::प्रधानआयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
द्वितीय तल,जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्डाकए.डी.द्वारा :- DIN-20210264SX000000B96D

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIO No.	दिनांक/ Date
	V2/19/GDM/2020	20/JC/2019-20	28.01.2020

ख अपील आदेश संख्या(Order-In-Appeal No.):

KCH-EXCUS-000-APP-023-2021

आदेश का दिनांक / Date of Order: **29.01.2021** जारी करने की तारीख / Date of issue: **11.02.2021**

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by **Shri Akhilesh Kumar**, Principal Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST,
Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता**&प्रतिवादी का नाम एवं पता /Name & Address of the **Appellant** & Respondent :-

M/s. United Coke Pvt. Ltd., Survey No. 901/2, Vidi Devaliya Road, Anjar, District Kutch.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील,केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखि+त जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असार्वा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग , ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of dutydemand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित अधिनियम,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम,1994की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) &9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार कोपुनरीक्षण आवेदन :**
Revision applica*ion to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई,वित मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली,2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s United Coke Pvt. Ltd., Survey No. 901/2, Vidi Devaliya Road, Anjar, Gujarat - 370110 (*hereinafter referred to as* "Appellant") has filed Appeal No. V2/19/GDM/2020 against Order-in-Original No. 20/JC/2019-20 dated 28.01.2020 (*hereinafter referred to as* 'impugned order') passed by the Joint Commissioner, Central GST & Central Excise, Gandhidham (*hereinafter referred to as* 'adjudicating authority').

2. The facts of the case, in brief, are that the Appellant was engaged in the manufacture of Lam Coke and Lam Coke dust falling under CETH No. 2704 00 30 of the First Schedule to the Central Excise Tariff Act, 1985 and holding Central Excise Registration No. AAACU6781HEM001. The Appellant was availing Cenvat credit facility under the Cenvat Credit Rules, 2004 (*hereinafter referred to as* "CCR, 2004").

2.1 During the course of audit of the records of the appellant by the officers of Central GST Audit Commissionerate, it was found that the Appellant had imported Coal classified under Chapter Heading No. 27011100, 27011200 and 27011990 on payment of Additional Duty of Customs (CVD) at the rate of 1%/ 2% in terms of Notification No. 12/2012-Cus dated 17.03.2012, as amended. It was found that the Central Excise duty on coal was levied @ 6% ad-valorem as per Central Excise Tariff Act, 1985 and was levied @ 1% under Notification No. 12/2012-CE dated 17.03.2012, as amended, subject to condition that no credit under Rule 3 or Rule 13 of CCR, 2014 is taken in respect of inputs or input services used in the manufacture of these goods; that CVD paid by the Appellant was not equivalent to duty of Excise as stipulated under clause (vii) of Rule 3(1) of CCR, 2004. The audit observed that the Appellant had wrongly availed and utilized Cenvat credit of CVD paid on imported Coal totally amounting to Rs. 1,96,95,624/- during the period from 01.04.2014 to 30.6.2017.

2.2 The Show Cause Notice No. V.CE/15-10/Audit/SCN-JC-10/18-19 dated 29.11.2018 was issued to the Appellant calling them to show cause as to why Cenvat credit amounting to Rs. 1,96,95,624/- availed and utilized during the period from 01.04.2014 to 30.6.2017 should not be demanded and recovered from them along with interest under Rule 14 of the CCR, 2004 read with Section 11A(4) of the Central Excise Act, 1944 and also proposing imposition of penalty

under Rule 15 of CCR, 2004 read with Section 11AC of the Central Excise Act, 1944 (*hereinafter referred to as the* "Act").

2.3 The Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who held that the CVD paid by the Appellant @1%/2% was a concessional rate of CVD in terms of Notification issued under the Customs Act, 1962 and such rate of CVD was independent and different from the duty of Excise; that clause (vii) of Rule 3(1) of CCR, 2004 permits Cenvat credit of CVD if it is equivalent to duty of Excise; that CVD paid by the Appellant was not equivalent to duty of Excise and hence not cenvatable under CCR,2004.

2.4 The adjudicating authority confirmed demand of Cenvat credit of Rs. 1,96,95,624/- and ordered for its recovery along with interest under Rule 14 of the CCR,2004 and imposed penalty of Rs. 1,96,95,624/- under Rule 15 of the CCR, 2004 read with Section 11AC of the Act.

3. Being aggrieved with the impugned order, the Appellant has preferred appeal on the grounds which is elaborated in subsequent paragraphs.

3.1 That the Show Cause Notice invoking extended period on 29.11.2018 is time barred for the entire period from April-2014 to June-2017; that they are registered manufacturers and are filing returns regularly, therefore the department is aware about the fact of CENVAT credit taken by them, therefore there is no suppression of facts with intent to evade payment of tax and hence extended period of time cannot be invoked.

3.2 That the Countervailing Duty (CVD) is an additional customs duty normally levied at rates equal to Central Excise Duty leviable on like goods produced or manufactured in India; that they had imported Coal on payment of CVD @2% by availing benefit of Notification no. 12/2012-Cus. dated 17.03.2012, as amended; that on perusal of the above Notification and relevant provisions of Rule 3(1)(i) of the Rules, it is can be seen that CENVAT credit of central excise duty paid on goods specified in serial no. 67 to 128 in respect of which the benefit of an exemption under the above notification has been availed; that the benefit of Notification No. 12/2012-CE has not been availed but the benefit of exemption under Notification No. 12/2012-Cus. has been availed and there is no restriction on taking the benefit under a Notification issued under the Customs Tariff Act (hereinafter referred to as "CTA"); that as per Rule 3(1)(vii) of the Rules, a manufacturer or a provider of taxable service is eligible to take CENVAT credit of

CVD paid on imported goods under Section 3 of the CTA, thus they have correctly availed the CENVAT credit of CVD. They further relied upon the decision of the Tribunal in the case of M/s. Hindalco Industries Ltd. Vs GST, Bhopal [2018 (363) E.L.T. 1085 (Tri.-Del) and in the case of M/s Jaypee Sidhi Cement Plant Vs Commr. of CGST, Cus. & C.Ex., Jabalpur-2019 (369) E.L.T 1673 (Tri.-Del.).

3.3 That Rule 3(1)(i) of the Rules was inserted vide Notification no. 21/2012-CE(NT) dated 27.03.2012 restricting credit in respect of only 2 commodities viz. Coal and fertilizers and the Central Excise duty was retained at 1% ad valorem; that the CVD fixed for imported Coal during the relevant period was 2% as against the concessional rate of Central Excise duty @ 1%; that Rule 3(1)(i) of the Rules clearly sets out denial of CENVAT credit in a situation where benefit of Notification No. 1/2011-CE or Notification no. 12/2012-CE is availed by them; that no such denial has been stipulated under Rule 3(1) (vii) of the Rules for availment of credit of CVD paid by availing benefit of Notification no. 12/2012-Cus. dated 17.03.2012, as amended.

3.4 The Appellant submitted that although the Additional duty of Customs(CVD) is levied under Section 3(1) of the Customs Tariff Act, 1975 should be equal to Central Excise duty leviable on like product if manufactured in India, the said levy continues to be in the nature of Customs Duty and is not collected as Central Excise duty on the imported goods; that restriction on availment of Cenvat credit contemplated under Rule 3(1)(i) of CCR, 2004 applies only to Central Excise duty levied under Notification No. 12/2012-CE dated 17.3.2012 on the goods manufactured in India and not in respect of Additional Duty of Customs paid on imported Coal under Notification No. 12/2012-Cus dated 17.3.2012.

3.5 That Penalty under Rule 15(2) of CCR, 2004 cannot be imposed without evidence that the alleged acts and omissions had been committed deliberately or contumaciously or in flagrant violation of provisions of law or with intent to evade duty; that all the transactions were recorded in their books of accounts. Further, they have regularly filed returns showing factual and correct details. Therefore, no charges of suppression can be established against the Appellant for failing to do so. Therefore, they prayed to set aside the order in challenge and prayed to allow the appeal.

4. Hearing in the matter was conducted on 1.7.2020 but due to change of

appellate authority, hearing was again held on 12.1.2021 in virtual mode. Shri Sarju Mehta, Chartered Accountant, appeared on behalf of the Appellant and reiterated the submission made in appeal memorandum and also those in written submissions made during earlier hearing.

5. I have carefully gone through the facts of the case, the impugned order and written as well as oral submissions made by the Appellant. The issues to be decided are (i) whether the Appellant has wrongly availed Cenvat credit of Additional Duty of Customs paid on imported Coal or not; and (ii) whether confirmation of demand and imposition of penalty on the Appellant are correct or otherwise.

6. On going through the records, I find that the Appellant had imported Coal which was assessed to, *inter alia*, Additional Duty of Customs (CVD) @1% / 2% under Notification No. 12/2012-Cus dated 17.3.2012, as amended. The Appellant availed and utilized Cenvat credit of said CVD during the period from 01.04.2014 to 30.6.2017 which has been disallowed by the adjudicating authority on the grounds that CVD paid by the Appellant @1% / 2% was a concessional rate of CVD in terms of Notification No. 12/2012-Cus dated 17.3.2012 issued under the Customs Act, 1962 and such rate of CVD was independent and different from the duty of Excise; that clause (vii) of Rule 3(1) of CCR, 2004 permits Cenvat credit of CVD, if it is equivalent to duty of Excise; that CVD paid by the Appellant was not equivalent to duty of Excise and hence not eligible for cenvat under CCR, 2004.

7. The appellant has contended that although the Additional duty of Customs(CVD) levied under Section 3(1) of the Customs Tariff Act, 1975 should be equal to Central Excise duty leviable on like product if manufactured in India, the said levy continues to be in the nature of Customs Duty and is not collected as Central Excise duty on the imported goods; that the benefit of Notification No. 12/2012-CE has not been availed but the benefit of exemption under Notification No. 12/2012-Cus. dated 17.3.2012 has been availed and there is no restriction/ condition on taking the benefit of said Customs notification and relied upon the case laws of M/s. Hindalco Industries Ltd-2018 (363) E.L.T. 1085 (Tri.-Del) and M/s Jaypee Sidhi Cement Plant- 2019 (369) E.L.T 1673 (Tri.-Del.).

8. I find that Additional Duty of Customs is levied under sub-section (1) of Section 3 of the Customs Tariff Act, 1975 at prescribed rate. The Coal imported

by the Appellant was assessed to duty, *inter alia*, @ 1%/2% CVD under Notification No. 12/2012-Cus dated 17.3.2012, as amended. I also find that there is no condition prescribed for import of Coal @2% CVD under Notification No. 12/2012-Cus dated 17.3.2012. The relevant entries appearing in the said Notification are reproduced as under:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002 Published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 118(E) dated the 1st March, 2002, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India,-

(a) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate specified in the corresponding entry in column (4) of the said Table;

(b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act 1975 (51 of 1975) as is in excess of the additional duty rate specified in the corresponding entry in column (5) of the said Table, subject to any of the conditions, specified in the Annexure to this notification, the condition number of which is mentioned in the corresponding entry in column (6) of the said table.

Sl. No.	Chapter or Heading or Sub-heading or tariff item	Description of goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
124	27011100	Anthracite Coal	2.5%	2%	-
124A	27011990	All goods	2.5%	2%	-

9. The Appellant availed Cenvat credit of CVD in terms of Rule 3(1)(vii) of CCR, 2004, which is reproduced as under:

"RULE 3. CENVAT credit. — (1) A manufacturer or producer of final products or a [provider of output service] shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act :

[Provided that CENVAT credit of such duty of excise shall not be allowed to be taken when paid on any goods -

(a) in respect of which the benefit of an exemption under Notification No. 1/2011-C.E., dated the 1st March, 2011 is availed; or

(b) specified in serial numbers 67 and 128 in respect of which the benefit of an exemption under Notification No. 12/2012-C.E., dated the 17th March, 2012 is availed;]

(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;

(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);

(vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);

[(via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);]

(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) [, (vi) and (via)]:

10. I find that the entire proceedings were initiated against the appellant on the grounds that the Cenvat credit of CVD availed by the Appellant in terms of clause (vii) of Rule 3(1) of CCR, 2004 was not equivalent to duty of Excise and hence not eligible for cenvat under CCR, 2004. I find that tariff rate of Central Excise duty on Coal imported by the Appellant was 6% and effective rate of Central Excise duty was 1% in terms of Notification No. 12/2012-CE dated 17.3.2012, subject to condition that no credit under rule 3 or rule 13 of CCR, 2004, has been taken in respect of the inputs or input services used in the manufacture of these goods. I find that in the present case, the Appellant is not engaged in the manufacture of Coal and hence Notification No. 12/2012-CE dated 17.3.2012 is not applicable to the Appellant at all. On the contrary, the

Appellant has paid Additional Duty of Customs @1%/2% on import of Coal by availing the benefit of concessional Notification No. 12/2012-Cus dated 17.3.2012, as amended. Though Additional duty of Customs(CVD) on an imported article was being levied at a rate equal to the excise duty leviable on a like article, if produced or manufactured in India, it is not correct to consider Notification No. 12/2012-Cus to be *pari materia* with Notification No. 12/2012-CE dated 17.3.2012 and rates of CVD and Central Excise duty can be different depending upon the policy of the Government. The Board vide Circular No. 41/2013-Cus dated 21-10-2013 issued from F.No. 354/58/ 2013-TRU has clarified as under:

> "3. The matter has been examined by the Ministry. Under the Free Trade Agreement (FTA), the preference/concession is extended only in respect of BCD. All other duties, including CVD are charged as applicable to similar imports from other countries. The CVD on an imported article is levied at a rate equal to the excise duty leviable on a like article, if produced or manufactured in India. However, at times, under a notification issued under section 25(1) of the Customs Act, 1962, CVD is levied at a rate which is lower than the rate of excise duty leviable on the like domestic article.
>
> 4. In the present case, the excise duty applicable on Steam Coal is 6%, if CENVAT benefit is availed of and 1% if the CENVAT benefit is not availed of. Normally, Steam Coal will suffer 6% CVD, as the condition of non-availment of cenvat benefit cannot be satisfied in respect of imported goods. However, in the Budget 2013-14, as a conscious policy decision, it was decided to levy 2% CVD both on steam Coal and bituminous Coal. This is the general applied rate of CVD on all imports of steam Coal and bituminous Coal regardless of the excise duty leviable on like domestic Coal. No such condition has been laid down that an importer cannot avail of this concessional CVD of 2% if he has availed of the concessional BCD on steam Coal under another notification."
>
> (Emphasis supplied)

10.1 On careful perusal of the aforesaid circular, it can be seen that the Board has clarified that the CVD on an imported article is normally levied at a rate equal to the Central Excise duty leviable on a like article, if produced or manufactured in India, however, at times, by virtue of a notification issued under Section 25(1) of the Customs Act, 1962, CVD is levied at a rate which is lower than the rate of Central Excise duty leviable on like domestic article. From the above, it is clear that the CVD need not be equal to the Central

Excise duty levied in all cases. Normally, Coal imported by the Appellant would attract 6% CVD, as the condition of non-availment of CENVAT credit benefit cannot be satisfied in respect of imported goods. However, in the Budget 2013-14, as a conscious policy decision, it was decided to levy 2% CVD on coal. It is apparent that the rate of CVD notified under Notification No.12/2012-Cus. dated 17.03.2012, as amended, is the general applicable rate of CVD on all imports of coal regardless of the Central Excise duty leviable on like domestic coal.

11. I further find that proviso to the Rule 3(1)(i) of the CENVAT Credit Rules, 2004 clearly sets out denial of CENVAT credit in a situation where benefit of Notification No. 1/2011-C.E. or benefit of Notification No.12/2012-C.E. in respect of serial numbers 67 and 128 is availed. No such restriction has been stipulated under Rule 3(1)(vii) of CCR, 2004 for availment of credit of CVD paid by availing benefit of Notification No. 12/2012-Customs, dated 17.03.2012, as amended. In the case at hand, the Appellant had not claimed any exemption under Notification issued under the Central Excise. Further, the rate of CVD @ 1% / 2% ad valorem, as the case may be, applicable at the material time, was prescribed under the relevant Customs Notification itself without any condition with regard to availability of Cenvat credit.

12. Apart from above, it is pertinent to mention that there is no bar in Rule 3(1) of CCR, 2004 about availment of Cenvat credit of CVD if tariff rate or effective rate prescribed under Excise Notification is different for the simple reason that Notification No. 12/2012-CE is applicable to the manufacturer of domestic goods and consequently condition prescribed therein cannot be made applicable to importer of goods. Further, I note that Cenvat credit is admissible as per Rule 3(1) of CCR, 2004, clause (vii) thereof entitles the appellant to avail the Cenvat credit of CVD in the given circumstances. The phrase used in clause (vii) of Rule 3(1) of CCR, 2004 is "equivalent" and not "equal" to the duty of Excise specified under clauses (i), (ii), (iii), (iv), (v) and (vi) and CVD levied on an imported article is not necessarily be equal to the excise duty leviable on a like article, if produced or manufactured in India, as discussed by me above. After careful examination of the facts of the case, I do not see any infirmity in availment of Cenvat credit of CVD by the Appellant.

13. I rely on the Order passed by the Hon'ble CESTAT, New Delhi in the case of Hindustan Zinc Ltd reported as 2020-TIOL-1545-CESTAT-DEL, wherein it has

been held that,

3. ... ... During the relevant period, Hindustan Zinc paid additional duty of customs in terms of section 3(1) of the Customs Tariff Act on the importation of steam Coal. It is stated that for payment of such additional duty of customs, the benefit under serial number 122 A/123 (serial number 121B w.e.f March 1, 2006) of the Customs Notification No. 12/2012-Cus dated March 17, 2012 Notification dated March 17, 2012, which prescribed a rate of 2% ad valorem was availed. Hindustan Zinc also availed CENVAT credit of the additional customs duty so paid under rule 3(1)(vii) of the CENVAT Credit Rules. However, a show cause notice dated July 8, 2019 was issued to Hindustan Zinc proposing to disallow CENVAT credit of Rs. 2,75,97,106/- for the relevant period from July 2016 to June 2017 and for recovery of the same with interest. The reason mentioned in the show cause notice was that CENVAT credit of duty specified in the First Schedule to the Excise Tariff Act was admissible under rule 3 of the CENVAT Credit Rules and so additional duty of customs equal to duty of excise leviable under the Excise Tariff Act read with any other notification was admissible for CENVAT credit. As the additional duty of customs paid at the rate of 2% was not the duty of excise as specified under the Excise Tariff Act, CENVAT credit of additional duty of customs paid under the Notification dated March 17, 2012 was wrongly availed by Hindustan Zinc.

...

...

9. It is not in dispute that both Hindustan Zinc and Ultratech Cement paid additional duty of Customs under section 3 (1) of the Customs Tariff Act, after availing the benefit of the Customs Notification dated March 17, 2012 and that they also availed CENVAT credit of the additional duty of customs so paid under rule 3(1)(vii) of the CENVAT Credit Rules. This availment of CENVAT credit has been denied to them for the reason that the additional duty of customs paid @ 2% was not the duty of excise as specified in the Excise Tariff Act and so CENVAT credit of the additional duty of customs paid under the Customs Notification dated March 17, 2012 have been wrongly availed.

...

...

14. The Commissioner has mixed up rule 3(1)(i) and rule 3(1)(vii) of rule 3 of the CENVAT Credit Rules. It is for this reason that the conditions specified in rule 3(1)(i) have also been imported into rule 3 (1)(vii) of the CENVAT Credit Rules. In the first instance, Hindustan Zinc had not paid duty of excise specified in the First Schedule of the Excise Tariff Act, nor it had availed the benefit of the Central Excise Notification dated March 1, 2011 or that specified in serial numbers 67 and 128 in respect of which the benefit of an exemption under Central Excise Notification dated March 17, 2012 had been availed. In fact, Hindustan Zinc had paid additional duty of customs by availing the benefit under serial number 122A/123 of the Customs Notification dated March 17, 2012. It is because of this misreading of rule 3(1) of the CENVAT Credit Rules that led the Commissioner to commit an error.

15. The Regional Advisory Committee of Hyderabad Zone, in its meeting held on February 9, 2015 considered this very issue at point No. 1 and concluded that CENVAT credit of additional duty of customs paid on imported goods under Customs Notification dated March 17, 2013 (and not under Central Excise Notification) is available for credit. The relevant portion of the minutes is

reproduced below:

"MINUTES OF THE MEETING OF THE REGIONAL ADVISORY COMMITTEE, HYDERABAD ZONE HELD ON FEBRUARY 09, 2015.

Point No. 1 - Credit on imported coal:-

Many manufactures are importing steam coal on payment of duties. As per Customs Notification No. 12/2012-Cus. They are availing concessional CVD @ 2%. Audit is of the view that since CVD has been paid @ 2% on imported coal, the credit under Cenvat Credit Rules, is not available. Audit is taking a view that CVD in lieu of Excise duty and if 2% duty has been paid on imports the credit is not admissible because a manufacturer who is procuring coal domestically where excise duty has been paid @ 2%, the credit is not available.

*Board has issued a circular No.*41/2013-Cus. *dated 21.10.2013 where it has been clarified that 2% of CVD is "general applied" rate and therefore it is industry's view that credit of CVD is available as per rule 3(1) (vii) of CENVAT credit rules. Please clarify.*

Reply:

Since the subject goods were levied at reduced rate of 2% CVD on their importation in terms of section 3 of Customs Tariff Act, 1975 read with Notification issued therein i.e. under Notification No. 12/2012-Cus. dated March 17, 2013 (and not under Notification No. 1/2011 CE) which was not excluded from the purview of Rule 3 of CENVAT credit rules, 2004, it appears that the CENVAT credit of CVD paid on imported coal (i.e. 2% adv.) under Notification No. 12/2012-Cus. dated 17.03.2013 is eligible for credit."

16. A Division Bench of the Tribunal in Hindalco Industries Ltd. considered this precise issue and held that if additional duty of customs has been paid after taking into consideration the Customs Notification dated March 17, 2012, there would be no bar for availment of CENVAT credit in terms of rule 3(vii) of the CENVAT Credit Rules.

...

....

22. The Commissioner, therefore, committed an illegality in denying the benefit of CENVAT credit to Hindustan Zinc."

14. I have also examined the decision passed by the Hon'ble Gujarat High Court in the case of M/s Lonsenkiri Chemicals Industries- 2019 (365) E.L.T. 22 (Guj.) relied upon by the adjudicating authority. I find that issue involved in the said case was that the Appellant therein had availed Cenvat credit of CVD paid under Notification No. 1/2011-CE dated 1.3.2011 and Notification No. 12/2012-CE dated 17.3.2012. The Hon'ble Court held that Cenvat credit of CVD is not admissible by virtue of proviso to Rule 3(1)(i) of the Cenvat Credit Rules, 2004. Whereas, in the present case the Appellant has availed Cenvat credit of CVD paid under Customs Notification No. 12/2012-Cus dated 17.3.2012, as amended and there is no bar for availment of Cenvat credit of CVD under Rule 3 of CCR,

2004, when CVD is paid under Customs Notification No. 12/2012-Cus dated 17.3.2012, as amended. Thus, facts involved in the case of Lonsenkiri Chemicals Industries is different and not applicable to the facts of the present case. I also rely on the Order No. A/10390/2019 dated 22.2.2019 passed by the Hon'ble CESTAT, Ahmedabad in the case of CCE & ST, Surat-I Vs. Aarti Industries Ltd, wherein it has been held that,

> "... ... As regard, the judgment cited by the Ld. AR in the case of Lonsenkiri Chemicals Industries (Supra), I find that in the said case Cenvat Credit was availed on the CVD paid under the Notification No. 12/12-CE which was barred from availing the Cenvat Credit in terms of Rule 3(1) proviso (a) and (b) whereas in the present case in Rule 3(1) there is no bar provided for CVD paid under Notification No. 12/12-Cus., therefore, the judgment of Hon'ble High Court in Lonsenkiri Chemicals Industries (Supra) is not applicable to the facts of the present case. As per the above discussion, the impugned order is upheld and Revenue's appeal is dismissed."

15. In view of above, I hold that the Appellant had correctly availed Cenvat credit of CVD paid under Customs Notification No. 12/2012-Cus dated 17.3.2012, as amended during the period from 1.4.2014 to 30.6.2017. I, therefore, set aside the confirmation of demand in respect of Cenvat credit amounting to Rs. 1,96,95,624/- along with interest. Since, demand is set aside, imposition of penalty of Rs. 1,96,95,624/- under Rule 15 of CCR, 2014 is also not sustainable and required to be set aside and I do so accordingly.

16. In view of above, I set aside the impugned order and allow the appeal.

17. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।

17. The appeal filed by the Appellant is disposed off as above.

सत्यापित,

बिपुल शाह
अधीक्षक (अपील्स)

29 January, 2021.

(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To,
M/s United Coke Pvt. Ltd.,
Survey No. 901/2,
Vidi Devaliya Road, Anjar,
District Kutch.

प्रतिलिपि :-

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र,अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
3) सहायक आयुक्त, केन्द्रीय वस्तु एवं सेवा कर, अंजार-भचाउ मण्डल, गांधीधाम को आवश्यक कार्यवाही हेतु।
4) अधीक्षक, केन्द्रीय वस्तु एवं सेवा कर रेंज, अंजार-भचाउ, गांधीधाम को आवश्यक कार्यवाही हेतु।
5) गार्ड फ़ाइल।