Brief Facts of the case:

M/s. DCW Limited, Dhrangadhra, Gujarat – 363 315 having IEC Code Number – 0388047402 (hereinafter referred to as the 'said noticee' for the sake of brevity) are importing Coal from Indonesia. M/s DCW classified the coal imported by them under CTH 27011920 claiming the same as 'Steam coal' and paid only 1% Additional duty leviable under Sub-Section (1) of Section 3 of the Customs Tariff Act 1975(CVD) claiming the exemption Notification 12/2012-Cus. dated 17.03.2012 (Sr. No.123). Intelligence collated and developed by the officers of DRI, Ahmedabad indicated that certain importers were importing Coal having the calorific value greater than 5,833 KCal/Kg and the coal imported by them fell in the category of Bituminous coal chargeable to duty @ 5% Basic Customs Duty (BCD) under the notification no: 12/2012-Cus. dated 17.03.2012 (Sr. No. 124) and 6% Additional duty leviable under Sub-Section (1) of Section 3 of the Customs Tariff Act 1975 (CVD) as in terms of the Central Excise Tariff.

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

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

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

4.1. From the scrutiny of the import documents submitted by the said noticee, it transpired that they have imported "Indonesian Steam Coal in Bulk" having Calorific value between 5486 Kcal/Kg to 5828 KCal/Kg (ADB basis) from various overseas suppliers at Kandla Port, as per the details given in paragraph 4.1 of the Show Cause Notice.

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

4.3 Further, it also transpired from the import documents that the said noticee was importing Coal at Kandla Port and during the scrutiny of documents it is also observed that the Coal imported vide various Bills of Entry were assessed finally on account of RMS facilitation / assessment of the Bills of Entry at Kandla 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 5828 KCal/Kg and 5486 KCal/Kg on 'As received Basis (ARB)' / 'Air Dry Basis (ADB)' / 'Dry Basis' 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 18(2) – *When the duty leviable on such goods is assessed finally (or re-assessed by the proper officer) in accordance with the provisions of this Act, then*

(a) in the case of goods cleared for home Consumption or exportation, the amount paid shall be adjusted against the duty (finally assessed or re-assessed, as the case may be) and if the amount So paid falls short of, or is in excess of [the duty [finally assessed or re-assessed, as the case may be],] the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(v) Section 18(3) *- The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order or re-assessment order under sub-section (2), at the rate fixed by the Central Government under section 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.*

(vi) 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.

(vii) 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.".

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

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

.....

.....

....."

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

(ix) 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;***

……..."

(x) 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. .....*

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

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

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

Notification
No.12 /2012 –Customs

New Delhi, dated the 17 th March, 2012

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

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

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

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

S. No.	*Chapter or Heading or Sub-heading or tariff item*	*Description of goods*	*Standard rate*	*Additional duty rate*	*Condition No.*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*
122	*2701*	*Coking coal* *Explanation - For the purpose of this exemption, "Coking coal" means coal having mean reflectance of more than 0.60 and Swelling Index or Crucible Swelling Number of 1 and above*	*NIL*	-	-

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

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

CHAPTER 27

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

SUB-HEADING Notes :

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

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

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

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

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

6.5 *FOREIGN TRADE (REGULATION) RULES, 1993*

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

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

7.1 Scrutiny of the various documents/records of the said noticee indicated that they have imported coal having Volatile Matter higher than 14% and Gross Calorific Value greater than 5833 Kcal/Kg. The said noticee was classifying the coal imported by them under Customs Tariff Item 27011920, and was 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 importers. In any case, the calorific values in respect of coal consignments covered in this show cause notice are not so very

close to the figure of 5833 kcal/kg, nor their volatile matter content percentage so very close to 14%, and hence ignoring the negligible presence of SO3 will be of no consequence as far as the classification of the impugned coal and duty liability thereon are concerned.

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 had imported Coal from various suppliers of Indonesia under various Bills of Entry at Kandla 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 indicated that the Coal imported was having Gross Calorific Value between 5828 KCal/Kg and 5486 KCal/Kg (ADB basis) 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' = $\frac{100\ (FC - 0.15S)}{100 - (M + 1.08A + 0.55S)}$

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

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

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

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 for 02 Certificates of Sampling & Analysis of Shipment of Coal herein below as a sample.

11.1 First in case of Certificates of Sampling & Analysis of Shipment of Coal, where GCV (ADB) is less than 5833 Kcal/kg i.e. for Reference 00501/GAEAAF dated 03.02.2012 on a Sample drawn from the cargo of 54997 MTs of coal described by the Exporter as Indonesian Coal in Bulk loaded at the Pik Lubuk Tutung Anchorage, East Kalimantan, Indonesia on board the vessel M.V. Li Dian 2. **(Annexure –C)**

11.2 The analysis report appended in the said certificate indicates the Coal was having Gross Calorific Value 4471 kcal/kg (As Received Basis), and the Volatile Matter 38.8 % (Air Dry Basis). On applying the above formulae the Gross Calorific Value (on moist, mineral-matter-free basis) worked out to be 5854 kcal/kg as against 4471 kcal/kg (Air Dry Basis).

12.1 Second in case of Certificates of Sampling & Analysis of Shipment of Coal, where GCV (ADB) is greater than 5833 Kcal/kg i.e. for Reference No. 42-2-20319 dated 22.03.2012, in respect of the test conducted by M/s PT.IOL Indonesia on a Sample drawn from the cargo of 52986 MTS of coal described by the Exporter as Indonesian Steam Coal in Bulk loaded at Taboneo Offshore Safe Anchorage, South Kalimantan, Indonesia on board the vessel M.V. Lorentzos **(Annexure – D).**

12.2 The analysis report appended in the said certificate indicates the Coal was having Gross Calorific Value 5828 kcal/kg (Air Dry Basis) and the Volatile Matter 42.78 % (Air Dry Basis). On applying the above formula the Volatile Matter (on dry, mineral-matter-free basis) worked

out to be 51.16 % and Gross Calorific Value (on moist, mineral-matter-free basis) worked out to be 6147 kcal/kg.

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

14. 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 M/s. DCW 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 Indonesia, 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.

15. 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.'

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

17.1 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:*

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

18. The Notification No: 12/2012-cus dated 17.03.2012 exempts the specified goods when imported into India;-

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

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

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

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

Since the impugned coal imported by M/s DCW appears 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.

19.1 In terms of Section 46 (4) of Customs Act, 1962, the importer is required to make a declaration as to truth of the contents of the bills of entry submitted for assessment of Customs duty. The said noticee has wrongly declared the coal imported by them as 'Steam Coal' 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%. In few cases, based on the formula the GCV was found to be more than 5833 Kcal/Kg and Volatile Matter is in excess of 14%. The said noticee was 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).

19.2 Thus it appeared that the said noticee has contravened the provisions of sub section (4) of Section 46 of the Customs Act, 1962, in as much as, they had mis-declared the goods imported as "Indonesian Steam 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.

19.3 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 noticee has failed to declare the true description of the products imported as 'Bituminous Coal' and has hence contravened the provisions of Rule 11 of the Foreign Trade (Regulation) Rules, 1993 and Rule 14 of the Rules ibid in as much as the said noticee knew that the declarations made by them were 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 appeared that the impugned goods as detailed in Annexure-A to the Show Cause Notice are liable to confiscation under Section 111(d) of the Act ibid.

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

19.5 Further, it also appears that the said noticee has mis-declared and (mis) classified the impugned goods under CTH 2701 1920 (instead of their correct classification under CTH 2701 1200) in their Bills of Entry and thereby wrongly availed the benefit of the exemption Notification 12/2012-Cus dated 17.03.2012 (Sr. No. 123) and paid duty (only CVD) @ 1% ad valorem instead of paying BCD @ 5% in terms of Notification 12/2012-Cus dated 17.03.2012 (Sr. No. 124) and CVD @ 6% ad valorem leviable under sub-section (1) of Section 3 of the Customs Tariff Act, 1975, which led to short levy of Customs duty. 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 / were provisionally/finally assessed. Hence, differential duty of Rs. 67,54,328/- on the 15000 MTs of impugned coal, imported by the said noticee at Kandla Port under the bills of entry as detailed in Annexure-A to the Show Cause Notice and assessed finally/provisionally assessed and on finally assessing, 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.

20. In view of the above, the said noticee, M/s. DCW Limited, were issued a Show Cause Notice bearing F. No.:S/10-14/DCW/Gr.I/12-13 dated 01.04.2013, calling upon them to show cause to the Commissioner of Customs, Kandla as to why:-

(i) Their claim for classification of impugned goods (as detailed in Annexure A) under Customs Tariff item / heading 270119 20, should not be rejected and why the same should not be re-classified under Customs Tariff item/heading 2701 1200 of the First Schedule to the Customs Tariff Act, 1975;

(ii) The Bills of Entry mentioned in Annexure –A wherever it is mentioned as provisionally assessed should not be finally assessed as per correct classification i.e. under Customs Tariff item/heading 2701 1200 of the First Schedule to the Customs Tariff Act, 1975 and duty be recovered from them under Section 18(2) of the Customs Act, 1962 and in terms of the bond executed during the provisional assessment

(iii) The 15000 MTs, imported Coal valued at Rs.6,36,66,017/- as detailed in Annexure –A should not be confiscated / held liable for confiscation under the provisions of Section 111(d) and 111(m) of the Customs Act,1962 ;

(iv) The differential Customs Duty amounting to Rs.67,54,328/-, on the 15000.MTs, of imported impugned Coal as detailed in Annexure-A to this notice, should not be demanded and recovered from them under Section 28(1) of the Customs Act, 1962;

(v) Interest should not be recovered from them on the said differential Customs duty, as at (iv) above, under Sections 18(3) of the Customs Act, 1962, in respect of provisional assessments made earlier;

(vi) Interest should not be recovered from them on the said differential Customs Duty, as at (iv) above, under Section 28AA of the Customs Act, 1962, in respect of final assessments made;

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

21. The said noticee in their written reply dated 20.02.2014 and further submissions dated 03.06.214 to the Show Cause Notice, has denied and disputed the allegations levelled against them in the present Show Cause Notice. In addition, they have, inter-alia, submitted that:

- The goods imported were not Bituminous Coal and therefore there is no mis-classification of goods by us in this case; that even otherwise, the allegation of mis-classification of the goods does not hold any water because they have been importing such goods for last several years from the same countries and suppliers and the goods were considered to be Steam Coal falling under CTH 27011920 all throughout this period, and therefore the case of the Revenue that we mis-classified the goods after 17.03.2012 is without only basis and justification; that the case of the Revenue that parameters of volatile matter and calorific value were in excess of the limits prescribed at Sub Heading Note No.2 of Chapter 27 is also not proved in this proceedings, but the proposal to classify the goods as Bituminous Coal is made only on assumptions and presumptions; that the goods were assessed to duty and were allowed to be removed for home consumption on payment of duties assessed by competent Custom Officers, and therefore the allegation of mis-classification of goods and further proposal to hold them as liable for confiscation are also not justified nor sustainable.

- There is a grave violation of the principles of natural Justice in this case because the adjudication is conducted without allowing opportunity of cross examination of the Director of CRCL, though his report and opinion form the back bone of the entire case; that there could also not be any dispute about the fact that the Joint Director, CRCL had approved the applicability of certain formula for determining various parameters and their conversion with reference to value of such parameters and it was in view of

this opinion of the Joint Director, CRCL that the goods in question are suggested to be Bituminous coal.

- The whole case of the Department is on applicability of the literature and formula of conversion of values like Volatile Matter and GCV prescribed by the US Department of Energy, and therefore it is necessary for the Departmental to establish in the present proceedings that such literature/formula of conversion for deriving figures of GCV and VM on ARB basis and ADB basis were applicable in our country for determining the above two parameters namely VM and GCV, but the Department has failed in establishing applicability of the formula published by the US Department of Energy; that such formula is arbitrary applied only because the Joint Director, Customs Laboratory allegedly confirmed the applicability of such formula.

- There is no dispute on the fact that VM and GCV limits on dry mineral–matter–free basis and on moist mineral–matter–free basis respectively were not available as regards the goods imported; that there is also no dispute on the fact that these two values are derived by the Department by relying on formula of conversion published by the US Department to Energy, and that the values are considered on ARB and ADB basis by applying such formula; that the Customs Act, the Customs Tariff Act, or any other law for the time being in force in India do not provide for applying the formula of US Department of Energy, nor is there any legal provisions for applicability of such formula for classifying goods like coal, for the purpose of Customs Duty. However, the Revenue has relied upon the letter dated 07.03.2013 issued by the Joint Director, Customs Laboratory who is claimed to have confirmed applicability of such formula available on web site of US Department of Energy, and therefore it was very vital to consider what was the basis for applying such formula of a Department of a foreign country for classification of the goods in our country for levy of Customs Duty; and it was therefore, equally vital to know from the said Joint Director as to on what basis he had confirmed the applicability of such formula.

- The predominant use as well as the actual use of the Steam Coal is to generate steam. Coal having a calorific value of less than

5833 kcal/kg is not suitable for generation of steam and that any interpretation to classify Steam Coal as Bituminous Coal for sake of charging duty is not sustainable and would render the Chapter sub-heading 27011920 for `steam coal' as nugatory; that it is amply clear that the term "Steam Coal" must be understood in context of its popular meaning, despite it having certain technical characteristics of bituminous coal and consequently, the goods imported are correctly classifiable as Steam Coal under Chapter sub-heading 27011920 and are entitled to the exemption, as claimed.

- Notification No.12/2012-Cus dated 17.03.2012 is a specific exemption granted to all varieties of coal used to generate steam. The object and purpose of the said Notification is clear in light of the Hon'ble Finance Minister's Budget Speech made on 16.03.2012; that the exemption notification must be interpreted in a manner that would bring about the furtherance of its underlying intent and purpose; that the said view finds preponderance in light of the judgment of the Hon'ble Supreme Court in the case of Oblum Electrical Industries Private Limited v Collector of Customs Bombay – 1997 (94) E.L.T. 449 (S.C.) wherein it was inter alia held that the words in a Notification have to be construed keeping in view of the object and purpose of the exemption; that coal of a variety having calorific value of less than 5833 kcal/kg in isolation is not suitable for the generation of steam and thus mechanically applying the sub heading note No. 2 in the instant case, would render the intention of the Legislature futile and thereby the Steam Coal which is actually used for generating steam would never be eligible for the exemption.

- Bituminous Coal is a genesis and steam coal is a species and that Steam Coal is a sub category of Bituminous Coal; that the well accepted judicial maxim of Generalia specialibus non derogant, would be applicable in the present case. It means that general things cannot abrogate the special heading, it attains a specific character and all the steam coals i.e. low grade anthracite and Bituminous coal are to be considered as Steam Coal for the purpose of granting the benefit of the exemption

Notification. that steam coal is indeed a species of bituminous coal as the same has also been duly taken into cognizance by the Tariff Schedules of various countries; that steam coal is nothing but a class of Bituminous Coal and lower grades of Anthracite Coal.

- In the instant case, the goods have been imported from Indonesia and that even if the coal imported by the Noticee is classified as bituminous coal, the same would be eligible for exemption of BCD by virtue of Notification No.127/2011-Cus as amended by Notification No. 64/2012-Cus dated 31.12.2012.

- Moist coal contains its natural inherent or bed moisture, but does not include water adhering to its surface; that Coal analysis expressed on Moist basis are performed or adjusted so as to describe the date when coal contains the moisture that exists in the bed in its natural state of deposition and when the coal has not lost any moisture due to drying. From the definitions given by the very organization which also relies on ASTM for coal ranking, brings out two points:
  (i) Moisture in coal means moisture present in its natural state before drying viz. As Received Basis (ARB).
  (ii) For determining the calorific value on the theoretical basis as MMMF, basic analytical data is to be used.

- The calculations made in this case are based on incorrect input values for calculating Gross Calorific Value (GCV) (on moist, mineral-matter-free-basis). As discussed above, as per the underlying assumptions of ASTM standards, GCV (on moist, mineral-matter-free-basis) has to be worked out using internationally used Parr formula for classification of coal by rank; that Customs Department has committed a grave error in not following the statutory requirement of determining the Volatile Matter limit and calorific value limit in accordance with sub-heading Note No. 2 of Chapter 27 of the Customs Tariff. This note clearly lays down for determining the above two parameters by MMMF (moist, mineral-matter-free-basis) in case of CV limit, and DMMF (dry, mineral-matter-free-basis) in case of VM limit, but the Customs Department has not followed such methods,

and instead a formula published on web site by the US Department of Energy has been taken into consideration; that the entire basis of this case that GCV limit and VM limit were in excess of the limits prescribed at sub-heading Note No. 2 of Chapter 27 is therefore illegal and without any jurisdiction.

- The Revenue has failed in appreciating that Moist coal contains its natural inherent or bed moisture, but does not include water adhering to its surface. Coal analysis expressed on Moist basis are performed or adjusted so as to describe the date when coal contains the moisture that exists in the bed in its natural state of deposition and when the coal has not lost any moisture due to drying. From the definitions given by the very organization which also relies on ASTM for coal ranking, brings out two points:

  (i) Moisture in coal means moisture present in its natural state before drying viz. As Received Basis (ARB).

  (ii) For determining the calorific value on the theoretical basis as MMMF, basic analytical data is to be used.

- 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. ASTM D388 gives the guidelines for ranking the coal on the basis of Moist Mineral Matter Free Calorific Value. 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 analyzed 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 all the coal quality load port reports are from reputed Independent Inspection Agencies (IIA) who have certified the `Inherent Moisture on ADB basis", as indicated in the load port "Certificate of Analysis" issued by them, which is nothing but the "Moisture in analysis sample of Coal" as analysed on finely powdered air dried laboratory quality coal sample using the standard ASTM method D3173 or equivalent ISO method 11722. As discussed above, by applying correct input values of the concerned parameters in Parr Formula, the "calorific value on moist, mineral-matter-free basis" for all the shipments referred in the SCN work out to be well below the threshold limit of 5833 Kcal./Kg. and hence do not satisfy the definition of "Bituminous Coal" in terms of sub-heading note 2 of Chapter 27 of the Customs Tariff. Further, the values of ash content and carbon content used in the formula adopted by the Customs appears to have not been adjusted to SO3 free basis. We do not agree with the view that the presence of SO3 is of no consequence in the classification of Coal and duty liability thereon.

- The goods in question are coal and that coal in question is a natural mineral obtained from mother earth; but coal is not a manufactured commodity. Therefore, no additional customs duty (i.e. CVD) is leviable on such natural mineral because such natural mineral is not in the nature of goods "manufactured". Coal is not manufactured in India nor anywhere in the entire world because coal is obtained by mining; that as held by Hon'ble Supreme Court in the case of M/s. Hyderabad Industries Ltd Versus UOI reported in 1995 (78) ELT (641) and 1999 (108) ELT 321, any activity in the

nature of separation of asbestos fiber from the parent rocks was not the result of process of manufacture and was not a new and commercially distinct article; and in view of this principle, mining of coal and taking out coal by cutting it from earth is not a process of manufacture; and accordingly, coal is not a new or commercially distinct commodity attracting levy of Central Excise in India, and consequently not attracting levy of CVD on imported coal. The assessment, collection and demand of CVD on coal in question (irrespective of the fact whether Bituminous Coal or Steam Coal) is therefore unconstitutional.

- The proposals about confiscation and penalty are also unreasonable and arbitrary because there was no case for ordering confiscation or for imposing even a token penalty; that all the documents required for clearance of imported goods were submitted and there is no disputes about genuineness of such documents also. Therefore, none of the ingredients of Section 112 (a) of the Customs Act was satisfied in this case for imposing any penalty on us. Section 111 (m) of the said Act was also not attracted in this case because there was no discrepancies in assessable value or any other particular disclosed by us under the Bill of Entry when compared to the goods under assessment. Therefore, the proposals about confiscation of coal in question and also imposing penalties on is are ex-facie incorrect and hence liable to be set aside.

Personal Hearing:

22. Personal hearing in the matter was fixed 13.05.2014, which was attended by Shri Paritosh R. Gupta, Advocate, on behalf of the noticee and reiterated submissions made in their written submissions dated 20.02.2014. They requested that they want to file detailed reply, for which they wanted time upto first week of June, 2014, which was accepted.

22.1 On 06.06.2013, Shri Paresh Dave, Advocate, appeared on behalf of the noticee and submitted the further submissions dated

6.6.2014 and pleaded to drop the Show Cause Notice on the basis of the written submissions.

23.1 I have carefully gone through the records of the case, including the Show Cause Notice dated 01.04.2013, the written submissions dated 20.02.2014 and 06.06.2014, as well as the oral submissions made during the course of Personal Hearings.

23.2 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-D to the Show Cause Notice;

2. Whether the Bills of Entry mentioned in Annexure –A, wherever it is mentioned as provisionally assessed, are to be finally assessed as per correct classification i.e. under Customs Tariff item/heading 2701 1200 of the First Schedule to the Customs Tariff Act, 1975 and duty be recovered from them under Section 18(2) of the Customs Act, 1962 and in terms of the bond executed during the provisional assessment;

3. Whether 15,000 MTs Coal valued at Rs. 6,36,66,017/- 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;

4. Whether the Differential Customs Duty amounting to Rs.67,54,328/-, on the 15,000/- MTs of Coal imported by the said noticee, as detailed in Annexure-A to the Show Cause Notice, is required to be determined under Sections 28(8)/18(2) of the Customs Act, 1962, wherever applicable, and recovered from the said noticee;

5. Whether the noticee is liable to pay Interest on the differential Customs duty shown at (4) above, under Sections 28AA/18(3) of the Customs Act, 1962;

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

23.3 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.

****

24.1 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.

24.2 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.

24.3 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.

24.4 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*."

24.5 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.**

26.6 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.

24.7 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*.

24.8 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.

24.9 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.

24.10 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.

24.11 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).

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

25.2 In terms of Rule 1 of the General Interpretative Rules, the titles of Sections, Chapters and Sub-chapters are provided for ease of reference only; **for legal purposes, classification shall be**

determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require. Thus, this is the first Rule to be considered in classifying any product. For practical purposes, we may break this rule down into 2 parts:

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

2) Classification is determined by the words (terms) in the Headings (the first four numbers) and the Section and Chapter Notes that apply to them unless the terms of the heading and the notes say otherwise. **In other words, if the goods to be classified are covered by the words in a heading and the Section and Chapter Notes do not exclude classification in that heading, the heading applies.**

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

25.4 As regards the classification of imported Coal under Chapter Sub-heading 27011920, as Steam Coal, is concerned, it is clear that the same is grouped under the Heading 'Other Coal' falling after the Anthracite and Bituminous Coal. Therefore, this heading covers only those Coals which are other than and do not fall within the above stated definition of Anthracite and Bituminous Coal. In respect of the imported

Coal covered by the Show Cause Notice, the same satisfies the parameters for Chapter Sub-heading 27011200 and clearly answer to the description of 'Bituminous Coal' as per the definite definition assigned to the said Coal by Sub-heading Note 2 of Chapter 27. Thus, when the concerned goods fall under the definition of Chapter Sub-heading 27011200, the question or even the need for referring to the entry of the same goods in Chapter Sub-heading 27011920 does not arise. Such a need would have arisen if there was a doubt about the classification of goods under Chapter Sub-heading 27011200. In this case since the classification of the product can be arrived at an appropriate Tariff Heading/Sub-heading, by applying Rule 1 of the General Interpretative Rules itself, I find no reason for referring to the other interpretative Rules i.e. from 2 to 6 ibid.

25.5 The Hon'ble Supreme Court in the case of 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. ……..."*

25.6 The Customs Tariff Act is broadly based on the system of classification from the International Convention called the Brussels' Convention on the Harmonised Commodity Description and Coding System (Harmonised System of Nomenclature). HSN is a safe guide for the purpose of deciding issues of classification. In the present case, the HSN explanatory notes to Chapter 27 categorically state that "bituminous coal" means coal having a volatile matter limit (on a dry, mineral-

matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg. The Hon'ble Supreme Court in the case of Phil Corporation Ltd. Vs. CCE, Goa reported in 2008 (223) E.L.T. 9 (S.C.) has held that HSN is a safe guide for deciding issue of classification. The relevant paragraph 13 of the said judgement is reproduced below.

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

25.7 **In this case, a particular definition has been assigned to the word 'Bituminous Coal' in the 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.

26.1 As for the relevance of the Chapter Notes, for deciding the classification of the product, and subsequently its eligibility or otherwise for any exemption by way of notifications, I find that classification is to be determined only on the basis of description of the heading, read with relevant section or chapter notes. Since, these chapter notes are part of

the Act itself; they have full statutory legal backing. It is a settled legal position that the Section Notes and Chapter Notes have an overriding force over the respective headings and sub-headings. This finds support in the decision of the Hon'ble Tribunal in the cases of Saurashtra Chemicals Vs CC – 1986 (23) ELT 283 (CEGAT); Tractors and Farm Ltd. Vs CC – 1986 (25) ELT 235 (CEGAT); Tracks Parts Corpn. Vs CCE - 1992 (57) ELT 98 (CEGAT) and Calcutta Steel Industries Vs CCE - 1991 (54) ELT 90 (CEGAT).

26.2 In the case of Fenner India Ltd. Vs CCE – 1995 (97) ELT 8 (SC), the Hon'ble Supreme Court has observed that tariff schedule would be determined on terms of headings and or any relevant section or chapter notes. In Sanghvi Swiss Refills Pvt. Ltd. case reported in 1997 (94) ELT 644 (CEGAT), it was held that section notes and chapter notes, being statutory in nature, have precedence over functional test and commercial parlance for purposes of classification. **From the above judgements/decision it flows that, in this case, the product imported being Bituminous Coal, in terms of Sub-heading Note 2 of Chapter 27, the said imported Coal will not be eligible for exemption under Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012.**

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

Thus, in this case, where the words of the statute i.e. Sub-heading Notes are plain and clear, there is no room or scope for applying any other interpretation than the one given in the statute.

27. **In view of the Sub-heading Note 2 of Chapter 27 of the Schedule to Customs Tariff Act, 1975; by applying Rule 1 of the General Interpretative Rules and by relying on the legal position in such cases settled by the Apex Court, it is quite evident that the Coal imported by the said noticee, is none other than 'Bituminous Coal' falling under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975 and in no way can be considered as "Steam Coal" falling under Chapter Sub-heading 27011990 ibid. As such, the exemption under Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012, as claimed by the said noticee will not be available to the imported Coal covered by the Show Cause Notice.**

28. 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.

The intention of the government was to grant exemption to all imported coal:

29.1 The said noticee has argued that the intention of the government, as manifested from the Budget Speech of the Hon'ble Finance Minister, was to grant exemption to all imported coal used as 'Steam Coal' and not only to a limited/restricted range of Coal with low calorific value of less than 5833 Kcal./Kg.

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 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, had 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. 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 exemption of is for Steam Coal, how the exemption can be extended for Bituminous Coal also.

The term "Steam Coal" must be understood in context of its popular meaning, despite it having certain technical characteristics of bituminous coal

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

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

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

according to the common parlance understanding of such goods." (emphasis supplied)

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

30.5 In the Oswal Agro Mills Ltd. case - 1993 (66) E.L.T. 37 (S.C.), the Hon'ble Supreme Court has emphasized that."……Where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute. The court would interpret them as they stand. The object and purpose has to be gathered from such words themselves. Words should not be regarded as being surplus nor be rendered otiose. Strictly speaking there is no place in such cases for interpretation or construction except where the words of statute admit of two meanings. The safer and more correct course to deal with a question of construction of statute is to take the words themselves and arrive, if possible, at their meaning, without, in the first place, reference to cases or theories of construction. ……."

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

> *"**36.**In deciding this question the first thing that requires to be noted is that Entry No. 25.15 refers specifically not only to marble but also to other calcareous stones whereas Entry No. 62 refers to*

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

30.7 From the above, it is quite evident that it has become the law of the land for the purpose of classification of goods is **that only in the absence of any statutory definitions, the common parlance understanding of such goods should be applied and that the classification of goods shall be determined according to the terms of the Headings and any corresponding Chapter or Section notes.** In this case, Sub-heading Note 2 of Chapter 27 in unambiguous terms defines what "Bituminous Coal" is. Thus, when a clear definition is available in statute, in respect of the coal imported by the said noticee, I

find no reason why it should be called and classified as 'Steam Coal'. As such, I do not find any merit in contention of the said noticee and they cannot take shelter for classifying the coal imported by them as 'Steam Coal', under the name of common/commercial/market parlance, which deserves to be rejected. Further, their argument that **where there is Statutory definition,** an item given in the Tariff should be interpreted in the commercial sense or in common trade parlance is nothing but mis-leading, in view of the discussions above.

Established practice followed by the noticee has never been questioned:

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

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

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

31.4 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.

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

32.1 The contention of the noticee on the above aspect is that the Customs authorities have incorrectly and arbitrarily adopted a formula and have worked out the GCV according to their convenience with the sole intention of slapping a huge demand and for making unsubstantiated allegation against the noticee and that that this formula is not applicable in the instant case and neither the exporter nor the importer has ever applied this formula.

32.2 I find that the above contention of the noticee is factually incorrect, in as much the Certificate of Sampling & Analysis of Shipment of Coal in respect of test conducted by various independent inspecting agencies at various Load Ports that the volatile matter limit of the coal imported by the said noticee exceeds 14% and also the calorific value of the said coal (on a moist, mineral-matter-free basis) as well as per the certificate was found to be greater than 5,833 kcal/kg.

32.3 The said noticee has not brought out any documentary evidence in support of their claim that the formula adopted by the Department is incorrect. It is a well settled position of law that once the department has educed evidence regarding the allegation made in the Show Cause Notice, and then the onus to prove otherwise is on the said noticee. There is no dispute regarding the fact that volatile matter limit of the coal imported by the said noticee exceeds 14% and also the

calorific value of the said coal (on a moist, mineral-matter-free basis) as well as per the certificate GCV was found to be greater than 5,833 kcal/kg. This fact has very well been accepted by the noticee and has never challenged the Certificate of Sampling & Analysis of Shipment of various agencies during their stated ten years of import of the Coal.

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

32.5 As far as the formulae adopted for arriving at the two parameters, as well as regarding the terms as-received basis (ARB), air-dried basis (ADB), inherent moisture, total moisture, moist, mineral-matter-free basis, gross calorific value and net calorific value and have examined the basis of calculations therein, I had referred to various

literatures, 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.

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

32.7 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. As such, I do not find any merit in the argument, which is required to be rejected summarily.

Violation of Principles of Natural Justice:

33.1 The said noticee has alleged that there is a grave violation of the principles of natural Justice in this case because the adjudication is conducted without allowing opportunity of cross examination of the Director of CRCL, though his report and opinion form the back bone of the entire case. It is a fact that the said request of the noticee for cross-examination of the Joint Director, CRCL, JNCH, Nava Sheva was not acceded to and was rejected by me, and the same was informed to the said noticee alongwith reasons thereof vide my office letter dated 16.04.2014.

33.2 As regards my decision for the said rejection, the same was necessitated on the basis of the fact that 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 said 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. Further, the said opinion sought of the Joint Director, CRCL, JNCH, Nava Sheva with respect to the applicability of the formula, was for the purpose of a fair inquiry only.

33.3 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 coals 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:

33.4 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.

33.5 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.

33.6 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.

Since Coal is not a manufactured item no CVD is leviable:

34.1 The noticee has contented that the coal in question is a natural mineral obtained from mother earth and is not manufactured in India nor anywhere in the world and as such the assessment, collection and demand of CVD on coal in question, irrespective of the fact whether bituminous or steam coal is unconstitutional.

34.2 In this regard, I find that the collection of CVD is made as the per rate of duty prescribed in the Schedule to the Customs Tariff Act vis-à-vis the exemption notifications in terms of Section 3(5) of the Customs Act, 1962. When the notification prescribes for levy of CVD on the bituminous/steam coal, then the said duty is ought to be collected. The said noticee has never challenged the notification but is challenging the collection. I find that the noticee became aware of this fact only when the imported coal was asked to be classified as bituminous coal. The very noticee was paying CVD when the same was classified by them as Steam Coal.

34.3 The very question regarding the applicability of CVD on coal has been clarified by the Board vide Circular No.41/2013 dated

21.10.2013. The relevant paragraph 4 of the said Circular is reproduced below:

> ***"4.*** *In the present case, the excise duty applicable on Steam Coal is 6%, if CENVAT benefit is availed of and 1% if the CENVAT benefit is not availed of. Normally, Steam Coal will suffer 6% CVD, as the condition of non-availment of cenvat benefit cannot be satisfied in respect of imported goods.* ***However, in the Budget 2013-14, as a conscious policy decision, it was decided to levy 2% CVD both on steam coal and bituminous coal. This is the general applied rate of CVD on all imports of steam coal and bituminous coal regardless of the excise duty leviable on like domestic coal. ……."*** (emphasis supplied).

34.4 Further, I am of the view that to decide whether a notification is unconstitutional or otherwise, the right forum for taking up the issue is not the adjudicating authority. In view of this, the above contention of the said noticee regarding the levy of CVD on the imported coal, is liable to be rejected summarily.

35. In view of foregoing discussions and the evidence before me, **I hold that the Coal imported by the said noticee, as detailed in Annexure A to the Show Cause Notice, is nothing but Bituminous Coal, classifiable under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975, as proposed in the Show Cause Notice. Accordingly, classification of the said Coal as Steam Coal, under Chapter Sub-heading 27011920, as claimed by the said noticee is hereby rejected. Consequently, I also hold that the said noticee is not eligible to avail the benefit of exemption prescribed under Sl. No.123 of Notification No.12/2012-Cus dt.17.03.2012.**

2. Whether the Bills of Entry mentioned in Annexure –A, wherever it is mentioned as provisionally assessed, should not be finally assessed as per correct classification i.e. under Customs Tariff item/heading 2701 1200 of the First Schedule to the Customs Tariff Act, 1975 and duty be recovered from them under Section 18(2) of the Customs Act, 1962 and in

terms of the bond executed during the provisional assessment

****

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

36.2 I find that out of the five Bills of entry covered by the Show Cause Notice, as detailed in Annexure-A to the Show Cause Notice, the Bills of entry appearing at Sr. No. 2 of Annexure-A, have been assessed provisionally. **The assessment in respect of the above mentioned four Bills of entry detailed in Annexure-A to the Show Cause Notice, which had been provisionally assessed, now stands finalized and concluded on the basis of the above discussion and findings. Accordingly, the Customs duty ought to have been paid by the said noticee on the basis of classification under Customs tariff heading 27011200 in respect of the above said Bills of entry pertaining to 2000 MTs. of Coal valued at 86,27,726/-, is hereby computed at Rs.11,07,181/-. From the records, it is seen that against the said duty liability, the said noticee has paid duty of Rs.1,91,866/- only against the said liability. Hence, the differential duty of Rs.9,15,315/- arising out of this finalization of the said Bills of entry, shall be recovered from them under Section 18(2) of the Customs Act, 1962, and in terms of the bond executed during the provisional assessment alongwith interest at the applicable rate under the provisions of Section 18(3) ibid.**

3. Whether 15,000 MTS of Coal totally valued at Rs.6,36,66,017/- imported by the said noticee is liable for confiscation under Sections 111 (d) and 111(m) of the Act, 1962.

****

37.1 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.67,54,328/- 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.

37.2 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.

37.3 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.

37.4 Therefore, I hold that 15,000 MTS of Coal totally valued at Rs.6,36,6,017/- 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 out of the five bills of entry covered by the Show Cause Notice, except the one Bills of entry appearing at Sr. Nos.2 of Annexure-A to 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 bills of entry have been assessed finally and the impugned goods have been cleared and are not available for confiscation, I refrain from imposing redemption fine in lieu of confiscation in respect of the said Bills of entry.

37.5 However, I find from the Annexure-A to the Show Cause Notice that the remaining one Bill of Entry appearing at Sr. No. 2 of the Annexure-A to the show cause notice, covering 2000 MTs. of Coal valued at Rs.86,27,726/- have been assessed provisionally. In this case, the imported goods were cleared on execution of Test Bond and the goods are not physically available for confiscation. It is now a well settled position of law that the mere fact that the goods were released on bond being executed would not take away the power of the customs authorities to levy redemption fine. Further, since the goods were released on bond, the position remains that the goods are available. In this regard, I rely on the judgement/decisions in the case of Weston Components Ltd. – 2000 (115) ELT 278 (SC); M/s. Raja Impex – 2008 (229) ELT 185 (P&H); Pregna International Ltd. – 2010 (262) ELT 391; R.D. Metal & Co. – 2008 (232) ELT 464 (Tri-Ahmd) and Amartexinds Ltd. – 2009 (240) ELT 391, which are squarely applicable to the facts of the case.

37.6 In view of the above, I hold that 2000 **MTs. of Coal valued at Rs. 86,27,726/-** imported under Bills of entry at Sr. No. 2 of the Annexure-A, as detailed above, are liable for confiscation and accordingly order for confiscation of the same. However, I give an option to the said noticee to redeem the same on payment of redemption fine, in lieu of confiscation.

4. Whether the differential Customs Duty amounting to Rs.67,54,328/-, as detailed in Annexure–A to the Show Cause Notice, is to be demanded and recovered from the said noticee under Section 28 (1)/18(2) of the Customs Act, 1962.

****

38.1 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. I find

from the records that the in respect of the Bills of entry, wherever mentioned as finally assessed in Annexure-A to the Show Cause Notice, since, the noticee is held not eligible for the said exemption, they has short paid duty to the tune of Rs.58,39,013/-, in respect of those four Bills of entry, which were finally assessed, involving a quantity of 13,000 MTS having value of Rs. 5,50,38,791/-.

38.2 Similarly, I find from the records that the said noticee had paid duty of Rs.1,91,866/- on the quantity of 2000 MTS of coal imported by them declaring as Steam Coal, by availing benefit of Sr. No. 123 of Notification No.12/2012-Cus dt.17.03.2012 in respect of the one Bills of entry No. 66,93,879 dated 30.4.2012, as provisionally assessed as mentioned ar Sr. No.2 of the Annexure-A to the Show Cause Notice. Since, the noticee is held not eligible for the said exemption, they should have actually paid a duty of Rs.11,07,181/ on the basis of the correct classification of the coal imported by them.

38.3 In view of the above, **I determine the total differential duty payable by the said noticee as Rs.67,54,328/- as detailed in Annexure-A to the Show Cause Notice, under Section 28(8) of the Customs Act, 1962 in respect of four bills of entry assessed finally, and under Section 18(2) ibid in respect of one bills of entry which were assessed provisionally and now stands finalized and the said differential duty not levied or short levied is to be recovered from them under.**

5. Whether the said noticee is liable to pay interest involved on the said differential Customs Duty amounting to Rs.76,54,328/- at the applicable rate under the provisions of Section 18(3)/28AA of the Customs Act, 1962.

****

39.1 In terms of Section 18(3) of the Customs Act, 1962, the importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order. In this case, one Bills of entry mentioned at Sr. No.2 of Annexure-A to the Show Cause Notice, which had been provisionally assessed, has now vide this Order been finalized and concluded.

39.2 Accordingly, **I hold that the said noticee is liable to pay interest involved on the amount of Rs.9,15,315/- under the provisions of Section 18(3) of the Customs Act, 1962.**

39.3 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. In this case I find that out of the five bills of entry covered in the Show Cause Notice, four Bills of entry at Sr. No.1, and 3 to 5,of Annexure-A to the Show Cause Notice, involving a differential duty of Rs.58,39,013/- have been finally assessed. The said Section provides for payment of interest automatically along with the duty. I have already held that differential Customs Duty is required to be demanded and recovered in this case. In view of this, **I hold that the said noticee is liable to pay interest involved on the amount of Rs.58,39,013/- under the provisions of Section 28AA of the Customs Act, 1962.**

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

40. 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.**

41.1 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.

41.2 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.

42.1 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.

42.2 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.

42.3 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.

43. 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 18.07.2013, is considered and held as "Bituminous Coal" and is correctly classifiable under Tariff heading/sub-heading 2701 1200 of the Schedule to the Customs Tariff Act, 1975. Accordingly the declared classification under Customs Tariff item/heading 270119 20, is hereby rejected. Consequently, I deny M/s. DCW Limited, Dhrangadhra, Gujarat – 363 315, the benefit of exemption under Sr. No. 123 of the Notification No. 12/2012-Customs dated 17.03.2012.

(b) Bills of Entry wherever mentioned as provisionally assessed in Annexure-A to the Show Cause Notice, now stands finally assessed under Customs Tariff item/heading 2701 1200 of the First Schedule to the Customs Tariff Act, 1975 and duty be recovered from them under Section 18(2) of the Customs Act, 1962 and in terms of the bond executed during the provisional assessment.

(c) The 13000 MTS of Coal valued at Rs.5,50,38,791/-**,** imported by M/s. DCW Limited, Dhrangadhra, Gujarat – 363 315, vide Bills of entry shown at Sr. No. 1 and 3 to 5 of Annexure-A to the Show Cause Notice, is held liable for confiscation, under the provisions of Section 111(m) and Section 111(d) of the Customs Act, 1962. However, since the bills of entry have been

assessed finally and the impugned goods are not available for confiscation, I refrain from imposing any redemption fine in lieu of confiscation.

(d) I order for confiscation of 2000 MT of Coal valued at 86,27,226/-, imported vide Bills of entry shown at Sr. No.2 of Annexure-A to the Show Cause Notice, by M/s. DCW Limited, Dhrangadhra, Gujarat – 363 315, which was provisionally assessed. I impose redemption fine of Rs.8,60,000/- (Rupees Eight Lacs Sixty Thousand Only) under Section 125 of the Customs Act, 1962, in lieu of the confiscation for the goods provisionally assessed and cleared under Bond.

(e) I determine the differential Customs duty payable by M/s. DCW Limited, Dhrangadhra, Gujarat – 363 315, as 58,39,013/- (Rupees Fifty Eight lacs, Thirty Nine Thousand Thirteen Only) under Section 28(8) of the Customs Act, 1962, in respect of the Bills of entry shown at Sr. No. 1, and 3 to 5 of Annexure-A to the Show Cause Notice and further determine the differential customs duty payable as Rs. 9,15,315/- (Rupees Nine Lascs Fifteen Thousand Three Hundred and Fifteen Only) in respect of the one Bills of entry shown at Sr. No.2 of Annexure-A to the Show Cause Notice under Section 18(2) ibid and order for recovery of the duty so determined from them.

(f) I order for recovery of interest involved on the total differential duty of Rs.67,54,328/-, from M/s. DCW Limited, Dhrangadhra, Gujarat – 363 315, in respect of Bills of entry finally assessed under Sections 28AA and under Section 18(3) of the Customs Act, 1962, in respect of Bills of entry, which were provisionally/finally assessed, as the case may be.

(g) I impose a penalty of Rs.8,00,000/- (Rupees Eighty One Lacs Only) on M/s. DCW Limited, Dhrangadhra, Gujarat – 363 315, under Section 112(a) of the Customs Act, 1962.

(K.L. GOYAL)
COMMISSIONER

F. No. S/10-99/Adjn./2013-14 Dated: 24.07.2014

BY REGISTERED A.D. POST

To,
M/s. DCW Limited,
Dhrangadhra,
Gujarat – 363 315

Copy to:
1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad, with copy of Show Cause Notice dated 01.04.2013.
2) The Additional Director General, Directorate of Revenue Intelligence, AZU, Ahmedabad for information pl.
3) The Deputy/Assistant Commissioner(GR-I), Customs House, Kandla,
4) The Assistant Commissioner (Recovery Section, Custom House Kandla,
5) Guard file.