



सीमा शुल्क आयुक्त का कार्यालय,
नवीन सीमा शुल्क भवन, नया कांडला - 370 210 (गुजरात)
OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA - 370 210 (GUJARAT)

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A	फाइल संख्या/ File No.	S/10-154/ADJ/ADC/ARTI/2016-17
B	मूल आदेश सं./ Order-in-Original No.	KDL/ADC/UBR/16/2017-18
C	पारित कर्ता/ Passed by	SHRI U. B. RAKHE, ADDITIONAL COMMISSIONER
D	आदेश की दिनांक/Date of order	30/11/2017
E	जारी करने की दिनांक/Date of issue	30/11/2017
F	एल.सी.डी.एन. सं. एवं दिनांक/LCDN No. & Date	S/20-02/Misc./Gr.VII/2010-11 Dated 21.07.2011
G	नोटिसी/Noticee	M/s. Aarti Industries Ltd., Plot No. 801/23, GIDC Estate, Phase-III, Vapi, Dist. Valsad- 396 195 (Gujarat)

- यह मूल आदेश संबंधित को निःशुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.
- यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A (1) के अंतर्गत प्रपत्र सीए 3- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A (1) (a) of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to :
“सीमा शुल्क आयुक्त)अपील(, कांडला
7वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड
अहमदाबाद 380 009”
“THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
7th Floor, Mridul Tower, Behind Times of India, Ashram Road
Ahmedabad - 380 009”
- उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।
Appeal shall be filed within sixty days from the date of communication of this order.
- उक्त अपील के ऊपर न्यायालय शुल्क अधिनियम के तहत 2/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 2/- under Court Fee Act it must accompanied by -
 - उक्त अपील की एक प्रति और
A copy of the appeal, and
 - इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं.-6 में निर्धारित 2/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 2/- (Rupees Two only) as prescribed under Schedule - I, Item 6 of the Court Fees Act, 1870.
- अपील ज्ञापन के साथ इयूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.
- अपील प्रस्तुत करते समय, सीमा शुल्क)अपील (नियम, 1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.
- इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का 10% भुगतान करना होगा।
An appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

BRIEF FACTS OF THE CASE:

M/s. Aarti Industries Ltd., Plot No. 801/23, GIDC Estate, Phase-III, Vapi, Dist. Valsad 396195 (hereinafter referred to as 'the importer') had imported 1468.50 MTs of Bright Yellow Crude Sulphur in bulk (hereinafter referred to as 'the goods') falling under Customs Tariff Item 25030010 of First Schedule of the Customs Tariff Act, 1975 and sought clearance under Bill of Entry No. 3022386 dated 23.03.2011, claiming exemption from payment of duty against Advance Authorisation (DEEC).

1.2 It was observed that as per Advance Authorisation, the importer was permitted to import yellow crude sulphur for the export of product Dimethyl Sulphate. The Chemical Examiner, Customs Laboratory, Kandla, in his test report of imported Sulphur, reported purity of imported sulphur as 99.8%, which showed that the imported Sulphur was not crude or unrefined sulphur, as required by SION of the export product mentioned in the said Advance Authorisation.

1.3 Therefore, Less Charge Demand Memo F. No. S/20-2/Misc./Gr. VII/2010-11 dated 21.07.2011 was issued to the importer demanding Custom duty of Rs. 29,52,384/- along with applicable interest, calculated as under:

Sr. No.	Particular	Amount in Rs.
1.	Assessable Value	14098563.34
2.	B.C.D @ 5%	704928.16
3.	C.V.D @ 10%	1480349.15
4.	Ed. Cess @ 2%	29606.98
5.	Sec. Ed. Cess @ 1%	14803.49
6.	Cus. Ed. Cess @ 2%	44593.76
7.	Cus. Sec. Ed. Cess @ 1%	22296.88
8.	SAD @ 4%	655805.67
	TOTAL =	2952384.09

WRITTEN SUBMISSION & PERSONAL HEARING:

2.1 Personal hearing in the matter was fixed on 27.09.2016 and 25.10.2016. Shri Vikas Mehta, Consultant, appeared for personal hearing on behalf of the importer on 25.10.2016. He reiterated the submission made vide their letters dated 13.10.2011 and 25.10.2016 and requested to take the same on record while adjudicating the Less Charge Demand Memo.

2.2 Due to change of adjudicating authority, the importer was given another opportunity for personal hearing on 30.06.2017, 24.07.2017 & 04.09.2017. Shri Vikas Mehta, Consultant, appeared for personal hearing on behalf of the importer on 04.09.2017 and reiterated their written defence reply submitted vide letters dated 13.10.2011 and 25.10.2016. Further he submitted that the heading 2503 covers all kinds of sulphur and the goods are correctly classifiable under CTH 2503. The CRCL does not have expertise to test these kinds of products and he therefore, requested to rely on the SGS report dated 10.12.2010 submitted at the time of import of the goods. The Consultant was allowed to make further submission in the matter and accordingly the next date of PH was given on 19.09.2017. He appeared for personal hearing on 04.10.2017 in lieu of 19.09.2017 and submitted the details of the following Advance Authorizations under which the importation of duty free raw materials Yellow Crude Sulphur has been made:

- (i) 0310554246 dated 07.01.2010;
- (ii) 0310602099 dated 19.11.2010 &
- (iii) 0310581961 dated 02.07.2010.

He, further, submitted that in all the three Advance Licences, since the duty free raw materials have been utilized in manufacturing of the product which have been exported and the DGFT has issued the redemption letters of all clearances, no issue or law point on demands is lying. Shri Mehta accordingly requested to drop the proceedings as initiated in the show cause notice.

2.3 The importer filed defence reply dated 13.10.2011, wherein they submitted as under:

(i) The Less Charge Demand Memo was based on the finding of test report. The test report is not based on the Bright Yellow Crude Sulphur imported by the importer. The sample has been drawn from Sulphur imported by M/s. Industrial Solvent and Chemicals Private Limited. Therefore, test report cannot be used to raise demand on importer.

(ii) The demand memo has alleged that imported Sulphur is not crude based on the test report of the Chemical Examiner, Customs Lab, Kandla. The importer, vide letter dated 18.08.2011, had requested the department to provide copy of the test report. Accordingly, vide letter dated 29.09.2011, the department provided them a copy the test report number IMP-02/28.01.2011. It is evident from the test report that the same is for Bright Yellow Crude Sulphur imported by M/s. Industrial Solvent and Chemicals Private Limited. They placed reliance on citation in case of Karnataka Agro Chemicals vs. Commissioner of C. Ex. Banglore-III 2007 (215) E.L.T. 470 (Tri.- Bang.).

(iii) Test report of a sample will be applicable only for quantity from which it has been taken. The importer placed reliance on citations in the cases of S.D. Kemex Industries vs. Collector of Central Excise, Calcutta [1995 (75) E.L.T. 377 (Tribunal)] and Standard Woollen Mills vs. Collector of Central Excise, Chandigarh [1987 (28) E.L.T. 417 (Tribunal)].

(iv) The demand memo has considered imported Sulphur as refined, purely on the basis of percentage of purity mentioned in the test result. They submitted that percentage of purity is not a criteria to infer that imported Sulphur is refined and not crude. In support of the said contention they have submitted prints of following research:

- a) It has been mentioned in the book of Industrial Mineral and Rocks: Commodities, markets and used by Society of Mining, Metallurgy and Exploration (U.S.) that crude Sulphur is commercial nomenclature for elemental Sulphur that 99.0% to 99.9% pure and is free from arsenic, selenium and tellurium.
- b) The purity percentage of Bright Yellow Crude Sulphur of Canada Origin is 99.986%. Source: <http://174.36.68.128/product/i6119602Sulphur+Lumos.html>.
- c) The Georgia Gulf Sulfur Corporation has mentioned that crude Sulphur possesses a minimum purity of 99.5% Source: <http://www.georgoagulf.com/production.htm>.
- d) The Sun Group India has mentioned the purity of crude Sulphur on its website <http://www.sungroupindia.com/sulphur.htm>. It will be evident from same that purity of Sulphur varies from 99.50% to 99.8% according to its country of origin.

(v) Minimum percentage of purity in Crude Sulphur is 99.50%. This percentage varies from 99.50% to 99.8% based on the origin of sulphur. To infer that imported sulphur is not crude based on the purity percentage is not tenable. In order to classify the sulphur as crude or refined it has to see whether the refinery process has been carried out or not. A well settled

process has to be undertaken to change the form of crude sulphur to refined Sulphur. The list of name and characteristic of sulphur on the website of Skylighter provide that characteristic of refined Sulphur is that it is distilled and has percentage purity of more than 99.8%. The source is http://www.skylighter.com/fireworks/help/names_and_characteristics_of_sulfur.asp.

(vi) Circular F. No. 528/59/93-Cus (TU) dated 22.2.2000 clarified that Sulphur obtained from Frasch process or as a by-product in petroleum refineries would be classified as Crude Sulphur. Hence, the circular also emphasis the fact that the process carried out to produce the Sulphur should be criteria to evaluate the form of sulphur.

(vii) There is no dispute that the importer has imported Sulphur which has been obtained as a by-product from petroleum refineries only. Therefore, the sulphur imported by the importer should be considered as crude sulphur only.

(viii) The clarification and the circulars issued by the CBEC are binding on the department and the department is bound to follow the same. Reliance placed on citation of Ranadey Micro Nutrients vs. CCE 1996 (87) ELT (SC), British Machinery Supplies Co. vs. UOI 1996 (86) ELT 449 (SC), CCE vs. Usha Martin Industries 1997 (94) ELT 460 (SC) and Rajan Ramkrishna vs. CWT 1981 (127) ITRI (Guj).

(ix) The memo is solely based on the fact that test report indicates that Sulphur is 99.8% pure. The test report does not give any finding on the form of imported sulphur. It does not provide correct determination of facts. Therefore, it cannot be used as legal evidence.

(x) The test report merely mentions the purity of imported Sulphur as 99.8%. Based on percentage of purity of the imported sulphur the department has concluded that imported sulphur is refined and not crude. The test report mentioned percentage of purity of sulphur. It has nowhere mentioned that percentage of purity is in excess to the purity percentage found in crude sulphur as well as nowhere mentioned in the report that tested sulphur is in refined form. Test report 02/28.01.2011 cannot be used to raise demand on the Noticee. A test report cannot be made basis for any conclusion for fastening any duty liability if it is without clear cut determination of facts or sound legal footing. If a test report lacks confidence about its sustainability then it cannot be relied on for legal purposes. Reliance placed on citation of Seema Exports 2009 (247) ELT 912 (Commr. Appl.).

(xi) The importer have received the demand memo demanding the duty of Rs. 29,52,384/- on basis of test report of Customs Lab, Kandla. The demand has been made on account of test result from test report without providing any information or evidence. The assessment order passed on Bill of Entry is appealable. Reliance is placed on citation of Priya Blue Inds. Ltd. Vs Commissioner of Customs (Prev) reported in 2004 (172) ELT 145 (SC), KARAN ASSOCIATES 2009 (236) ELT 23 (Bom.), ASHOOSONS 2009 (239) ELT 107 (Tri. - Del.), Max India Limited 2005 (192) ELT 246 (Tri.- Del.) and Midland Plastics Ltd. 2002 (141) ELT 235 (Tri.- Del.)

(xii) The language of demand memo is vague and it lacks details - Demand memo is liable to be quashed. The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details then it is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause

notice. Reliance is placed on citation of Commissioner of C.E., Bangalore vs. Brindavan Beverages (P) Ltd. 2007 (213) ELT 487 (S.C.) NOT APPLICABLE

(xiii) The demand memo does not mention the details of Bill of Entry for which demand memo is raised. The copy of test report was also not attached alongwith the report, which was subsequently provided on the request of the importer. The notice is issued to demand the duty of Rs. 29,52,384/-, however, it does not provide any details of manner of computation of duty. The Demand Memo mentioned that imported sulphur is not as per the list of products mentioned in SION, however, the memo has not provided given any reference of the SION number. NOT CORRECT

2.4 The importer filed further defence reply dated 25.10.2016, wherein they submitted as under:

(i) The Less Charge Notice merely states that purity of imported sulphur is 99.8% and hence, it cannot be considered as Crude or unrefined Sulphur. Based on this averment, they had been directed to pay duty amounting to Rs. 29,52,384/- with applicable interest.

(ii) On the request of the importer vide letter dated 18.08.2011, the Superintendent (Gr. VII), Custom House, Kandla provided them duty calculation vide letter dated 29.09.2011.

(iii) The subject 1468.500 MT of imported Bright Yellow Crude Sulphur was purchased by the importer in bulk from overseas supplier M/s. Emirates Trading Agency LLC, Dubai. The importer classified the goods under Customs Tariff Item 2503 0010 of the First Schedule to Customs Tariff Act, 1975. As per Chapter Note 2(a) of Chapter 25 of the Customs Tariff Act, 1975, the Chapter 25 does not cover sublimed sulphur, precipitated sulphur and colloidal sulphur. As per Tariff Heading 2503, Sulphur of all kinds, other than sublimed sulphur, precipitated sulphur and colloidal sulphur shall fall under the said heading. Thus, all kinds of sulphur, except sublimed sulphur, precipitated sulphur and colloidal sulphur, are covered by tariff heading 2503. The only requirement for any kind of sulphur to fall under tariff heading 2503 is that it must be other than sublimed sulphur, precipitated sulphur and colloidal sulphur. There is no reference to purity for classification of sulphur, either under 2503 or 2802. The importer rightly classified the sulphur imported by them under CTH 2503 being other than sublimed sulphur, precipitated sulphur and colloidal sulphur. Demand of duty without challenging the test report and without proposing a different classification cannot be sustained in the eyes of law.

(iv) There is no provision in law governing classification between competing entries of chapter heading 2503 or 2802 to determine classification on the basis of purity percentage of Sulphur. What is not prescribed cannot be imported into the Statute. The only determining factor prescribed in law is whether Sulphur is sublimed sulphur, precipitated sulphur and colloidal sulphur (CTH 2802) or other than sublimed sulphur, precipitated sulphur and colloidal sulphur (CTH 2503). Therefore, there is no room in law to read purity in percentage into these entries for determining classification of Sulphur. Consequently, the less charge demand proposing to demand Custom duty by proposing to determine classification on the basis of purity in percentage is without any authority of law and hence, the same is liable to be quashed, being void ab initio.

(v) The condition sheet attached to Advance Authorization against which clearance was permitted makes a clear mention of the ITCHS Code as "2503 0010". Therefore, unless it is alleged or proved that goods imported by

the importer are covered by any other ITCHS Code, there is no justification in demanding duty from them. The less charge demand notice does not propose any other classification/ITCHS Code for the goods imported by them. The classification made by the importer in Bill of Entry is thus, unchallenged. Therefore, there is no justification in demanding duty without even proposing a new classification.

(vi) The Chemical Examiner in Test Report dated 13.01.2011 only certified that the purity of imported Sulphur was 99.8% in spite of specific request in the Test Memo for nature of the sample, the Chemical Examiner did not state that the sample is not Crude Sulphur. In the absence of such a certification from the Chemical Examiner only on the basis of purity the sample cannot be held as refined sulphur.

(vii) The importer referred Letter F. No. 75-Exo/C-27/2008-09 dated 14th September 2009 issued by Director (Revenue Laboratories), New Delhi, which clarified that *"Whether Sulphur is Crude or Refined Sulphur cannot be ascertained by Chemical test in light of Chapter Notes to Ch. Subheading 25.03 of HSN. It is the method of manufacturing and source of origin which is the criteria to decide whether Crude or otherwise.* This clarification was issued based on the CBEC Telex Message issued from No. 528/59/93-CUS(TU) addressed to Collector of Customs (P), Ahmedabad and Kandla, wherein it was clarified that *"Sulphur obtained by Frasch Process or as a by-product in Petroleum Refinery would fall under category of Sulphur Crude".* In this present case, the consignment of Sulphur originated in a Petroleum Refining operation which is evident from the Manufacturer's Certificate (issued by The Bahrain Petroleum Company) in respect of the subject consignment which clarifies that the consignment of Sulphur is a by-product of Oil and Gas Refinery process without any further process having been undertaken.

(viii) A copy of another Test Report issued in case of import of Crude Sulphur in the jurisdiction of Alibaug Customs is submitted by the importer, wherein the Customs had requested Chemical Examiner to examine, *"To check whether any process of refinery has been done and to verify whether it is unrefined Sulphur other than sublimed, Precipitated Sulphur, Colloidal Sulphur, Insoluble Sulphur".* The test report states that Sulphur is not of sublimed, precipitated, colloidal and unsolvable variety which implies that it is "unrefined Sulphur".

(ix) As per tariff description to Heading 2503 and subheading 250300 of Chapter 25 of the Customs Tariff, only that variety of Sulphur which is not sublimed, precipitated and colloidal, would find classification under Heading 2503 whereas the tariff item 25030010 classifies Sulphur recovered as by-product in refining of crude oil. A combined reading of the description appearing against Heading 2503 and Tariff Item 25030010 indicates that if the variety of Sulphur is other than sublimed, precipitated and colloidal, the same would be Sulphur obtained as a by-product in crude oil refinery. In the present case the Chemical Examiner had certified that the sample is other than insoluble, sublimed, precipitated and colloidal Sulphur, which necessarily implies that it is obtained in crude oil refining process.

(x) The Chapter Note 1 to the Chapter 25 of the Customs Tariff also indicates that the headings of this Chapter only cover products which are in crude state. This chapter note when read with the description appearing against Tariff Item 25030010 clearly implies that the Sulphur recovered as by-product during crude oil refining is nothing but "Crude Sulphur". In the present case the consignment of Sulphur originated in a Petroleum Refining operation which is seen from the Manufacturer's Certificate (issued by The Bahrain Petroleum Company) in respect of the subject consignment which

states that the consignment of Sulphur is a by-product of Oil and Gas Refinery process without any further process having been undertaken.

(xi) The website of Indian Oil (A State Owned Oil and Gas Corporation) at <https://www.iocl.com/Products/Sulphur.aspx> (in the specifications) states that the Sulphur obtained as a by-product in their various refineries is 99.9% pure. It is clear from this clarification issued by Indian Oil that the consignment imported by us which is certified to be 99.8% pure by the Chemical Examiner cannot be treated as refined Sulphur only on account of its purity since even 99.9% pure Sulphur can also be obtained as by-product in refining process and it may be appreciated that any Sulphur recovered as a by-product in refining of crude oil is also covered by CTH 2503.

DISCUSSION & FINDINGS:

3.1 I have carefully gone through the entire issue, Less Charge Demand Memo, relevant correspondence, submission made in defence as well as made during personal hearing.

3.2 Facts of this case are that the importer was granted above mentioned three Advance Authorisations, against export of Dimethyl Sulphate, for duty free import of raw material viz. Yellow Crude Sulphur in terms of norm prescribed under Standard Input Output Norms. They imported the subject consignment and sought clearances under Bill of Entry No. 3022386 dated 23.03.2011 declaring description of goods as Bright Yellow Crude Sulphur in Bulk and classifying it under Customs Tariff Item 25030010 of the Customs Tariff Act, 1975. The importer claimed exemption against the Advance Authorisations granted to them for import of raw material viz. Yellow Crude Sulphur under Notification No. 96/2009 dated 11.09.2009. The Chemical Examiner, Custom Laboratory, Customs House Kandla, reported that *imported goods were in the form of yellowish granules. It was sulphur. It was other than insoluble, precipitated, sublimed and colloidal Sulphur and its purity was 99.8%.* Considering the high purity of sulphur i.e. 99.8%, it has been disputed that the same cannot be Crude Sulphur and as the product is other than Crude Sulphur, it is not covered under the Advance Authorisations granted to the importer, therefore, exemption against the said advance authorisation (meant for Crude Sulphur) is not available to the goods imported by the importer. In view of the same, the Less Charge Demand Memo demanding customs duty amounting to Rs. 29,52,384/- has been issued. Thus, the issue in the instant proceeding is to decide the nature of the imported goods and eligibility of exemption against advance authorisation.

3.3 Opposing the allegations of the subject imported goods being other than Crude Sulphur, the importer have submitted various contentions in their defence, which can be categorized as under:

(a) Sample was drawn from Sulphur imported by some other party, therefore, the test report cannot be used to raise demand against them.

(b) The demand memo is based on test report and no other information or evidence has been supplied. The demand memo lacks details.

(c) The assessment order passed on Bill of Entry is appealable but no appeal has been filed by the Department.

(d) Percentage of purity is not a criteria to ascertain classification and to infer that imported Sulphur is refined and not crude.

(e) As per Chapter Note 2(a) of Chapter 25 of the Customs Tariff Act, 1975, the Chapter 25 does not cover sublimed Sulphur, precipitated sulphur and colloidal sulphur. Thus, all other kinds of Sulphur are covered under Chapter 25.

(f) The importer has submitted copies of redemption letters, issued by jurisdictional FTDO under the DGFT, in respect of subject Advance Authorizations and as per condition sheet of the Advance Authorizations, Yellow Crude Sulphur covered under ITCHS 25030010 can be imported against the said Advance Authorizations. The importer has contended that the Less Charge Demand Memo does not propose change in classification so duty cannot be demanded without proposing change in classification.

(g) Since the duty free raw materials have been utilized in manufacturing of the product which have been exported and the DGFT has issued the Redemption letter of all clearances, exemption cannot be denied.

(h) Vide letter F. No. 75-Exo/C-27/2008-09 dated 14.09.2009, the Director (Revenue Laboratories), New Delhi has clarified, "*Whether Sulphur is Crude or Refined Sulphur cannot be ascertained by Chemical test in light of Chapter Notes to Ch. Subheading 25.03 of HSN. It is the method of manufacturing and source of origin which is the criteria to decide whether Crude or otherwise.*"

3.4 In respect of contention of the importer that the demand is based on test report pertaining to goods imported by M/s Industrial Solvent and Chemicals Private Limited and not from impugned goods, I find that a consignment of 3500 MTs of Sulphur in Bulk was loaded from KBSP Bahrain, under Bills of Lading No. 8 to 14 all dated 10.12.2010. The entire cargo was supplied in bulk by M/s Emirates Trading Agency (LLC) Dubai in vessel MV Fairwind, which included the 1468.50 MTs, imported by the importer under Bill of Lading No. 8 dated 10.12.2010. The entire consignment of 3500MTs was in bulk and supplied by the same supplier and imported in same vessel. At the time of import one representative sample was drawn and sent for testing. As the entire cargo was in bulk and was same for different importers, the test result, covers whole of the cargo. Therefore, the subject test report also covers that part of the consignment which pertains to the importer. In view of these facts, I do not find force in this contention of the importer.

3.5 The importer has also contended that the demand memo is based on test report. No information/ evidence has been supplied to them. The demand memo lacks details. I find that details of duty calculation and copy of the test report desired by the importer were supplied to them. Thus, all details and documents necessary for effective defence have been supplied to the importer and thus, the subject contention of the importer is not correct.

3.6 The importer has also contended that the assessment order passed on Bill of Entry is appealable and no demand can be raised without filing an appeal. They have placed reliance on following case laws: Priya Blue Inds. Ltd. Vs Commissioner of Customs (Prev) reported in 2004 (172) ELT 145 (SC), Karan Associates 2009 (236) ELT 23 (Bom.), Ashoosons 2009 (239) ELT 107 (Tri. - Del.), Max India Limited 2005 (192) ELT 246 (Tri.- Del.) and Midland Plastics Ltd. 2002 (141) ELT 235 (Tri.- Del.). I find that the cited judgments in the matters of Priya Blue Inds. Ltd. [2004 (172) ELT 145 (SC)] and Karan Associates 2009 (236) ELT 23 (Bom.) pertains to matters relating to refunds and not to the demands under Section 28, therefore, I do not find those judgments relevant to the issue in hand. In respect of the cited judgments in the matters of Max India Limited [2005 (192) ELT 246 (Tri.- Del.)] and Midland Plastics Ltd. [2002 (141) ELT 235 (Tri.- Del.)] I find that it

has been held that assessment orders are appealable orders. In these two cases the issue before the Hon'ble tribunal was not relating to issue of demand under Section 28 after assessment of Bill of Entry.

I find that the subject issue was addressed by the Hon'ble Supreme Court of India in the matter of Union of India Vs. Jain Shudh Vanaspati Ltd., reported at 1996 (86) E.L.T. 460 (S.C.), wherein it was held by the Hon'ble Supreme Court:

"It is patent that a show cause notice under the provisions of Section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under Section 47 of the concerned goods. Further, Section 28 provides time limits for the issuance of the show cause notice thereunder commencing from the "relevant date"; "relevant date" is defined by sub-section (3) of Section 28 for the purpose of Section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under Section 47. The High Court was, therefore, in error in coming to the conclusion that no show cause notice under Section 28 could have been issued until and unless the order under Section 47 had been first revised under Section 130."

Therefore, I find that the contention of the importer that no demand notice can be issued without challenging the assessment order is not correct.

3.7 The importer has also contended that as per Chapter Note 2(a) of Chapter 25 of the Customs Tariff Act, 1975, the Chapter 25 does not cover sublimed Sulphur, precipitated sulphur and colloidal sulphur, which means, all other kinds of Sulphur are covered under Chapter 25. I have gone through the said Chapter Note which states:

"This Chapter does not cover:

(a) sublimed sulphur, precipitated sulphur and colloidal sulphur (heading 2802);"

As per the above chapter note, the Chapter 25 of the First Schedule of the Customs Tariff Act, 1975 does not cover sublimed sulphur, precipitated sulphur and colloidal sulphur. However, I find that it does not mean that all other kinds of sulphur are covered under Chapter 25. Therefore, I find that this contention of the importer is not correct.

3.8 The importer has submitted copies of redemption letters, issued by jurisdictional FTDO under the DGFT, in respect of subject Advance Authorizations. The importer has submitted that Advance Authorizations, were issued for duty free import of Yellow Crude Sulphur covered under ITCHS 25030010. They have further contended that as the Demand Memo does not propose change in classification, duty cannot be demanded. I have gone through the copies of the three Advance Authorizations. I find that as per condition sheets of the Advance Authorizations, Yellow Crude Sulphur covered under ITCHS 25030010 can be imported against the said Advance Authorizations. I find that contention of the importer is only partly true. In fact, classification alone is not the condition. The condition sheets of the Advance Authorizations also mention descriptions of input products, allowed to be imported under the authorizations. Therefore, even if description/nature of the imported goods differ from the goods covered under the Authorization, the exemption benefit cannot be granted.

3.9 The importer has also contended that since the duty free raw materials have been utilized in manufacturing of the product which have

been exported and the DGFT has issued the redemption letters of all clearances, exemption cannot be denied. I have gone through the copies of redemption letters submitted by the importer and I find that the importer has fulfilled their export obligation under the subject Authorizations. However, I find that the issue in hand is not related to non-fulfilment of export obligation.

3.10 The importer has contended that purity of Sulphur is not a criteria to infer as to whether it is refined or crude. The subject test report shows purity of Sulphur as 99.8% but does not give any finding as to whether the same is refined or crude. The importer has also submitted a copy of telex issued from F. No. 528/59/93-Cus (TU) by the STO Customs (TU), CBEC, New Delhi to the Collector of Customs (P) Ahmedabad and the Collector of Customs, Kandla. The copy submitted by the importer reads, "*In terms of Notification No. 32/90-Cus., Sulphur (Crude) is exempted from the levy of Customs Duty. Applicability of the aforesaid Notification to Sulphur obtained by Frasch process or as a by-product in petroleum refineries has been examined in consultation with Chief Chemist CRCL and it is clarified that these kinds of Sulphur would fall under the category of Sulphur (Crude) and would be entitled to the benefit available to Sulphur (Crude). Pending cases of assessment may be finalized accordingly.*" It has been contended by the importer that as the subject imported consignment has been obtained as a by-product from petroleum refinery, the consignment should be considered as Crude Sulphur. They have also contended that there is no law governing classification between CTH 2503 and 2802 on the basis of purity of Sulphur. Next contention is linked to this contention and so I find it proper to discuss their next contention, before going into merit of the same.

3.11 In the next contention, importer has referred letter F. No. 75-Exo/C-27/2008-09 dated 14th September 2009 issued by Director (Revenue Laboratories), New Delhi and addressed to the Assistant Commissioner of Customs (P), Alibag, which clarified that "*Whether Sulphur is Crude or Refined Sulphur cannot be ascertained by Chemical test in light of Chapter Notes to Ch. Subheading 25.03 of HSN. It is the method of manufacturing and source of origin which is the criteria to decide whether Crude or otherwise.*" In this present case, the Manufacturer's Certificate states that the consignment of Sulphur is by-product of oil and gas refining process. The manufacture has also mentioned the consignment in their certificate as 'Crude Sulphur'. I have gone through the copies of letter F. No. 75-Exo/C-27/2008-09 dated 14th September 2009 issued by Director (Revenue Laboratories), New Delhi and the manufacturer's certificate. I find that the Director (Revenue Laboratories) has clearly stated that it is the method of manufacturing and source of origin which is the criteria to decide whether a consignment of Sulphur is Crude or otherwise. It also supports the contention of the importer that purity of a consignment of Sulphur cannot be basis for ascertaining whether it is Crude or otherwise. In the instant case Customs duty has been demanded solely on the basis of purity of the import consignment. In view of these facts I find force in this contention of the importer.

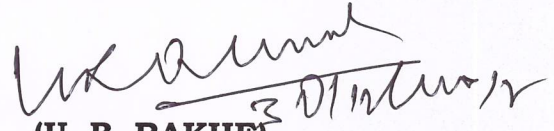
3.12 In the conclusion, I find that though some of the contentions of the importer are not tenable, as discussed above, but their contention that only on the basis of the purity of the imported Sulphur, it cannot be ascertained as to whether the imported consignment of Sulphur is crude or otherwise but in order to classify the Sulphur as crude or refined the process of manufacturing has to be seen. Further, I find that the importer has submitted prints obtained from various websites relating to research in the subject matter. These documents show existence of production of Crude Sulphur, having purity up to 99.9%. Since Customs duty has been demanded from them solely on the basis of high purity of the import

consignment of Sulphur, I find this contention as relevant to the issue in hand.

4. In view of the foregoing discussions, findings and respectable compliance of several case laws on the issue, I, accordingly, pass the following order:

:ORDER:

I hereby drop the proceeding initiated under Less Charge Demand Memo F. No. S/20-02/Misc./Gr.VII/2010-11 dated 21.07.2011.


(U. B. RAKHE)

ADDITIONAL COMMISSIONER

BY RPAD/SPEED POST TO:

M/s Aarti Industries Ltd.,
Plot No. 801/23, GIDC Estate,
Phase-III, Vapi,
Dist. Valsad- 396 195 (Gujarat).

COPY TO:

- 1) The Deputy/Assistant Commissioner (RRA), Customs House, Kandla.
- 2) The Deputy/Assistant Commissioner (Recovery Cell), Customs House, Kandla.
- 3) The Deputy/Assistant Commissioner (Gr. VII), Customs House, Kandla.
- 4) Guard File.