2014 (3) ECS (192) (Tri - Bang.)

In The Customs, Excise & Service Tax Appellate Tribunal South Zonal Bench, Bangalore

M/S. COASTAL ENERGY PVT. LTD.

Vs.

C.C.E & S.T, GUNTUR

Date of Hearing: 06/06/2014
Date of Decision: 20/06/2014

Appeals involved: C/21178/2014; C/21255/2014; C/21257/2014; C/20700/2014; C/21458/2014
[Arising out of the Orders-in-Original Nos. 43/2013-Customs dated 26.12.2013; 41/2013 (BVNK) dated 19.12.2013; 01/2014 dated 27.01.2014; 5/2013-Commr dated 25.10.2013 and 09/2014-Customs dated 31.1.2014, passed by Commissioner of Central Excise, Customs & Service Tax, Guntur / Visakhapatnam / Mangalore]

Appearance:
Shri V. Sridharan, Sr. Counsel
Shri G. Shivadass, Advocate
Shri G. Raghuraman, Advocate
Shri B.V. Kumar, Advocate — For the Appellant
Shri PRV Ramanan — For the Respondent

CORAM:

Hon'ble Shri B.S.V.Murthy, Technical Member
Hon'ble Shri S.K. Mohanty, Judicial Member

Final Order Nos. 20998 - 21002/2014

"Once the Department depending upon the definition and specifications comes to the conclusion that the product is bituminous coal and it fulfills the definition given therein and in view of the settled law that when there is a specific definition available in the tariff, trade parlance is not relevant. What is required the Department is to show that what is imported fulfills the definition as given in the tariff and if in trade parlance the product has another name, that could not make a difference to the classification issue. In any case, it is nobody's case, that bituminous coal is always called as steam coal. In fact, steam coal is also bituminous coal but vice versa is not always true. Therefore if the Department is able to show that what is imported is bituminous coal, in our opinion, the Department

need not travel further especially in view of the fact that bituminous coal can be coking coal or steam coal also and tariff has chosen to give them separate headings and therefore it becomes necessary to classify coal imported as coking coal or steam coal only if and when it does not covered by the definition of bituminous coal given in the tariff."(Para 69)

Per: B.S.V. MURTHY:

R.1. Before we proceed to record the order, we consider it appropriate to deal with a letter received from Asian Natural Resources (India) Ltd. dated 9th June 2014. This letter has been addressed to both the Members of the Bench. A request has been made that this Bench should recuse from hearing the matter in Stay Application Nos. C/Stay/21299/2014, C/Stay/21408/2014, and C/Stay/21411/2014 and concerned Appeal Nos. C/21178/2014, C/21255/2014 and C/21257/2014. In the letter the Company has taken note of the fact that the company came to know the fact that the case had already been discussed with me by the Revenue and I had sought to know whether either party had any objection to this Bench to hear the appeal (I and me refer to Member (Technical) wherever used). After ascertaining that both parties had no objection and at the request of both the sides, the Bench proceeded to hear the appeal. An incidence has been cited wherein the Hon'ble Chief Justice of Supreme Court had recused himself on the advice of senior counsel Shri F.S. Nariman who was present in the Court.

R.2. We find that the letter is based on incorrect information. It was not mentioned that the matter had been discussed with me by the Revenue. What was mentioned was that, I had heard about the issue and I had also heard that even one of the importers had informed the investigating officers that importers also are in agreement with the view taken by the Revenue about classification. This was a casual conversation, heard by me and there was no application of mind on the issue and I had no occasion to discuss or study the issue at all thereafter. Even though it was a casual conversation heard by me in the middle of a group of officers, yet I had offered to recuse since it has always been our endeavour to be not only fair but also seen to be fair.

R.3. Unfortunately the letter was received on 09.06.2014. In fact, the offer to recuse was made on 22.05.2014, the day on which the matter was part-heard after the observations of the Bench regarding recusal and the submission by the senior counsel that he has no objection. On 27.5.2014, both sides sought adjournment to 03.06.2014. On 03.06.2014, when the matter came up again, we had once again requested both sides that since the stay applications have been

heard in Ahmadabad, we would prefer to await the decision of the Bench in Ahmadabad. We were informed by both sides that both the Members have taken leave in Ahmadabad and in any case, both the sides submitted that the matter may be finally decided once for all since both sides would like the matter to be quickly disposed of and both sides once again expressed confidence in our fairness and only after preliminary discussion, which arose because of the observations of the Bench, the matter was continued to be heard. We must have heard the matter for about 12 hours. After the completion of hearing and when the order was to be prepared after getting the written submissions as promised on 9th and 10th June 2014, this letter has been received.

R.4. The facts narrated above would show that the instance cited by the company in their letter about the recusal by Hon'ble S.H. Kapadia, the then Chief Justice of Supreme Court in the celebrated ITC case is not all comparable to this case wherein he had recused himself on the basis of suggestion made by Shri F.S. Nariman. First of all in this case, the suggestion is coming from a party who has not even indicated that they were represented in the court or they were present in the court. The source of information has not been revealed. Therefore the observations made by them that the Technical Member had a pre-hearing discussion are not based on any information but only imagination. While the suggestion made by senior advocate Shri Nariman was on the basis of information which was accurate, the company here is making a suggestion on the ground that legal process does not permit any pre-hearing discussion without any evidence to make such a suggestion at all without even knowing / being sure that there was such a discussion. Fact is there was no such discussion.

R.5. Further there is absolutely no basis for apprehensions expressed by the company in their letter about future consequences and the fact remains that even the basis for the request for recusal is imaginary.

R.6. In the letter it has been repeatedly said that they have no misgivings regarding the integrity or impartiality of the Bench but are only trying to prevent anyone from contending that the Hon'ble Bench ought not to have heard the matter. We do not find any justification for this apprehension or submission.

R.7. Moreover, the recusal instance in the case of the then Hon'ble Chief Justice is not comparable since according to the news item enclosed to the company's letter, Justice Kapadia had declared that he and his wife investments in shares had a market value of Rs.41 lakhs which in the Indian context, may not be considered a small amount. Moreover having interest in one of the private parties in dispute is

entirely different from a casual conversation between officers not followed by a discussion about the issue nor considered in greater depth and cannot be compared with the case wherein there was a pecuniary interest.

R.8 The Hon'ble Supreme Court in the case of Subarea Roy Sahara Vs UOI & ors. in the decision rendered on 06/05/2014, made several observations which in our opinion are worth reproducing and taking into consideration. In this decision considering the request by the counsels for the appellant requesting them to recuse themselves from hearing the case, Hon'ble Supreme Court made following observations in paragraph 7 & 10, which are reproduced below:-

"7. Now the embarrassment part. Having gone through the pleadings of the writ petition we were satisfied, that nothing expressed therein could be assumed, as would humiliate or discomfort us by putting us to shame. To modify an earlier order passed by us, for a mistake we may have committed, which is apparent on the face of the record, is a jurisdiction we regularly exercise under Article 137 of the Constitution of India. Added to that, it is open to a party to file a curative petition as held by this Court in Rapa Ashok Hurrah v. Ashok Hurrah, (2002) 4 SCC 388. These jurisdictions are regularly exercised by us, when made out, without any embarrassment. Correction of a wrong order would never put anyone to shame. Recognition of a mistake, and its rectification, would certainly not put us to shame. In our considered view, embarrassment would arise when the order assailed is actuated by personal and/or extraneous considerations, and the pleadings record such an accusation. No such allegation was made in the present writ petition. And therefore, we were fully satisfied that the feeling entertained by the petitioner, that we would not pass an appropriate order, if the order impugned dated 4.3.2014 was found to be partly or fully unjustified, was totally misplaced.

10. We have recorded the above narration, lest we are accused of not correctly depicting the submissions, as they were canvassed before us. In our understanding, the oath of our office required us to go ahead with the hearing. And not to be overawed by such submissions. In our view, not hearing the matter, would constitute an act in breach of our oath of office, which mandates us to perform the duties of our office, to the best of our ability, without fear or favour, affection or ill will. This is certainly not the first time, when solicitation for solicitation for recusal has been sought by learned counsel.

Such a recorded peremptory prayer was made by Mr. R.K. Anand, an eminent Senior Advocate, before the High Court of Delhi, seeking the recusal of Mr. Justice Manmohan Sarin from hearing his personal case. Mr. Justice Manmohan Sarin while declining the request made by Mr. R.K. Anand, observed as under:

"The path of recusal is very often a convenient and a soft option. This is especially so since a Judge really has no vested interest in doing a particular matter. However, the oath of office taken under Article 219 of the Constitution of India enjoins the Judge to duly and faithfully and to the best of his knowledge and judgment, perform the duties of office without fear or favour, affection or ill will while upholding the constitution and the laws. In a case, where unfounded and motivated allegations of bias are sought to be made with a view of forum hunting / Bench preference or brow-beating the Court, then, succumbing to such a pressure would tantamount to not fulfilling the oath of office."

The above determination of the High Court of Delhi was assailed before this Court in R.K. Anand v. Delhi High Court, (2009) 8 SCC 106. The determination of the High Court whereby Mr. Justice Manmohan Sarin declined to withdraw from the hearing of the case came to be upheld."

R.9. In this case also, if we accept the submissions and recuse ourselves after spending 12 hours of our valuable time in hearing the matter wherein a senior counsel, special consultant for the Revenue and two advocates had argued the matter, it would be a criminal waste of valuable time of the Tribunal and the learned counsel who argued before us. More so in view of the fact that the Bangalore Bench of the CESTAT has the highest pendency in respect of number of appeals pending compared to the all India situation. CESTAT has sanctioned strength of 10 Benches and the total pendency as at the end of April 2014 was about 88,000 and pendency in Bangalore is 15,000/- whereas going by the average per Bench, it should have been maximum 9000. Further in terms of pendency of stay applications, even though Bangalore Bench is a single Bench, the pendency in Bangalore is the highest in India in respect of all 6 places wherein Tribunal is situated. In such a situation, the observations of Hon'ble Supreme court in para 10 would be very much relevant to us and we cannot afford to take the path of recusal in the light of the observation of the Hon'ble Supreme Court referred to hereinabove.

R.10. Another observation of the Hon'ble Supreme Court while considering the submissions of Shri Rajeev Dhawan, Sr. Counsel is

also relevant. Para 111 of the judgement in the case of Subrata Roy Sahara is relevant and is reproduced below:-

> "111. Dr. Rajeev Dhawan, learned Senior Counsel also accused us of having a pre-disposition in respect of the controversy. This predisposition, according to him, appeared to be on the basis of a strong commitment towards the other side. This assertion was repeated several times during the hearing. But, which is the other side? In terms of our order dated 31.8.2012, the only gainer on the other side, is the Government of India. The eighth direction of our order dated 31.8.2012, reads as under:- 8. SEBI (WTM) if, after the verification of the details furnished, is unable to find out the whereabouts of all or any of the subscribers, then the amount collected from such subscribers will be appropriated to the Government of India."

R.11. As can be seen, Hon'ble Supreme Court observed that in that case the decisions of the Hon'ble Supreme Court would have benefited the Government and fact that beneficiary would be Government of India and no other individual which is another aspect considered to hold that certainly no substance in the aspersion cast by the learned counsel. In this case it is not even true that the matter was discussed and it was not even mentioned that the matter was discussed and there is absolutely no ground to take a view that even Government would benefit. Unlike the case before the Hon'ble Supreme Court where a decision had already been given and after the decision Hon'ble Supreme Court was compelling Mr. Subrata Roy Sahara to make the payments by ordering detention, in this case, we had not even heard the matter and only it is an apprehension on the part of the company which is yet to file an appeal before us and which was not even represented by anybody and which is not even making mention of the preliminary discussion in this regard we had which has been referred in the order referred to explaining why the final order is being passed even though stay applications were listed. We consider that it would be totally unfair and unethical on our part to refrain from pronouncing the order after spending considerable time in the order for which we are paid and after hearing learned counsel for considerable time which is also equally valuable time for which they are paid by tax payers.

R.12. Hon'ble Supreme Court's observations in para 107 also, in our opinion, is relevant and this also supports our view that we need not recuse ourselves.

R.13. Another decision of the Hon'ble Supreme Court in the case of R.K. Anand Vs. Registrar, Delhi High Court on 29/07/2009, in our opinion, has some observations which are relevant for us to take

note of before coming to any conclusion on the request made by the company in their letter. In that case, Shri R.K. Anand, had requested one of the judges hearing the contempt case to recuse himself. This request was made on the ground that Hon'ble judge Shri Manmohan Sarin was personally hostile to him and Shri R.K. Anand had given a confidential note. Even in such a situation, the Hon'ble Supreme Court took the view that Hon'ble Justice Shri Manmohan Sarin was right in continuing to hear the appeal and not recusing himself. The Hon'ble Supreme Court as already mentioned by us upheld the stand taken by the Hon'ble Justice Shri Manmohan Sarin.

R.14. It can be clearly seen in the instances cited above had more serious allegations and were presented vociferously but yet, it was held that recusal was not necessary.

R.15. What emerges from the judgments referred to above which we had occasion to go through in detail because of the request before us clearly shows that recusal is an option which has to be exercised with great caution and judicial or quasi-judicial authorities should prefer to decide the cases which is their duty fairly and impartially and not to recuse themselves at the drop of a hat or request.

R.16. Even though it is not required and in my opinion, I do not have to justify, yet I would like to recall an instance wherein I had recused myself from a case because I had occasion to investigate a similar case when I was working in the Department. That time I had recused myself from the Bench constituted with the Hon'ble President of the Tribunal for hearing the matter and even before hearing, I had recused myself. This is only to show that if I have the slightest feeling that it would not be appropriate for me to hear a case, I will be the first man to recuse myself.

R.17. At the cost of repetition, I would like to make it clear that there was no discussion about the case with anyone leave alone Revenue officers before hearing.

R.18. In view of the above observations, the request made by the company for recusal is rejected and we proceed to decide the matter before us in accordance with law.

1. In all these appeals, the issue involved is common and in all the cases only stay applications have been listed for hearing. The hearing first started in the case of M/s. Coastal Energy Pvt. Ltd. on 22/05/2014. On that date after matter was heard for some time, learned sr. counsel for the appellant sought adjournment and accordingly the matter was adjourned to 27/05/2014. On 27/05/2014, there was a request made by the AR for the Revenue that the Department would like to

appoint Special Consultant and therefore the matter may be adjourned. As per the request made by him and as per the date sought by him with the consent of other side, the matter was fixed for hearing on 03/06/2014. On 03/06/2014, when the matter came up for hearing, both the sides were asked whether hearing should be proceeded at all since according to both the sides, matter had been heard in Ahmedabad for waiver of pre-deposit and grant of stay in the case of another appellant and the order was reserved. After some discussion, both sides intimated the Bench that since the issue involved is an all India issue and the appeals have been filed before the Benches in several places, it would be appropriate that the matter can be decided finally rather than hearing only for the purpose of grant of waiver and stay. At this juncture, two other appellants also requested that their cases also may be taken up and they were also prepared to argue the matter for final hearing. Since all the appellants as well as Revenue requested for final hearing of the matter, the Bench proceeded to hear the matter in detail. Accordingly, in all the appeals, the requirement of pre-deposit is waived and all the appeals are taken up for final disposal.

2. The appeals that have been taken up and the details thereof are as under:-

Appellant	Appeal No.	Period	Customs duty (Rs.)	Penalty (Rs.)	Amount paid & appropriated (Rs.)
M/s. Coastal Energy Pvt. Ltd.	C/21178/14	4/12 to 1/13	25,35,17,421 + interest	25,35,17,421	Duty - 59,03,777 Interest - 5,99,604
--- do---	C/21255/14	5/12 to 11/12	15,69,70,759 + interest	4,00,00,000	NIL
---do---	C/21257/14	7/12 to 10/12	36,28,94,381	30,08,90,820 Fine - 28 crores	
M/s. Davangere Sugars Co. Ltd.	C/20700/14	17/3/12 to 28/2/13	2,52,04,571	50,40,000	1,75,00,000

M/s. Maruthi Ispat & Energy Pvt. Ltd.	C/21458/14	-do-	1,47,49,453	RF -Rs.15,000/-	--

3. In all the appeals, the dispute is whether the coal imported by the appellants is to be charged to basic customs duty and CVD treating the same as Bituminous Coal or Steam Coal. Department's contention is that according to sub-heading Note 2 of Chapter 27, wherein the definition of bituminous coal has been given, the steam coal imported by the appellants which answers to the definition of bituminous coal, has to be classified as bituminous coal and therefore, the lower rate of duty benefit extended to steam coal would not be available for the importers. On this ground, all the impugned orders have been passed and are being challenged.

. On the last date of the hearing i.e. on 06/06/2014, Shri PRV Ramanan, learned special consultant for the Revenue wished to submit written submissions and promised to submit the same on 09/06/2014 and hand over copy to the defence counsels also. On the part of the defence, it was submitted that they would submit their submissions if any on 10/06/2014. Accordingly on 09/06/2014, the written submissions of special consultant were received and submissions from the counsel for M/s. Coastal Energy were also received on 10/06/2014.

5. Shri V. Sridharan, learned sr. counsel, assisted by Shri G. Shivadass, advocate, on behalf of M/s. Costal Energy Pvt. Ltd., took us through the history of taxation in respect of coal on the first day and since this gives a background of the classification as well as duty structure in a broad manner, we consider it appropriate that the same should be briefly covered. There was no definition of different types of coal in British Tariff Nomenclature which was being followed all over the world prior to introduction of HSN. After the introduction of HSN, India followed the same in 1986. Also the world pattern of levy on coal continued. Certainly from 1994 onwards, there were two rates

for coal. One rate was for coking coal and another for all types of other coals. This continued till 2011 when the present structure was introduced. The learned counsel sought our attention to Customs Tariff of India 2002-03. In 2002-03, there were only 4 headings under coal which read as under:-

Heading	Sub-heading	Description of article	Rate of duty	
			Standard	Preferential areas
27.01		Coal, briquettes, ovoids and similar sold fuels manufactured from coal - Coal, whether or not pulverised, but not agglomerated:		
	2701.11	-- Anthracite	25%	—
	2701.12	-- Bituminous coal	55%	---
	2701.19	-- Other coal	25%	---
	2701.20	-- Briquettes, ovoids and similar solid fuels manufactured from coal	15%	

The notification prescribed same rates of duty for bituminous coal as well as coking coal till this period. Besides it was also submitted that sub-heading notes No.1 & 2 explaining anthracite and bituminous coal also existed almost throughout.

6. Eightdigit tariff was introduced in the year 2003. Notification No. 21/2002 dated 1.3.2002 as it stood prior to 28.2.2003, specified a single effective rate of duty of 25% for "all goods" other than coking coal Vide Sl. No. 70 of the notification. Sl.No.70 as amended by Notification No. 66/2004 dated 9.7.2004 referred to sub-headings 2701 11 00, 2701 12 00 and 2701 19 and carried the description "all goods other than coking coal". Thus whether goods fell under sub-heading 2701.12 or sub-heading 2701.19, same rate was applicable. This continued till 28.2.2012. In the year 2011, in the exemption notification the definition of coking coal was given and the uniform rates for all other coals continued. In March 2012, exemption from basic customs duty for steam coal with CVD of 1% was introduced

for a period of two years specified in the notification. In the year 2013, taking note of the fact that there was rampant misclassification as observed by the Hon'ble Finance Minister, the rates of duty for bituminous coal as well as steam coal was brought on par.

7. Hon'ble Finance Minister in his budget speech for 2012-13 observed as follows:-

184. Domestic producers of thermal power have been under stress because of high prices of coal. I propose to ease the situation by providing full exemption from basic customs duty and a concessional CVD of 1 per cent to Steam coal for a period of two years till March 31, 2014. Full exemption from basic duty is also being provided to the following fuels for power generation:

* Natural Gas and Liquified Natural Gas; and
* Uranium concentrate, Sintered UraniumDioxide in natural and pellet form.

Learned counsel submitted that this shows that the intention was to give relief to domestic power producers who are using steam coal and other fuels specified in the speech.

In the budget 2013, the Hon'ble Finance Minister said as follows:-

166. Steam coal is exempt from customs duty but attracts a concessional CVD of one percent. Bituminous coal attracts a duty of 5 per cent and CVD of 6 per cent. Since both kinds of coal are used in thermal power stations, there is rampant misclassification. I propose to equalize the duties on both kinds of coal and levy 2 per cent customs duty and two per cent CVD.

8. Learned sr. counsel dealt with these two paragraphs and argued that from the observation of the Hon'ble Finance Minister what emerges is that the intention of the Government was to give relief to the power producers. However even though intention becomes quite clear, what emerges from the speech is that after the exemption was introduced, there was rampant misclassification. Obviously, the misclassification mentioned in the Finance Minister's speech has to be taken as the one indulged by the importers and not by the Government. We are also not able to accept this submission that this would mean that the intention of the Government was to exempt all types of steam coal and even if it was bituminous coal, the intention was to exempt and give relief to power producers. If that was the case, there was no need to increase the rate of duty in respect of both the BCD and CVD in 2013. While taking a view that there was misclassification and disputes, what the Government seems to have done is to reduce disputes and with that intention increase the rate

of duty and give relief to all types of coal. We could not find any help from the parts of the speeches that can be derived by the importers who imported steam coal prior to the notification prescribing same rate for bituminous coal and steam coal. If the intention was to give relief and to take a view that importers have suffered and if there was no intention to collect duty on steam coal classifiable as bituminous coal, it was easy for the Government to give exemption to all types of coals for the previous year and introduce a common rate for the next year which was not done.

9. It was the submission of all the appellants that throughout tariff structure and rate of duty on coal was based on the division between coking and non-coking coal and all along non-coking coal irrespective of the variety was treated as one variety and enjoyed the same rate of duty. This being the position, just because a lower rate of duty was prescribed for steam coal in the Budget of 2012, applying definition of bituminous coal rigidly and treating bituminous coal and steam coal as separate was not correct. Besides quoting the history of taxation of the coal, the appellants also pressed the ground that in trade parlance, steam coal can be bituminous coal also and vice versa. A lot of technical material was placed to make the submission that steam coal, coking coal and bituminous coal cannot be differentiated and if that is done, entries related to coking coal/steam coal may become redundant which we will be dealing with at a later stage in that particular category of submission. At this stage, it was the submission that there was no dispute at all in the history of taxation of coal about steam coal. It was also submitted that the appellants M/s. Coastal Energy Pvt. Ltd. had been importing coal at least for the past 10 years and all through, they have been describing the coal as steam coal and the same was assessed as steam coal and no questions were asked. In view of the fact that throughout the period, coal was being assessed as steam coal and there was no dispute about classification and description etc, suddenly just because there was a differential rate of duty prescribed for steam coal, it was not appropriate for the Revenue to take a view that the coal imported by the appellants is bituminous coal only to deny the exemption which they entirely deserved since what they were importing earlier was steam coal and what they imported now is also steam coal.

10. In our opinion, we cannot go by the history of taxation and we also cannot go by the trade parlance especially when a product is defined in the tariff. In fact, the learned sr. counsel fairly admitted that a statutory definition overrules trade parlance. Nevertheless, it was his submission that this case stands on a different footing and he would urge several more grounds in addition to the submissions

hereinabove to support his contention that the impugned order classifying the product imported by the appellants as bituminous coal is not correct.

11. The next point taken up by the appellants is, according to them, there is overlapping/ambiguity between the sub-heading 2701 12 and 2701 19.

12. It was submitted that classification of coal is based on rank into Anthracite, Bituminous, Lignite and peat. Classification is done on the basis of degree of metamorphism or progressive alteration from lignite to anthracite of the coal. Classification of coal into coking coal and steam coal is done on the basis of end use. Bituminous coal is very abundant in nature and most widely used of all types of coal. It shows broad rank of variation of difference characteristics physical and chemical parameters and for that reason, it is often placed in sub-groups; according to the content of volatile matter, bituminous coal can be classified as :

* low volatile bituminous coal with a content of volatile matter below 22% dmf (dry and mineral free mass basis)
* medium volatile bituminous coal with a content of volatile matter between 22% dmf and 31% dmf.
* high volatile bituminous coal with a content of volatile matter above 31%dmf.

According to use, bituminous coal itself can be classified as -

* thermal coal which is used as fuel for boilers, kilns etc. and has to satisfy lower restrictions concerning other non-volatile matter components, and
* metallurgical coal - low content of ashes and sulphur for instance - make it appropriate for the production of metallurgical coke.

Sub-bituminous and thermal bituminous coal are used essentially as fuel to :

* generate electricity
* generate steam for creation of high temperature thermal reservoirs or traction purposes.
* public heating systems.
* to meet households needs- cooking, heating of water etc.

Metallurgical bituminous coal as the name shows is used essentially in the production of coke which is -

* a primary input for producing iron and steel;
* also used in other industries of metal production.

Anthracite is the least common and most expensive of the coals. It has some unique features:

* the capacity, for instance, for a smokeless fire;
* used for specific purposes.

13. On the basis of technical literature and various authoritative books, it was submitted that all coals of a quality that allows production of coke suitable to be used as a blast furnace charge is known as coking coal. Steam coal is a coal which is suitable for use in power generation and generation of steam. The basis of the two classifications are that one is based on metamorphism and other is based on end use. Therefore it is submitted that the two are not mutually exclusive and there is certain amount of overlapping between the two.

14. While there is a statutory definition of 'bituminous coal', there is no such definition for coking coal or steam coal. Since there is no statutory definition for steam coal or coking coal, the meanings accepted in trade parlance alone may be applied.

15. The main requisite for a coal to be suitable for the manufacture of coke is no ash content, low volatile matter and reasonably high calorific value. Hence coals of a quality lower than the bituminous coal are unsuitable for the manufacture of coke. Therefore all coking coals are also bituminous coals. All steam coals, with a calorific value greater than 5833 kcal/kg., are also bituminous coals. As mentioned earlier, all through, while prescribing effective rate of duty, the Government has been referring to all goods other than coking coal. The above discussion according to the learned counsel would show that in view of the fact that steam coal and coking coal are sub-classifications of bituminous coal, the classification adopted by the Indian Government which is not in line with international classification results in overlapping and creates ambiguity. It was submitted that an interpretation which advances the intention of the Central Government and results in no discrimination should be adopted. Principles of interpretation require that any definition is always subject to the context to the contrary. Rule of harmonious construction is readily attracted according to the learned counsel and detailed submissions were made with regard to the applicability of Rule 6 of Interpretation Rules for classification thereafter. In our opinion, at this stage, we do not have to deal with this aspect since in the subsequent submissions with regard to the classification procedure to be adopted, the effect of the rules, their application and application of notes are going to be considered separately.

16. Before we deal with various submissions, it would be appropriate to examine the procedure to be followed for classification of the goods in the tariff and the application of rules for introduction of tariff to the relevant heads and sub-headings etc. It is also necessary to reproduce the relevant entries in tariff as it extracts after introduction of 8 digit tariff with effect from 28.2.2003.

Heading/ Sub-heading/ Tariff Item	Description of goods
2701	Coal, briquettes, ovoids and similar solid fuels manufactured from coal
	-Coal, whether or not pulverized, but not agglomerated
2701 11 00	-- Anthracite
2701 12 00 -	- Bituminous coal
2701 19 -	- Other coal :
2701 19 10	--- Cokingcoal
2701 19 20	--- Steam coal
2701 19 90	--- Other
2701 20	- Briquettes, ovoids and similar solid fuels manufactured form coal:
2701 20 10	-- Anthracite agglomerated
2701 20 90	-- Other

17. In this regard, we would be failing in our duty if we failed to record our appreciation for the clarity brought about by the learned special consultant as regards the meaning of '-, --, ---, ----', Rules of Interpretation and meaning of heading, sub-heading etc. After he explained the procedure for classification and the logic in classification, issue became clearer than what they were. Before we proceed further we would explain his submissions as they were understood by us during the hearing as regards classification of the goods and while doing so, we would also consider the submission of the learned senior counsel that a definition is always subject to the context to the contrary whether so stated in the definition or otherwise.

8. First of all it would be appropriate to reproduce the sub-heading note (2) which is the main cause for the dispute in this case.

"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 5833 kcal/kg."

19. General Rules for the interpretation of the schedule to the tariff form part of the Customs Tariff Act. The classification of goods in the schedule is governed by the principles laid down in the rules. The rules make it clear that titles of sections, chapters and sub-chapters are provided for ease of reference only and for legal purposes classification has to be determined according to the terms of the headings and any relevant section or chapter notes and provided such headings or notes do not otherwise require, according to subsequent rules. Rules 2 to 5 of rules for interpretation speak of heading all through. Therefore, Rule 6 would be relevant rule for our purposes since this rule comes into play when the dispute arises between two sub-headings and not between headings. This is in view of the fact that according to the tariff entries under chapter 2701, coal, whether or not pulverized, but not agglomerated is the main heading and Anthracite, Bituminous coal come under one category and coking coal and steam coal come under the category of other coal preceded by '—'. Therefore Anthracite and Bituminous coal and other coal form 3 sub-headings and we have to determine which sub-heading is applicable. As far as heading is concerned which is coal, whether or not pulverized, but not agglomerated is the heading and this heading covers all the items which are to be considered by us. Having dealt with this since the dispute relates to determination of sub-heading of the items imported, since Rules 2 to 5 relate to headings, we have to go to Rule 6 for determination of the sub-headings.

20. Before this it is also necessary to take note of the guidelines available in the additional notes given to the rules which is also part of the rules. According to additional notes:-

In this schedule,-

(1) (a) "Heading", in respect of goods, means a description in list of tariff provisions accompanied by a four-digit number and includes all sub-headings of tariff items the first four-digits of which correspond to that number;

(b) "sub-heading", in respect of goods, means a description in the list of tariff provisions accompanied by a six-digit number and includes all tariff items the first six-digits of which correspond to that number;

(c) "tariff item" means a description of goods in the list of tariff provisions accompanying eight-digit number and the rate of customs duty.

Above additional notes make it clear that the comparable items have to be identified by the number of digits accompanying the headings. It was submitted by the special consultant for Revenue that the number of digits and the dashes invariably tally and follow a pattern and the principles to be applied to headings, sub-headings and tariff items are taken note of and kept in mind while providing the number of digits. Even though he explained the logic behind the number of dashes behind each headings and the difference between heading, sub-heading and tariff item with illustration, we do not consider it necessary to go into the same except stating what exactly is understood with regard to the dispute before us in this case.

21. The submissions of the learned special consultant for Revenue leads us to the conclusion that in this case we have to treat Anthracite, Bituminous coal and other coal as equal sub-headings in view of the fact that the last two digits of 'Anthracite' and 'Bituminous coal' 2701 11 and 2701 12 are '00' and 2701 19 covering 'other coal' stand on the same footing and have to be considered as of equal level and comparable at the same level. It has to be noted that coal, whether or not pulverized, but not agglomerated is preceded by 4 digits and therefore is to be taken as the heading as explained in the additional notes. Therefore we have the heading which covers non-agglomerated coal whether or not pulverized and there are 3 categories of this type of coal namely, Anthracite, Bituminous coal and other coal.

22. General explanatory notes also provided that when the description of article or group of articles preceded by "—", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "---" This also supports the view that Anthracite, Bituminous Coal and other coal are sub-classification of the coal pulverized, but not agglomerated. Further the General Explanatory note to the General Rules for the Interpretation also provided that where the description of an article or group of articles is preceded by "---" or "----", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "—". In this case both coking coal, steam coal and other (2701 19 90) are preceded by "---" and come under other coal preceded by "—". This means according to the General Rules for Interpretation of Tariff, coking

coal, steam coal and other have to be treated as sub-classification of 'other coal'

23. As already mentioned earlier Rule 6 of the General Rules would apply to the present case and the rule reads as under:

"For legal purposes, the classification of the 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."

This brings us to the position that we have to examine whether according to the rules under which heading the item is classifiable and thereafter we have to see whether section notes/chapter notes have to be applied since if the context otherwise requires, said notes, need not be applied. It was the submission that in this case the head notes need not be applied on behalf of the appellants.

24. We have already reproduced the sub-heading notes above. In the light of the above, we have to examine how the classification of the product has to be approached and what would be the result thereafter.

25. Coal has been first of all classified under the respective sub-headings (6 digits) depending upon whether the same is classified as 'Anthracite', 'Bituminous' or 'Other coal' which fall respectively under sub-headings 2701 11, 2701 12 or 2701 19.

26. To classify the imported coal under the correct sub-headings we have to look at the tariff description and sub-heading notes 1 & 2 of chapter 27. The sub-heading notes provided definitions of the expressions 'Anthracite' and the 'Bituminous' in technical terms. For the expression 'other coal' respective entry has not been defined.

27. In terms of sub-heading Note No. 2 of Chapter 27, for the purpose of 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.

28. Therefore it is clear that any coal with volatile matter limit specified and calorific value limit as specified has to be invariably classified as bituminous coal for sub-heading 2701 12 and under tariff heading 2701 00.

29. Therefore as long as the goods are covered by definition as per sub-heading Note 2, such imported coal must be classified under

bituminous coal. Only when the specifications laid down in the definition in sub-heading note are not matched, imported coal can be classified under other coal under heading 2701 19 and thereafter under tariff item namely 2701 19 10, 2701 19 20 or 2701 19 90.

30. In the cases before us, there is no necessity to conduct any examination or test since the report submitted by the appellants themselves showed that the imported coal was as per the specification in the definition given in the sub-heading notes. It has to be stated that above exercise explained above is in line with Rule 6 of General Interpretative Rules and is in accordance with additional notes relating to headings and sub-headings.

31. Bituminous coal (2701 12 00) and steam coal (TI 2701 19 20) are tariff items which are not comparable as per the existing tariff structure. While TI 2701 1200 is preceded by a " –" TI 2701 1920 is preceded by "---". General Interpretative Rules apply only to classification of goods under the nomenclature up to 6 digits. Rules 1 to 5 of the General Interpretative Rules apply at heading level and Rule 6, governs classification at sub-heading levels in this case.

32. It was submitted by the learned special consultant :

"The GI Rules have come under vigorous scrutiny of various judicial fora including the Apex Court and as per the principle of law settled by them, classification shall be determined according to the terms of the headings and any relevant section or chapter notes; that the section notes and chapter notes in the Customs Tariff Act are part of the statutory tariff and relevant headings in the tariff have to be interpreted and applied in the light of section notes and chapter notes which are statutory and binding like the headings themselves; that the scheme of the Customs Tariff Act is to determine coverage of respective headings in light of the section notes and chapter notes and in this sense the section notes and chapter notes have an over-riding force on the respective headings and are therefore relevant in the matter of classification of goods under the Customs Tariff; that these section notes and chapter notes sometimes expand and sometimes restrict the scope of certain headings; that Rule-1 ibid gives primacy to the section notes and chapter notes along with terms of the headings and therefore they should be first applied for determining correct classification of goods; that if neither the heading nor section-notes or chapter-notes suffice to clarify the scope of a heading and if no clear picture emerges then only can one resort to the subsequent provisions of the GI Rules.

From the above, it can be deduced that imported coal meeting the following two specific parameters of bituminous coal mentioned in

sub-heading note (2) of Chapter 27: (i) volatile matter limit (on a dry, mineral-matter-free basis) should exceed 14% and (ii) calorific value limit (on a moist, mineral-matter-free basis) should be equal to or greater than 5,833 kcal/kg has to be necessarily classified under heading 2701 12. Accordingly, at the eight digit level, goods covered in the present appeals should be reclassified under Tariff Item: 2701 12 00."

33. Thus purely looking from a legal point of view, it is quite clear that procedure adopted by the Revenue is correct. Once the correct classification is determined, the question of examination of classification further should not arise in the normal course. Nevertheless in view of the fact that detailed arguments were presented and decisions were cited, we would consider these submissions also since as submitted by the learned counsel in the case of Swaroop Fibre Industries Ltd., the Tribunal departed and had held that construction attributing redundancy to a legislation not acceptable. Learned counsel for the appellant made very detailed submissions on this issue.

34. It was submitted that in the book, Principles of Statutory Interpretation, Third Edition 1983 by G.P Singh at page 147, it is said:

"It is a novel and unheard of idea that an interpretation clause which might easily have been so expressed as to cover certain sections and not to cover others should be when expressed in general terms divided up by a sort of theory of applicana singula singulis, so as not to apply to sections where context suggests no difficulty of application."[29] But where the context makes the definition given in the interpretation clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause; all definitions given in an interpretation clause are therefore normally enacted subject to the qualification-'unless there is anything repugnant in the subject or context or 'unless the context otherwise requires;.[30] Even in the absence of an express qualification to that effect such a qualification is always implied.[31] However, it is incumbent on those who contend that the definition given in the interpretation clause does not apply to a particular section to show that the context in fact so requires."

35. In addition it was also submitted that all parts of a statute have to be read together and no portions should be read in isolation. In the Principles of Statutory Interpretation of G.P Singh (Volume V) page 415 and 416 it is said that "every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole

statute or series of statutes relating to the subject matter. It is spoken of construction "ex visceribus actus". "It is the most natural and genuine exposition of a statute", laid down Lord Coke "to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers." To ascertain the meaning of a clause in a statute the court must look at the whole statue, at what precedes and at what succeeds and not merely at the clause itself, and, "the method of construing statutes that I prefer". Singha C.J observed "the court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occur."

36. On the basis of the above submissions it was argued that to ascertain the meaning of expression 'other coal' appearing in sub-heading 2701 19, the Revenue is considering coking coal and steam coal figuring under the 'other'category. According to the appellants this is a classic example of not reading various portions of an enactment together but reading only a portion of an enactment to arrive at interpretation/conclusion. Interpretative statute shows that this is incorrect. It was also submitted that the decision in the case of Swaroop Fibre Industries Ltd., has to be applied in this case and steam coal imported by the appellant should not be classified as bituminous coal otherwise the heading coking coal and steam coal would be redundant.

37. It was submitted by learned special consultant for Revenue that appellant's argument proceeds on the premise that the expression 'coking coal' fall under 270119 by virtue of its properties and the dispute before us is not about coking coal at all. Nevertheless, even if the issue is not relating to coking coal and its classification, the examination is required in view of the broader arguments put-forth by the appellants referring to the case of Swarup Fibre Industries Ltd. vs. C.C.E. [1990 (48) E.L.T. 118 (Tri.)]. In that case, the Tribunal classified the item 'Vulcanized fibre' under heading which may not have been appropriate at all on the ground that otherwise the heading would become irrelevant and redundant and therefore to ensure that heading 'cokingcoal' does not become irrelevant and on this ground, if we are going to treat coking coal and classify the same on the basis of trade parlance, the question only would arise as to why the same principle may not be applied to 'steamcoal'. Therefore, this submission also requires an examination.

38. It was submitted by the appellants that coal having GCV less than 5833 kcal/kg and of non-agglomerating character is not considered as

'cokingcoal' in the trade parlance. Our attention was drawn to page 531 (ASTM Standard Classification of Coals) in Volume VI of the paper book submitted by the appellants. In page 531, 'Methodsof Analysis and Testing' has been indicated according to ASTM. We could not find any reference to GCV on page 531 as was submitted in the written submission. However, we find in page 530, a Table of 'Classification of Coals by Rank'. In this Table-1, coal with Gross Calorific Value (GCV) of equal to 10500 would be agglomerating and it would be non-agglomerating also. If GCV range between 10500 to 11500 (10500 is equal to 5833 kcal/kg), it can be agglomerating or non-agglomerating. It was submitted in the written submission that the contention of Revenue that there can be coking coal of non-agglomerating quality is without any material and contrary to all technical literature produced by the appellants. According to the definition of International Energy Association (IEA) for coking coal, cited by the appellants in page 519 of Volume VI, coking coal is bituminous coal with a quality that allows the production of coke. Its GCV is greater than 5700 kcal/kg and lesser than 5833 kcal/kg on an ash-free but moist basis. Determination of GCV of coal based on an ash-free but moist basis and mineral matter free basis would depend upon ash and sulphur contents in the coal.

39. Learned special consultant referred to worksheet submitted by the appellant, according to which Calorific Value (Kcal/Kg) of 5829 on moist, mineral matter free (m,mmf) basis was equivalent to 5709 kcal/kg on moist, ash-free (maf) basis. This sample satisfies GCV parameters given by IEA for bituminous coking coal but under Customs Tariff, it would be classified under'other coal' as GCV (m,mmf) was 5829 kcal/kg. This being coking coal as per the worksheet furnished by learned counsel, the sample would be meriting classification as 'coking coal' if it is agglomerating but not agglomerated and therefore, tariff entry 'coking coal' does not become redundant.

40. As regards next point relating to agglomeration also, we find, the submission of learned special consultant for Revenue is more appropriate. According to the appellants, agglomeration is a critical property of coking coal. As submitted by learned special consultant and as observed by us above, coking coal with GCV (m,mmf) in the range 10500 Btu (5830 kcal/kg) to 11500 Btu can be either agglomerating or non-agglomerating. Therefore, cocking coal coming in this range, if non-agglomerating only would be classifiable as bituminous coal and if it is agglomerating but not agglomerated and gcv is less than 5833 K.cal/kg, it is classifiable as coking coal. Therefore, coking coal heading does not become irrelevant on this ground also. In sum, we find, the appellants have

not been able to make out a case for redundancy in respect of the heading 'cokingcoal'. We have to take note of the fact that 2701 covers non-agglomerated coal and 2701 20 covers agglomerated coal.

41. As regards 'steamcoal', there is no problem in view of the fact that learned senior counsel himself fairly agreed that steam coal can have a GCV above 5833 kcal/kg or below 5833 kcal/kg also. If it is above 5833 kcal/kg, it would come under bituminous coal and if it is below 5833 kcal/kg, it would come under steam coal.

42. Learned special consultant for Revenue also pointed out that out of 533 Bills of Entry filed in Visakhapatnam Port, show-cause notice has been issued only in respect of 400 Shipping Bills which would show that in respect of the remaining 133 Bills of Entry, the claim of the appellants that what was imported is steam coal has been accepted thereby accepting the fact that GCV is less than 5833 kcal/kg in those Bills of Entry.

43. It was also submitted that as per IEA Coal data System, coking coal has GCV of 5709 kcal/kg based on an ash-free but moist basis whereas coal with GCV of 5833 kcal/kg was mineral matter free basis. From the ASTM Standard submitted by the appellants themselves, we find that GCV of 5709 kcal/kg on moist, ash-free basis is equivalent to GCV of 5829 kcal/kg on moist, mineral free basis. Therefore, we do not find any discrepancy in this regard.

44. In any case, we have already considered ASTM standard regarding agglomerating and non-agglomerating coal and range of GCV and have come to the conclusion that the coal having GCV of 10500 Btu to 11500 Btu can be either agglomerating or non-agglomerating.

45. Another submission that was made and required to be examined is regarding the clause "unless the context otherwise requires" and it was submitted that in this case, 'context requires otherwise' and therefore, sub-heading notes should not be considered when it comes to classification of coking coal and steam coal. It was submitted that in view of the fact that coking coal and steam coal and bituminous coal can be classified as either of the two, it would be appropriate to first eliminate coking coal entry and steam coal entry and only when coal is not classifiable under both, the same is to be classified as 'bituminous coal'. It was submitted that only then the correct classification would have been made.

46. A point which was argued vehemently is the fact that by classifying steam coal or coking coal imported by the appellants as bituminous coal, the legislative intent of providing exemption of the coal used by power industry is defeated. Moreover, it was also submitted that

a heading cannot be made redundant. In our opinion, in this case, it has been noted that according to the taxation historical background submitted by the appellants themselves, even in the Indian Tariff as it existed up to 28.2.2003, there was no reference to coking coal or steam coal in the sub-heading or heading 27.01 of the Customs Tariff Act, 1975. However, definition contained in Note 2 existed ever since 1.3.2003 and even prior to 28.2.2003. The very fact that the tariff structure underwent change with effect from 28.2.2003 and 'cokingcoal' and 'steamcoal' were added to the Schedule under the heading 2701 19 carrying description 'OtherCoals' would show and lead to the inference that this was a deliberate change made and it cannot be said that relevant facts and factors affecting tariff was ignored by legislature. It is to be remembered in this case that the appellants are contesting the entry 'OtherCoal'. Coking coal as well as steam coal are classifiable as bituminous coal also and therefore, a conflict / ambiguity arose and therefore, there can be redundancy. Our examination detailed above shows that definitely it would be possible to segregate bituminous coal, coking coal and steam coal and one type would be classifiable under one heading and may not fall different heading at all. In any case, when an item imported is classifiable under more than one heading, the Interpretation Rules for classification would help to overcome the problem. In this case, the first question to be seen and examined whether the sub-heading note which defines bituminous coal covers the item imported or not. Once it covers, that is the end of the matter. If the GCV is less than 5833 kcal/kg and according trade parlance, the product would become classifiable under steam coal. Therefore, it cannot be said that the intention of the statute or intention of the legislature is being defeated by process of reclassification by Revenue.

47. At this stage, it would be appropriate to consider the applicability of decision of the Tribunal in the case of Swarup Fibre Industries (supra). Reliance placed on the decision in Swarup Fibre Industries' case is misplaced. In that case, the item to be classified was 'vulcanizedfibre' in sheet form. The dispute was whether these would be classified under 'primaryforms' or as fully finished sheets. There was no reference to a third tariff description as being argued herein. Ambiguity arose because the definition of primary forms did not specify 'sheets' as one of the primary forms, though it was an admitted fact that in the context of vulcanized fibre, sheet form was one of the primary forms. The decision was rendered in the context of Central Excise Tariff, which was adopted from the HSN. The scope of the heading note was expanded taking note of the facts peculiar to the case. It did not do any violence to the Note. More significantly, with reference to the products viz. steam coal,