

BRIEF FACTS OF THE CASE

M/s. Kyori Oremin Ltd., 4th Floor, "My Home Jupally" Green Lands, Ameerpet, Hyderabad (IEC– 0907012426) (hereinafter referred to as the 'KOL') were engaged in Trading of Coal. M/s. KOL, Hyderabad were importing Steam Coal from Indonesia and South Africa for trading business. M/s KOL 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 the calorific value of Coal imported by M/s KOL was 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 was 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 1990	--- 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. Based on the above intelligence, inquiry was initiated against M/s. KOL and the import documents like Bills of Entry, Bills of Lading, Load Port Sampling and Analysis Report, Test Report of Samples, Commercial Invoice, Packing list etc. were called for from M/s. KOL vide summons No. 69/3416 dated 30.01.2013.

4.1 Shri Vijay Patel, Vice President of M/s Kyori Oremin Ltd., during his statement dated 11.02.2013 has submitted the details viz: port name where coal were imported and details of Batch No. Vessel name, Bills of Entry details, Qty, Item

description, value etc. and photocopies of import documents in respect of Coal imported at various ports.

5.1 On scrutiny of the import dockets submitted by M/s. KOL it transpired that M/s. KOL had imported Indonesian Coal having Calorific value **5,999 to 6,130 kcal/kg (ADB basis)** from various overseas suppliers at Kandla Port as detailed below.

S. No.	Port	Vessel Name	B/E	Date	GCV (ADB) Kcal/Kg	VM (ADB)
1	Kandla	MV Soldov	7112370	14-06-2012	6130	48.34
2	Kandla	MV Soldov	7112377	14-06-2012	6130	48.34
3	Kandla	MV Soldov	7138624	18-06-2012	5999	48.61

5.2 It transpired from the import documents that M/s. KOL were engaged in Trading of Imported Coal; that M/s KOL had 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.

5.3 Further, it also transpired from the import documents that M/s. KOL were importing Coal at various ports i.e. Paradip Port, Dharma Port, Kandla, Navlakhi, Chennai etc. During the scrutiny of documents it is also observed that the Coal imported vide various Bills of Entry by M/s. KOL were assessed provisionally/finally at various ports across the country.

6.1 The analysis reports of the shipments of coal submitted by M/s. KOL indicated that the Gross Calorific Value of the Coal imported was above 5833 Kcal/Kg on 'As received Basis (ARB)', 'Air Dry Basis (ADB)' and 'Dry Basis' and the Volatile matter exceeds 14% (ADB).

6.2 Similar such data like Gross Calorific Value (ADB), Total Moisture (MI) (ARB), Inherent Moisture (IM) (ADB), Ash Content (ADB), Volatile Matter (ADB), Fixed Carbon (ADB) and Sulphur (ADB) from various 'Certificate of Sampling and Analysis of Shipment of Coal' in respect of import of Coal of Indonesian and South African origin shipped under various vessels at various Ports in India under various Bills of Entry, where Gross Calorific Value exceeds 5833 Kcal/Kg and Volatile matter exceeds 14% are tabulated in **Annexure-A** annexed to the Show Cause Notice.

7.1 During the course of investigation, the key personnel of M/s.KOL were summoned and evidences were recorded in the statement, which are discussed below:

7.2 A Statement of Shri Vijay Patel, Vice President of M/s Kyori Oremin Ltd., Hyderabad was recorded under Section 108 of the Customs Act, 1962 on 11.02.2013 in the course of which he inter alia stated that:-

- after, completion of his B. Com, he joined M/s Kyori Oremin Ltd., Hyderabad as Senior General Manager, Finance, Account and Administration; that in April' 2011, he was promoted as Vice President, Port Operation and given the responsibilities of import of coal;
- regarding import of coal, he stated that presently they are importing coal from various firms involved in trading of coal / mines owners at Indonesia and South Africa;
- he submitted two box files containing documents related to import of coal by their company; that these documents include the Commercial Invoice, Bills of Lading, Certificate of Origin, Load Port Sampling and Analysis Report, Test Report of Samples, Certificate Of Weight, Draft Survey Report etc. related to the Import of Coal from Indonesia and South Africa on and after 01.03.2012; that their company made purchase order/contract for individual consignments having quantity 55000 MT approx. with the oversea suppliers;
- the documents produced by him did not contain copies of purchase order/contract made by them with their overseas suppliers, he ensured that copy of all the purchase orders/contracts would made available within three days time;
- he stated that they were importing and Indonesian Steam coal through Paradeep Port, Krishnapatnam Port, Navlakhi Port, Kandla Port etc.;
- he was shown the Customs Tariff, CHAPTER-27 'Mineral fules, mineral oils and products of their distillation; bituminous substance; mineral waxes', wherein Tariff Item 2701 defines the **Coal; briquettes, ovoids and similar solid fuels manufactured from coal**, as reproduced here below:-

Tariff Item	Description of Goods	Unit	Rate of Duty	
			Standard	Preferential Areas
(1)	(2)	(3)	(4)	(5)
2701	Coal; Briquettes, Ovoids and Similar solid fuels manufactured from coal <i>- coal, whether or not pulverized, but not agglomerated</i>			
27011100	-- Anthracite	kg.	10%	-
27011200	-- Bituminous coal	kg.	55%	-
270119	-- Other Coal :			
27011910	--- Coking coal	kg.	10%	-
27011920	--- Steam coal	kg.	10%	-

- he put his dated signature on the Customs Tariff, CHAPTER-27 shown to him, total pages 1 to 2, in token of having perused and seen the same; he stated that M/s. Kyori Oremin Ltd., has classified the coal Imported from Indonesia and South Africa under CTH 27011920 under the category of Steam Coal, which falls under the category of “*other coal*” as per above table and availing the benefit of exemption Notification 12/2012-Cus. Dated 17.03.2012 by paying additional duty (CVD) 1% (Sl. No. 123);
- he was also been shown the sub-heading note (2) of the Chapter 27, which is reproduced here below:-

“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”.

- he put his dated signature on the sub-heading note (2) of the Chapter 27, shown to him, total pages 1 to 2, in token of having perused and seen the same;
- on being asked about his understanding about the Tariff Item 270112 and the sub-heading note (2) of the Chapter 27, he stated that 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. is “Bituminous Coal” and classifiable under the CTH 27011200;
- now, he was also shown the exemption Notification 12/2012-Cus. Dated 17.03.2012, total pages 1 to 3 and the Sl.No. 122, 123 & 124 are 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%	-	-

- he put his dated signature on exemption Notification 12/2012-Cus. Dated 17.03.2012, in token of having perused and seen the same; he stated that from the reading of the above entries of exemption Notification 12/2012-Cus. Dated 17.03.2012 it is revealed that exemption of Basic Customs Duty has been granted to all coking coal classifiable under CTH 2701 (four digit classification) (Sl. No. 122 of the said Notification), while such exemption of Basic Customs Duty has been granted in case of Steam Coal classifiable under CTH 27011920 (eight digit classification) (Sl. No. 123 of the said Notification) under the category of *Other Coal*;
- he stated that all the goods other than those specified at Sr.No. 122 & 123 (CTH 27011100, 27011200 & 270119) is chargeable to 5% BCD (Sl. No. 124) in the above notification; that the tariff and effective rate of duty applicable to different categories of coal is as per the details given in table below:

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:					
27011100	-- Anthracite	10%	6%	5%	6%	Exemption: See Notn.12/2012-Cus., dated 17.03.2012; Sl.No.124.
27011200	-- Bituminous coal	55%	6%	5%	6%	Exemption: See Notn.12/2012-Cus., dated 17.03.2012; Sl.No.124.
270119	-- Other coal					Exemption: See Notn.12/2012-Cus., dated 17.03.2012; Sl.No.124.
27011910	--- Coking coal	10%	6%	NIL	6%	Exemption: See Notn.12/2012-Cus., dated 17.03.2012; Sl.No.122.
27011920	--- Steam coal	10%	6%	NIL	1%	Exemption: See Notn.12/2012-Cus., dated 17.03.2012; Sl.No.123.

- on being asked about his understanding about volatile matter limit on a dry, mineral-matter-free basis and a calorific value limit on a moist, mineral-matter-free basis, he stated that he did not have any idea regarding these parameters;

- he was shown copies of Coal Production and Preparation Report (Instructions) attached to Coal Production Report (Form EIA -7A) total pages 1 to 6, retrieved from website www.eia.gov/cneaf/coal/page/surveys/coal7a.html; that the said Form EIA-7A is an annual survey of all U.S. coal mines; that he saw and perused the same and put his dated signature; that at page no.4 of Instruction (running page no.6) defines the formula to ascertain the volatile matter limit on a dry, mineral-matter-free basis and a calorific value limit on a moist, mineral-matter-free basis above terms as detailed below:

- (i) Dry, mineral-matter free fixed carbon percentage = $100(FC-0.15S)/(100-(M+1.08A+0.55S))$
- (ii) Dry, mineral-matter free volatile matter percentage = $100 - (\text{Dry, mineral-matter free FC})$
- (iii) Moist, mineral – matter free Btu content = $100 (Btu-50 S)/(100-(1.08A+0.55 S))$

Where,

Btu=gross calorific value per pound;

M= moisture content percentage by weight;

A=ash content percentage by weight; and

S= sulfur content percentage by weight

FC= fixed carbon content percentage by weight;

Btu = Kcal/kg * 1.800 (as per website Bulk testing Int – coal conversion facts & calculations)

- he understood and agreed with the above formulas;
- he was shown the Certificate of Sampling & Analysis report, Ref. No. 12/01655/M dated 10.07.2012 of Shipment of Coal in respect of test conducted by M/s. Inspectorate M & L (PTY) Ltd., South Africa in respect of Coal consignments purchased by them on High Sea Sell basis from M/s Kothari Products Ltd., Mumbai; that the details of parameters given in the said Certificate of Sampling & Analysis report are as under:
 - (i). Gross Calorific Value (ADB) = 6608 KCAL/KG.
 - (ii). Volatile matter (ADB) = 21.3 %
- on the basis of the formula to ascertain the volatile matter limit on a dry, mineral-matter-free basis and a calorific value limit on a moist, mineral-matter-free basis, as defined in the Coal Production and Preparation Report (Instructions), annual survey of all U.S. coal mines shown to him, he

calculated the volatile matter limit on a dry, mineral-matter-free basis and calorific value limit on a moist, mineral-matter-free basis from the figures shown in Certificate of sampling and analysis Report Ref. No. 12/01655/M dated 10.07.2012 of Shipment of Coal in respect of test conducted by M/s. Inspectorate M & L (PTY) Ltd., South Africa in respect of Vessel MV Lucky Sunday and value arrived are as under:

- (i). The volatile matter limit on a dry, mineral-matter-free basis comes to 24.63% as against 21.30 % Volatile matter (ADB)
- (ii). The calorific value limit on a moist, mineral-matter-free comes to 7979 Kcal/kg as against 6608 Kcal /kg calorific value (ADB)
- he stated that it is evident from the details contained in the above documents produced by him and calculation above that the coal imported by M/s. Kyori Oremin Ltd., were having the volatile matter (dry, mineral-matter free basis) exceeds 14% and the calorific value (moist, mineral-matter free basis) exceeds 5833 Kcal/kg;
- he agreed on the point that the volatile matter on a dry, mineral-matter-free basis and calorific value limit on a moist, mineral-matter-free is always higher than the volatile matter (ADB basis) and calorific value (ADB basis); that he confirmed that the said coal was bituminous coal as defined in the chapter note 2 of chapter 27; that he accepted that coal imported by their company is correctly classifiable under CTH 27011200 as bituminous coal attracts Basic customs duty @ 5% adv and additional duty (CVD) @ 6 % adv.; that on account of correct classification they are required to pay the differential duty;
- regarding payment of differential duty, he stated that the matter would be decided by their Corporate Office at the earliest;
- he further stated that they had classified the coal imported by their company in CTH 27011920 because of the reason that the said coal was being used for generating steam;

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

8.1 The Customs Act, 1962

- (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) Section 15 (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.*

- **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 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.

8.2 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%	-	-

8.3 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.

8.4 A. 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.

B 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.

Rule: 14. Prohibition regarding making, signing of any declaration, statement or documents. —

(1) No person shall make, sign or use or cause to be made, signed or used any declaration, statement or document for the purposes of obtaining a licence or importing any goods knowing or having reason to believe that such declaration, statement or document is false in any material particular.

(2) No person shall employ any corrupt or fraudulent practice for the purposes of obtaining any licence or importing or exporting any goods.

9.1 Scrutiny of the various documents/records submitted by Shri Vijay Patel and the statement of Shri Vijay Patel, Vice President of M/s Kyori Oremin Ltd., Hyderabad recorded on 11/02/2013 indicate that M/s. KOL has imported 'COAL' having Volatile Matter higher than 14% and Gross Calorific Value equal to greater than 5833 Kcal/Kg. M/s KOL 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 instant notice covers the period commencing from 17.03.2012 to till date.

9.2 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.

9.3 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:-

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

$$\text{Dry, mineral-matter free volatile matter percentage} = 100 - (\text{Dry, mineral-matter free FC})$$

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

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.

$$Btu = 1.80 * kcal/kg$$

9.3.1 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.

9.3.2 It may be pertinent to mention here that 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 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 this 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.

10.1 A reference was made 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.

10.2 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. He also confirmed that the values of Ash content, Sulphur content and Btu are to be applied on Air Dry Basis (ADB). Shri Vijay Patel, Vice President of M/s Kyori Oremin Ltd., Hyderabad understood and accepted these formulae to be correct in his voluntary statement recorded under Section 108 of Customs Act, 1962.

11. M/s KOL had imported Coal from various suppliers of Indonesia and South Africa under various Bills of Entry and at various ports describing as 'Indonesian Steam Coal/ Indonesian Non Coking Steam Coal In Bulk/ Indonesian Steam Coal in Bulk/Steam Coal'. The various **Certificates of Sampling & Analysis of Shipment of Coal** for each vessel submitted by M/s. KOL indicated the Coal imported were most of time having Gross Calorific Value more than 5833 kcal/kg and in some cases it is less than 5833 kcal/kg, simultaneously, the Volatile Matter is always 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 literature as discussed above gives the formulae to calculate the Volatile Matter (on dry, mineral-matter-free basis) & Gross Calorific Value (on moist, mineral-matter-free basis). On the basis of above said formulae the Volatile Matter (VM) (on dry, mineral-matter-free basis) & Gross Calorific Value (GCV) (on moist, mineral-matter-free basis) are calculated for 01 Certificates of Sampling & Analysis of Shipment of Coal herein below as a sample.

11.1 The **Certificate of Analysis** dated 28/05/2012, in respect of the test conducted by **PT. Surveyor Independent Indonesia**, on a Sample drawn from the cargo of 16998.00 MT of coal described by the Exporter as **INDONESIAN STEAM COAL IN BULK**, loaded at the Samarinda (Muara Jawa), Open Sea Anchorage between 21.05.2012 to 23.05.2012 on board the vessel **MV SOLDYO**. The analysis report in the said certificate indicated the Coal was having Gross Calorific Value 4592 kcal/kg (As Received Basis) and the Volatile Matter 40.12 % (Air Dry Basis). On applying the above formulae the Volatile Matter (on dry, mineral-matter-free basis) worked out to be 48.61% as against 40.12 % (Air Dry Basis) and Gross Calorific Value (on moist, mineral-matter-free basis) worked out to be 5999 kcal/kg (Air Dry Basis) as against 4592 kcal/kg (As Received Basis) { 5623 (Air Dry Basis)} as clear from Annexure-A to the notice.

11.2 Similarly the Volatile Matter (on dry, mineral-matter-free basis) and Gross Calorific Value (on moist, mineral-matter-free basis) for all other such Certificates of Sampling & Analysis have been calculated on the basis of above said formula. The Volatile Matter (on dry, mineral-matter-free basis) exceeding 14% and Gross Calorific Value (on moist, mineral-matter-free basis) equal to greater than 5833 Kcal/Kg are tabulated in **Annexure-A** annexed to the Show Cause Notice.

12. The Shri Vijay Patel, Vice President of the said importer in his statement recorded on 11/02/2013 had himself stated and accepted that after going through the relevant sub-heading note (2) of the Chapter 27, the 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 is "Bituminous Coal" and classifiable under the CTH 27011200. Further, he accepted the **formulae to be correct.**

13. It thus appears from the various Certificate of Sampling & Analysis of Shipment of Coal as detailed in Annexure-A to the notice in respect of test conducted by

various independent inspecting agencies at various Load Ports that the volatile matter limit (on a dry, mineral-matter-free basis) of the coal imported by M/s. KOL exceeds 14% and also the calorific value of the said coal (on a moist, mineral-matter-free basis) is found to be greater than 5,833 kcal/kg. Hence, in terms of Sub-heading note (2) of the Chapter-27 discussed supra, it is evident that the Coal imported from Indonesia by declaring as 'Indonesian Steam Coal/ Indonesian Non Coking Steam Coal In Bulk/ Indonesian Steam Coal' and classified under Customs Tariff Item 27011920 was in fact Bituminous Coal and is correctly classifiable under Sub-Heading 2701 1200.

14. 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.'

15.1 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 M/s KOL 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.

15.2 The structure of chapter heading no: 2701 is reproduced below as under:-

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:

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.

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%	-	-

Since the impugned coal imported by M/s KOL appeared to be classifiable under CTH 2701 12 00, the same was 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. M/s. KOL have wrongly declared the coal imported by them as 'Steam 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%. Further, the Certificate of Sampling & Analysis received from the overseas supplier categorically mentioned that the said Coal imported were having Gross Calorific Value in excess of 5833 Kcal/Kg and the percentage of Volatile matter in excess of 14%. M/s. KOL 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 M/s. KOL had 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 Coal/ Indonesian Non Coking Steam Coal In Bulk/ Indonesian Steam Coal' in the declaration in 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 constitutes 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 were 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 M/s. KOL have 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 M/s. KOL 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-B** to the notice were 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 had rendered the impugned goods liable to confiscation under the provisions of Section 111(d) and 111(m) of the Customs Act 1962, M/s. KOL were also liable for penalty under Section 112(a) of the Act ibid.

17.5 From the foregoing, it appeared that M/s. KOL have 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. Bills of Entry as detailed in **Annexure-B** to the notice were assessed finally during the period 17.03.2012 to 31.01.2013 and on such Bills of Entry, M/s. KOL paid the duty **Rs.49,40,797/-** on **55003.00 MTs** imported coal on the basis of (mis) classification under Customs Tariff heading 27011920, as against the Customs duty amounting to **Rs. 2,66,54,668/-** payable on the basis of correct classification of the impugned goods under Customs Tariff heading 2701 1200, as detailed in Annexure- B. Hence, differential duty of **Rs.2,17,13,871/-** on the **55003.00 MTs** of impugned coal, imported by M/s. KOL at Kandla port under the bills of entry as detailed in **Annexure-B** to the notice and assessed finally was liable to be recovered from them under **Section 28(1) of the Customs Act, 1962** along with applicable interest under **Section 28 AA** of the Customs Act, 1962.

18. In view of the foregoing para, M/s. Kyori Oremin Ltd., were called upon to show cause to the Commissioner of Customs, Kandla, as to why:-

- (i) Their claim for classification of impugned goods (as detailed in **Annexure –B** to the notice 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 **55003.00 MTs**, Imported Coal valued at **Rs. 20,46,74,058/-** as detailed in **Annexure –B to the notice should not be confiscated / held liable for confiscation** under the provisions of Section 111(d) and 111(m) of the Customs Act,1962 ;
- (iii) The Differential Customs Duty amounting to **Rs. 2,17,13,871/- (Rupees Two Crores Seventeen Lakhs Thirteen Thousand Eight Hundred and Seventy One only)**, on the **55003.00 MTs** of Imported impugned Coal as detailed in **Annexure-B** to the notice should not be demanded and recovered from them under Section 28(1) of the Customs Act, 1962;
- (iv) Interest should not be recovered from them on the said differential Customs duty, as at (iii) above, under Sections 28AA of the Customs Act, 1962.
- (v) Penalty should not be imposed on them under Section 112(a) of the Customs Act, 1962.

19. DEFENCE REPLY:

M/s. KOL in their written replies dated 15.07.2013, 05.10.2013 and 17.07.2014 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:

19.1 That they had been engaged in import of Coal which is **commercially known as “Steam Coal”** during the last about 5 years from Indonesia and South Africa; that they had been supplying the same to industrial users, majority of which are Power Generating Units located all over India; that “Steam Coal” being imported by all the Indian Importers was being declared under Tariff Items 2701.1920 without differentiating between the “Steam Coal” of volatile matter exceeding 14 percent and Gross Calorific Value equal to or exceeding 5833 Kcal/Kg and the “Steam Coal” of Gross Calorific Value less than 5833 Kcal/kg; that none of the Custom Officers assessing the said consignments had anytime raised any objection with regard to the said classification; that they had submitted copies of Load Port Analysis Reports giving the technical specifications of the imported consignments and samples from each of the

said consignments were also drawn for chemical analysis; that some of the Load Port Analysis Reports indicated that the "Steam Coal" was of volatile matter exceeding 14 percent and Gross Calorific Value exceeding 5833 Kcal/Kg. However, the Assessing Officers had never considered the said Gross Calorific Values as relevant for categorizing the said "Steam Coal" as "Bituminous Coal" and had accepted the declared classification of "Stem Coal" under Tariff 2701.1920;

19.2 That the Notification No. 12/Cus-2012 dated 17.03.2012 was issued by Government to ease the duty burden of Coal on domestic Power Manufacturers who were the major consumers of "Steam Coal"; that vide the said Notification a concessional rate of duty was specified for "Steam Coal", i.e. the Basic Customs Duty was reduced to 0% (from 6%) and Additional Customs Duty (CVD) was reduced to 1% (from 5%). The said concessional rate of duty extended to "Steam Coal" was availed by them and other importers in respect of all imports of "Steam Coal", irrespective of their Volatile Matter percentage and the Gross Calorific Value; that the classification of "Steam Coal" declared under Tariff Heading 2701.1920 by M/s. KOL was invariably accepted as correct in respect of their all imports of "Steam Coal", irrespective of its Gross Calorific Value. i.e. whether the Gross Calorific Value exceeded 5833 Kcal/kg or not, the "Steam Coal" was always considered as "Steam Coal" categorized under 2701.1920, whether before issue of Notification No. 12/Cus-2012 dated 17.03.2012 or after that; that in none of the declared imports of "Steam Coal" exceeding Volatile matter 14% and Gross Calorific Value exceeding 5833 Kcal/kg any objection was raised or any action was taken in respect of any import of "Steam Coal" till January 2013; that in January 2013 that DRI Ahmedabad came up with a new view that "Steam Coal" answering the technical specifications of Volatile matter and Goss Calorific Value specified in respect of Bituminous Coal would be covered by Bituminous Coal and issued a Circular no 3/2003 advising all the Customs field formations accordingly.

19.3 That they had had no reason to doubt that the department would anytime seek to classify the imported "Steam Coal" as "Bituminous Coal" wherever the technical specifications defined for Bituminous Coal under 2701.1200 were met; that in respect of all the imports of "Steam Coal" samples were regularly drawn by the department and their technical characteristics were tested; that till the DRI issued an alert circular on 31.01.2013 there was absolutely no objection whatsoever to the classification under 2701.1920 and particularly to the concessional rate of duty availed under notification no 12/2012-Cus dated 17.03.2012; that the Alert Circular No. 3/2013 dated 31.01.2013 was issued by DRI New Delhi based upon the inputs provided by DRI Zonal Unit Ahmedabad which had allegedly gathered intelligence that "Steam Coal" liable to be classified as 'Bituminous Coal' was being mis-declared as "Steam Coal" and cleared by availing concessional rate of duty under Notification No 12/2012 dated 17.03.2012;

19.4 That Shri Vijay Patel, the Vice-President of M/s KOL while recording of the statement by the DRI was threatened with arrest and his signature was obtained under duress on typed sheets without letting him express the correct state of affairs; that it was alleged that Shri. Vijay Patel in the statement dated 11.02.2013 admitted that the imported goods are required to be treated as "Bituminous Coal" falling under tariff item 2701.1200 and cannot be considered as "Steam Coal" ; that letter dated 03.05.2013 addressed by their Vice-President Shri Vijay Patel to The Additional Director General DRI Ahmedabad Zonal Unit intimating that he was retracting from his statement recorded by the authority on 11.02.2013 as it was not at all voluntarily made and his signature was forcibly procured on typed sheets by giving threats; that the said statement dated 11.02.2013 contained many twisted facts and aberrations and that no copy of the said statement was given to Shri Vijay Patel or to them at any earlier point of time.

19.5 That the classification of "Steam Coal" declared by them is attempted to be reopened with reference to the technical specifications specified for "Bituminous Coal" under Tariff Item 2701.1200 proposed by DRI and was based on total misconception of facts and misconstruction and/or misreading of the Customs Tariff and General Interpretative Rules of the Customs Tariff; that there has not been a proper application of mind or a proper appreciation of facts before arriving at the said proposition; that it is to be appreciated that Customs Tariff categorizes the different types of coal for the purpose of levy of Customs duty with reference to the incidence of 'import' and hence the trade name/ nomenclature of the imported coal being imported is of specific relevance; that the coal imported by M/s. KOL was "Steam Coal" and traded as such it has to be classified under the tariff sub-heading for "Steam Coal" appearing in the Tariff; that it was not the case of the department that the Customs Tariff does not have any specific entry for "Steam Coal" and hence it has to be categorized under some other type of coal. In fact, Tariff Item 2701.1920 specifically refers to "Steam Coal". As such the categorization of "Steam Coal" under any other heading which does not refer to "Steam Coal" is illogical and against the Tariff Structure; that the classification of varieties of Coal under different sub headings under the Customs Tariff has not been in consonance with the classification followed internationally; that the Bituminous Coal defined under 2701.1200 as of non agglomerating type in fact does not exist. The department's attempt to reclassify the "Steam Coal" having Gross Calorific Value more than 5833 Kcal/kg as Bituminous Coal by referring to such specifications of Bituminous Coal is therefore a biased act to garner more revenue without having regard to the facts;

19.6 That following points are relevant for classification of imported coal:
(i) "Bituminous Coal" categorized under Indian Customs Tariff Act 1975 actually refers to "Sub-bituminous coal" and not to "Bituminous Coal"

that the Tariff Headings related to the varieties of coal given in the Indian Customs Tariff Act, 1975 the classification of Bituminous Coal appears under only one main heading i.e. 27.01 which runs as follows. 'Coal whether or not pulverized, but **not agglomerated**'. Further **no separate entry appears for sub bituminous coal or for agglomerated bituminous coal**, which means that the non agglomerated coal classified under the heading 2701.1200 is actually sub-bituminous coal and that the Bituminous Coal (agglomerated) gets classified only under heading 2701.2090 **as the other agglomerated coals** and not under 2701.1200. Hence the proposition to classify the "Steam Coal" which is 'non-agglomerating' as 'Bituminous Coal' which necessarily has to be 'agglomerating' is devoid of any reasoning.

(ii). "Steam Coal" is nothing but non agglomerating coal which is non coking. It is technically either Anthracite or Bituminous/Sub bituminous Coal. No technical parameters are specified for "Steam Coal" as it is categorized with reference to its physical qualities viz : Its non coking ability and the fact that it is ideal for use as fuel in steam generation.

In this regard M/s. KOL refer to "The Coal Information (2011 early edition) -3 Documentation for Beyond 2020 Files" published by the International Energy Agency; that it follows that "Steam Coal" is a variety of Non-coking, non-agglomerating type of Coal which includes Anthracite or Bituminous/Sub-bituminous Coal of that type but which essentially is ideal for use in steam generation.

(iii) The Government has accepted that Coal consumed by the Power Generating Units was "Steam Coal" irrespective of its Gross Calorific Value.

The intention of the Government to extend the benefit of notification no 12/2012 dated 17.03.2012 to the Coal being used by the Power Generating Units was spelt out by the Finance Minister while presenting the Financial Budget for the financial year 2012-13; that any attempt to classify the "Steam Coal" under the category of Bituminous Coal and deny the concessional rate of duty available to "Steam Coal" under notification no 12/2012 would make the notification 12/2012 redundant to that extent. Since the legislature clearly intended to extend the benefit to "Steam Coal" because it is used in power generation and no restrictions with regard to its Gross Calorific Value were specified Our Clients submit that the concessional rate has been correctly availed by them.

19.7 That there will be no dispute with the proposition that the question of determination of the proper classification of the goods is absolutely necessary to construe with tariff entries only on the basis of the proper appreciation. Our Clients submit that on proper appreciation of the entries in the Customs Tariff relating to "Steam Coal" and 'Bituminous Coal' there is no escape than to draw conclusion that

the imported coal is nothing but a “Steam Coal” and can only be classified under Tariff Item 2701.1920.

19.8 That the classification of the varieties of Coal as given in the Indian Customs Tariff Act, 1975 by sub categorization of Main Heading 2701 into different sub headings and Tariff Items the following logical inferences can be drawn.

(i) The sub headings 2701.11 to 2701.19 refer to all the varieties of Coal **Non-agglomerated** and Sub heading 2701.20 refers to other Coal. By implication it means all types of **Agglomerated Coal are covered by heading 2701.20.**

(ii) Amongst the Non-agglomerated Coal, Anthracite is defined to be a Coal with less than 14% Volatile matter and Bituminous Coal as the coal with more than 14% Volatile matter and having Gross Calorific Value equal to or greater than 5833 Kcal/kg. There is no reference to the Coal with Volatile matter exceeding 14% and having Gross Calorific Value less than 5833 Kcal/kg. If such residuary category of Coal only were to be classified as ‘Other Coal’ under 2701.19, then its further differentiations into Tariff Items namely 2701.1910 (coking Coal), 2701.1920 (“Steam Coal”) and (iii) 2701.1990 (Other Coal) would have been clearly spelt out by defining technical parameters.

(iii) The fact that the Other Coal (2701.19) has been sub-divided into Coking Coal (2701.1910), “Steam Coal” (2701.1920- Non Coking Coal but having utility in Steam Generation) and Other Coal (2701.1990- Other Non Coking Coal) shows that the Other Coal of sub-heading 2701.19 has been grouped with reference to the specific characteristics of the Coal like (Coking or Non coking, Suitability for use in Steam generation etc) and not with reference to any technical specifications like Volatile Matter and Gross Calorific Value. The fact that the Coking Coal (2701.1910) can be of the technical specification not bound by the parameters like more or less than 14% of Volatile matter and less than 5833 Kcal/kg shows that “Steam Coal” would also be not bound by the said technical specifications.

19.9 That the department has applied BTU/LB, Sulphur, Ash corresponding to Laboratory conditions i.e. Air Dried Basis Values; that the reason for employing the Air Dried Values appears to be the clarification received by DRI vide letter dated 07.03.2013 from the Joint Director CRCL at JNCH, wherein while confirming the above formula which is given in the Coal Production and Preparation report issued by Department of Energy, USA for arriving at the GC values of the Coal at MMMF basis, he has clarified that values on Air Dried basis can be taken as base values; that the said proposition that “Values at Air Dried Basis” can be taken to arrive at the GCV at MMMF basis is totally wrong as the values that should be applied for arriving at the GCV at MMMF basis are the “As Received basis values”; that as per ASTM such conversion is

done on Bed Moisture basis and if Bed Moisture Basis is not available then Equilibrium Moisture at 96 % RH and 30 degree C is to be ascertained through ASTM 1412 from which Bed Moisture is to be extrapolated which is unique to each rank of coal. In the absence of above two values, the Technical Book of Indonesian Coal Mining Association states that values corresponding to "As Received Basis" can be applied to arrive at Moist. Mineral Matter Free Basis figures; that the adoption of Air Dried basis values instead of As Received basis values has given GC values of more than 5832 Kcal/kg resulting in the department resorting to reassessment of the Coal as Bituminous Coal and raising demands of differential duty.

19.10 That the coal imported by M/s. KOL as covered in this case, was of Indonesian origin and as such, even if it is held classifiable as 'Bituminous Coal' they are entitled to the concessional rate of Basic Customs Duty of 2% as provided in the Notification No. 46/2011 dated 1st June 2011; that even in the unlikely event of holding the subject Steam Coal as Bituminous Coal, the duty demand would be Rs. 1,50,09,978/- only and not Rs. 2,17,13,871/- as worked out in the Show Cause Notice.

19.11 That there was absolutely no prohibition prescribed in regard to importation of "Steam Coal" and as such applicability of clause (d) of Section 111 does not arise; that they submitted requisite documents and furnished all the relevant particulars correctly which included the declarations with regard to Volatile Matter Values and Gross Calorific Values as required by the Customs Authorities. In the circumstances, our Clients' case also does not get covered by clause (m) of Section 111; that the provisions of the Section 111(d) are not applicable for the goods in respect of which all material details were correctly declared but Tariff Classification was wrongly done. i.e. even assuming that "Steam Coal" should have been classified as Bituminous Coal there can be no allegation of mis-declaration of any fact; that imposition of any penalty under Section 112(a) does not arise at all; that the SCN does not allege any mis-declaration with intention to evade Customs Duty; that the alleged short-levy is as a result of reasons of any collusion or any willful mis-statement or suppression of fact; that even if the department had any ground for reclassification of such "Steam Coal" as Bituminous Coal the Central Board of Excise & Customs should have issued an order or instruction or direction under the provisions of Section 151 A of the Customs Act, 1962, which takes effect only prospectively; that for the same reason the interest liability alleged against M/s. KOL under Section 28AA also does not hold good.

PERSONAL HEARING:

20. The hearing was held on 10.04.2015, which was attended by Shri U. R. Naik, Advocate and Shri Tejas Rao, Head Technical Services on behalf of M/s. KOL. During the course of Personal Hearing, they reiterated the submissions made in the

replies to the Show Cause Notice. They have also filed additional submissions at the time of PH. They also cited the RUD-6 wherein the working itself has been explained by way of a table and it has been clearly mentioned 'As Received Basis' only and hence RUD-6 cannot be relied upon which is contradictory. Calculation should have been done only on 'As Received Basis' and if so the demand does not sustain in the present case. They have also filed literature on variations with coal rank and contended that for the purpose of analysis the ASTM classification of coals by rank theoretically is based on the nature, or inherent moisture of coal seam before it is sampled or mined. Since the matter has been referred to Larger Bench in view of the of the conflicting decisions they have requested to keep the matter in abeyance. As the coal is of Indonesian origin they are entitled for concessional duty and they are not liable for any penalty since it is known as Steam Coal in trade parlance and there is no mis-declaration. He has also cited IS 1350 which also prescribes how bed moisture to be analysed.

DISCUSSION & FINDINGS:

21. I have carefully gone through the records of the case, including the Show Cause Notice dated 28.03.2013, the written submissions, as well as the oral/written submissions made during the course of Personal Hearing.

22. 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 M/s KOL, as detailed in Annexure-B to the Show Cause Notice.
2. Whether **55003.00 MTs**, Imported Coal valued at **Rs. 20,46,74,058/-** as detailed in Annexure-B to the Show Cause Notice, imported by M/s. KOL is liable for confiscation under the provisions of Sections 111 (d) and 111(m) of the Customs Act, 1962.
3. Whether the Differential Customs Duty amounting to Rs. **Rs. 2,17,13,871/- (Rupees Two Crores Seventeen Lakhs Thirteen Thousand Eight Hundred and Seventy One only)**, on the **55003.00 MTs**, of impugned Coal imported by M/s. KOL, as detailed in Annexure-B to the Show Cause Notice, is required to be demanded and recovered from M/s. KOL, under Section 28(1) of the Customs Act, 1962;
4. Whether M/s. KOL is liable to pay Interest on the differential Customs duty shown at (3) above, under Section 28AA of the Customs Act, 1962;

5. Whether M/s. KOL is liable for penal action, under Section 112(a) of the Customs Act, 1962.

23. 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 M/s. KOL, as detailed in Annexure-B to the Show Cause Notice, under the schedule to the Customs Tariff Act, 1975.

23.1 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 M/s. KOL, **within the ambit of the Schedule to the Customs Tariff Act, 1975**, for the purpose of levying of duty/deciding the eligibility for exemption.

23.2 In view of the above, the main issue before me for decision is whether the 'Coal' imported by M/s. KOL, falls under the category of 'Steam Coal' as declared by M/s. KOL, or is 'Bituminous Coal', as alleged in the Show Cause Notice, within the ambit of the Schedule to the Customs Tariff 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.

24.1 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.

24.2 I find that the whole issue of whether the goods imported by M/s. KOL, 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.*”

24.3 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. **Thus, I am proceeding to decide the case on the said facts and on the premises that the Coal imported by M/s. KOL 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 SI.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012.**

24.4 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%	

24.5 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.

24.6 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.*

24.7 From a reading of the above definition, it evolves that all Coals 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.

24.8 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.

24.9 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.

25. 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).

25.1 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.

25.2 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.**

25.3 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.

25.4 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*.

25.5 The Hon'ble Supreme Court in the case of Oswal 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.”

25.6 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.”

25.7 In this case, a particular definition has been assigned to the word ‘Bituminous Coal’ in the statute. 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 statute, 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.

26.1 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).

26.2 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.

26.3 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.

27. 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 M/s. KOL, 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 M/s. KOL will not be available to the imported Coal covered by the Show Cause Notice.

28. M/s. KOL 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 as under :

None of the Custom Officers assessing the consignments had anytime raised any objection with regard to the said classification:

29.1 M/s. KOL has argued that reclassification sought in the Show Cause Notice cannot be sustained since they have been importing the Steam Coal for the past several years and the Department has never objected to the classification of the goods.

29.2 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 Notices have been issued to all such importers. In the instant case also, the Show Cause Notice has been issued to M/s. KOL on the same aspect to recover the differential duty. Consequently, the issue has been taken up for adjudication as per law in vogue.

29.3 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 M/s. KOL 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 which is more legitimate.

29.4 Further, the contention of M/s. KOL 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 SCN has been issued at the appropriate stage.

The term "Steam Coal" must be understood in context of its popular meaning interpreted in the commercial or trade parlance.

30.1 Another contention is that as long as what is imported is commercially treated and traded as steam coal, then classification adopted should be as steam coal, under tariff item 27011920; that the entries in the Tariff should be interpreted in the commercial or trade parlance and not as per its scientific or technical meaning only.

30.2 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.**

30.3 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)

30.4 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).

30.5 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."

30.6 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).

30.7 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 M/s. KOL, 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 M/s. KOL 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 misleading, in view of the discussions above.

INCORRECT INTERPRETATION OF FORMULA FOR WORKING OF GCV on MMMF BASIS RESULTING IN DETERMINATION OF VALUES EXCEEDING 5833 Kg/K.Cal:

31.1 The contention of M/s. KOL on the above aspect is that the Customs authorities have incorrectly and arbitrarily adopted a formula and have worked out the

GCV according to their convenience with the sole intention of slapping a huge demand; that opinion of the Joint Director of the Customs Laboratory is incorrect in view of usage of wrong formula; that the customs authorities ought to have referred to ASTM D-3180 standards; that by applying this formula, in all the shipments referred in the Show Cause Notice, the calorific values works out to be well below the threshold limit of 5833 Kcal/Kg.

31.2 I find that the above contention of M/s. KOL 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 M/s. KOL 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. was shown and had been accepted and agreed to by the key person Shri Vijay Patel, the Vice-President of M/s. KOL. Further, the formula adopted for calculating was also agreed to by M/s. KOL. Also, Shri Vijay Patel, the Vice-President, KOL, after being explained of the formula had accepted that these formulae to be correct in his voluntary statement recorded under Section 108 of Customs Act, 1962, which has not been retracted at any point of time. Further, on being shown all the Certificate of Sampling & Analysis of Shipment of Coal covered under the Show Cause Notice, in respect of test conducted by various independent inspecting agencies at various Load Ports and in his statements he has stated as under:

“he stated that 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. is “Bituminous Coal” and classifiable under the CTH 27011200.”

31.3 As for his disagreement with the formula for arriving at the GCV, at the time of import, M/s. KOL had never stated and brought to the notice of the customs authorities that the formula adopted for calculating the GCV in the Certificate of Sampling & Analysis of Shipment of Coal was wrong. This fact has been taken up by them only after the issue of Show Cause Notice, which is nothing but an afterthought, which cannot be accepted at this stage. There is no dispute regarding the fact that volatile matter limit of the coal imported by M/s. KOL 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 M/s. KOL and has never challenged the Certificate of Sampling & Analysis of Shipment of various agencies during their years of import of the Coal.

31.4 M/s. KOL 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 adduced evidence regarding the allegation made in the Show Cause Notice, and then the onus to prove otherwise is on M/s. KOL. There is no dispute regarding the fact that volatile matter limit of the coal imported by M/s. KOL 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 them and has never challenged the Certificate of Sampling & Analysis of Shipment of various agencies during their stated five years of import of the Coal.

31.5 Notwithstanding 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 M/s. KOL 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.

31.6 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, namely, para 3.1.2. of ASTM D3180-07; Coal Conversion Statistics of World Coal Association; Coal Marketing International; Wikipedia, ASTM-D121-01; para 9.1 of ASTM D388-12 etc., wherein all the details in this regard, are available.

31.7 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.

31.8 It is not a case that the Department had forced any Testing Agency to issue certificate to the effect that the GCV and volatile matter limit should be that of Bituminous Coal for the purpose of slapping a huge demand and for making unsubstantiated allegation against them. It is worth mentioning here that the Show Cause Notice has not been issued to M/s. KOL in isolation. The Show Cause Notices have been issued to all the importers of coal across the country, in respect of consignments where volatile matter limit of the coal imported 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. Further, The Show Cause Notices have been issued only in those cases, based on the Certificate of Sampling & Analysis of Shipment, where the volatile matter limit of the coal imported exceeds 14% and also the calorific value of the said coal is greater than 5,833 kcal/kg. In terms of Sub-heading Note 2, the meaning of Bituminous Coal has been defined and the coal imported by M/s. KOL falls within the said meaning. Wherever, it was found that the imported Coal is Steam Coal, the eligible exemption has not been denied. In other words, if the intention of the department was to raise the revenue, then all imports of coal would have been treated as Bituminous Coal and duty demanded accordingly. As such, I do not find any merit in the argument, which is required to be rejected summarily.

The Government has accepted that Coal consumed by the Power Generating Units was "Steam Coal" irrespective of its Gross Calorific Value.

32.1 Their further contention is that the exemption to Steam Coal granted in Notification No.12/2012-Cus, dated 17.03.2012, should be interpreted in the light of the Hon'ble Finance Minister's budget speech made on 16.03.2012, which was on account of recognized downtrend faced by the domestic producers of thermal power.

32.2 With regard to the above contention, it is a fact that exemption has been granted to Steam Coal under Notification No.12/2012-Cus, dated 17.03.2012, wherein the BCD has been made nil and CVD has been reduced to 1% and this exemption, as per the finance ministers' speech is for domestic producers of thermal power. However, it is also a fact that the exemption has been granted to Steam Coal only. Thus what

flows from the above is that Steam Coal is required to be imported and used for producing thermal power, if one is to become eligible for the above said exemption. **Bituminous Coal can also very well be used for producing thermal power and the law makers are aware of this fact. Had the intention of the notification was to grant exemption to any type of coal used for producing thermal power, then naturally exemption would have been granted to Bituminous Coal also.**

32.3 In the present case, issue is of classification of the imported Coal and classification cannot be decided on the basis of the headings to which exemption has been granted. For imports, firstly the Heading/Sub-heading of the goods imported is to be decided and only thereafter one has to see whether the said Heading/Sub-heading of the goods imported, is there in the exemption notification. In other words, in the present case, the classification of the Coal, whether it is Bituminous Coal or Steam Coal is to be decided first. Then only the matter of exemption for the said imported goods is to be looked into. If the goods fall under the definition of Bituminous Coal, then there is no question of grant of exemption in terms of Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012 and if it is steam coal, then the said exemption is indeed available. In this connection, it is pertinent to point out here that the present Show Cause Notice does not covers all the coal imports made by M/s. KOL. Show Cause Notice has been issued only in respect of those imports, where the goods falls under the category Bituminous Coal, in the light of Note 2 to Chapter 27. Thus, the intention of the department was not to deny benefit to import of all types of coal. Wherever, it was found that the imported Coal is Steam Coal, the eligible exemption has not been denied and the intent of the notification has been served. In other words, if the intention of the department was to raise the revenue, then all imports of coal would have been treated as Bituminous Coal and duty demanded accordingly.

32.4 In this case, there is no doubt regarding the fact that by classifying the goods as Bituminous Coal under CTH 27011200, M/s. KOL is indeed deprived of the eligibility for exemption under Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012 and consequently has to pay a higher rate of duty. However, this liability of a higher rate of duty in no way should be the consideration for classifying the said Coal under a different Heading/Sub-heading, where there is less rate of duty or no duty at all. This aspect has been clearly spelt out by the Hon'ble Tribunal in the case of Gosai Trading Co. - 2007 (214) E.L.T. 301 (Tri. - Kolkata), wherein it was observed that "the present higher rate of duty by itself cannot be a ground for deciding the classification of the impugned goods outside the Heading 6212 **as classification of goods are to be done according to the terms of the Headings, Section and Chapter Notes and the Rules of Interpretation contained in the Customs Tariff Act but not on the basis of the duty rates which keep changing from time to time.**" (emphasis supplied). As such, I do not find any merit in the argument.

Exemption is available to goods imported from Indonesia in terms of Notification No.46/2011-Cus dtd.01.06.2011

33.1 I find that, said noticee has finally contended that in any event, even if the coal imported by them is classified as bituminous coal, the same would be eligible for exemption from payment of BCD, in terms of Notification No.46/2011-Cus dated 01.06.2011, as amended by Notification No.127/2011-Cus dated 30.12.2011 and Notification No. 64/2012-Cus dated 31.12.2012, since the imports of the coal under consideration are from Indonesia.

33.2 I find that M/s. KOL has adopted an 'either' or 'or' policy in the matter. If the coal is treated as Steam Coal, then exemption under Sr. No. 123 of Notification No.12/2012-Cus dt.17.03.2012, if not, then under Notification No.46/2011-Cus dated 01.06.2011, as amended from time to time. This cannot be accepted since in order to avail the benefits under Notification No.46/2011-Cus dated 01.06.2011, some basic procedures prescribed, such as, for applying for such benefits in the country of export, inspection of goods and subsequent issue of Country of Origin Certificate etc. are required to be followed, and proof of these conditions are required to be produced at the time of import. These procedures have not been followed in the case by M/s. KOL, which also cannot be followed at this stage.

33.3 Accordingly, I hold that M/s. KOL is not eligible for the benefit of exemption from payment of BCD as well as CVD, in terms of Notification No.46/2011-Cus dated 01.06.2011, as amended by Notification No.127/2011-Cus dated 30.12.2011 and Notification No. 64/2012-Cus dated 31.12.2012, and consequently their claim is rejected in toto.

34. In view of foregoing discussions, I hold that the Coal imported by M/s. KOL, 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. Accordingly, the classification of the said Coal as Steam Coal, under Chapter Sub-heading 27011920, as claimed by M/s. KOL is hereby rejected. Consequently, I also hold that M/s. KOL is not eligible for the benefit of exemption prescribed under SI.No.123 of Notification No.12/2012-Cus dt.17.03.2012.

2. Whether 55003 MTS of Coal totally valued at Rs.20,46,74,058/- imported by M/s. KOL is liable for confiscation under Sections 111 (d) and 111(m) of the Act, 1962.

35.1 In this case, as already discussed and decided by me, the coal imported by M/s. KOL, 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, M/s. KOL has declared the

same as Steam Coal and classified it under Chapter Sub-heading 27011920 ibid. Since they 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 differential BCD as well as CVD of Rs.2,17,13,871/- 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.

35.2 I also find that M/s. KOL 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 M/s KOL 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.

35.3 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.

35.4 Therefore, I hold that 55003.000 MTS of Coal totally valued at Rs.20,46,74,058/- imported by M/s. KOL, as detailed in Annexure-B to the Show Cause Notice, are liable for confiscation under Section 111(m) and Section 111(d) of the Customs Act, 1962. I find that all the Bills of Entry covered under the Show Cause Notice, have been finally assessed at the relevant time on account of RMS facilitation, and the impugned goods have been cleared. **As such, since the impugned goods have been cleared and are not available for confiscation, I refrain from imposing redemption fine in lieu of confiscation in respect of the said Bills of entry.**

3. Whether the differential Customs Duty payable by M/s. KOL is to be determined as Rs. 2,17,13,871/- under Section 28 (8) of the Customs Act, 1962, and the duty so determined is to be recovered from M/s. KOL.

36.1 As discussed above, I have already held that the Coal imported by M/s. KOL as detailed in Annexure-B to the Show Cause Notice is Bituminous Coal, and as a consequence M/s. KOL 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.

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. Thus, M/s. KOL is required to pay the differential duty of Rs.2,17,13,871/-, as detailed in Annexure-B to the Show Cause Notice, demanded vide the Show Cause Notice.

36.2 In view of the above, I determine the differential duty payable by M/s. KOL at Rs. 2,17,13,871/- under Section 28(8) of the Customs Act, 1962, and the same is required to be recovered from them.

4. Whether M/s. KOL is liable to pay interest involved on the said differential Customs Duty noticee amounting to Rs. 2,17,13,871/- at the applicable rate under the provisions of Section 28AA of the Customs Act, 1962.

37. As per the wordings of Section 28AA of the Customs Act, 1962 it is clear that when M/s. KOL is liable to pay duty in accordance with the provisions of Section 28 ibid, he in addition to such duty is liable to pay interest as well. The said Section provides for payment of interest automatically along with the duty. I have already held that differential Customs Duty of Rs. 2,17,13,871/-, is required to be recovered from them. In view of this, **I hold that M/s. KOL is liable to pay interest involved on the amount of Rs. 2,17,13,871/-, under the provisions of Section 28AA of the Customs Act, 1962.**

5. Whether M/s. KOL is liable for penal action, under Section 112(a) of the Customs Act, 1962:

38. As regards, imposition of penalty on M/s. KOL 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, **the penalty under Section 112 (a) ibid is attracted on the importer. However, 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.**

39. In view of the foregoing discussions and findings, I pass the following order:-

:ORDER:

- (a) The coal imported under the Bills of Entry covered in Annexure-B to the Show Cause Notice dated 10.04.2013, 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 of the imported Coal detailed in Annexure-B to the Show Cause Notice, under Tariff Heading/Sub-heading 2701 1920 ibid, is hereby rejected. Consequently, I deny M/s. Kyori Oremin Ltd, the benefit of exemption under Sl.No.123 of Notification No.12/2012-Cus. dated 17.03.2012.

- (b) 55003.000 MTS of Coal valued at Rs.20,46,74,058/-, imported by M/s. Kyori Oremin Limited is held liable for confiscation, under the provisions of Section 111(m) and Section 111(d) 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.
- (c) I determine the differential Customs duty payable by M/s. Kyori Oremin Limited as Rs. **2,17,13,871/- (Rupees Two Crores Seventeen Lakhs Thirteen Thousand Eight Hundred Seventy One Only)** under Section 28(8) of the Customs Act, 1962, accordingly, I demand and order for recovery of the duty so determined from them under Section 28(1) of the Customs Act, 1962.
- (d) I order for recovery of Interest involved on the differential Customs Duty of Rs. **2,17,13,871/- (Rupees Two Crores Seventeen Lakhs Thirteen Thousand Eight Hundred Seventy One Only)** mentioned at (c) above, from M/s. Kyori Oremin Limited, under Section 28 AA of the Customs Act, 1962.
- (e) I impose a penalty of Rs.22,00,000/- (Rupees Twenty Two Lakhs Only) on M/s. Kyori Oremin Limited, under section 112 (a) of the Customs Act, 1962.

(P. V. R. REDDY)
PRINCIPAL COMMISSIONER

F. No.S/10-35/Adjn/2013-14

Date: 30.04.2015

To;

M/s. Kyori Oremin Ltd.,
4th Floor, "My Home Jupally" Green Lands,
Ameerpet,
Hyderabad.

Copy to:

- 1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad, alongwith a copy of the Show Cause Notice.
- 2) The Additional Director General, Directorate of Revenue Intelligence, AZU, Ahmedabad, for information.
- 3) The Assistant Commissioner (Recovery Cell) Customs House, Kandla.
- 4) The Assistant Commissioner (Gr.I) Customs House, Kandla.
- 5) **Guard File.**