

THE BURNING COAL - I

(S.Jaikumar, Advocate, Swamy Associates)

"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."

- Hon'ble FM in his Budget Speech 2012

I am sure that the above budget speech shall definitely get into the Hall of Fame (Shame), triggering the *magnum opus* of the indirect tax litigation ever, both in terms of the number of notices as well as the amount involved.

To give effect to the FM's commitment, the Board issued a Notification No.12/2012 - Customs, Dt: March 17, 2012, wherein "Steam coal" falling under Chapter Heading 27011920 of the Customs Tariff, was given a preferential rate of 1% BCD vide SL. NO. 123 of the said Notification.

Once the Notification *supra* was issued, all the coal importers across the nation, started to claim the benefit of the same, till the sleuths of the DRI landed upon a case at Ahmedabad, wherein, they investigated a case of importation of "bituminous coal" as "steam coal".

In Customs Tariff, under Chapter 27, there is a sub-heading Note 2, which reads as under:

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

Now, based on the above Chapter Note, numerous notices have been issued to various importers of coal, proposing to reclassify the coal imported by them as " bituminous coal" instead of "steam coal" by resorting to the twin parameters set out in the above Chapter Note, viz., Volatile matter (VM) exceeding 14% and Calorific value (CV) is equal of greater than 5833kcal/kg.

While doing so, the department has also alleged that the **Gross Calorific Value** ascertained on an **air-dried basis (ADB)** of the coal imported by the importers had exceeded the prescribed limit of 5833 kcal/kg and hence the same were proposed to be classified as "bituminous coal" by virtue of the Chapter Note *supra*.

At the outset, it is to be noted that, "**Calorific value**" is the heat of combustion of a unit quantity of a substance.

There are two types of calorific values, namely, **Gross Calorific Value (GCV)** as well as **Net Calorific Value (NCV)**. When the Chapter note refers only to the term calorific value limit, it is not known as to how the department has chosen to adopt GCV instead of NCV at the first place.

Similarly, the department's adoption of determination of GCV under ADB also appears baseless. Sub heading note 2 to chapter 2701 reads as "for the purposes of sub heading 270112, 'bituminous coal' means coal having a volatile matter limit (on a dry, mineral matter free basis) exceeding 14% and calorific value limit (on a moist, mineral matter free basis) equal to or greater than 5833 kcal/kg." Thus, the calorific value limit has to be taken on a **moist, mineral matter free basis**.

As per the American Standards of Testing and Measures (ASTM), the standard relied upon by the Customs Tariff as well as the department, the moist, mineral matter free basis (MMMF) is the basis to which calorific value is calculated for determining the coal rank for sample of coal ranks high volatile A bituminous and lower. This is the mineral matter free, inherent moisture containing basis which is equivalent to the as received basis for samples collected and preserved as described in para 7 of the said standard. Thus it is evident that MMMF basis is mineral

matter free, inherent moisture containing basis which is equivalent to the as-received basis (ARB) for samples collected and preserved as described in para 7 of the said standard in ASTM.

The relevant Para 7 of ASTM deals with the procedure for taking the samples and preserving them. In none of the cases, there appears to be any evidence adduced by the Department that the calorific value determined and is representing the calorific value on moist, mineral matter free basis has been done as prescribed in the ASTM standards, as the said Para 7 prescribes taking of coal samples and preserving them from the mines.

In this connection, reference is drawn to the decision of the Hon'ble CESTAT in the case of **Tamil Nadu Newsprint and Papers Ltd. v. CC, Tuticorin reported in 2010 (253) ELT 153 (Tri-Che)**, wherein the Hon'ble CESTAT has held that if the department had doubt about the description of the impugned goods and the classification of the same, they should have carried out a chemical test. Without such a chemical test, the department has no basis to classify the impugned goods under heading 270112 and charge the same to higher rate of duty. The said decision was given with reference to steam coal where the department was proposing the

classification as bituminous coal based on the test reports undertaken by the importer for valuation purpose on a different basis.

As the issue involved is about the classification of coal with respect to its technical parameters, it is also relevant and pertinent to understand certain basic facts with reference to its technical aspects to appreciate the issue better, which will be dealt in **Part II...**