Brief Facts of the case:

M/s. Haryana Power Generation Corporation Ltd., Rajiv Gandhi Thermal Power Plant, Khedar, Hisar, Haryana 125121, holding IEC No: 0100000029 (here-in after referred to as 'the said noticee' for the sake of brevity), are engaged in the generation of Electricity for which they import Coal through the port of Mundra. The Said noticee classified the coal imported by them under CTH 27011920, claiming the same as 'Steam coal' and paid only 1% ad valorem as Additional Duty leviable under Sub-Section (1) of Section 3 of the Customs Tariff Act 1975 (CVD) claiming the benefit of exemption Notification No: 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 the said noticee was greater than 5,833 kcal/kg and its volatile matter exceeded 14% and therefore the coal imported by them fell in the category of Bituminous coal of Customs Tariff Heading 2701 1200 chargeable to Basic Customs Duty (BCD) @ 5% under Notification no: 12/2012-Cus. dated 17.03.2012 (Sr. No. 124) and Additional Duty (CVD) @ 6% leviable under Sub-Section (1) of Section 3 of the Customs Tariff Act 1975.

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

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

3. Further, sub-heading note (2) of the Chapter 27 specifically provides that for the purposes of sub-heading 2701 12 "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit

(on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg.

4.1. From the scrutiny of the import documents submitted by the said noticee, it transpired that they have imported "Seam Coal" of Indonesian origin having Calorific value 6072 Kcal/Kg to 6306 KCal/Kg (ADB basis) from various overseas suppliers at Mundra Port. The same is detailed below:-

Sl. No.	**IGM No. / Date**	**Certificate date**	**Vessel Name**	**Volatile Matter (ADB)**	**Volatile Matter (Dry, MMF basis)**	**Gross Calorific Value (ADB) kcal/kg**	**Gross Calorific Value (on Moist, MMF basis) kcal/kg**
1	2038996/ 23.06.2012	15.06.2012	Medi Genova	40.35	41.24	6280	67.87
2	2040649/ 18.07.2012	10.07.2012	MV F Duckling	40.12	41.04	6320	6925
3	2048180/ 08.11.2012	05.11.2012	MV Fuyuan	38.33	40.00	6072	6523
4	2049009/ 21.11.2012	10.11.2012	MV Southern Harmony	38.59	40.10	6164	6730
5	2049029/ 26.11.2012	16.11.12	MV Cape Fushen	40.69	41.49	6261	6776
6	2050666/ 15.12.2012	12.12.2012	MV Cape Olive	41.59	42.08	6306	6762

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

4.3 Further, it also transpired from the import documents that the said noticee was importing Coal at Mundra Port and during the scrutiny of documents it was also observed that the Coal imported vide various Bills of Entry were assessed finally on account of RMS facilitation of the Bills of Entry at Mundra Port.

5.1 The analysis reports of the shipments of coal in respect of the said noticee indicated that the Gross Calorific Value of the Coal imported was between 6072 Kcal/Kg to 6320 KCal/Kg on 'Air Dry Basis (ADB)' and the Volatile matter exceeds 14% (ADB) the details are tabulated in Annexure-B annexed to the Show Cause Notice.

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

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

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

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

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

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

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

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

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

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

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been short levied or short-paid or to whom the refund has erroneously been made, requiring him to

show cause why he should not pay the amount specified in the notice;

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

(i) his own ascertainment of the duty; or

(ii) the duty ascertained by the proper officer,

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

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

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

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

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

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

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

(vi) Section 46: Entry of goods on importation. - *(1) The said noticee 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 said noticee 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 said noticee 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.*

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

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

Notification
No.12 /2012 –Customs

New Delhi, dated the 17 th March, 2012

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002 Published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 118(E) dated the 1st March, 2002, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India,-

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

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

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

S. No.	*Chapter or Heading or Sub-heading or tariff item*	*Description of goods*	*Standard rate*	*Additional duty rate*	*Condition No.*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*
122	*2701*	*Coking coal*	*NIL*	*-*	*-*

		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			
123	*27011920*	*Steam Coal*	*NIL*	*1%*	*-*
124	*2701 11 00, 2701 12 00, 2701 19*	*All goods other than those specified at S. Nos. 122 and 123 above*	*5%*	*-*	*-*

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

CHAPTER 27

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

SUB-HEADING Notes :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Where,
Btu = gross calorific value per pound;
FC = fixed carbon content percentage by weight;
M = moisture content percentage by weight;
A = ash content percentage by weight; and
S = sulfur content percentage by weight.
*Btu = 1.80 * kcal/kg*

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

7.3.2 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 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 said noticees. 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.

8. A reference was made by DRI, vide a letter F. No: DRI/AZU/INT-01/2013 dated 05.03.2013 to the Joint Director, Customs and central Revenue Control Laboratory (CRCL) to ascertain whether the aforesaid formulae can be applied as such in calculation of the volatile matter limit (on a dry, mineral-matter-free basis) and the calorific value limit (on a moist, mineral-matter-free basis) in case of Coal imported into India.

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

10. The said noticee has imported Coal from Indonesian under various Bills of Entry at Mundra Port describing them as "Indonesian Steam Coal in Bulk". The various Certificates of Sampling & Analysis of Shipment of Coal for each vessel submitted by The said noticee indicate that the Coal imported were having Gross Calorific Value more than 5833 kcal/kg simultaneously, the Volatile Matter is more than 14%. But, the Gross Calorific Value and the Volatile Matter in these analysis reports are on Air Dry Basis (ADB) conditions,

whereas as per Sub-heading Note 2 to Chapter 27 of the Customs Tariff the volatile matter limit should be on a dry, mineral-matter-free basis and a calorific value limit should be on a moist, mineral-matter-free basis. The formulae to calculate the Volatile Matter (on dry, mineral-matter-free basis) & Gross Calorific Value (on moist, mineral-matter-free basis) is given below:

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

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

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

Btu=Gross calorific value per pound.
S= Sulphur content percent by weight
A= Ash content percent by weight.
(1 Kcal/Kg = 1.800001 Btu/Lb.)

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

11. It thus appeared from the Certificates of Sampling & Analysis of Shipment of Coal (As detailed in Annexure-B) 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 the said noticee 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 Chapther-27 discussed supra, it is evident that the Coal imported from Indonesian, by declaring as "Indonesian Steam Coal in Bulk" and classified under Customs Tariff Item 27011920 is in fact Bituminous Coal and is correctly classifiable under Sub-Heading 2701 1200.

12**.** The classification of the goods under Customs Tariff is governed by principles as set out in 'The General Rules for the Interpretation of Import Tariff'. Rule 1 of The General Rules for the Interpretation of Import Tariff clearly stipulates that for legal purposes, classification shall be determined according to the terms of

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

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

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

2701		***COAL; BRIQUETTES, OVOIDS AND SIMILAR SOLID FUELS MANUFACTURED FROM COAL.***
		- Coal, whether or not pulverised, but not agglomerated:
2701 11 00	*- -*	*Anthracite*
2701 12 00	*- -*	*Bituminous coal*
2701 19	*- -*	*Other coal:*
2701 19 10	*- - -*	*Coking Coal*
2701 19 20	*- - -*	*Steam Coal*
2701 1990	*- - -*	*Other*
2701 20	*-*	*Briquettes, ovoids and similar solid fuels manufactured from coal:*

14.2 As is evident from the above structure, only that coal which does not get covered under the category of anthracite coal of Customs tariff heading (CTH) 27011100 and Bituminous Coal of CTH 27011200 can go in the category of 'Other Coal' of CTH 2701.19. The 'Other Coal' of CTH 2701.19 is then divided into Coking Coal CTH 2701 19 10, Steam Coal CTH 2701 19 20 and other CTH 2701 1990. It has

been abundantly brought out without any doubt that the impugned coal categorically and unambiguously satisfies the requirements stipulated for its classification under CTH 27011200 as 'Bituminous Coal' and therefore it gets classified there (i.e. under CTH 27011200) and as a consequence it cannot be covered under the category of 'Other Coal' of CTH 27011920 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 27011920. This is so self evident that any further elaboration on this point will be a futile exercise in tautology.

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

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

(b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act 1975 (51 of 1975) as is in excess of the additional duty rate specified in the corresponding entry subject to any of the conditions, specified:

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

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

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

16.1 In terms of Section 46 (4) of Customs Act, 1962, the said noticee is required to make a declaration as to truth of the contents of the bills of entry submitted for assessment of Customs duty. The said noticee have wrongly declared the coal imported by them as 'Steam 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 was having Gross Calorific Value in excess of 5833 Kcal/Kg and the percentage of Volatile matter in excess of 14%. The said noticee were aware that the sub-heading note (2) to the Chapter 27 of the Customs Tariff categorically mentioned that for the purposes of sub-heading 2701 12 "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5833 Kcal/kg. Despite of the same they chose to declare their goods as "steam coal" classifiable under CTH 27011920 to wrongly claim the benefit of exemption applicable to the 'Steam Coal' under Notification No. 12/2012-Cus dated 17.03.2012 (Sr.No.:123).

16.2 Thus it appeared that the said noticee have 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 In Bulk' in the declaration form of Bill of Entry filed under the provisions of Section 46(4) of the Customs Act 1962 and mis-classified the goods under Customs tariff heading 27011920, in order to avail the exemption available in the Notification 12/2012-Cus. Dated 17.03.2012 against the Sr. No. 123. This 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 – A to the show cause notice are liable to confiscation under Section 111(m) of the Customs Act, 1962.

16.3 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 said noticees The said noticee 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 The said noticee knew that the declarations made by them was false with regard to the description of the Coal imported by them. The contraventions of the provisions of the Foreign Trade (Development and Regulation) Act, Foreign Trade (Regulation) Rules and Export and Import policy is a prohibition of the nature as described under the Section 11 of the Foreign Trade (Development and Regulation) Act, 1992. Now, in terms of Section 3(3) of the Act ibid the prohibitions are deemed to be a prohibition under the Section 11 of the Customs Act 1962. In terms of the Section 111 (d) of the Customs Act, 1962 any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force is liable to confiscation. Thus it appears that the impugned goods as detailed in the Annexure-A to the show cause notice are liable to confiscation under Section 111(d) of the Act ibid.

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

16.5 Further, it also appeared that the said noticee has mis-declared and (mis) classified the impugned goods under CTH 2701 1920 (instead of their correct classification under CTH 2701 1200) in their Bills of Entry and thereby wrongly availed the benefit of the

exemption Notification 12/2012-Cus dated 17.03.2012 (Sr. No. 123) and paid CVD and ECess/SHE Cess @ 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-A to the show cause notice which were assessed finally on account of RMS facilitation of these Bills of Entry. Hence, differential duty of Rs.37,48,00,871/- on the 734633 MTs of impugned coal, imported by The said noticee at Mundra Port under the bills of entry as detailed in Annexure-A to this notice & assessed finally is 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.

17. In view of the foregoing, the said noticee, M/s. Haryana Power Generation Corporation Ltd., Hisar , was issued a Show Cause Notice bearing F.No.VIII/48-89/Coal/IMP/MP&SEZ/2012 dated 19.06.2013, calling upon them to show cause to the Commissioner of Customs, Kachchh Commissionerate, Kandla as to why:-

(i) Their claim for classification of impugned goods 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 7,34,633 MTs, imported Coal valued at Rs. 3,52,72,02,106 /- as detailed in Annexure –A to the Show Cause 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.37,42,00,871/-, on the 7,34,633 MTs, of imported impugned Coal as detailed in Annexure-A to the show cause 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 Section 28AA of the Customs Act, 1962;

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

Defence Reply & Personal Hearing:

18.1 Personal Hearing in the said case was fixed on 28.11.2013 and the intimation regarding the same was sent vide letter dated 08.11.2013. However, the said noticee neither attended the said Personal Hearing nor had made any communication seeking adjournment. Accordingly, the second Personal Hearing was fixed on 23.12.2013 and the intimation was sent vide this office letter dt.03.02.2013, which was also not attended to. However, the said noticee, vide letter dated 27.11.2013, acknowledging this office letter dated 08.11.2013, informed that they have not received the subject Show Cause Notice and requested to supply the copy of the same. In response to the said letter, the noticee was again provided a copy of the Show Cause notice Personal Hearing vide letter dated 27.12.2013 and was also informed that the next Personal was fixed on 06-01-14. However, for this Personal Hearing also the said noticee neither attended the said Personal Hearing nor had made any communication seeking adjournment.

18.2 Further vide letter dated 27.01.2014 the said notice was informed about the supply of the subject Show Cause Notice which was already been sent on 21.06.2013 by Speed Post and proof of the same was provided to the said noticee. Also, the Noticee was requested to submit their written submission. In the interest of natural justice, another opportunity of Personal Hearing was offered to them on 28.03.2014. In response, the noticee vide their letter informed that the letter intimating the personal hearing was received by them on 01.04.2014 only and as such requested for fixing another date. As such, another opportunity was granted on 28.04.2014.

19. For the Personal Hearing held on 28.04.2013, Shri S.J. Vyas, Advocate, alongwith Shri Rajnish Kumar, Asstt. Executive Engineer (Fuel) of the said noticee and submitted the written submissions dated 26.04.2014, and pleaded to drop the Show Cause Notice, in the light

of the said submissions. In their defence reply, the noticee has, inter-alia, submitted that:

- It is submitted that the calculation made for calculating the calorific value in the notice is incorrect and is not in accordance with the requirement of sub-heading note or the very basis relied upon in the notice.

- The technical definition provided in the sub-heading note 2 to Chapter 27 in respect of calorific value limit specifically provided calculation of such value on moist basis; that the word "moist" has clear implication and it is definitely not on dry basis as wrongly presumed in the show cause notice; that moist is followed by coma and the word free is linked to mineral-matter-free would be one word. Thus, it is not possible to interpret the word as moist free.

- MMMF basis has been defined to mean a theoretical analysis calculated from basic analytical data and expressed as if mineral matter has been removed and the natural moisture retained.

- The requirement for calculating volatile matter limit is on dry basis whereas the calorific value is on moist basis; that this vital differentiation is not kept in mind and therefore, though the correct formula are referred in the Show Cause Notice, while implementing the same in Annexure-B, the Department has changed the base from moist to dry.

- As per ASTM standards, for calculating calorific value on moist, mineral-matter-free-basis, one must use value as specified parameters on ARB and not on ADB; that ASTM D388 gives the guidelines for ranking the coal on the basis of Moist Mineral Matter Free Calorific Value; that the ADB value does not reflect heat value of coal in its natural form with inherent moisture. ADB value is measured at the moisture level present in laboratory sample of coal. The Laboratory samples of Coal are prepared as per the guidelines of the Standard and further tested for various coal quality parameters like "Proximate (Moisture, Ash, Volatile Matter, Fixed Carbon) Gross Calorific value and Ultimate analysis (Carbon, Nitrogen, Hydrogen,

Sulphur & Oxygen). All the analysis done is reported on ADB. The very purpose of checking moisture in analysis sample is to use the same when other quality parameters like GCV, Ash, VM etc, are required to be covered into either on "Dry Basis" or in "As Received" as or any other basis for the purpose of comparison or commercial use.

- Moisture analysed as per ASTM Standard Method D3173 clearly indicates that the moisture analysed and specified on "As Determined Basis" (also referred as "Air Dried Basis") (ADB) is "Moisture in Analysis Sample of Coal" and the same is checked in the laboratory on a finely powdered sample (250 micron size) which is prepared after the coal quality sample collected, goes through various stages of sample preparation, drying and further equilibrated to laboratory environment before testing. Hence, the laboratory analysed moisture on ADB cannot be adopted for the calculation of calorific value determination of moist, mineral-matter-free basis as it does not represent the "natural inherent moisture of coal".

- It is submitted that when the technical definition is prescribed in the tariff, meaning has to be assigned in technical terms only. This is a crucial aspect of the whole matter. While the department has changed the technical parameters in the show cause notice based upon the letters of CRCL and DRI, this becomes therefore a crucial aspect for resolution of this notice that when the department has relied upon letters which expressly contrary to the technical literature, it is crucial that the cross examination be offered of those evidences which the department has relied upon.

- The denial of cross examination, if any, would clearly imply that the department does not propose to rely upon the letters referred in the notice. It is well established that the technical literature in its plain reading would be preferred over the department's, including CRCL and DRI, reading of the technical literature.

- The relevance of S03 adjustment would be significant in cases (around 5833 to 5855 Kcal/Kg.) when correct inputs are applied in Parr Formula for calculating the Moist, MMF GCV; that if, the ash value is adjusted to S03 free basis as recommended in Parr formula, the Calorific Values on Moist, mineral-matter-free basis has shown a drop by a value between 5 to 20 Kcal 1 kg in respect of the Indonesian coal imported by us. Hence, the significance of S03 adjustment on calorific values of coal cannot be ignored as in certain cases, it would bring the GCV to below 5833 Kcal/kg and thereby impact the classification of the same. Thus the observation in the notice as to negligible effect is technically incorrect.

- In order to determine the appropriate classification of the imported coal, it would also be relevant to consider the General Rules of Interpretation of the First Schedule; that under the CTH, the two sub-headings i.e. sub-heading 2701 1200 and sub-heading 2701 1920 are different in scope and their ambits, since the former is based on the technical characteristics of the coal, while the latter refers to the end use of coal. As such, even if there is overlap in the two sub-headings of CTH, when coal is imported for a specific purpose, the same has to be classified under the said heading which specifically covers such a purpose or end use. Further, the coal imported is recognised to be steam coal even in the country of export and amongst people who deal with the same. Otherwise also, when two entries merit equal consideration, the latter entry is to be preferred viz. sub-heading 2701 1920 and consequently, eligible for the benefit of the Exemption Notification.

- Since, the expression 'Steam Coal' is not defined either under the CTH or under the Customs Act neither does the Exemption Notification has its meaning for the purposes of the exemption granted therein. The words 'Steam Coal' must therefore be given a popular meaning based on the manner it is commercially understood by those conversant with the relevant trade or industry.

- While Steam Coal of GCV upto 4200 Kcal/Kg (GCV ARB) is easily available in India, it is a coal of higher GCV which is not available in India and hence needs to be imported for achieving the best results; that while there is no dispute in relation to Steam Coal with less than 5,833 Kcal/Kg GCV(moist/MMF basis). It is the higher grade of steam coal, which has the specifications of Bituminous Coal, as defined in the said sub heading note 2 of Chapter 27, where the benefit of the said exemption Notification is sought to be denied. Such high grade Steam Coal is also being imported by many public sector enterprises/undertakings and being classified as Steam Coal.

- There are no specific technical requirements that have been prescribed for coal to qualify as Steam Coal. Consequently, the only criteria relevant are the extent of heat which is released when the Coal is burnt. Hence, Steam Coal would encompass within its ambit all types and variants of Coal that are used for/applied for the purpose of generating steam; that tt is settled law that while interpreting a general term used for describing any commodity in any fiscal legislation, the general term used covers that commodity or item or article in all tis firms and varieties. On the case of Tungabhadra Industries Ltd. Vs. Commercial Tax Officer, Kurnool [11STC 827]**,** the Supreme Court construed 'groundnut oil' to include hydrogenated groundnut oil and this was done notwithstanding the fact that chemical properties of Vanaspati are somewhat different from those of groundnut oil.

- In regard to a taxing statute where an entry provides for technical description as well as entry in regard to a taxing statue where an entry provides for technical description as well as an entry with regard to its commercial sense, the latter shall prevail unless a contrary intention is clearly expressed by the statue. Reliance in this regard is placed on the decision of Porritts and Spencer (Asia) Ltd. Vs. State of Haryana [1983 (13) E.L.T. 1607 (SC) wherein the question which arose for consideration was whether 'dyer felts' will qualify as 'all varieties of cotton, woollen or silken textiles' and accordingly would be exempt from Sales Tax. The Hon'ble Supreme court held the 'textile' has not be defined under the Act, but it is settled law

that in a taxing statues words of everyday use must be constructed not in their scientific or technical sense but as understood in common parlance.

- It is equally well settled that in such a case, the entry in the notification must be interpreted in accordance with the trade parlance and commercial understanding. Consequently, the expression "steam coal" in the said Notification cannot be read to exclude imported coal having GCV of 5833 Kcal/Kg or more. Reliance in this regard can be placed on the decision of **Collector of Customs, Kandla Vs. Purity Flex Pack Limited – 1994 (69) ELT 293 (Tribunal)** wherein the Hon'ble Tribunal held that it is well settled that in interpreting the words in a taxing statute, the regard has to be had not to the technical meaning of the terms but as to how it is understood by those conversant with the trade.

- Apart from having regard to the popular meaning of the term steam coal, due consideration must also be given to the end use of the coal as in the instant case the classification of Coal would be significantly affected by its end use; that historically, any coal which is used for generation of steam is termed as Steam Coal and the said term is accordingly derived based on its usage. In this regard, we have reproduced below, definition of Steam Coal as defined by various international agencies. 'Steam coal is coal used for steam raising and space heating purposes and includes all Anthracite coals and Bituminous coals not included under coking coal.

- It is submitted that the judicial precedents clearly suggest that when the classification of the goods is based on function of the goods, the predominant use of the goods is very relevant and cannot be disregarded; that in the present case, the classification of coal as "steam coal" is based on the end use-of the coal hence the same is relevant and ought to be considered by the authorities.

- In light of the various judicial pronouncements, it is manifestly clear that the classification on the basis of end use of goods cannot be brushed aside; that in the event the predominant use

of the coal is generation of steam, classifying the coal as 'Bituminous Coal' is totally unwarranted. Accordingly, the coal which is used for generation of steam should be classified as steam coal. Thus when there is a specific exemption granted to coal based on the end-use thereof, the benefit thereof cannot be denied. It is submitted that the SCN is baseless and on this ground alone, the same is to be set aside. It is settled law that chapter note is not relevant for the purpose of Exemption Notification. This is more so when the entry in the Notification is not defined either in the Notification or in the CTH. Reliance in this regard can be placed on the decision of High Energy Batteries Limited Vs. Commissioner of Central Excise, Trichy – 2002 (142) ELT 266 (Tri. – Chennai) "The Section note and the Chapter note would apply to interpret the notification only when the entire chapter heading has been extracted in toto in an exemption notification. In the present case, the Notification is very wide in its sense, granting benefit to parts of aircraft and helicopter falling under any chapter heading of the first and second schedule of the tariff."

- They have already produced load port certificate by international testing agencies wherein it has been certified that the Coal imported is Steam Coal; that they have classified the coal as Steam Coal and the CTH does not prescribe any technical qualifications for classifying coal as steam coal. Accordingly, calorific value limit and volatile matter limit was not required to be mentioned on the load port certificate; that the load port certificate issued by an accredited agency cannot be brushed aside; that reliance is placed on **CC, Visakhapatnam Vs. GMR Technologies & Industries Ltd. – 2008 (227) ELT 70 (Tri. – Bang.)** wherein it was held that the inspection certificates produced by the assessee, issued at the port of loading by various international agencies of repute, cannot be brushed aside. Further, in the case of **Taurion Iron & Steel Co. Pvt. Ltd. Vs. CCE, Visakhapatnam – 2009 (241) ELT 390 (Tri. – Bang.)**, the Hon'ble Tribunal granted the benefit of concessional rate of duty and held that there was no reason to reject the test reports produced by the assessee from two services, one from a reputed testing organisation and other from the destination

port. The load port certificates produced by the assessee were given due credence in the case of Adani Exports Ltd. Vs. CC, Jamnagar – 2010 (249) ELT 93 (Tri. – Ahmd.); that the load port certificates submitted by us have certified the imported coal as steam coal and we are therefore eligible for exemption under the exemption notification.

- An exemption notification cannot be interpreted in a way so as to create a duty liability where none existed in the Tariff Item. This view find preponderance in the light of the judgment rendered in case of Kiran Spinning Mills, Thane v. CCE, Bombay – II – 1984 (17) E.L.T. 396 (T); that if the exemption has been granted by the Government under one Notification, it cannot be recovered back under a different interpretation of the same Notification. This view find preponderance in light of the judgment rendered in case of Shakthi Sugars Limited, Coimbatore v. UOI – 1983 (12) E.L.T. 484 (Mad).

- In the instant case, the goods have been imported from Indonesia and the said fact is not in dispute.; that in any event, even if the coal imported is classified as Bituminous Coal, the same would be eligible for exemption of BCD by virtue of Notification No. 46/2011–Cus, as amended. As mentioned above, Notification No. 46/2011-Cus was amended by Notification No. 64/2012-Cus dated 31.12.2012. Prior to the said amendment, the rate of BCD prescribed by the said Notification was 3%.

- They have been importing Steam Coal for past several years and that prior to 17.03.2012, the department did not object or raise any query as regards the technical characteristics of the coal imported by us and assessments were complete as steam coal. However post 17.03.2012, the department is disputing the classification adopted by us. It is very well settled law that the department cannot abruptly deviate from the established practice without any reasonable cause. Accordingly, the department cannot reclassify the coal imported by us as Bituminous Coal.

- In view of the commitment made by the Hon'ble Finance Minister on behalf of Government of India on the floor of the Parliament, the department is stopped from seeking to interpret the said Notification contrary to the commitment made by the Government of India, through the Finance Minister and thereby, stopped from levying BCD on Steam Coal used for generation of steam; that any erroneous interpretation, merely with a view to collect higher revenue, which is contrary to the assurance of the Hon'ble Finance Minister, post which the Exemption Notification was issued, would be violative of the doctrine of promissory estoppel and hence, liable to be rejected; that reliance is placed in the decision in the case of Vijaya Industrial Products (P) Limited vs. Union of India (1995 (76) ELT 531 (Mad.); that assuming without admitting that Steam Coal with GCV of 5,833 Kcal/Kg or more is classifiable under sub-heading 2701 1200 on account of the definition of 'Bituminous Coal' in the sub heading note 2 of Chapter 27, the exemption must be interpreted to achieve the object and purpose intended to be achieved thereunder.

- In the present case, there cannot be any confiscation even if the exemption is held to be not available, since the description of the goods as "steam coal" is proper and appropriate to the goods imported. Firstly, the description given in the bills of entry is correct. Secondly, the goods have been assessed to appropriate tariff item and assessed to appropriate duty, after examination of the goods and after arriving at the satisfaction that the goods were indeed steam coal; that at the time of assessment itself, the customs department was aware of the volatile content and calorific value of the imported steam coal. Despite this fact, the coal was classified under tariff item 2701 19 20. In fact, this type and grade of coal was classified under tariff item 2701 19 20, even prior to 17.3.2012. In other words, the classification adopted by us did not undergo any change after the introduction of the exemption notification with effect from 17.3.2012.

- It is a settled principle of law that in cases where the demand is not sustainable, interest cannot be demanded; that it is clear that the demand itself is not sustainable and hence, the question of imposing interest does not arise.

- Section 112(a) can be invoked only against a person whose act or omission renders the goods liable to confiscation.; that penalty under section 112(a) is not just specific to goods which are liable to confiscation but also specific to persons whose act or omission renders such goods liable to confiscation under Section 111; that they have not done or omitted to do any act, which act or omission render the goods liable to confiscation.

Discussion & Findings:

20.1 I have carefully gone through the records of the case, including the Show Cause Notice dated 19.06.2013, the written submissions dated 26.04.2014, as well as the oral submissions made during the course of Personal Hearing.

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

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

2. Whether 734633 MTs. of imported Coal valued at Rs.352,72,02,106/- as detailed in Annexure-A to the Show Cause Notice, imported by the said noticee, 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 payable by the said noticee is to be determined as Rs.37,42,00,871/- under Section 28 (8) of the Customs Act, 1962, and the duty so determined is to be recovered from the said noticee.

4. Whether the said noticee is liable to pay interest involved on the said differential Customs Duty at the applicable rate under the provisions of Section 28AA of the Customs Act, 1962.

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

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

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

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21.1 In this case, it is an undisputed fact that the coal under consideration is imported and that duty is leviable on such imported coal vis-à-vis grant of exemption, if any. For this purpose, one of the important steps in assessing the duty payable is the classification of goods under the Schedule to the Customs Tariff Act. Thus, the crux of the issue in this case, around which all the above five issues are revolved, which I am required to decide, is regarding the classification of the Coal imported by the said noticee, **within the ambit of the Schedule to the Customs Tariff Act, 1975,** for the purpose of levying of duty/deciding the eligibility for exemption.

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

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

related Section Notes, Chapter Notes and the General Interpretative Rules.

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

21.5 I find that the Show Cause Notice has been issued proposing the classification of the imported Coal under CTH 2701 1200 as 'Bituminous Coal', only in respect of those imports, where the volatile matter limit (on a dry, mineral-matter-free basis) exceeds 14% and calorific value limit (on a moist, mineral-matter-free basis) is equal to or greater than 5,833 kcal/kg. Further, the Show Cause Notice does cover those bills of entry where the calorific value limit and the GCV is less than the above prescribed limit, which means that the same has been accepted as 'Steam Coal" falling under CTH 27011990. The above fact has not been disputed by the said noticee. **Thus, I am proceeding to decide the case on the said facts and on the premises that the Coal imported by the said noticee is having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg. and as a consequence whether the said Coal is eligible for exemption under Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012.**

21.6 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%	
270119	-- Other Coal:					
2701 19 10	- - - Coking Coal	10%	6%	0%	6%	
2701 19 20	- - - Steam Coal	10%	6%	0%	1%	
2701 19 90	- - - Others	10%	6%	5%	6%	

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

21.7 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*.

21.8 From a reading of the above definition, it evolves that all Coal with a volatile matter limit (on a dry, mineral-matter-free basis) not exceeding 14% are to be classified as 'Anthracite', irrespective of

the calorific value. However, the coal with a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% will be classified as 'Bituminous Coal' if the calorific value limit (on a moist, mineral-matter-free basis) is equal to or greater than 5,833 kcal/kg and in other case, where the caloric value limit is less than 5,833 kcal/kg, the same would be classified as 'Other Coal'. 'Other Coal' amongst others includes 'Steam Coal'. As such, the issue under consideration whether imported coal is Steam Coal or Bituminous Coal, is to be decided in the light of the above Chapter Notes and the General Interpretative Rules. Also, it is to be seen whether the headings/sub-headings of the imported coal can be arrived at by applying Rule 1 of the General Interpretative Rules or whether the other Rules from 2 to 6 ibid are to be applied sequentially.

21.9 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.

21.10 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.

21.11 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).

22.1 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.

22.2 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.**

22.3 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.

22.4 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.

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

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

22.6 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.""*

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

23.1 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).

23.2 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.**

24.1 It is not the case in the Show Cause Notice, that whether the product imported is Coal or not and for what purpose the same is imported. The issue is whether the Coal imported is 'Steam Coal or 'Bituminous Coal', for the determining the eligibility of exemption or otherwise, in terms of Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012. In this regard, I find that, as already discussed, as per the Sub-Heading Note 2 to Chapter 27, the Coal having Volatile Matter, calculated on dry, mineral-matter-free basis, for all the imported shipments is in excess of 14%. (whether ADB/ARB) and calorific value for all these consignments on moist, mineral-matter-free basis, is in excess of 5,833 Kcal/Kg. is defined as 'Bituminous Coal'. Further, there is no dispute regarding the fact that the Show Cause Notice has been issued proposing the classification of the imported

Coal under CTH 2701 1200 as 'Bituminous Coal', only in respect of those Bills of entry, where the volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg in respect of the imported coal. **Thus, in this case, where the words of the statute i.e. Sub-heading Notes are plain and clear, there is no room or scope for applying any other interpretation than the one given in the statute.**

24.2 **In view of the Sub-heading Note 2 of Chapter 27 of the Schedule to Customs Tariff Act, 1975; by applying Rule 1 of the General Interpretative Rules and by relying on the legal position in such cases settled by the Apex Court, it is quite evident that the Coal imported by the said noticee, is 'Bituminous Coal' falling under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975 and in no way can be considered as "Steam Coal" falling under Chapter Sub-heading 27011990 ibid. As such, the exemption under Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012, as claimed by the said noticee will not be available to the imported Coal covered by the Show Cause Notice.**

25. The said noticee in their written submissions as well as during the course of personal hearing has advanced many arguments to justify that the imported coal, covered by the Show Cause Notice, clearly falls under the category of 'Steam Coal', classifiable under Chapter Sub-heading 27011920 of the Schedule to the Customs Tariff Act, 1975. As such, I proceed to discuss those contentions one by one, for which titles broadly based on those contentions, have been assigned.

Incorrect adoption of formula by the Department for working out the GCV:

26.1 The contention of the noticee on the above aspect is that the Customs authorities have incorrectly adopted a formula and have worked out the GCV according to their convenience and that that this formula is not applicable in the instant case.

26.2 I find that the above contention of the noticee is factually incorrect, in as much the Certificate of Sampling & Analysis of

Shipment of Coal in respect of test conducted by various independent inspecting agencies at various Load Ports that the volatile matter limit of the coal imported by the said noticee exceeds 14% and also the calorific value of the said coal (on a moist, mineral-matter-free basis) as well as per the certificate was found to be greater than 5,833 kcal/kg. In this regard, I am in full agreement with the argument of the said noticee that the Load Port Certificate submitted by the said noticee cannot be brushed aside.

26.3 Not withstanding the above, I find that as regards the application of the formula in this case, it would be necessary and imperative to understand the technicalities of the relevant terms, namely, as-received basis (ARB), air-dried basis (ADB), inherent moisture, total moisture, moist, mineral-matter-free basis, gross calorific value and net calorific value. The international trade in coal resolves around mutually accepted Certificates of Sampling and Analysis and/or Certificates of Quality usually issued by independent accredited testing and certifying agencies, which are commonly known as load port certificates or discharge port certificates. All these certificates are taking the coal for sampling, testing and certification of quality either on as-received basis (ARB) or air-dried basis (ADB) or dry basis (DB). However, in the context of Indian Customs Tariff and classification thereof the two primary criteria i.e. volatile matter content and calorific value content are neither on ADB nor on ARB/DB. The two parameters that are to be adopted are 'a dry, mineral matter free basis' and 'a moist, mineral matter free basis' respectively. These load port certificates clearly mention that they have adopted ASTM standards for the purpose of sampling and analysis and the test results generated on the basis of the said ASTM standards are based on (i) Total moisture is based on as received basis (ii) Inherent moisture is based on air dried basis (iii) gross calorific value is based on air dried basis and (iv) other parameters such as ash, volatile matter, fixed carbon sulphur are based on air dried basis. The arguments at a latter stage questioning the authenticity of the certificates, when the said noticee themselves are relying on the load port certificates, which are based on ASTM standards, are devoid of any merits, which is nothing but an afterthought.

26.4 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; Wikepedia, ASTM-D121-01; para 9.1 of ASTM D388-12 etc., wherein all the details in this regard, are available.

26.5 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.

26.6 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 the noticee. It is worth mentioning here that the Show Cause Notice has not been issued to the said noticee in isolation. The Show Cause Notice has 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 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 the said noticee 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.

26.7 **Further, going by the said noticee's argument, the formula adopted by the Department should have been challenged in those cases also, where the coal imported had been accepted by the Department as Steam Coal, and consequently the exemption was granted. The said noticee has accepted the formula in those cases which is beneficial to them, and is challenging only where the same is not in their favour.** As such, I do not find any merit in the argument, which is required to be rejected summarily.

The term 'Steam Coal' has to be interpreted in the light of its popular meaning based on the manner it is commercially known and understood by those conversant the relevant trade or industry:

27.1 Another contention of the said noticee in support of their claim that the Coal imported is to be classified as 'Steam Coal" is that since the expression 'Steam Coal' is not defined either under the CTH or under the Customs Act neither does the Exemption Notification has its meaning for the purposes of the exemption granted therein. The words 'Steam Coal' must therefore be given a popular meaning based on the manner it is commercially understood by those conversant with the relevant trade or industry.

27.2 I find that in respect of the description of the entries under Heading No.2701 that 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.

27.3 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)

27.4 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).

27.5 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. ……."

27.6 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).

27.7 From the above, it is quite evident that it has become the law of the land for the purpose of classification of goods **that only in the absence of any statutory definitions, the common parlance understanding of such goods should be applied and that the classification of goods shall be determined according to the terms of the Headings and any corresponding Chapter or Section notes.** In this case, Sub-heading Note 2 of Chapter 27 in unambiguous terms defines what "Bituminous Coal" is. Thus, when a clear definition is available in statute, in respect of the coal imported by the said noticee, I find no reason why it should be called and classified as 'Steam Coal'. As such, I do not find any merit in contention of the said noticee and they cannot take shelter for classifying the coal imported by them as 'Steam Coal', under the name of common/commercial/market parlance, which deserves to be rejected.

Classification of Steam Coal based on function and predominant use:

28.1 Another argument of the said noticee for classifying the goods as Steam Coal is that the judicial precedents clearly suggest that when the classification of the goods is based on function of the goods, the predominant use of the goods is very relevant and cannot be disregarded; that in the present case, the classification of coal as "steam coal" is based on the end use-of the coal hence the same is relevant and ought to be considered by the authorities. Coming to this contention, I have already clearly stated that that the issue before me for decision is not regarding a study on various types of coal, its uses and characteristics etc. The issue in this case is regarding the classification of the Coal imported by the said noticee, **within the ambit of the Schedule to the Customs Tariff Act, 1975,** for the purpose of levying of duty/deciding the eligibility for exemption. Thus what is required to be seen is whether the end use rule can be applied for classification, when specific statutory definition is available for that particular product.

28.2 On careful consideration of this argument, I find that end-use, by itself, would not change the nature of the commodity. It is a well settled legal position that end use of the product cannot determine the classification of the product, which is supposed to be

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

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

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

> ***"15.*** *End use to which the product is put to by itself cannot be determinative of the classification of the product. See Indian Aluminium Cables Ltd. v. Union of India and Others, 1985 (3) S.C.C. 284. There are a number of factors which have to be taken into consideration for determining*

the classification of a product. For the purposes of classification the relevant factors inter alia are statutory fiscal entry, the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to, the end use to which the product is put to, cannot determine the classification of that product."

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

33. *A commodity cannot be classified in a residuary entry, in the presence of a specific entry, even if such specific entry requires the product to be understood in the technical sense [see Akbar Badrudin v. Collector of Customs, 1990 (2) SCC 203 = 1990 (47) E.L.T. 161 (S.C.); Commissioner of Customs v. G.C. Jain, 2011 (12) SCC 713 = 2011 (269) E.L.T. 307 (S.C.)]. A residuary entry can be taken refuge of only in the absence of a specific entry; that is to say, the latter will always prevail over the former [see C.C.E. v Jayant Oil Mills, 1989 (3) SCC 343 = 1989 (40) E.L.T. 287 (S.C.); H.P.L. Chemicals v. C.C.E, 2006 (5) SCC 208 = 2006 (197) E.L.T. 324 (S.C.); Western India Plywoods v. Collector of Customs, 2005 (12) SCC 731 = 2005 (188) E.L.T. 365 (S.C.); C.C.E. v. Carrier Aircon, 2006 (5) SCC 596 = 2006 (199) E.L.T. 577 (S.C.)]. In C.C.E. v. Carrier Aircon, 2006 (5) SCC 596 = 2006 (199) E.L.T. 577 (S.C.), this Court held :*

"14.....There are a number of factors which have to be taken into consideration for determining the classification of a product. For the purposes of classification, the relevant factors inter alia are statutory fiscal entry, the basis character, function and use of the goods. When a commodity fall within a tariff entry by virtue of the purpose for which it is put to (sic. produced), the end use to which the product is put to, cannot determine the classification of that product."

28.6 In my opinion, the said noticee is entitled to call the imported coal by any name they wish. But for the purpose of classification in the Custom Tariff Act, the definition and name given by the statue is required to be considered. In view of the discussions, I am clearly of opinion that in the state of the evidence before me, no reasonable person could come to the conclusion that the imported coal under consideration would not come under Bituminous Coal. **The basis of the reason with regard to the end-use of the article is**

absolutely irrelevant in the context of the entry where there is no reference to the use or adaptation of the article. In view of this, I do not find any merit in the contention of the said noticee, which is required to be rejected summarily.

Exemption Notification to be interpreted in the light of its object and purpose:

29.1 The noticees' 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 to boost the power sector and to reduce the cost of the power.

29.2 With regard to the above contention, it is a fact that exemption has been grated 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%. This exemption, as per the finance ministers' speech is for domestic producers of thermal power. However, it is 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.

29.3 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 the said noticee. 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.

29.4 In this case, there is no doubt regarding the fact that by classifying the goods as Bituminous Coal under CTH 27011200, the said noticee 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.

Applicability and scope of Sub-heading Note 2 of Chapter 27:

30. The noticee's contention is that once it is already established that the coal imported by them is classifiable under Chapter Sub-heading 27011920 as Steam Coal, the sub-heading note would not be applicable to steam coal. I do not find any merit in this argument in as much as, this is nothing but an argument for the sake of argument. The noticee has taken a reverse position of first fixing

the heading of the item imported and then sees whether the chapter note is applicable to the said heading. As already discussed in the foregoing paras, the classification of goods is 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. In this case, in terms of Sub-heading Note 2, the meaning of Bituminous Coal has been defined and the coal imported by the said noticee falls within the said meaning. They have never disputed that calorific value limit and the GCV is less than the one prescribed for Bituminous Coal. Thus, the contention in this regard raised by the said noticee is without the support of any basis or law, which deserves to be rejected.

The SCN is in violation of the doctrine of promissory estoppel:

31.1 Another argument raised by the said noticee is that the exemption notification under consideration is in pursuance of the Finance Minister's Speech dated 16.03.2012, and any interpretation which is contrary to it, would be violation of the doctrine of promissory estoppel.

31.2 First, I find that, the said position is legally settled by the Hon'ble Apex Court, that the doctrine of promissory estoppel had no application to the legislative exercise of powers by the Central Government under Section 25(1). The full Bench of the Hon'ble Delhi High Court in the case of Bombay Conductors and Electricals Ltd. v. Government of India - 1986 (23) E.L.T. 87 has held "that it was unnecessary to explore the parameters of the doctrine of promissory estoppel in the case before it because it would be trespassing on the legislative domain if it admitted the doctrine in the fiscal field. **The question of estoppel did not arise in the case of a tax law. In tax law there was "hardly any room" for the applicability of promissory estoppel.** The legislature was omnipotent in the exercise of the taxing prerogative." (emphasis supplied)

31.3 Even for the sake of argument, it is taken that the doctrine of promissory estoppel is applicable, in that case also, there is no violation of the said promissory estoppel, since the promise of exemption under Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012, which in turn is argued to be based on Finance Minister's Speech dated 16.03.2012, has been granted to Steam Coal only. In

this case, I have already decided the issue of classification of the coal imported by the said noticee, by treating the same as Bituminous Coal. Thus, when the noticee has imported Bituminous Coal and the promise of exemption of is for Steam Coal, how there can be a violation of promissory estoppel? Further, the exemption has indeed been granted to the noticee, in case of import of Steam Coal by them, which has not been denied and promised kept.

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

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

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

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

32.4 Further, the contention of the noticee that the SCN 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.

33. In view of foregoing discussions, **I hold that the Coal imported by the said noticee, as detailed in Annexure B to the Show Cause Notice, is nothing but Bituminous Coal, classifiable under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975, as proposed in the Show Cause Notice. Accordingly, classification of the said Coal as Steam Coal, under Chapter Sub-heading 27011920, as claimed by the said noticee is hereby rejected. Consequently, I also hold that the said noticee is not eligible to avail the benefit of exemption prescribed under Notification No.12/2012-Cus dt.17.03.2012.**

2. Whether 734633 MTS of Coal totally valued at Rs.352,72,02,106/- imported by the said noticee is liable for confiscation under Sections 111 (d) and 111(m) of the Act, 1962.

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34.1 In this case, as already discussed and decided by me, the coal imported by the said noticee, as detailed in Annexure-A to the Show Cause Notice, is Bituminous Coal, classifiable under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975. However, for the purpose of claiming exemption, the said noticee has declared the same as Steam Coal and classified it under Chapter Sub-heading 27011920 ibid. Since the noticee had wrongly claimed and availed the benefit of exemption under Sr. No. 123 of Notification

No.12/2012-Cus dt.17.03.2012, which in turn led to less payment of differential BCD as well as CVD of Rs.37,42,00,871/- 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.

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

34.3 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.

34.4 Therefore, I hold that 734633 MTS of Coal totally valued at Rs.352,72,02,106/- imported by the said noticee, as detailed in Annexure-A to the Show Cause Notice, are liable for confiscation under Section 111(m) and Section 111(d) of the Customs Act, 1962. I find that all the 13 bills of entry covered by 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.**

3. Whether the differential Customs Duty payable by the said noticee is to be determined as Rs.37,42,00,871/- under Section 28 (8) of the Customs Act, 1962, and the

duty so determined is to be recovered from the said noticee.
****

35.1 As discussed above, I have already held that the Coal imported by the said noticee as detailed in Annexure-A to the Show Cause Notice is Bituminous Coal, and as a consequence the said noticee is not eligible for the benefit of exemption Sr. No. 123 of Notification No.12/2012-Cus dt.17.03.2012, which is applicable for steam coal. 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, the noticee is required to pay the differential duty of Rs.37,42,00,871/-, as detailed in Annexure-A to the Show Cause Notice, demanded vide the Show Cause Notice.

35.2 In view of the above, **I determine the differential duty payable by the said noticee at Rs.37,42,00,871/- under Section 28(8) of the Customs Act, 1962, and the same is required to be recovered from them.**

35.3 In this regard, I find that the said noticee vide their letters, ending with letter dated 02.04.2014, has informed that they have paid the entire differential duty on various dates, bill of entrywise, the details of which have been has been given therein. From the said letter, I find that the said noticee has paid an amount of Rs.37,42,00,874/- against the total demand of Rs.37,42,00,871/- raised in the Show Cause Notice. This aspect was got verified from the import Section of Custom House, MP & SEZ, Mundra, who has confirmed the said payment. **Accordingly, I hold that the said amount of Rs.37,42,00,874/- paid vide the various TR6 challans is required to be appropriated against the differential duty liability determined vide paragraph 35.2 above.**

4. <u>Whether the said noticee is liable to pay interest involved on the said differential Customs Duty amounting to Rs.37,42,00,871/- at the applicable rate under the provisions of Section 28AA of the Customs Act, 1962.</u>

36. As per the wordings of Section 28AA of the Customs Act, 1962 it is clear that when the said noticee 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.37,42,00,871/-, is required to be recovered from them. In view of this, **I hold that the said noticee is liable to pay interest involved on the amount of Rs.37,42,00,871/-, under the provisions of Section 28AA of the Customs Act, 1962.**

5. <u>Whether the said noticee is liable for penal action, under Section 112(a) of the Customs Act, 1962:</u>

37. As regards, imposition of penalty on the noticee under Section 112(a) of the Customs Act, 1962, since it has been held that the impugned 'Coal" as detailed in Annexure-A to the Show Cause Notice are liable for confiscation under Section 111(m) and 111(d) ibid of the Customs Act, 1962, **I, hold that the penalty under Section 112 (a) ibid is attracted on the importer. However, since the issue involved in this case being of technical nature regarding classification and availment of benefit of a notification, I take a lenient view while imposing the penalty.**

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

38.2 While applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind. The Hon'ble Supreme Court in the case of CCE, Calcutta Vs Alnoori Tobacco Products [2004 (170) ELT 135 (SC)] has stressed the need to discuss, how the facts of decision relied upon fit factual situation of a given case and to exercise caution while applying the ratio of one case to another. This has been reiterated by the Hon'ble Supreme Court in its judgment in the case of Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)], wherein it has been observed that

one additional or different fact may make difference between conclusion in two cases; and so, disposal of cases by blindly placing reliance on a decision is not proper. Again in the case of CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)], it has been observed by the Hon'ble Supreme Court that, the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of decision has to be culled out from facts of given case; further the decision is an authority for what it decides and not what can be logically deduced there from.

39.1 It has been contented by the said noticee that while the department has changed the technical parameters in the show cause notice based upon the letters of CRCL and DRI, this becomes therefore a crucial aspect for resolution of this notice that when the department has relied upon letters which expressly contrary to the technical literature, it is crucial that the cross examination be offered of those evidences which the department has relied upon. I find no merit in the request for cross-examination, since the Joint Director, CRCL, JNCH, Nava Sheva, has given his opinion on the applicability on technical terms mentioned in ASTM, USGS in the context of Coal imported in India. It is pertinent to mention that the said noticee themselves have relied upon the SGS Certificates, which in turn are prepared on the basis of ASTM standards and therefore, there should not be any doubt on the part of the said noticee about the applicability of the said Certificate(s) in the Indian context. Neither the Show Cause Notice nor my decision has relied solely on the opinion and the same was a taken as a reference only. There is a vast difference between relying and referring. Even otherwise, no different view would have taken by me even in the absence of the said opinion. Accordingly, it was felt that there is absolutely no necessity to allow Cross-examination of the Joint Director, CRCL, JNCH, Nava Sheva, since he has given the opinion on the basis of the technical literatures, which has already been relied upon by the said noticee at the time of import.

39.2 It is worth mentioning that in the case of an identical issue, wherein also the Show Cause Notice had given reference to the same opinion of the Joint Director, CRCL, the opportunity to cross-examine the Joint Director, CRCL, JNCH, Nava Sheva was granted by the Commissioner of Customs (Imports), Nava Sheva on 11.09.2013. I have gone through the copy of record of the said cross-examination,

wherein Joint Director, CRCL has reiterated the points narrated in his opinion letter F.No.JNCH/T.O./2012-13 dated 07.03.2013. Amongst others, in his cross-examination, the Joint Director has reiterated that (i) inherent moisture basis is equivalent to ADB and the explanation given in ASTM/note no.3 indicates the parameters should be of ADB basis (ii) inherent moisture is obtained by air-drying of the coal sample and sample obtained after air-drying is test for other parameters. The relevant extracts from the said record of the cross-examination is reproduced below:

Quote:

Q.2. Regarding Q.No.2 the questions refers to "the Formulae mentioned above", however no formulae is mentioned in the letter. It is therefore, requested to inform as to which formulae has been stated to be applicable to the coal imported?

Ans: Page No.1 gives the formulae for application of coal imported. The formulae was referred in ASTM D-388 standard classification of coals by rank in page no.221 (copy enclosed). As the formulae was mentioned in this standard it was opined that the formulae can be applied to coal imported (copy of relevant page has been handed over to you). The formulae asked to confirm is Equation No.4 mentioned in page 221.

Q.3 Regarding Q.2 is of Dy. Director letter dt. 05.03.2012 addressed to you "The opinion shows that the BUT, Ash content and sulphur content are on ADB basis". What is meant by ADB basis and is there any ASTM standard which supports the opinion?

Ans: In the ASTM D-388 standard formulae no.4, below it is mentioned that all the quantities mentioned are on inherent moistures. It is nothing but air dry basis of coal surface moisture removed.

Q.4 Is there any definition for "inherent moisture" to suggest that the same is equal to moistures on "air dried basis"?

Ans: The proximate analysis of coal gives the measure for expression of inherent moisture calculation by air drying the coal sample received for testing.

Q.5 Are the words "inherent moisture", "moisture on air dry basis", "residual moisture" and "equilibrium moisture" one and the same as per ASTM standards?

Ans: "Inherent moisture" is obtained by air drying of the coal sample. The sample obtained after air drying is tested for other parameters mentioned in the letter. The values obtained for those parameters are called as on air dry

basis. CRCL Laboratories follows BIS standards for coal proximate analysis. In the BIS standards the calculation for coal on MMF basis is not there and as the formulae mentioned in the letter was given in as standard and same was confirmed as moist mineral (MMS) calculation.

Q.6 The ASTM standards if are not followed, and BIS standards are followed, I would like to have a copy of the BIS standard which is to be applied white calculating GCV on moist mineral matter free basis, by applying formulae given in the ASTM standard D-388-12.

Ans: The note given in equation no.4 given in D-388 shows that the parameters are on inherent moisture basis. This is nothing but air dry basis. The calculation of parameters mentioned in the equation are given in BIS standard for proximate analysis of coal (copy will be given).

……

Q.7 Whether the BIS standard has adopted in verbatim manner, the ASTM standard for the purpose of standard classification of coals and the calculations relating thereof?

Ans: The query raised by DRI letter is for verification of formulae mentioned. The formulae was referred in ASTM and the formulae is on ADB basis was confirmed by the note mentioned under equations. The classification of foals mentioned under ASTM D-388 are similar for all coals.

Q.8 Does the above answers are supported by "Standard terminology of coal and coke" as per ASTM standards?

Ans: The formulae and parameters tested are according to the standard test methods hence the substitution in the equation no.4 is correct.

Unquote:

39.3 It is to be noted that primary objective of cross examination is to seek information of any deviation on the part of the investigating officers and to ascertain whether the case is made out of genuine or malafide actions of the offenders or the case is just foisted without adequate justification. In this case, from the above, it can be seen that the Joint Director has reiterated the points narrated in his opinion letter F.No.JNCH/T.O./2012-13 dated 07.03.2013 and the said opinion is on the applicability on technical terms mentioned in ASTM, USGS in the context of Coal imported in India.

39.4 In case of Commissioner of Customs, Chennai Vs. D. Bhoormul, reported in 1983 (13) ELT 1546 (SC), the Hon'ble Supreme

Court has held that the provisions of the Evidence Act as well as Code of Criminal Procedure, in terms, are not applicable to the adjudication proceedings. Further, Hon'ble Madras High Court, in the case of K. Balan Vs. Govt. of India, reported in 1982 ELT (386) Madras, had held that right to cross examination is not necessarily a part of reasonable opportunity and depends upon the facts and circumstances of each case.

39.5 It is highly imperative to mention that hundreds of show cause notices have been issued, in identical issue covered vide the Show Cause Notice under adjudication, to all the importers of coal, falling under different Commissionerates across the country, wherein the imported coal falls under the two parameters under consideration. Further, the above opinion given by the Joint Director finds reference in all the show cause notices so issued. Thus, cross examination of the Joint Director in all these individual show cause notices, is neither desirable nor possible. Accordingly, I find that the cross-examination will be of no relevance as far as the issue covered in the Show Cause Notice is concerned. If at all, then also the same has been answered to as per the record of cross-examination given above.

40.1 I find that, the 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.

40.2 I find that the said noticee 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 the said noticee, which also cannot be followed at this stage.

40.3 **Accordingly, I hold that the said noticee 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.**

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

:ORDER:

(a) The Coal imported under the Bills of Entries covered in Annexure A to the Show Cause Notice dated 19.06.2013, is considered and held as "Bituminous Coal" and is correctly classifiable under Tariff heading/sub-heading 2701 1200 of the Schedule to the Customs Tariff Act, 1975. Accordingly the declared classification under Customs Tariff item/heading 2701 1920, is hereby rejected. Consequently, I deny M/s. Haryana Power Generation Corporation Ltd., Rajiv Gandhi Thermal Power Plant, Khedar, Hisar, Haryana 125121, the benefit of exemption under Sr. No. 123 of the Notification No. 12/2012-Customs dated 17.03.2012.

(b) The 734633 MTs. Coal valued at Rs.352,72,02,106/- as detailed in Annexure –A to the Show Cause Notice, imported by M/s. Haryana Power Generation Corporation Ltd., Rajiv Gandhi Thermal Power Plant, Khedar, Hisar, Haryana 125121, are held liable for confiscation under the provisions of Section 111(d) and 111(m) of the Customs Act,1962. However, since the impugned goods are not available for confiscation, I refrain from imposing any redemption fine in lieu of confiscation.

(c) I determine the differential Customs duty payable by M/s. Haryana Power Generation Corporation Ltd., Rajiv Gandhi Thermal Power Plant, Khedar, Hisar, Haryana 125121, as Rs.37,42,00,871/- (Rupees Thirty Seven Crores Forty Two Lakhs Eight Hundred Seventy One Only) under Section 28(8) of the Customs Act, 1962, and order for recovery of the duty so determined from them.

(d) I order for appropriation of differential duty amounting to Rs.37,42,00,874/- paid by M/s. Haryana Power Generation Corporation Ltd., Rajiv Gandhi Thermal Power Plant, Khedar, Hisar, Haryana 125121, against their differential duty liability mentioned at (c) above.

(e) I order for recovery of interest involved on the differential duty of Rs.37,42,00,871/- from M/s. Haryana Power Generation Corporation Ltd., Rajiv Gandhi Thermal Power Plant, Khedar, Hisar, Haryana 125121, under Section 28AA of the Customs Act, 1962.

(f) I impose a penalty of Rs.4,50,00,000/-(Rupees Four Crores Fifty Lakhs Only) on M/s. Haryana Power Generation Corporation Ltd., Rajiv Gandhi Thermal Power Plant, Khedar, Hisar, Haryana 125121, under Section 112(a) of the Customs Act, 1962.

(K.L. GOYAL)
COMMISSIONER

F. No. S/10-60/Adjn./2013-14 Dated:13.05.2014

BY REGISTERED A.D. POST

To,
M/s. Haryana Power Generation Corporation Ltd.,
Rajiv Gandhi Thermal Power Plant,
Khedar, Hisar,
Haryana 125121.

Copy to:
1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad, with copy of Show Cause Notice dated 19.06.2013.
2) The Additional Director General, Directorate of Revenue Intelligence, AZU, Ahmedabad for information pl.
3) The Joint Commissioner, Custom House, MP & SEZ, Mundra.
4) The Assistant Commissioner (Recovery Section, Custom House Kandla,
5. Guard file.