

सहायक आयुक्त कार्यालय सीमा शुल्क (निवारक) मण्डल पोरबंदर - 360575 दूरभाष - 0286 2220277 फैक्स - 0286 2220027		<b>Office of the Assistant Commissioner          Customs (Prev.) Division Porbandar</b> Porbandar -360577 Tel :- 0286 2220277 Fax :- 0286 2220027
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Date: 28.10.2021

F. No. VIII/20-R-4/PBR/2019-20  
 DIN No. 20211071MM00002252B8

रजिस्टर पोस्ट ए० डी० / By Regd. Post A.D./By hand delivery

द्वारा पारित: वी एस राणावत

Passed By: Shri V. S. Ranawat

आयुक्त सीमा (निवारक) सहायक आयुक्त, सीमा शुल्क मंडल  
 पोरबंदर

Assistant Commissioner,  
 Customs Division, Porbandar

- 1 NOV 2021

मूल आदेश संख्या : Order in Original No. : 02/AC/PBR/21-22

जायज न्याय प्रती उस व्यक्ति को जिसके लिए यह आदेश जारी किया गया है उसके व्यक्तिगत उपयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for the private use of the person to whom it is issued.

- 2 यदि कोई स्वयं को इस आदेश से असंतुष्ट अनुभव करता है तो इस आदेश के विरुद्ध सीमाशुल्कआयुक्त (अपील), सातवीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड, अहमदाबाद 380009 को इस आदेश की प्राप्ति के साठ दिन के अंदर अपील कर सकता है।

Any person coming himself aggrieved by this order may appeal against the order to the Commissioner of Customs (Appeals), 7<sup>th</sup> Floor, Mridul Tower, Opposite times of india, aashram road, ahmedabad-380009 within sixty days from the date of receipt of this order.

- 3 उक्त अपील के साथ निम्नलिखित अवश्य संलग्न किया जाये :

The appeal must accompanied by:

उक्त अपील की एक प्रति

(a) a copy of the appeal and

इस आदेश की एक प्रति अथवा कोई अन्य प्रति जिस पर 2.50 (दो रुपया पचास पैसे मात्र) का न्याय शुल्क टिकट अवश्य लगा होना चाहिए,

(b) This copy or any other copy of this order within must bear a Court fee stamp of Rs. 2.50 (two rupees fifty paise only)

4. यदि कोई इस आदेश के विरुद्ध अपील करना चाहता है तो, उक्त अपील माँगा गया शुल्क अथवा उस पर लगायी गयी शास्ति जमा करने और उक्त अपील के साथ ऐसे भुगतान का सबूत प्रस्तुत करने पर विचाराधीन रहेगी, ऐसा करने में असफल होने पर उक्त अपील सीमा शुल्क अधिनियम 1962 के धारा 129 के प्रावधानों के गैर अनुपालन करने के लिए अस्वीकृत किये जाने योग्य होगी।

Any person desirous of appealing against this order shall pending the appeal, deposit the duty demanded or penalty levied therein and produce proof of such payment alongwith the appeal, failing which the appeal is liable to be rejected for non-compliance of the provision of Section 129 of the Customs Act, 1962.

Sub: - SCN No. VIII/20-R-26/CUS(T)/07-08 dated 21.10.2008.

## Brief facts of the Case

M/s Ultratech Cement Limited, (Formerly known as Larson & Toubro Ltd.) Gujarat Cement works, P.O. Kovyra, Taluka- Rajula, Dist. Amreli (hereinafter referred to as “the noticee”) had imported in bulk 19000 MTs of Indonesian Steaming (Non Cooking) Coal at the Port Porbandar falling under Customs Tariff heading No. 2701.19 through M. V. URI and sought clearance vide Bill of Entry No. F-14 dated 01.05.2004. The said bill of entry was provisionally assessed on 03.05.2004 by the assessing officer for want of original documents and chemical analysis report in terms of Section 18(1) of the Customs Act, 1962. The noticee through TR-6 Challan paid the amount of Rs. 66,500/- towards the Additional duty of Customs/Coal Cess @ 3.50/MT. The basis of this additional Cess was the notification S.O. 95(E), dated the 8th February, 1983 issued by the department of coal. As the bill of entry was filed under advance license, the BCD amount was not paid in cash but was debited through the advance license number 0310262478/2/03/00 dated 05/04/2004 issued by DGFT Mumbai.

2. The Said Bill of Entry was finally assessed by the assessing officer accepting the invoice value presented at the time of provisional assessment the same was conveyed vide letter F. No. VIII/BE/FA/CH/PBR/2003 dated 08.06.2005 by the Superintendent Custom House, Porbandar. The additional duty of Customs cess @ Rs 3.5/MT was also levied in the bill of entry. The basis of this additional cess was the notification S.O. 95(E), dated 08.02.1983 issued by the department of coal under Section 6 of the Coal Mines (Conservation and Development) Act 1974 (28 of 1974). This Coal Cess was paid by the importer in cash through Challan under protest

3. Further, a SCN F. No. VIII/6(a)-06/CH/PBR/2005-06 dated 09.05.2005 was issued to the noticee demanding the differential Additional duty of Customs/Coal Cess in terms of Notification No. SO 727 (E) dated 25.06.2003 issued under Section 6 of the Coal Mines (Conservation and Development) Act, 1914 (28 of 1974). As the cess @ Rs 3.5/MT was already paid by the importer at the time of provisional assessment, the remaining amount was demanded through the SCN dated 09.05.2005. The table below summarizes the calculation of differential demand.

S.No.	Notification	Cess	Amount for 19,000 MT
1	S.O. 95(E), dated 08.02.1983	Rs 3.5/MT	Rs 66,500
2	S.O. 727(E), dated 25.06.2003	Rs 10/MT	Rs 1,90,000
	Differential Demand through SCN		Rs 1,23,500

4. The adjudicating authority vide Order-In-Original No. 11/AC/CUS-PBR/2007-08 dated 27.12.2007 dropped the demand under show cause notice and allowed the consequential relief. Therefore, the applicant filed a refund claim dated 08.02.2008 amounting to Rs. 66,500/- received on 11.02.2008 on the ground that the amount of Coal Cess paid in the form of Additional duty of Customs/Coal Cess @ 3.50/MT is refundable to them in terms of above said OIO dated 27.12.2007 and the judgement passed by Hon'ble Supreme Court in the matter of Commissioner of Central Excise & Customs, Bhuvaneshwar-I V/s Tata Iron & Steel Co. Ltd. in Civil Appeal No. 4077-4079 of 2001 reported in 2003(154) ELT-343(SC). The noticee also filed a certificate of Chartered Accountant dated 09.01.2008 with reference to un-just enrichment, clarifying that the same is not recovered from the sales to customers in any manner.

6. Further, the Assistant Commissioner, Custom division, Porbandar vide OIO No. 53/AC/PBR/08-09-Refund dated 18.06.2008 sanctioned the refund claim amounting to Rs. 66,500/- u/s 27 of Customs Act, 1962.

7. The said OIO dated 18.06.2008 was not accepted by the Hon'ble Commissioner of Customs, HQ, Jamnagar and the department under process of review preferred an appeal against the same with the Commissioner of Customs (Appeals) on the grounds that the said OIO is not legal, proper and valid and the refund under reference paid erroneously.

8. The Commissioner of Customs (Appeals) vide OIA No. 31/Commr(A)/JMN/2009 dated 23.07.2009 had set aside the OIO No. 53/AC/PBR/08-09-Refund dated 18.06.2008 passed by the Assistant Commissioner of Customs, Porbandar.

9. Consequent to the said OIA dated 23.07.2009 a protective demand SCN No. VIII/20-R-26/CUS(T)/07-08 dated 21.10.2008 was issued to M/s Ultratech Cement Limited which was confirmed by the Assistant Commissioner, Porbandar vide OIO No. 14/AC/PBR/2009-10 dated 30.09.2019.

10. Being aggrieved, the importer challenged the said OIA No. 31/Commr(A)/JMN/2009 dated 23.07.2009 by filed an appeal to CESTAT in Appeal No. C/445/2009. After filing this appeal, the importer also filed an appeal against OIO No. 14/AC/PBR/2009-10 dated 20.10.2009 with the Commissioner (Appeals). This appeal against OIO No. 14/AC/PBR/2009-10 was rejected by the Commissioner (Appeals) on the ground that there can't exist parallel remedies on the same subject as it may lead to conflict of findings.

11. The matter was decided by Hon'ble CESTAT vide FINAL ORDER NO. A/10747-10751/2019 dated 30.04.2019 by way of remand to the adjudicating authority. The relevant para of the order is reproduced below for

reference.

***“We therefore, set-aside the impugned order and remand the matter to the Adjudicating Authority to provide order of final assessment to the appellant and thereafter on their representation, a reasoned order should be passed. The appeals are allowed by way of remand to the Adjudicating Authority.”***

12. In light of the said CESTAT Order a speaking order No. VIII/20-R-4/Ref/PBR/2019-20 dated 09.06.2021 has been issued and the same was provided to the importer vide letter F. No. VIII/20-R-4/Ref/PBR/2019-20 dated 09.06.2021.

#### PERSONAL HEARING

13. Personal hearing in this matter was fixed on 25.06.2021 vide letter F. No. VIII/20-R-4/Ref/PBR/2019-20 dated 09.06.2021, fixed on 09.07.2021 vide letter F. No. VIII/20-R-4/Ref/PBR/2019-20 dated 28.06.2021 and fixed on 23.07.2021 vide letter F. No. VIII/20-R-4/Ref/PBR/2019-20 dated 12.07.2021 but neither Exporter nor his authorized representative appeared.

Subsequently, as the change of adjudicating authority another personal hearing was fixed on 29.09.2021 & 30.09.2021 vide letter F. No. VIII/20-R-4/Ref/PBR/2019-20 dated 22.09.2021 but again neither Exporter nor his authorized representative appeared and vide their letter dated 15.10.2021 requested not to grant any further PH in the matter and decide the case on the basis of documents/records and the reply submitted by him vide their letter dated 06.08.2021.

In view of above, since the noticee has been given ample opportunity to come for hearings which they failed to avail, I observe that principles of natural justice have been complied with.

#### DEFENSE REPLY

14. The noticee vide their letter No. UTCL/GCW/Coal Cess refund dated 06.08.2021 submitted their defense reply.

The main contention of the defense reply dated 06.08.2021 submitted by M/s Ultratech Cement Ltd. is as under-

*“we are submitting this letter to reiterate our position regarding the refund claim filed by us for Rs. 66,500/- (Rs. Sixty Six thousand five hundred only) B/E No. 14 dt. 01.05.04 which was not leviable under section 7 of Coal Minas (Conservation and Development) Act, 1914 for imposing duty of customs under the said Act, and have been erroneously paid by us. We have filed refund claim on 08.02.2008 stating therein that Additional duty of Customs @3.50PMT was*

*refundable to us on the ground that there was no levy of customs duty of coal cess as held by Hon'ble Supreme court in the matter of Civil Appeal No. 4077-4079 of 2001 by CCE & C Bhuvaneshwar V/s Tata Iron & Steel Co. Ltd. reported in 2003(154) ELT-343(SC). The main reason of denying the benefit of the refund to us is that final assessment of subject B/E has not been challenged by way of filing appeal.*

*In this regard it is humbly submitted that filing of refund claim is itself challenge of assessment order & we are entitled to claim reassessment in terms of the refund application. The aforesaid submission squarely gains support from the following judgements:*

- (i) Karnataka Power Corporation Ltd. Vs CC-2002(143)ELT2482(SC)*
- (ii) Jindal Vijaynagar steels Ltd. Vs CC-2006(206)ELT 529*
- (iii) Technosales Corporation Vs CC, Banglore-2006(200)ELT 296*
- (iv) CC, Mumbai Vs HEG Ltd 2006(074)RLT 427*
- (v) Mecon Ltd. Vs CC-2003(153)ELT 574*
- (vi) Hindustan Petroleum Corporation Ltd. Vs CC-2003(156)ELT 425'*

However, the noticee vide letter dated 06.08.2021 has requested to pass a speaking order on the basis of reply submitted by him. Further, the noticee vide their letter dated 15.10.2021 has requested not to grant any further PH in the matter and decide the case on the basis of documents/records and the reply submitted by him vide their letter dated 06.08.2021.

## DISCUSSION & FINDINGS

15. I have gone through the aforesaid Show Cause Notice and relevant case records. They were also given ample opportunities to appear for hearing and plead their case, as per the provisions of law.

16. I have carefully gone through the records of the case and show cause notice. The issues to be decided in this case are whether-

- (i) The importer is entitled for the refund claim of Rs. 66,000/- paid by the importer in the form of Additional duty of Customs/Coal Cess @ 3.50/MT or otherwise.
- (ii) The refund claim is not hit by limitation because the refund ensued only when the order dated 27.12.2007 was passed.
- (iii) The finalization of Bill of Entry dated 08.06.2005 was conveyed to the importer or otherwise.

17. In the present case, I find that the importer had imported 19000 MT of Indonesian steam (non coking) coal in bulk at Porbandar Port. This coal was imported via vessel M V Uri, classified under CTH 27011920 and bill of entry No. F-14 was filed on 01.05.2004 for the home consumption. The said bill of entry was provisionally assessed on 03.05.2004 for the want of original

documents & test report as per Section 18(1) of the Customs Act, 1962. The importer paid the BCD amount of Rs 24,91,317 and additional duty of Customs Cess of Rs 66,500 (@ Rs 3.5/MT). The basis of this additional Cess was the notification S.O. 95(E), dated the 8th February, 1983 issued by the department of coal. As the bill of entry was filed under advance license, the BCD amount was not paid in cash but was debited through the advance license number 0310262478/2/03/00 dated 05/04/2004 issued by DGFT Mumbai. The cess amount was paid in cash by using TR-6 challan.

18. I find that the bill of entry was finalized on 08.06.2005 and the intimation of finalization of bill of entry was provided to the authorised CHA of the importer i.e. Velji P and Sons vide letter issued by F.No. VIII/B/FA/CH/PBR/2003 dated 08.06.2005.

19. I also find that the notice had claimed refund of amount of Coal Cess paid in the form of Additional duty of Customs /Coal Cess on the basis of consequential relief granted vide OIO No. 11/AC/CUS/PBR/2007-08 dated 26.12.2007 passed by the Assistant Commissioner, Custom Division, Porbandar by dropping the demand of differential duty of Rs. 1,23,500/- issued by the Superintendent of Custom House, Porbandar vide SCN No. VIII/6(a)-06/CH/PBR/2005-06/262 dated 09.05.2005. Consequently, the Assistant Commissioner, Custom division, Porbandar vide OIO No. 53/AC/PBR/08-09-Refund dated 18.06.2008 sanctioned the refund claim amounting to Rs. 66,500/- u/s 27 of Customs Act, 1962 and the said OIO was challenged, under the process of review, by the department before the Commissioner of Customs (Appeals) under Section 129D(4) of the Customs Act, 1962 on the ground that the refund was paid erroneously and the claim filed by the notice is hit by limitation period as per the provisions of Section 27 of the Customs Act, 1962. Since the bill of entry No. 14 dated 01-05-2004 was finally assessed on 08.06.2005 and the noticee filed refund claim only on 08.02.2008 i.e, after the lapse of more than two and half years. Consequently, the protective demand was issued to the noticee.

20. further I find that the Hon'ble Commissioner (Appeals) Customs, Jamnagar vide OIA No. 31/Commr(A)/JMN/2009 dated 23.07.2009 has allowed the appeals of the Revenue on the basis of the settled legal position regarding admissibility of refund by offering his detailed findings as narrated here below:

“As per the facts on record the subject bill of entry was assessed finally on 08.06.2005. There is no dispute that the assessment order was not challenged by the respondent by filing appeal against the same. Assessment of the Customs Act is an appealable order and appeal and an appeal against the same has to be preferred in accordance with the provisions of Section 128

of the Customs Act, 1962 as held by the tribunal in Max India Ltd. V/s CC, ICD, New Delhi [2005(192) ELT 246(Tri-Del)] where such assessment has not been challenged in appeal, it is not open to the assessee to challenge it indirectly by filing a refund claim under Section 27 of Customs Act, 1962. Refund Claim being not appeal proceedings the authority considering a refund claim is not competent to review or modify an assessment order and he cannot sit in appeal or an assessment made by a competent officer which has not been challenged. In this case, sanction of refund claim by the lower authority is not in conformity with the ratio of judgment of Hon'ble Supreme Court in the case of M/s Priya Blue Industries Ltd. V/s CC(Prev) [2004(172)ELT 145 (S.C.)] Hon'ble CESTAT Ahmedabad has also laid down in its judgment in case of J. M. Baxi & Co., CC, Ahmedabad [2009(237) ELT (Tri-Ahmd)] and Indian Potash Ltd. V/s CC, Kandla [2007(220)ELT 294(Tri-Ahmd)] that appeal not being filed against the finally assessed Bill of entry, refund is not admissible. It will thus follow in this case that the lower authority has granted refund to the respondent regardless of the fact that the assessment, on the basis of which the amount has been paid, had not been challenged on merit by the respondent by filing appeal against the same with the competent appellate authority.”

21. As per Section 27(1)(b) of Customs Act, 1962, the refund claim is required to be filed before expiry of six months from the date of final order. In this case there has been provisional assessment u/s 18(1) of the customs act, therefore, the limitation of six months shall be applicable and computed from the date of final assessment order, as stipulated in Explanation-II to the Section 27(1)(b) of Customs Act, 1962 which is reproduced as under;

Explanation-II: Where any duty is paid provisionally under section 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.

In this case the provisional assessment was finalized in 08.06.2005 and the refund claim was filed only on 08.02.2008 received on 11.02.2008 i.e, after the lapse of more than six months and therefore the refund claim filed by the notice is clearly barred by the limitation under Section 27(1)(b) of Customs Act, 1962.

22. It was contended by the noticee that even through the bill of entry was finally assessed in June 2005 the refund was consequent to the OIO date 26.12.2007 and thereby the refund claim filed by them on 08.02.2008 was not hit by limitation. I find this contention to be factually and legally incorrect. Since the payment of additional duty of Customs/Coal Cess was already been confirmed at the time of final assessment and the noticee had not challenged such final assessment, it is irrespective of the outcome, consequential relief,

of OIO 11/AC/CUS-PBR/2007-08 dated 26.12.2007 in respect of SCN VIII/6(a)-06/CH/PBR/2005-06 dated 09.05.2005 for limitation of filing appeal. Sanction of refund or the amount of the amount Rs. 66,500/- by the Assistant Commissioner which was not subject matter of dispute in SCN and the adjudication order was not legal particularly when the final assessment has not been set aside or modified by the any appellate authority in appeal filed by the appellant. I therefore reject the contention that the refund ensued to the notice as a consequence to the order dated 26.12.2007 of the Assistant Commissioner and cannot be subjected to the conditions of Section 18 and 27 of the Customs Act, 1962.

23. In view of above, it is clear that the provisional assessment was finalized in 08.06.2005 and the refund claim was filed only on 08.02.2008 received on 11.02.2008 i.e, after the lapse of more than six months and therefore the refund claim filed by the notice is clearly barred by the limitation under Section 27(1)(b) of Customs Act, 1962 and hence the importer is not eligible for the refund.

24. Further, I find that the bill of entry was finalized on 08.06.2005 and the intimation of finalization of bill of entry was provided to the authorised CHA of the importer i.e. Velji P and Sons vide letter issued by F.No. VIII/B/FA/CH/PBR/2003 dated 08.06.2005 which clearly meant that the department by due procedure conveyed about the finalization of such Bill of Entry to the importer through its authorized CHA. Therefore, the importer was well aware about the finalization of Bill of entry and didn't challenged the final assessment order dated 08.06.2005 willingly and appears to be accepted by them. So the contention of the importer about the non-communication of finalization of Bill of entry is absolutely wrong and bad in laws.

25. I rely on the CESTAT order in case of Max India Ltd wherein it was held that the assessment of bill of entry under Section 47 of the Customs Act, 1962 is itself an appealable order. There is no need to issue a speaking order to go to appeal. Further, the importer never requested to issue a speaking order. Therefore, importer is just diverting the matter. Further, this matter was never raised in the earlier round of adjudication. Nevertheless, the intimation of finalization of bill of entry was also given to the authorized CHA on 08.06.2005. Even the importer could have filed the appeal against this letter.

26. Further I rely on Supreme Court judgment of PRIYA BLUE INDUSTRIES LTD. Versus COMMISSIONER OF CUSTOMS (PREVENTIVE) reported as 2004 (172) E.L.T. 145 (S.C.), it is clear that refund can't be sanctioned unless the assessment order is either reviewed or modified in appeal. In this case neither the assessment order was reviewed nor appealed by the importer. The relevant portion is reproduced below:-

*“Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.”*

Further, in case of *Khemka Travels v. C.C.* - [1992 \(57\) E.L.T. 458](#) and *C.C., Bombay v. Hari & Co.* - [1997 \(92\) E.L.T. 518](#) (T) it was held that order of assessment on a bill of entry is an appealable order against which appeal is required to be filed, if the party is aggrieved by the same

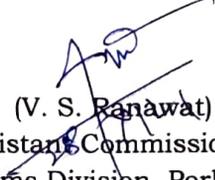
As discussed in para above, the bill of entry itself is an appealable order. Further, the letter of intimation to authorized agent could be a basis of appeal. But, the excuse that the speaking order was not issued is nothing but an excuse to divert the matter. The OIO No. 53/AC/PBR/08-09-Refund dated 18.06.2008 is also passed before the review process of the assessment order under section which also not proper. Further, The OIO passed was for a different demand and was not related to Rs 3.5/MT.

27. I further find that the noticee in support of their contention, have quoted various judgements wherein I find that the judgement relied upon by the noticee are not squarely applicable to the facts and circumstances of the present cases, as the issue in the instant case be decided is whether refund is admissible and whether the assessment order, appealable, is delivered to the importer or otherwise in light of the remand proceedings by CESTAT vide its order A/10747-10751 / 2019 dated 30.04.2019. The law position presented by the noticee does not support his case and noticee have tried to shelter from different decision/judgements in support of their contention & therefore the same are is-quoted, irrelevant and inapplicable to the issue required to be decided and actually decided fairly by the Commissioner of Customs(Appeals) vide OIA No.31/Commr(A)/JMN/2009 dated 23.07.2009

28. In view of the above, I come to the conclusion on the basis of facts and circumstances that the refund sanctioned, in this case vide OIO dated 18.06.2008, is erroneous and liable to be recovered from the importer. Therefore, I pass the following orders.

**ORDER**

I hereby confirm the demands raised vide Show Cause Notice No. VIII/20-R-26/CUS(T)/07-08 dated 21.10.2008 issued under Section 28(2) of the Customs Act, 1962 and order to recover the refund amounting to Rs. 66,500/- (Rs. Sixty Six thousand five hundred only), erroneously sanctioned and paid to the noticee. I also order to recover the interest at applicable rates thereon under Section 28AB from relevant date.

  
(V. S. Ranawat)  
Assistant Commissioner,  
Customs Division, Porbandar

F. No. VIII/20-R-4/PBR/2019-20  
By Reg. Post AD/Speed Post  
DIN No. 20211071MM00002252B8

dated: 28.10.2021

To,  
M/s Ultratech Cement Limited,  
(formerly known as Larson and Tourbo Ltd.),  
Gujarat Cement Works, P.O. Kovaya, Taluka Rajula.  
Distt.- Amreli, Gujarat-365541.

Copy to : (1) The Commissioner Customs(P), Jamnagar (RRA Section).  
(2) The Superintendent, Customs, Custom House for information.  
(3) The Assistant Commissioner(systems), Hq, Jamnagar for  
uploading the OIO on Commissionerat's website.  
(4) The Superintendent (Recovery Cell), CD, Porbandar for  
information & n.a.  
(5) Guard File.