

**In The Customs, Excise & Service Tax Appellate Tribunal  
West Zonal Bench At Ahmedabad**

**Appeal No. C/214/2010-DB**

[Arising out of OIA-22/COMMR-A-/JMN/2010 dated 25.01.2010 passed by the Commissioner of  
CUSTOMS-JAMNAGAR (PREV)]

M/s Saurashtra Chemicals Ltd

Appellant

Vs

C.C.,- Jamnagar (Prev)

Respondent

**Represented by:**

For Appellant: Shri P. P. Jadeja (Consultant)

For Respondent: Shri A. Mishra (A.R.)

**CORAM:**

**HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)**

**HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

Date of Hearing: 04.09.2018

Date of Decision: 03.12.2018

**Final Order No. A / 12698 /2018**

***Per: Ramesh Nair***

1. Brief facts of the case are that the appellant had imported the consignment of 15115.723 M/T "Weak Coking Coal" falling under Customs Tariff Head, 2701.19 vide Bill of Entry No. F-200 dated. 09.02.1995 in the Bill of Entry they claimed Notification No. 19/1994-Cus dated 01.03.1994. The Bill of Entry was provisionally assessed after drawing the sample and exemption from CVD under Notification No.19/1994-Cus dated 01.03.1094 for want of chemical test result and original document and thereafter clearance was allowed on payment of concessional rate BVD at the rate of 5% ad-valorem. The CRCL, New Delhi, has sent test report, on examination of test result with reference to the description of the consignment declared in the import documents, the department has observed that the appellant had wrongly availed the benefits of concessional rate of duty under Notification No. 19/1994-Cus in as much as the exemption under subject Notification was specifically for the Coking Coal of Ash Content below 10.29%. Accordingly, the SCN

dated 15.05.1998 was issued to the appellant for recovery of differential Customs duty which was adjudicated Vide Order in Original wherein the differential Customs Duty was confirmed. Being aggrieved by the said Order in Original, the appellant filed appeal before Commissioner (Appeals) which came to be rejected, therefore, the present appeal.

2. Shri. P. P. Jadeja, Ld. Consultant appearing on behalf of the appellant submits that the appellant had entered into the agreement dated 27.12.1994 for import of 15.00 MT "Weak Coking Coal" with detailed specification and pre-shipment examination by independent Surveyors SGS with internationally credible and to import carried out pre-shipment inspections/analysis. As per the specification communicated by supplier to the appellant the goods description is Weak Coking Coal of ash Content 10 % maximum. He submits that as per Certificate of sampling and analysis issued by the Independent Agency in Indonesia, the description of goods was mentioned as Weak Coking Coal. As per said Certificate the ash content is 7.94%. He submits that it is not the case that the appellant have miss-declared the description of goods as Weak Coking Coal but they have entered into the agreement for import of Weak Coking Coal, the entire import documents also show the supply of Weak Coking Coal. Accordingly, appellant in the Bill of Entry declared the goods as Weak Coking Coal and claimed the concessional rate of duty under Notification No. 19/1994-Cus. He submits that even though the test report of CRCL, New Delhi, also shows that Ash Content is 10.29% even i.e. taken correct it is well below the limit of 12%. He further submits that the categories of coal are evidenced by the Gradation of Coal and Coke issued by Ministry of Coal, Government of India. Such semi and weakly coking coals are

categorized in two grades i.e. Semi-Coking Coal Grade I and Semi-Coking coal Grade II. Semi coking Grade I is such Coking coal which has Ash plus moisture content not exceeding 10% whereas Semi-coking coal Grade II is such Coking coal which has Ash plus moisture content exceeding 19%, but not exceeding 24%. Appellant submits that as shown in Test Report No. 65-cus/97 dated 20.06.1997, the said Goods has Ash content 10.29% and moisture content of 8.30% totalling to 18.59%. It is therefore evident that the imported Coal in fact is semi-coking/weak coking coal of the grade Semi-coking coal grade-I as classified by Govt. of India [Ministry of Coal].

3. He further submits that the sample is required to be drawn in accordance with IS:436, however as regard test report No. 65-cus/97 dated 20.06.1997 of CRCL, New Delhi, there is nothing in record to show that the sample was drawn in accordance with IS:436. On the contrary the Load Port Certificate shows that samples were analyzed as per BS 1016 Standards which is one of the credible and world wide recognized methods for testing the coal samples. This shows that the analysis of imported goods done by the department was not in accordance with Section 18 of the Customs Act, 1962. In this regard, he placed reliance on the Supreme Court Judgment in the case of TATA Chemicals Limited Vs. C.C., (Preventive), Jamnagar-2015 (320) E.L.T. 45 (S.C) wherein it was held that if the samples drawn are not in accordance with Law and drawn with no regard whatsoever to IS: 436. That IS: 436 would apply but if the methods of testing of any items of the Central Excise Tariff are not mentioned that Indian Standard Institution Method should be apply. That these would apply to Customs Act, as well. He submits that OIO denied exemption on the ground that Chemical Examiner's Test Report shows goods as "Coal having ash

content 10.29 %”, whereas exemption is available to “Coking Coal having Ash content less than 12 %. The OIA is on the basis that imported coal is not used for manufacture of “Coke” in Materlogical Industry; therefore, it is not coking coal. He submits that expression “Coking Coal” used in exemption Notification No. 19/1994-Cus is a genus and would cover within its ambit different species thereof such as prime/hard coking coal, semi-hard coking coal, medium coking coal, soft coking coal, semi-soft coking coal, weak coking coal etc. He placed reliance on the Ministry of Coal Notification defining Coals other than coking or semi-coking or weakly coking coals as non-coking coals. The coal Directory of India also contains the very same definitions of semi coking and weakly Coking Coal. He submits that exemption to coking coal would apply to all species of “Coking Coal” and not to coking coal which is actually used in coke making as held in OIA. He rely on the Hon’ble Apex Court judgment in the case of Gujarat State Fertilizer Co. Vs. CCE 1997 (91) ELT 3 (SC) wherein it was held that exemption granted to fertilizer, the expression fertilizer is genus that consist of various species of fertilizer such as chemical fertilizer, soil fertilizer, animal or vegetable fertilizer and that the exemption could not be limited only to soil fertilizer. The ratio laid down by Apex Court squarely applies in facts of this case. He also refer to Indian Standard: 770-1977 for classification and codification of Indian Coals and lignites lays down the tests and parameters for making classification more precise for discriminatory between caking/coking coals and non-caking coals.

4. He submits that the order in appeal has travelled beyond the SCN dated 15.05.1998 inasmuch as on that basis the imported coal is not used for manufacture of coke or used for materlogical industry, therefore, it is not weak coking coal. He submits that the SCN has not

raised the issue of "end use" of imported goods, the SCN solely relies on report of chemical analysis stating that it is coal with Ash content below 12%, whereas exemption is to coking coal with Ash content below 12%, therefore, the OIA based on end use is beyond the scope of the SCN issued. He submits that as per the developing technology in 1995, weak coking coal is used for generation of energy in co-generation power plant. The appellant also used the said goods for generation of energy. Without prejudice to the above submission, he submits that for imported goods cleared in 1995, the SCN was issued only on 15.05.1998 which is beyond 6 months, hence it is time barred. In support of his submission he places reliance on the following judgments:

- Sterlite Industries Ltd. 2008 (223) ELT 633 (Tri.Chennai)
- Radiant cables Pvt. Ltd 2017 (348) ELT 558 (Tri.Hyd)
- Kamdar associates 2016 (339) ELT 158 (Tri.Ahmd.)
- Bhagyanagar Metals Ltd 2016 (333) ELT 395 (Tri.LB)
- Reliance Industries Ltd 2015 (326) ELT 664 (Guj.)
- Sterlite Industries (India) Ltd. 2014 (311) ELT 91 (Tri.Chennai)
- Gwalior Alcobrew Pvt. Ltd 2014 (309) ELT 692 (Tri.Del)
- Goyal Traders 2014 ((302) ELT 529 (Guj.)
- Raj Petroleum Products Ltd 2013 (292) ELT 125 (Tri.Mum)
- Ricoh India Ltd 2009 (247) ELT 433 (Tri.Mum)
- Sah Petroleums Ltd 2009 (246) ELT 716 (Tri.Mum)

5. Sh. A. Mishra, Ld. Deputy Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order. He further submits that as per the test report No.65-Cus/97 dated 20.06.1997 of CRCL, New Delhi, it is clear that the goods imported is coal and not weak coking coal, therefore, the benefit of exemption was rightly denied to the appellant.

6. We have carefully considered the submissions made by both the sides and perused the records. We find that the whole issue to resolve is whether the goods imported by the appellant is weak coking coal having Ash content below 12% and consequently eligible for exemption notification 19/94-cus dated 01.03.1994, which is reproduced below:

**Effective rates for certain specified goods falling within Chapter 27**

*In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in column (3) of the Table hereto annexed and falling under the heading No. or sub-heading No. of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), specified in column (2) of the said Table, when imported into India, from so much of that portion of the duty of customs leviable thereon which is specified in the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table.*

**TABLE**

<b>S. No.</b>	<b>Heading No./sub-heading No.</b>	<b>Description of goods</b>	<b>Rate of duty</b>
<b>(1)</b>	<b>(2)</b>	<b>(3)</b>	<b>(4)</b>
<b>1.</b>	<b>27.01</b>	<b>Coking coal of ash content below 12%</b>	<b>5% ad valorem</b>
2.	27.01	All goods, other than those specified in S. No. 1 above	35% ad valorem
3.	27.02, 27.03	All goods	35% ad valorem
4.	27.04	All goods	25% ad valorem
5.	27.05, 27.06, 27.07, 27.08	All goods	30% ad valorem
6.	27.09	All goods	35% ad valorem
7.	27.10	Kerosene	Nil
8.	27.10	Naphtha	Nil
9.	27.10	All goods, other than Kerosene and Naphtha	30% ad valorem
10.	27.11	All goods	15% ad valorem
11.	27.12, 27.13, 27.14, 27.15	All goods	30% ad valorem

**Explanation** - For the purpose of this notification, -

1. "Kerosene" means any hydrocarbon oil (excluding mineral colza oil and white spirit) which has a smoke point of eighteen millimetres or more and is ordinarily used as an illuminant in oil burning lamps.

2. "Smoke point" shall be determined in the apparatus known as the smoke point lamp in the manner indicated in the Indian

*Standard Institution specification ISI: 1448 (P. 31) - 1968 as in force for the time being.*

From the above notification, at Serial No. 1 exemption is provided to coking coal of ash content below 12%. Accordingly, the coal imported by the appellant should confirm that the coking coal of ash content should be below 12%. The Revenue has decided the matter solely on the basis of CRCL, New Delhi test report No. 65-Cus/97 dated 20.06.1997. The said test report scanned below:

भारत सरकार  
 वित्त मंत्रालय  
 (राजस्व विभाग)  
 केंद्रीय राजस्व नियंत्रण प्रयोगशाला  
 हिल साईड रोड, पूसा, नई दिल्ली-११० ०१२

Telephone : 741495, 5781491  
 5787027 & 5727926  
 Fax : 91-11-5741495

GOVERNMENT OF INDIA  
 MINISTRY OF FINANCE  
 (Department of Revenue)  
 CENTRAL REVENUES CONTROL LABORATORY  
 Hill Side Road, Pusa, New Delhi-110012

प्रम सं  
 C.No. 65-Cus/97

106  
 14.2.97

दिनांक  
 Dated: Thu 20th June, 1997.

From  
 The Chief Chemist,  
 Central Revenues.

To  
 The Superintendent of Customs,  
 Custom House, Port Area,  
 Forbandar - 560575.

Sir,

Sub. :- Customs: Forwarding of samples of Weak Coking Coal  
 for testing purpose.

Please refer to your letter F.No. VIII/26-1/94 dated 20.2.95  
 on the above subject.

The sample received under the cover of your above mentioned  
 letter was registered here vide Lab. No. CLR/SC-149/530 A dated 2.2.95  
 and analysed with the following results.

The sample received is in the form of black coloured lumps  
 of irregular shape and size. It is coal. Ash content, moisture content  
 and volatile matter determined on the sample is as under :-

Ash Content	= 10.29% by wt.
Moisture Content	= 6.30% by wt.
Volatile Matter	= 36.09% by wt.

No specification for weak coking coal with respect to its  
 Physico-Chemical properties are available in the technical literature.

Sealed remnant of the sample is returned to you separately.

Yours faithfully  
 Dr. B. S. SINGH  
 Chief Chemist Central Revenues

(H.R.)  
 Dr. S. S. SINGH  
 put up assessment  
 15/7/97

From the above report it is observed that there is no dispute that the sample is of coal in which ash content is 10.29%. In the bottom of the report it is mentioned as, no specification for weak coking coal with respect to its physico-chemical properties are available in the technical

literature. However in the chemical analysis result, it does not show that whether it is weak coking coal or otherwise. Therefore, the test report 65-Cus/97 only confirms that the sample is of coal and Ash content is 10.29%. There is no dispute that the weak coking coal is also specie of coal ash content being 10.29% is well within the parameter prescribed in the entry Serial No of the notification i.e. below 12%. It can be seen that as per above report the remark of the chemical examiner regarding not mention of specification of weak coking coal is with reference to technical literature, it is nothing to do with actual analysis of coal conducted by the chemical examiner. Therefore, the report does not confirm that the goods imported by the appellant is not weak coking coal, therefore, only on the basis of the test report it cannot be concluded that the coal imported by the appellant is not weak coking coal. The department has nothing on record except aforesaid report to conclude that the coal imported by the appellant is not weak coking coal. Therefore, as regard the contention of the department that the coal imported by the appellant is not weak coking coal as per the test report is not correct, as the reports does not specifically gives the result that the coal is weak coking coal or otherwise. On the contrary, as per the certificate of Samples analyzed at the time of boarding of coal from the exporting country i.e. Indonesia. The certificate clearly mentioned that the Ash content is 7.94%. The said certificate is scanned below:

LTD 2212219 T-951 P.13

## PT. SUPERINTENDING COMPANY OF INDONESIA

INDEPENDENCE OF  
SECRIETE GENERALE DE SURVEILLANCE S.A. GENEVA

### CERTIFICATE OF

SAMPLING AND ANALYSIS No. 175962B

**HEAD OFFICE:**  
ELCOHOO CENTER  
JL. RAYA PASIR MUDU RAY 34  
JAKARTA 10734  
P.O. BOX: 1377JAKARTA 10001  
PHONE: 1011 11111  
FAX: 1011 11111

**BRANCH OFFICE:** TELKOM BENGKULU  
TEL: 081 501 1001  
BRANCH OFFICE/AGENTS  
IN ALL MAIN PORTS OF INDONESIA

**DESCRIPTION OF GOOD:** 15,286.937 MT Of Weak Coking Coal  
**SHIPPER:** P.T. Kiliran Pradana Ripper  
Jl. Rafflesia no 79 - Bengkulu  
**VESSEL:** MV "CHEUNG SUN"  
**PORT OF LOADING:** Pulau Saai, Bengkulu  
Berkelau - India.

**THIS IS TO CERTIFY,** that upon request of shippers, we proceeded to the following location for the purpose of conducting sampling for quality analysis and particle size test of the above consignment.

**DATE AND PLACE OF INTERVENTION:** On January 30 to February 02, 1995, Hooper conveyor, Pulau Saai, Bengkulu.

**LOADING:**  
Vessel arrived: January 28, 1995 at 09.30 hrs  
Vessel berthed: January 30, 1995 at 08.00 hrs  
Commenced loading: January 30, 1995 at 09.40 hrs  
Completed loading: February 02, 1995 at 12.44 hrs  
Loading system: From stockpile into ship's hold by dumptruck and conveyor  
Weather conditions: steady intermediate rain  
Loading materials: loader, dumptruck and conveyor

**SAMPLING:**  
During loading operation sample were drawn by standard sampler no 1017 from stockpile as follows:  
Number of samples: 1733  
Average weight each increment: 3. kilogram approx  
Total gross sample: 733 kilogram  
Sample interval: 62.39 M/Tons

After air dried all sub sample were crushed pass to 10 mm sieve, well mixed reduced and placed insuitable containers.  
A separate sample for total moisture determination was also placed in air tight containers.

**SIZE ANALYSIS:**

0 . 5 mm	20.01 %
5 . 50 mm	78.83 %
50 mm above	3.16 %

.....2/

\*All inspections are carried out in the best of our knowledge and ability and to the extent our procedure and methods permit. We do not assume any liability for the accuracy of the results of our tests and our analyses.

Form: JKU/1

SENT BY: PT TELKOM BENGKULU



prescribe any "end use" condition, the finding of the Ld. Commissioner (Appeals) that the exemption should be based on "end use" of the imported coal is absurd and without authority of law. Though the appellant's product is weak coking coal and exemption is granted for coking coal. This does not make any difference for the reason that coking is a genus term in which all type of coking coal covered such as prime/hard coking coal, semi-hard coking coal, medium coking coal, soft coking coal, semi-soft coking coal, weak coking coal etc. the only criteria is that Ash content should be less than 12% which is not under dispute even as per the report of CRCL, New Delhi, therefore, the appellant is eligible for exemption notification 19/94-Cus. This identical issue has been considered in the case of Adani Export Ltd Vs. CC, Jamnagar 2010 (249) ELT 93 (Tri.Ahmd.), wherein the following judgment has been passed:

*"Both the appeals are being disposed off by a common order as the same arise out of the same set of facts and circumstances. Appeal No.45/05 is against the order vide which the benefit of Notification No.11/97-Cus dated 01.3.97 stands denied to the appellant in respect of the Weak Coking Coal imported by them and appeal No.C/1206/05 is against the order confirming the demand of duty, as a consequence of passing of the first order.*

*2. As per facts on record appellant imported Weak Coking Coal and filed a bill of entry on 04.04.97, declaring the Ash Content of the coal less than 12% and under the claim of benefit of concessional rate of duty in terms of Notification No.11/97-Cus. The said notification granted concessional rate of duty, if the Ash Content in the coal is less than 12%.*

*3. It is seen that at the time of filing of bill of entry, the appellant produced certificate of quality issued by the supplier of the goods at Indonesia and produced by them at the Load Port, certifying the Ash Contents in the coal to be 9.98% (Air Dried) in accordance with ASTM capital method. At the Discharge Port, samples were again drawn for every 2000 Metric tones of the said goods discharged by M/s. SGS India Ltd., who also conducted the tests and vide their test report dated 25.04.97 have certified the Ash Content as 10.20% (Air Dried).*

*4. The bills of entries so filed by the assessee were assessed provisionally. The Customs House at the Discharge Port drew samples and sent the same to the Customs House Laboratory, Kandla. The test report of the said laboratory showed the Ash Contents as being 14.4%. As the said laboratory suggested that samples be tested by Central Fuel Research Institute, Dhanbad, the same were sent to the said laboratory who by their test report dated 13.7.98 reported the Ash Contents to the tune of 13.2%. Based upon the result of the above two test reports conducted by*

Customs House Laboratory, Kandla and Central Fuel Research Institute, Dhanbad, showing the Ash Contents to be more than 12%, the benefit of Notification No.11/97-Cus dated 01.3.97 stands denied to the appellant, with the resultant confirmation of demand of duty to the extent of Rs.24,97,477/-(Rupees twenty four lakh ninety seven thousand four hundred and seventy seven only).

5. Arguing on the appeals, learned advocate, Shri Naresh Thacker has submitted that the samples were drawn from the imported consignment of Week Coking Coal after a period of twenty one days. They were however not immediately sent to the Customs House for testing. The said samples were kept in the custody of the department for three months and were ultimately sent on 08.09.1997. According to him such delay in getting the samples tested immediately, inspite of having drawn the samples, has resulted in unbalanced results, showing the Ash Contents to the tune of 15.9%, as against the Ash Contents being below 12% in the Load Port certificate of quality as also in the test report of M/s. SGS India Ltd. He further submits that the same samples were subsequently sent to Dhanbad after a further gap of one year and as per the report of the Central Fuel Research Institute, Dhanbad, Ash Contents were found to be 13.2%. By submitting that even the two test reports relied upon by the Revenue showed different Ash Contents, this fact itself reveals that the passage of time has the effect on the Ash Contents of the coal and as such the said reports cannot be relied upon.

6. He has further submitted that the cross examination of the inspector, who drew the samples reveals that the samples were not drawn in accordance with the prescribed standards, as he was not aware of the sampling methods prescribed under the relevant standards. In the cross examination of chemical examiner conducted before the adjudicating authority, he has accepted that the test results would vary depending upon the sampling process, the sample itself and the test method adopted by the testing agencies. As such he submits that the inconsistency in the Ash Contents is on account of inaccuracy in the sampling method as also on the basis of time gap and as such the said sample results cannot be relied upon.

7. He has further submitted that the two testing reports produced by the appellant conclusively established that the Ash Content in the said goods is below 12%. On the other hand the two reports produced by the Revenue are contrary to each other in as much as in the Customs House Laboratory, Kandla test report the Ash Contents has been shown as 15.9%, whereas the Dhanbad Laboratory has shown the same to be 13.2%. As such the decreased Ash Contents as shown by Central Fuel Research Institute, Dhanbad, as compared to the Ash Contents shown by Kandla Laboratory lead to only one fact that the said two reports are not reliable and should not be made the basis for confirmation of demand against them. He has also relied upon various Tribunal decisions to support his above pleas.

8. Countering the arguments learned SDR, Shri Rajendra Nagar, draws our attention to the impugned orders and submits that the authorities below have correctly relied upon the report of the Chief Chemist of Customs House Laboratory as also the Central Fuel Research Institutes report. The cross examination conducted by the appellant has nowhere established that the said reports were not correct. To challenge the said reports based upon the method of drawing of samples or on the basis of the time gap is not appropriate. He further submits that in as much as Ash Content was one of the conditions of the notifications for extending concessional rate of duty and the said condition having not been fulfilled by the importer, the benefit of the same has been rightly denied by the authorities below.

9. After carefully considering the submissions made by both the sides and after having gone through the impugned order and the other documentary evidences, we find that the dispute required to be resolved in the present appeal is as regards the Ash Contents contained in the Week Coking Coal imported by the appellant. Undisputedly, the certificate of quality procured at the Load Port disclosed the Ash Content on air dried basis as 9.98%. In the same report total moisture on as received basis is 13.56% and inherent moisture, (Air Dried) was 7.44%. The said certificate also certified that the sample was analyzed in accordance with ASTM method. Further, at the Discharge Port at Okha, samples were drawn for every 2000 Metric tones of the said goods discharged by M/s. SGS India Ltd. which showed the date of attendance as 07.04.1997 to 16.04.1997. It also revealed the method of drawing of samples. The chemical analysis of the same on air dried basis showed the inherent moisture as 6.26% and Ash to the extent of 10.20%.

The above two test reports are showing the Ash Contents to be less than 12% and thus are in favour of the assessee.

10. It is seen that Revenue drew the sample on 25.4.1997 and the same was sent to Chemical Examiner, Customs House Laboratory, Kandla by the Superintendent under the coverage of letter dated 08.09.97. As rightly pointed out by the learned advocate though the samples were drawn in the month of April 1997, the same were sent for testing purposes in September 1997. There is no explanation coming from the Revenue as to why the samples were kept in the custody of the Revenue for a period of around four months. We further note that while sending the said samples to the chemical examiner the same were described as "Low Ash Coking Coal" whereas the goods imported by the appellant were Week Coking Coal. The report of the chemical examiner sent on 30.09.97 is as under:

"Report

The sample is coal in the form of black coloured coarse powder. Ash.(ADB)15.9% whether it is Low Ash Coking Coal could not be ascertained here. The duplicate sample may be forwarded to Central Fuel Research Institute, Dhanbad".

As is clear from above report a suggestion was made to send the sample for further testing to Central Fuel Research Institute. Accordingly, the sample was sent and a report was received from the said institute on 13.7.1998 i.e. almost after 10 months from the report of the chemical examiner. As per the said report moisture on air dried basis was to the extent of 9.5% and Ash on air dried basis was to the tune of 13.2%. It was disclosed in the said report that "sampling not done by CFRI". Further, the said report carried remark to the effect that "the quantity of the sample is not representative as per IS:436 (Part-1/ Sec-I) -1964 (Part-II)-1981."

11. The above two reports are the basis for denial of exemption notification to the appellant. As such the sole question is as to whether the said two test reports can be held to be reliable and more effective than the two certificates of Load Port and M/s. SGS India Lit., which are in favour of the assessee.

12. Learned advocate has drawn our attention to the various discrepancies so as to submit that the said two reports do not reflect the correct position. Apart from the fact that the sample was kept by the Revenue with them for a period of four months before sending the same to the Chief Chemical Examiner without any explanation, we find that even a comparison of the two test reports, one conducted by the Customs House Laboratory, Kandla and the other by CFRI are showing varying results. Whereas the chemical examiners report showed the Ash Contents to be 15.9%,

the same were reflected as 13.2% by CFRI. The difference between the two reports is to the extent of 2.7% whereas the Ash Contents, according to CFRI report are in excess of 1.2% only than the requisite as Ash Contents of 12%. The result of the two test reports conducted by the Revenue itself shows that the Ash Contents vary depending upon various factors, the most effective being the moisture factor as also the method of sampling etc.. The CFRI report clearly mentions that the quantity of the sample was not representative as per IS standards. There is also nothing on record to show that the samples were drawn in accordance with the IS standards.

13. We also note that the sample was described as Low Ash Coking Coal in the Revenues letter dated 08.09.97, while sending the same to chemical examiner whereas the goods imported by the appellant are Week Coking Coal. During the course of cross examination of the chemical examiner conducted before the adjudicating authority, it was clarified by him that the word Week in Week Coking Coal pertains to coking properties of the Coking Coal whereas the word Low Ash in Low Ash Coking Coal pertains to Ash Contents. The two products could be same or otherwise depending on their parameters. He also clarified that there are many methods like ISI, ASTM etc. available for testing and a small variation is always possible in the results due to the person testing the sample, laboratory situation, instructions, variations etc.. He also accepted that the test results will depend on whether the sampling was proper and homogenous. In cases like Blended Thermal Coals such variations have been observed. He accepted that if sampling has not been done properly there is a likelihood of there being a difference in test results.

As is clear from above depositions made by the chemical examiner the variation in Ash Contents would depend upon the method used and most importantly the drawing of sample. As we are all aware coal is in the form of huge and small lumps as also in powder form. The drawing of samples of coal is required to be done in accordance with IS:436. There is nothing on record to show that the sample was drawn in accordance with IS:436. On the other hand the test report of CFRI shows that the quantity of the sample was not representative as per IS:436. In such a situation, can it be said that the samples were drawn in accordance with the law and the test was done accordingly. In fact we note that ISI prescribes standards for testing coal for its Ash Contents in IS:1350. Neither the report of the chemical examiner nor CFRI states that the said method of testing as prescribed in IS:1350 was adopted by them. On the other hand we have the Load Port certificate, certificating that samples were analyzed in accordance with ASTM method. Chemical examiner in his cross examination has accepted that ASTM method is one of the recognized methods for testing the samples. The cross examination of the inspector conducted during the course of adjudication also revealed that the sampling was not done in accordance with the ISI standards.

14. The appellants vide their letter dated 18.09.98 submitted that the test reports at the Load Port as also at the Discharge Port has been done by the internationally renowned testing organizations which are acceptable through out the world and according to the said reports the Ash Contents are much below 12%. They accordingly requested the department for getting the retest of the samples done at independent laboratories which are of repute and recognized by the government. They also referred to two such laboratories. The Superintendents letter dated 10.3.99 informed the appellant that such request has not been exceeded to by the Assistant Commissioner. However, no reasons were given as to why retest was not possible.

15. The Tribunal in the case of Sandur Manganese & Iron Ores Ltd. Vs. Commissioner of Cus., Goa reported in 2007 (218)

*ELT 291 (Tri. Mumbai) has observed that drawing of samples according to the ISI method was very essential and in the absence of establishment that these procedures are followed the report of the laboratory cannot be accepted. Similarly in the case of Bombay Oil Industries Pvt. Ltd. Vs. Union of India reported in 1995 (77) ELT 32 (S.C.) it was observed that method of testing as laid down by ISI is required to be followed. In the case UK Paints Industries Vs. Collector of Customs, Bombay reported in 1994 (74) ELT 392 (Tribunal) it was observed that whenever method of testing is relevant, the method adopted are to be mentioned in the test reports in the case of Commissioner of Customs, Ahmedabad Vs. Rajkot Engineering Association reported in 2000 (123) ELT 968 (Tribunal) it was observed that as the test result of National Testing House, Alipur was not made as per specified standards and sending of sample was not proper, the same cannot be held to be acceptable. Similarly, variance in the test results obtained from the chemical examiner and Chief Chemist were not appreciated by the Tribunal in the case of Commissioner of Central Excise, Madurai Vs. Ponjestly Filament (P) Ltd. reported in 2003 (154) ELT 629 (Tri. Chennai) and the test result of IIT New Delhi which was in terms of ISI standard and was got conducted by the assessee was held to be examined by the lower authorities.*

16. *As we have already observed that the drawing of the samples in accordance with the ISI and testing of the same in accordance with such standards is not forthcoming from the records. Even the two test reports which got conducted by the Revenue are at variance with each other. The remark of Dhanbad Laboratory showing that the sample was not representative as per ISI standards, further places the said report under doubt. The infirmities in the two said reports do not prompt us to place reliance upon the same and to hold that they reflect the correct Ash Contents.*

17. *We would also like to discuss here the Tribunals judgment in the case of Commissioner of Customs, Ahmedabad Vs. TATA Chemicals Ltd. reported in 2004 (177) ELT 1038 (Tri. Mumbai), strongly relied upon by the learned DR. We have gone through the entire judgment very carefully. In para 8 of the said judgment, it stands observed by the Tribunal that the respondents (as it was Revenues appeal) failed to produce any other report except the one given by foreign surveyors to disapprove the results communicated by the department. In the present case we find that apart from the Load Port report there is GGS report also in favour of the assessee. Further, in para 18 it was observed that the method adopted for testing was gross air dried method which was adopted at the Load Port as also at the Port of Discharge and was universally recognized method of testing the Ash Content. In the present case though the two reports show the testing as air dried and there is nothing to show that the same was gross air dried method. Further, in para 22 of their judgment, it stands accepted that the test itself was conducted in accordance with the procedure laid down in IS:1350 whereas in the present case there is nothing to show that the correct procedure as laid down in IS:1350 was followed. In fact in para 23 the Tribunal has observed by taking note of the earlier decision of the Tribunal in the case of Rajkot Engineering Association that where the samples were not tested as per specified standards the test reports cannot be accepted. As such they did not follow the Tribunals decision in the case of Rajkot Engineering Association as the samples were admittedly tested with the procedure laid down in IS:1350. The Tribunals judgment in the case of TATA Chemicals Ltd. is not on any legal issue but is based upon the appreciation of facts and evidences in that particular case. Having already examined that the evidences which weighed with the Tribunal to come to a conclusion in favour of the Revenue, are not available in the present case. In fact there are so many infirmities (long time gaps between drawl of samples and testing and retesting of the same,*

*non observance of IS procedure for drawing of samples, no indication showing ISI adoption of testing methods etc. and contradictions in the two reports) and the availability of favourable report, which lead us to discard the chemical examiners and CFRI report relied upon by the authorities below. In view of the above, we set aside the impugned orders and allow both the appeals with consequential relief to the appellant.*

From the above judgment, it is observed that the appellant's case is on much better footing inasmuch as the Ash content in Adani's case as per the chemical examiner report was 13.2%, whereas in the present case even as per CRCL, New Delhi report the Ash content admittedly is 10.29%. The above judgment of Adani Exports was taken by the Revenue to the Hon'ble Gujarat High Court by way of Tax Appeal No. 141 of 2010 which was dismissed by reporting as, CC Preventive Vs. Adani Exports Ltd, 2013 (295) ELT 678 (Guj.). In case of JSW Steel Ltd Vs. CC, C.EX. & ST, Goa 2016 (343) ELT 717 (Tri.Bom), the coordinate Bench of Tribunal categorically held that no "end use" conditions are provided in the notification, therefore, the usage cannot be determining factor. In view of these judgments, the finding of the Commissioner (Appeals) regarding "end use" is incorrect and not acceptable. We also gone through the judgment of Hon'ble Supreme Court in the case of Gujarat State Fertilizer Co. (Supra) wherein the Apex Court held that the fertilizer is of genus which may consist of various species of fertilizer namely, chemical fertilizer, soil fertilizer, animal or vegetable fertilizer as seen from description of various type of fertilizer found in chapter 31 of Central Excise Tariff Act, 1985 it was held that interpretation of expression under the Notification has to be given its due effect. Applying the ratio of above judgments in the present case, exemption is provided to weak coking coal which is genus of all coking such as prime/hard coking coal, semi-hard coking coal, medium coking coal, soft coking coal, semi-soft coking coal, weak coking coal etc. therefore, merely because the chemical examiner does not mention in the test result that

whether it is a weak coking coal or otherwise, the exemption cannot be denied particularly when all other documents clearly establish that the coal imported by the appellant is weak coking coal of Ash content below 12%.

7. As per our above discussion, we hold that the coal imported by the appellant is weak coking coal having Ash content below 12%, accordingly, the appellant is eligible for exemption Notification No. 19/94-cus, hence the demand is not sustainable. The impugned order is set aside and appeal is allowed, with consequential relief.

*(Pronounce in the open court on 03.12.2018)*

**(Raju)**  
**Member (Technical)**

**(Ramesh Nair)**  
**Member (Judicial)**

Seema