper. Again in the case of CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)], it has been observed by the Hon'ble Supreme Court that, the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of decision has to be culled out from facts of given case; further the decision is an authority for what it decides and not what can be logically deduced there from.

41. In view of the forgoing discussions and findings, I pass the following order:-

:ORDER:

(a) The Coal imported under the Bills of Entries covered in Annexure A to the Show Cause Notice dated 08.05.2013, is considered and held as "Bituminous Coal" and is correctly classifiable under Tariff heading/sub-heading 2701 1200 of the Schedule to the Customs Tariff Act, 1975. Accordingly the declared classification under Customs Tariff item/heading 270119 20, is hereby rejected. Consequently, I deny M/s. Trinetra Cement Ltd., 93, Santhome High Road, Karapagam Avenue, Raja Annamaliapuram, Chennai-600 028, the benefit of exemption under Sr. No. 123 of the Notification No. 12/2012-Customs dated 17.03.2012.

(b) The assessment in respect two Bills of Entry, detailed Annexure-A to the Show Cause Notice, which were provisionally assessed, is hereby finalized under Section 18(2) of the Customs Act, 1962. Accordingly, I hold that the Customs duty payable by the said noticee on the basis of classification under Customs tariff heading 27011200 is to be computed at Rs.1,38,88,752/- (Rupees One Crores Thirty Eight Lakhs Eighty Eight Thousand Seven Hundred Fifty Two Only)**.**

(c) The 20000 MTs. Coal valued at Rs.11,04,79,860/- as detailed in Annexure–A to the Show Cause Notice, imported by M/s. Trinetra Cement Ltd., 93, Santhome High Road, Karapagam Avenue, Raja Annamaliapuram, Chennai-600 028, are held liable for confiscation under the provisions of Section 111(d) and 111(m) of the Customs Act,1962. However, since the impugned goods are not available for confiscation, I refrain from imposing any redemption fine in lieu of confiscation.

(d) The differential Customs duty amounting to Rs.1,17,20,810/- (Rupees One Crore Seventeen Lakhs Twenty Thousand Eight Hundred Ten Only) arising on finalization of the Bills of entries detailed in Annexure-A to the Show Cause Notice under Section 18(2) of the Customs Act, 1962, is to be recovered from M/s. Trinetra Cement Ltd., 93, Santhome High Road, Karapagam Avenue, Raja Annamaliapuram, Chennai-600 028,

(e) I order for recovery of interest at the applicable rate, involved on the differential duty of Rs.1,17,20,810/- from M/s. Trinetra Cement Ltd., 93, Santhome High Road, Karapagam Avenue, Raja Annamaliapuram, Chennai-600 028, under Section 18(3) of the Customs Act, 1962.

(f) I impose a penalty of Rs.14,00,000/- (Rupees Fourteen Lakhs Only) on M/s. Trinetra Cement Ltd., 93, Santhome High Road, Karapagam Avenue, Raja Annamaliapuram, Chennai-600 028, under Section 112(a) of the Customs Act, 1962.

(K.L. GOYAL)
COMMISSIONER

F. No. S/10-27/Adjn./2013-14 Dated:07.04.2014

BY REGISTERED A.D. POST

To,

M/s. Trinetra Cement Ltd.,
93, Santhome High Road,
Karapagam Avenue,
Raja Annamaliapuram,
Chennai-600 028.

Copy to:

1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad, with copy of Show Cause Notice dated 08.05.2013.
2) The Additional Director General, Directorate of Revenue Intelligence, AZU, Ahmedabad for information pl.
3) The Assistant Commissioner (Gr.I), Custom House, Kandla.
4) The Assistant Commissioner (Recovery Section, Custom House Kandla,
5. Guard file.