

IN THE HIGH COURT OF JHARKHAND AT RANCHI**W.P. (T) No. 5161 of 2022**

M/s. Bihar Foundry & Castings Ltd., through its Director Sri
Gaurav Budhia **..... Petitioner**

Versus

1. Union of India through the Secretary, Ministry of Finance, Department of Revenue having his office at Central Secretariat, North Block, P.O & P.S. Vijay Chowk, New Delhi.
2. Central Board of Indirect Taxes and Customs, Government of India, Ministry of Finance, Department of Revenue North Block, P.O. & P.S. Vijay Chowk, New Delhi.
3. The Commissioner (Appeals), Central Goods and Services Tax, Central Excise & Customs, Central Revenue Building, Rajswa Vihar, Bhubaneswar, Odisha.
4. The Joint Commissioner, Commissionerate of Customs (Preventive), Central Revenue Building (GST Bhawan), Rajaswa Vihar, Bhubaneswar, Odisha. **...Respondents**

With**W.P. (T) No. 4340 of 2022**

M/s. Bihar Foundry & Castings Ltd., through its Director Sri
Gaurav Budhia **..... Petitioner**

Versus

1. Union of India through the Secretary, Ministry of Finance, Department of Revenue having his office at Central Secretariat, North Block, P.O & P.S. North Block, New Delhi.
2. Central Board of Indirect Taxes and Customs, Government of India, Ministry of Finance, Department of Revenue North Block, P.O. & P.S. North Block, New Delhi.
3. The Commissioner (Appeals), Central Goods and Services Tax, Central Excise & Customs, Central Revenue Building, Rajswa Vihar, Bhubaneswar, Odisha.
4. The Assistant Commissioner, Customs Division, Dhamra, P.O. & P.S. Dosinga, Bhadrak, Odisha. **...Respondents**

CORAM: HON'BLE MR. JUSTICE RONGON MUKHOPADHYAY**HON'BLE MR. JUSTICE DEEPAK ROSHAN**

For the Petitioner	: Mr. K.Kurmy, Advocate
	Mr. N.K.Pasari, Advocate
For the Res.-CGST	: Mr. Amit Kumar, Advocate
For the Res.-UOI	: Mr. Anil Kumar, ASGI

11/04.03.2024

Per Deepak Roshan J.

Heard learned counsel for the parties. Since both these writ applications are inter connected and the issue involved is common; as such both are heard together and disposed of by this common judgment.

2. In writ application being W.P.(T) No. 5161 of 2022 the petitioner has made following prayers;

“A. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Order-in-Appeal dated 10-08-2022 bearing No.113-114/CUS/CCP/2022 which is at Annexure -"1" of this writ petition passed by the Respondent No.3, in exercise of powers conferred under Section 128 read with Section 128A of the Customs Act, 1962 and holding/declaring that the said impugned Order is bad in law as is passed ignoring the mandatory provisions of Section 28 of the Customs Act, 1962;

B. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Order-in-Original dated 19-11-2018 bearing No. CC(P)/BBSR/CUS/No-16/Joint Commissioner/2018 passed by the Respondent No.4 which is at Annexure-"2" of this Petition and holding/declaring that the said impugned Order is bad in law as is passed ignoring the mandatory provisions of Section 28 of the Customs Act, 1962 and also that it is barred by limitation under Section 28(9)(a) ibid;

C. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Order-in-Original dated 19-11-2018 bearing No. CC(P)/BBSR/CUS/No-17/Joint Commissioner/2018 passed by the Respondent No.4 which is at Annexure-"3" of this Petition and holding/declaring that the said impugned Order is bad in law as is passed ignoring the mandatory provisions of Section 28 of the Customs Act, 1962 and also that it is barred by limitation under Section 28(9)(a) ibid,

D. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Show Cause Notice dated 20-04-2018 bearing C. No. VIII (10)11/SCN/BSIL/CUS(P)/BBSR/2018/8187A issued by the Respondent No.4 in respect of the Bill of Entry No.260/HC/2011- 12 Dated 20-03-2012, which is at Annexure-"4" of this Petition and holding/declaring that the said impugned Show Cause Notice is bad in law as is issued ignoring the mandatory provisions of Section 28 of the Customs Act, 1962 and that it is barred by reasonable period of limitation;

E. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Show Cause Notice dated 20-04-2018 bearing C. No. VIII(10)11/SCN/BSIL/CUS(P)/BBSR/2018/8189A issued by the Respondent No.4 in respect of the Bill of Entry No.261/HC/2011- 12 Dated 20-03-2012, which is at Annexure-"5" of

this Petition and holding/declaring that the said impugned Show Cause Notice is bad in law as is issued ignoring the mandatory provisions of Section 28 of the Customs Act, 1962 and is barred by reasonable period of limitation.”

3. In writ application being W.P.(T) No. 4340 of 2022 the petitioner has made following prayers;

“A. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Order-in-Appeal dated 01.08.2022 bearing No. 107- 110/CUS/CCP/2022 which is at Annexure-1 of this writ petition passed by the Respondent No.1, in exercise of powers conferred under Section 128 read with Section 128A of the Customs Act, 1962 and declaring that the finalization of provisional assessment in the instant case is barred by limitation and without jurisdiction;

B. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Final Assessment Order dated 26.06.2021 bearing No. C. No. VIII(06)95/CUS/DMR/2012/Pt./04/1087 passed by the Respondent No.4 finally assessing the Bill of Entry No.158/HC/2012-13 Dated 17.07.2012, which is at Annexure-"2" of this Petition and holding that the finalization of provisional assessment in the instant case is barred by limitation and without jurisdiction;

C. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Final Assessment Order dated 20/21.09.2021 bearing Order-in-Original No.AC/DMR/FA/IMP/02/2021 passed by the Respondent No.4 finally assessing the Bill of Entry No.341/HC/2012-13 Dated 26.11.2012, which is at Annexure-"3" of this Petition and holding that the finalization of provisional assessment in the instant case is barred by limitation and without jurisdiction;

D. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Final Assessment Order dated 03-04-2018 bearing No. C. No. VIII(6)40/CUS/DMR/2012/447 issued by the Respondent No.3 finally assessing the Bill of Entry No.260/HC/2011-12 Dated 20.03.2012, which is at Annexure-"4" of this Petition and holding that the finalization of provisional assessment in the instant case is barred by limitation and without jurisdiction;

E. For issuance of writ(s), order(s) and/or direction(s), quashing and setting aside the impugned Final Assessment Order dated 03.04.2018 bearing No. C. No. VIII(6)40/CUS/DMR/2012/448 issued by the Respondent No.3 finally assessing the Bill of Entry No.261/HC/2011-12 Dated 20.03.2012, which is at Annexure-"5" of this Petition and holding that the finalization of provisional assessment in the instant case is barred by limitation and without jurisdiction”

4. The brief fact of the case is that the Petitioner is a Company having its registered office and factories in the State of Jharkhand. The Petitioner imported Steam Coal within the meaning of Section 2(23) of the Customs Act, 1962 from outside

the territory of India for use in its factory in the State of Jharkhand. The Petitioner is the importer of the Steam Coal within the meaning of Section 2(26) of the Act.

5. In W.P.(T) No. 5161 of 2022, the Petitioner is challenging the legality and validity of the common Order-in-Appeal dated 10-08-2022. (Annexure "1") passed by the Commissioner (Appeal), GST, Central Excise & Customs, Bhubaneswar, the Respondent No.3 by which he set aside the impugned Order-in-Original dated 19-11-2018 (Annexure-"2") and the impugned Order-in-Original dated 19-11- 2018 (Annexure-"3") and remanded the matter back for *denovo* adjudication ignoring that the impugned Orders dated 19-11-2018 are barred by limitation of Six months under Section 28 (9) (a) of the Customs Act, 1962 and also entire proceedings is carried out without Pre-Show Cause Notice consultation provided under Section 28 (1) (a) of the Act which provisions are mandatory and imperative in character and goes to the root of the matter.

The Petitioner in this writ petition is further challenging the legality and validity of impugned Order-in-Original dated 19-11-2018 (Annexure-"2") & Order-in-Original dated 19-11-2018 (Annexure - 3") passed by the Respondent No.4 under Section 28(8) of the Customs Act, 1962 demanding differential Basic Custom duty of Rs.24,69,401/- @ 5% along with interest under Section 28AA of the Act and imposition of penalty of Rs.24,69,401/- under Section 112(a) and also imposition of Redemption Fine of Rs.23,27,648/- in lieu of confiscation under

Section 125. The demand in the said order is confirmed under Section 28(1) of the Customs Act, 1962.

The Petitioner in the instant writ petition has further challenged the legality of impugned Show Cause Notice dated 20-04-2018 (Annexure"4") & Show Cause Notice dated 20-04-2018 (Annexure-"5") issued by the Respondent No.4 under Section 28 of the Customs Act, 1962 in respect of the Bill of Entry No.260/HC/2011-12 Dated 20-03-2012 & Bill of Entry No.261/HC/2011-12 Dated 20-03-2012 proposing in each case differential Basic Customs duty of Rs.24,69,401/-@ 5% along with interest under Section 28AA and penalty under Section 112(a) and also confiscation of 3650 MT of Steam Coal of the value of Rs.2,32,76,477/- under Section 111(d), Section 111(m) and Section 112(a) of the said Act. Both the Show Cause Notices are issued under Section 28(1) as no case of collusion, wilful mis-statement or suppression of facts is alleged and no penalty for such offences under Section 114A of the Customs Act, 1962 is proposed.

6. Mr. Kartik Kurmi assisted by Mr. N. K. Pasari and Ms.Sidhi Jalan, learned counsels for the petitioner submits that the Show Cause Notice is issued under Section 28(1) as no case of collusion, wilful mis-statement or suppression of facts is alleged and no penalty for such offences under Section 114A of the Customs Act, 1962 is proposed or imposed.

In the year 2012, the Petitioner entered into High Seal Sale vide Agreement dated 02-03-2012 with M/s QVC Exports Private

Ltd., (Bill of Entry No.260/HC/2011-12] and Agreement dated 02-03-2012 with M/s QVC Exports Private Ltd., (Bill of Entry No.261/HC/2011-12] for import of Steam Coal of South African Origin for use in its factory in the State of Jharkhand for manufacture of Sponge Iron and generation of electricity for use in the production of finished goods. The said Steam Coal was imported by the Petitioner as an importer within the meaning of Section 2(26) of the Customs Act, 1962 through Dhamra Port in the State of Odisha against said 2 nos. of Bill of Entries.

Upon filing of aforesaid Bill of Entries, the Superintendent Customs, Dhamra Port, in the State of Odisha provisionally assessed the said Bill of Entries under Section 18(1) of the Customs Act, 1962.

In respect of the Bill of Entry No.260/HC/2011-12 Dated 20-03-2012 and Bill of Entry No.261/HC/2011-12 dated 20-03-2012, the Finalization of Provisional Assessment was done after lapse of more than 6 years vide Final Assessment Order dated 03-04-2018 (Annexure-"10") and Final Assessment Order dated 03-04-2018 (Annexure-"11") respectively passed by the Assistant Commissioner, Customs Division, Dhamra.

7. Learned counsel further submits that being aggrieved with finalization of provisional assessment against the aforesaid 2 nos. of Bill of Entries, the Petitioner carried the matter into appeal before Commissioner (Appeal), Bhubaneswar Zone. Pending said two appeals, the Respondent No.4, in respect of Bill of Entry No.260/HC/2011-12 Dated 20-03-2012 after finalization of

provisional assessment on dated 03-04-2018 issued the impugned Show Cause Notice dated 20-04-2018 (Annexure-"4") demanding differential Basic Customs duty of Rs.24,69,401/- under Section 28 of the Customs Act, 1962 along with interest under Section 28AA of the Act on the ground that the imported 'Coal' is not "Steam Coal" falling under SH 27011920 but "Bituminous Coal" falling under SH 27011200 and the rate of applicable BCD is @ 5% *ad-valorem* under Sl. No. 124 of Customs Tariff Notification No. 12/2012-Cus dated 17-03-2012 and not NIL as claimed by the Petitioner under Sl. No. 123 of the said Notification.

He further submits that similarly in respect of Bill of Entry No.261/HC/2011-12 Dated 20-03-2012, during pendency appeal before Commissioner(Appeal) against finalization of provisional assessment on dated 03-04-2018, the Revenue issued the impugned Show Cause Notice dated 20-04-2018 (Annexure"5") demanding differential Basic Customs duty demand of Rs.24,69,401/- under Section 28 of the Customs Act, 1962 along with interest under Section 28AA on the ground that the imported Coal is not "Steam Coal" falling under SH 27011920 but "Bituminous Coal" falling under SH 27011200 and the rate of applicable BCD is 5% *ad-valorem* under Sl. No.124 of Customs Tariff Notification No. 12/2012-Cus dated 17-03-2012 and not NIL as claimed by the Petitioner under Sl. No. 123 of the said Notification.

8. Learned counsel specifically asserted that the Show Cause Notices are issued under Section 28(1) as no case of collusion,

wilful mis-statement or suppression of facts is alleged and no penalty for such offences under Section 114A of the Customs Act, 1962 is proposed. The Respondent No.3 vide one earlier Order-in-Appeal dated 01-08-2022 bearing No. 107-110/CUS/CCP/2022 disposed of the said two appeals against Final Assessment of Bill of Entry No.260/DC/2011-12 and Bill of Entry No.261/HC/2011-12 including finalization of two other Bill of Entries, by a common Order-in-Appeal dated 01-08-2022, set aside the Final Assessment Orders dated 03-04-2018 (Annexure-10" & Annexure-11] against which the said appeals were filed before him and remanded the matter back to the lower authority with a direction to issue a speaking order after providing reasonable opportunity of hearing before finalization of the Bill of Entries as per the Section 18(1A) of the Customs Act, 1962 and Regulation 5 and 6 of the Customs (Finalization of Provisional Assessment) Regulation, 2018.

9. Mr. Kurmi contended that the said Order-in-Appeal dated 01-08-2022 is a subject matter of challenge in W. P. (T) No.4340 of 2022. He further contended that Sub-Section [9] of Section 28 provides for determination of duty and interest within the period of six months from the date of notice, in respect of case falling under Clause (a) of sub-Section (1) of Section 28 i.e. where no collusion, wilful mis-statement or suppression of facts are involved and within a period of one year as per Clause (b) of Section 28(9) in respect of cases falling under Section 28(4) i.e.

where no collusion, wilful mis-statement or suppression of facts are involved.

He strenuously contended further that the words “*where it is possible to do so*” under Clause (a) and Clause (b) of Sub-Section (9) of Section 28 of the Customs Act, 1962 is omitted by Section 63 of the Finance Act, 2018 (w.e.f. 29-03-2018). Now Section 28(9) of the Customs Act, 1962 is mandatory and imperative in character.

He further submits that the second proviso to Section 28(9) provides that where the Proper Officer fails to determine the amount of duty, interest within such extended period, such proceeding shall be deemed to have concluded as if no notice had been issued and in the instant case no case is made out which might have prevented the Proper Officer from determining the amount of duty, interest within the period of six months specified under Clause (a) of Section 28(9) nor there is any extension of time limit by any senior Officer in accordance with first proviso to section 28(9). Even no case under Section 28(9A) is made out by the proper officer that the proper officer is unable to determine amount of duty or interest under Section 28(8) for reason of an appeal in a similar matter is pending before Tribunal, High Court or Supreme Court or an interim order of stay or the Board has in a similar matter issued direction or order to keep such matters pending or Settlement Commission has admitted application of the concerned person.

10. Learned counsel further submits that no information for not determining the duty or interest is even communicated to the Petitioner as mandated U/s 28(9A). It is further submitted by Ld. Counsel that the proviso to Clause (a) of sub-Section (1) of Section 28 provides for mandatory pre-show cause notice consultation. The Respondent No.2 in exercise of powers under Section 157(2) read with Section 28(1)(a) of the Customs Act, 1962 has framed Pre-Notice Consultation Regulations, 2018 w.e.f. 02-04-2018 vide Notification No.29/2018-Cus. (NT) dated 02-04-2018.

It is submitted that under proviso to Section 28(1)(a) of the Customs Act, 1962 provides that before issuing the show cause notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as prescribed under the Pre-Notice Consultation Regulations, 2018. The Respondent No. 4 vide impugned Order-in-Originals both dated 19- 11-2018 (Annexure-2 & Annexure-3") against two Show Cause Notices both dated 20-04-2018, (Annexure"4" and Annexure "5") after lapse of 7 months i.e. beyond limitation of six months as provided under section 28(9)(a) of the Act in respect of Bill of Entry No.260/HC/2011-12 dated 20-03-2012 and Bill of Entry No. 260/HC/2011/12 dated 20-03-2012 arbitrarily determined the differential Basic Customs duty along with interest and also imposed equal penalty under Section 112(a) of the Act.

The demand is confirmed under Section 28(1) of the Act. He reiterated that in the impugned Order, no case of collusion,

wilful mis-statement or suppression of facts under Section 28(4) is made out and no penalty for such offences is imposed under Section 114A of the Customs Act, 1962.

11. He further contended that the Respondent No.3 passed the impugned common Order-in-Appeal dated 10-08-2022 bearing No.113-114/CUS/CCP/2022 (Annexure"1") and set aside Order-in-Originals, both dated 20-04-2018 (Annexure "2" & Annexure-"3"), and remanded the matter back for *denovo* adjudication ignoring that the adjudication orders are barred by limitation under section 28(1)(a) of the Act and the Show Cause Notices are issued without Pre-Show Cause Notice consultation as provided under Section 28(9)(a) of the Act which goes to the root of the matter; hence the entire proceeding is void *ab initio* nullity and vitiated.

Further, issuance of the impugned Show Cause Notices dated 20-04- 2018 i.e. after lapse of more than 6 years from the date of provisional assessment on 20-03-2012 is barred by reasonable period of limitation. The said finalization of provisional assessment is subject matter of challenge in W.P. (T) No. 4340 of 2022.

He further submits that as per Para 3.1 of Chapter 7 of the Customs Manual Instruction issued by the Respondent No.2 in exercise of power under Section 151A of the Customs Act, 1962 which is binding upon the department, the provisional assessment should be finalized within a period of six months whereas in the instant case provisional assessment is finalized

and the impugned Show Cause Notices are issued after lapse of more than six months, hence, it is barred by limitation.

It is submitted that when the initial action of finalization of provisional assessment is not tenable in law the subsequent proceedings by way of impugned Show Cause Notice, Order-in-Original and Order-in-Appeal has to fall.

12. So far as **W.P.(T) No. 4340 of 2022** is concerned; the Petitioner has challenged the legality and validity of the common Order-in- Appeal dated 01.08.2022 (Annexure-1) passed by the Commissioner (Appeal), GST, Central Excise & Customs, Bhubaneswar against the Final Assessment Orders dated 26-06.2021 (Annexure-2), dated 20/21.09.2021 (Annexure-3), dated 03.04.2018 (Annexure-4) and dated 03.04.2018 (Annexure-5) to the extent he has remanded the matter back to the Respondent No.4 for fresh initiation of proceedings for finalization of provisional assessment under Section 18(2) of the Customs Act, 1962 even though the proceeding is barred by limitation.

The Petitioner by the instant writ petition is further challenging the legality and validity of impugned Final Assessment Order dated 26.06.2021 (Annexure-2), dated 20/21.09.2021 (Annexure-3), dated 03.04.2018 (Annexure-4) and dated 03.04.2018 (Annexure-5) finalizing 4 Bill of Entries No. 158/HC/2012-13 Dated 17.07.2012, No.341/HC/2012-13 Dated 26.11.2012, No.260/HC/2011-12 Dated 20.03.2012 and No.261/HC/2011-12 Dated 20.03.2012 respectively.

From records it is evident that the aforesaid 4 Bill of Entries were filed in the year 2012. The Superintendent Customs, Dhamra Port, in the State of Odisha provisionally assessed the said Bill of Entries under Section 18(1) of the Customs Act, 1962 on the date of presentation and provisionally permitted clearance of the imported Steam Coal for home consumption upon payment of NIL Basic Customs duty and upon payment Countervailing duty (CVD) @1% as tabulated above (including other Cess etc.).

13. Mr. Kurmi contended that upon provisional assessment of the aforesaid 4 Bill of Entries, the finalization of assessment was kept pending in suspended animation *sine die* for 6 years to 9 years by the Respondent No.4. The "CBIC Customs Manual of Instructions" under Chapter 7 which deals with Provisional Assessment, it is mandated by the CBIC Respondent No.2, under Para 3.1 that, the provisional assessment is expected to be finalized expeditiously well within 6 months. In respect of the two Bill of Entry No. 158/HC/2012-13 dated 17-07-2012 and Bill of Entry No.341/HC/2012-13 dated 26.11.2012 the Finalisation of Provisional Assessment was done after lapse of more than 9 years vide Final Assessment Order dated 26.06.2021 (Annexure "2") and Final Assessment Order dated 20/21.09.2021 (Annexure-"3").

14. In respect of the other two Bill of Entry No.260/HC/2011-12 Dated 20.03.2012 and Bill of Entry No.261/HC/2011-12 dated 20.03.2012, the Finalization of Provisional Assessment was done after lapse of more than 6 years vide Final Assessment Order

dated 03.04.2018 (Annexure-4) and Final Assessment Order dated 03.04.2018 (Annexure-5) respectively.

Learned counsel for the Petitioner submits that being aggrieved with delayed finalization of provisional assessment against the aforesaid 4 nos. of Bill of Entries by the Respondent No.4, the Petitioner carried the matter into appeal vide Memo of Appeals under Section 128 read with Section 128A of the Customs Act, 1962 before Commissioner (Appeal). Bhubaneswar Zone.

The Respondent No.1 vide Order-in-Appeal dated 01.08.2022 bearing No. 107- 110/CUS/CCP/2022 held that finalization of provisional assessment after 6-9 years is barred by limitation while at the same time remanded the matter back to the lower authority with a direction to issue a speaking order after providing reasonable opportunity of hearing to the Petitioner.

15. Learned counsel contended that the finalization of provisional assessment is barred by limitation of 6 months as per Para 3.1 under Chapter 7 of the *"CBIC Customs Manual of Instruction"* and is in violation of natural justice, hence, is without jurisdiction and a nullity in the eyes of law. The *"CBIC Customs Manual of Instruction"* which is a compilation of instruction issued by Respondent No.2 in exercise of power under Section 151A of the Customs Act, 1962 and is binding on the officers working under the Customs Act, 1962.

Further in respect of Bill of Entry No.158/HC/2012-13 Dated 17.07.2012 and Bill of Entry No.341/HC/2012-13 Dated 26.11.2012, no show cause notice and/or adjudication order

under Section 28 of the Customs Act, 1962 have been issued as yet even after lapse of 10 years (one decade), hence, the demand of duty of Rs 75,76,956/- and Rs.62,83,824/- aggregating to Rs. 1,38,60,780/- is also not sustainable being hopelessly barred by limitation, and therefore, the Respondent No.3 committed a serious error by remitting the said matter to the Respondent No.4 for initiation of a fresh proceeding which is arbitrary, unreasonable and oppressive.

16. Learned counsel for the Revenue submits that M/s. Bihar Foundry & Castings Limited., (Unit: Gautam Ferro Alloys) Main Road, Ranchi-834001. Jharkhand, (hereinafter referred to as the 'Petitioner') is an importer and imported Coal through the port of Dhamra. The Petitioner had imported and cleared South African Coal in bulk and classified the same under CTH 27011920 declaring as "Steam Coal (Non-Coking)" and paid only 1% Additional duty (CVD) leviable under Sub-Section (1) of Section 3 of the Customs Tariff Act, 1975, claiming exemption under Notification No. 12/2012-Cus dated 17.03.2012. The Bills of Entry were assessed provisionally against PD Bond executed by the Noticee. The goods under subject Bills of entry were classified under Tariff item No.27011920 of the Customs Act, 1975.

He further submits that Chapter 27 of the Customs Tariff Act, 1975 stipulates that for the purpose of sub-heading 27011200 "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 greater than 5833 Kcal/Kg. As per the load port test/analysis report submitted at the time of the Bill of Entry it was found that the coal declared in B/E have a volatile matter limit exceeds to 14% and calorific value is greater than 5833 Kcal/Kg.

Learned counsel further contended that the coal imported under the above B/Es is to be classified as "Bituminous Coal" (Tariff classification - 27011200 instead of "Steam Coal" (Tariff classification - 27011920) as declared and thus duty would be as per Notification No. 12/2012-CUS dated 17.03.2012 (SI.No.124) attracting Basis Customs Duty (BCD) @ 5% and Additional Duty of Customs (CVD) @ 6% under Sub-Section (1) of Section 3 of the Customs Tariff Act, 1975.

He lastly submits that the Adjudication Orders (O-I-O), both dated 19.11.2018, against the Show Cause Notices, both dated 20.04.2018, have been set aside vide Order-in-Appeal No. 113- 114/CUS/CCP/2022 dated 10.08.2022. Hence the instant Writ Applications are not required and by filing the Writ Petitions, the Petitioner has tried to consume the valuable time of this Hon'ble Court.

17. Having heard learned counsel for the parties and after going through the documents annexed with the respective affidavits and the averments made therein it transpires that the Bill of Entries No. **260/HC/2011-12 & No.261/HC/2011-12** are common to both the Writ Petitions but its provisional assessment is under Challenge in W.P(T) No.4340 of 2022.

In **W.P.(T). No.4340 of 2022**, the delayed finalization of Provisional Assessment of 4 nos. of Bill of Entries including the above two Bill of Entries are under challenge along with 1st Appellate Order against such provisional Assessment of those four nos. of Bill of Entries.

In **W.P.(T). No.5161 of 2022**, the two Show Cause Notices (issued under Section 28 of the Customs Act, 1962, issued after finalization of Provisional Assessment) & Order-in-Original issued against two Bill of Entries No.260/HC/2011-12 & No.261/HC/2011-12 and 1st Appellate Order against Order-in-Original are the subject matter of challenge.

18. Against, the other two Bill of Entries No.158/HC/2012-13 & No.341/HC/2012-13 which are among the four nos. of Bill of Entries under challenge in 1st W.P.(T) No.4340 of 2022, no show cause notice has yet been issued even after lapse of 10 years from the date of provisional assessment.

From record it is further evident that there is delayed finalization of the provisional Bill of Entries No.158 / HC / 2012-13, Bill No. 341/ HC/2012-13, Bill No. 260/ HC/ 2011-12 & Bill No.261/HC/2011-12; however, the same is contrary to Para 3.1 of “Chapter 7 Provisional Assessment” of CBIC Manual of Instructions which is issued by the CBIC in exercise of powers under Section 151A of the Customs Act, 1962 and which is binding on the Respondent. For brevity, the same is quoted herein below: –

3. Finalisation of provisional assessment :

3.1 The provisional assessments are expected

to be finalized expeditiously, well within 6 months. However, in respect of cases involving machinery contracts or large project imports, where imports take place over long period, such finalisation may take more time since action to can be taken only after all the imports have been made. Here too, effort should be made to finalise the cases within 6 months of the date of import of the last consignment covered by the contract.

[Refer Instructions F. No. 512/5/72-Cus.VI, dated 23-4-1973; and F. No. 511/7/77-Cus.VI, dated 9-1-1978 and Circular No.17/2011-Cus., dated 8-4-2011]

19. At this stage, it is necessary to refer the case of **Commissioner of Customs Vs. Indian Oil Corporation** reported in **2004 (165) ELT 257 (SC)**, wherein it has been held by the Hon'ble Apex Court that the Revenue cannot raise a contention contrary to binding circular by the Board when circular remains in operation, Revenue is bound by it (Para – 12).

As per Para 3.1 of the said CBIC instruction, the Bill of Entries are to be finalized expeditiously well within 6 months. In the instant case, the finalization of provisional assessment is governed by Para 3.1 of the CBIC Instruction which is the reasonable period as under Section 18 of the Customs Act, 1962.

It is true that under Section 18 of the Customs Act, no period of limitation is prescribed, however, finalization should be done within reasonable period of limitation. Reference may be made to the case of **K.B. Nagur, M.D. (Ayurvedic) Vs. UOI** reported in **(2012) 4 SCC 483 (Para 38)]**.

20. In the impugned 1st Appellate Order dated 01-08-2022 the Commissioner (Appeal) which is also under challenge, Respondent No.3 has held that the finalization of assessment is

barred by limitation under Rule 5 of Customs (Finalisation of Provisional Assessment) Regulation, 2018 but remanded the matter for fresh adjudication giving a fresh lease of life to a stale and time barred claim, which is not sustainable in the eye of law. Thus, it is clear that the case of the Petitioner is barred by limitation of 6 months as per Para 3 of Chapter 7 of CBIC Manual and not as per Rule 5 of 2018 Regulation.

The Commissioner (Appeal) in the impugned 1st Appellate Order dated 01-08-2022 has held that the finalization of provisional assessment is barred by limitation. Para 3.1 of the CBIC Instruction; the limitation under Rule 5 of 2018 Regulation is applicable prospectively w.e.f. 14-08-2018, is not applicable to present case as the Bills of Entries are assessed provisionally in 2011-12 and 2012-13 i.e. much before 14-08-2018.

21. It is not out of place here to mention that Rule 5 of Customs (Finalization of Provisional Assessment) Regulation, 2018 (the 2018 Regulation) applies only to provisional assessment made after 14-08-2018; hence, in the case at hand it cannot be applied on the provisional assessments of the 4 Bill of Entries as they are made in the year 2012. The limitation for finalization to the case at hand would be governed by Para 3.1 of the CBIC Instruction as per which the finalization of provisional assessment is to be made expeditiously, well within 6 months whereas in the instant case the finalization is done after 6 years to 9 years.

The Punjab & Haryana High Court in the case of **Golden Enterprises Vs. CC** reported in **2022 (379) E.L.T 334 (P&H)**

under the Customs Act, 1962 while dealing with similar circumstances following its earlier judgment in the case of **Gupta Smelters Pvt. Ltd Vs UOI** reported in **2019 (365) ELT 77**, **M/s GPI Textiles Vs. UOI** reported in **2018 (362) ELT 388 (P&H)** and judgment of the Gujarat High Court in the case of **M/s Siddhi Vinayak Syntex Pvt. Ltd Vs. UOI** reported in **2017 (352) ELT 455 (Guj)** wherein the finalization of provisional assessment after 8-9 years from the date of Bill of Entry was quashed considering that there was no petition by the Petitioner pending before Competent Court nor was any stay of any court, thus, there was no reason to withhold framing of final assessment.

22. Further, in the case of **Tata Teleservices Ltd Vs. State of Chhattisgarh** reported in **2022(381) E.L.T 145(S.C)** the Hon'ble Apex Court has held that point of limitation is point of jurisdiction and it goes to the root of the matter. In the instant case; out of the 4 nos. of Bill of Entries, the Bill of Entry No.158/HC/2012-13 was provisionally assessed on 17-07-2012 under Section 18 of the Customs Act, 1962 which was finally assessed after 9 years on 26-06-2021 (Annexure – 2).

Further, after finalization no show cause notice under Section 28 of the Customs Act, 1962 is issued yet even after expiry of more than 10 years from the date of provisional assessment. Similarly, Bill of Entry No.341/HC/2012-13 was provisionally assessed on 26-11-2012 and was finally assessed on 20/21-09-2021 i.e. after 9 years (Annexure 3). Here also, after finalization no show cause notice under Section 28 of the

Customs Act, 1962 is issued yet even after expiry of more than 10 years from the date of provisional assessment. In respect of Bill of Entry No.158/HC/2012-13 and Bill of Entry No.341/HC/2012-13 no show cause notice under Section 28 of the Act is yet issued even after lapse of more than 10 years. The Bill of Entry No. 260/HC/2011-12 was provisionally assessed on 20-03-2012 and was finally assessed on 03-04-2018 i.e. after 6 years (Annexure-4) which is subject matter of W.P.(T) No.4340 of 2022. After finalization, the show cause notice under Section 28 of the Act was issued on 20-04-2018 (Annexure – 21) and the adjudication Order was passed on 19-11-2018 (Annexure – 23). The said Show Cause Notices and adjudication Orders are subject matter of W.P.(T) No.5161 of 2022.

The Bill of Entry No.261/HC/2011-12 was provisionally assessed on 20-03-2012 and was finally assessed on 03-04-2018 i.e. after 6 years (Annexure – 5) which is subject matter of W.P.(T) No.4340 of 2022. After finalization, the Show Cause Notice under Section 28 of the Customs Act was issued on 20-04-2018(Annexure-22) and the adjudication Order was passed on 19-11-2018(Annexure-24). The said Show Cause Notices and adjudication Orders are subject matter of W.P.(T) No.5161 of 2022.

23. So far as W.P.(T) No. 5161 of 2022 is concerned; in this writ petition 1st Appellate Order dated 10-08-2022 is challenged along with legality and validity of two SCNs dated 20-04-2018 and legality and validity of two Order-in-Original both dated 22-11-

2018, both against two Bill Entries i.e. (Bill of Entry No.260/HC/2011-12 and Bill of Entry No.261/HC/2011-12 respectively). As discussed herein above; both the impugned Order-in-Originals dated 19-11-2018 are barred by limitation of 6 months under Section 28(9)(a) of the Customs Act, 1962 which Respondent No.3 failed to appreciate while passing impugned 1st Appellate Order dated 10-08-2022. Due to delayed passing of the Order-in-Originals, entire proceeding right from impugned SCNs dated 20-04-2018 deserves to be quashed and set aside.

24. Having regards to the aforesaid discussions we hold that the 1st Appellate Order dated 10-08-2022 which is challenged along with validity of aforesaid two show cause notices both dated 20-04-2018 and two adjudication Orders, both dated 19-11-2018, under Section 28 [against Bill of Entry No.260/HC/2011-12 and Bill of Entry No.261/HC/2011-12 respectively] is not sustainable in the eye of law and legal proposition settled by the Hon'ble Apex Court and various High Courts on the ground that both the adjudication orders dated 19-11-2018 are passed after expiry of mandatory period limitation of 6 months as provided under Section 28(9)(a) of the Customs Act, 1962; further, the impugned two SCNs dated 20-04-2018 are issued without Pre-SCN consultation as mandated under proviso to Section 28(10)(a) of the Customs Act, 1962.

25. As stated herein above; the words "*where it is possible to do so*" under clause (a) and (b) of Section 28(9) is omitted by Section 63(iii)(a) of Act 13 of 2018 w.e.f. 29-03-2018. After

deletion of the said words, the period of limitation under Section 28(9)(a)/(b) are mandatory and imperative in character. Section 28(9)(a) envisages that the proper officer “shall” determine the amount of duty or interest under Section 28(8) within a period of 6 months from the date of SCN in respect of cases falling under Section 28(1) i.e. where there is no collusion or wilful mis-statement or suppression of fact is involved and within a period of 1 years in respect of cases falling under Section 28(4) i.e. where collusion, wilful mis-statement or suppression of facts are involved.

26. In view of the above facts we are having no hesitation in holding that the impugned Order-in-Originals both dated 19-11-2018 should have been passed within limitation period of 6 months in accordance with Section 28(9)(a) which is mandatory in character particularly after omission of the words “*where it is possible to do so*”.

At the cost of repetition, the word; “*where it is possible to do so*” which exists under Section 11A(11) of the Central Excise Act, 1944, is omitted under Section 28(8) of the Customs Act, 1962 w.e.f. 29-03-2018 whereas the impugned Order-in-Originals were passed on dated 19-11-2018, hence, provisions of Section 28(9) had become mandatory w.e.f. 29-03-2018 which the Respondent No.3 failed to appreciate while passing the 1st Appellate Order dated 10-08-2022 as in the instant case no extension of time was ever granted for passing the Order-in-Originals by the competent authorities, facts of which are not

disputed by the Respondent in their Counter Affidavits. Further, in the instant case, no case of collusion or wilful mis-statement or suppression of fact is made out. Section 114A of the Customs Act provides for imposition of penalty in case of collusion, wilful mis-statement or suppression of facts.

27. Though, penalties are imposed in the Order-in-Originals under Section 111(d) & (m) and Section 112(a) which does require ingredients of collusion, wilful mis-statement or suppression of facts. In the instant case for absence of collusion, wilful mis-statement or suppression of fact, no penalty under Section 114A have been imposed, hence, extended period of one year is not attracted in the instant case.

Further, the mandatory *Pre-SCN* consultation as mandated under proviso to Section 28(1)(a) of the Customs Act, 1962 read with Pre-Notice Consultation Regulation, 2018 are not complied with while issuing the impugned SCNs both dated 20-04-2018, hence, the subsequent Order-in-Original both dated 19-11-2018 and the impugned 1st Appellate Order dated 10-08-2022 are bad in law being void *ab initio* and a nullity in the eyes of law.

In the Counter Affidavit, the Respondents have not disputed that no Pre-Notice consultation was extended. The Respondent accepts that while issuing the impugned SCN, the Pre-SCN consultation was not done. In the case of ***Victory Electric Vehicles International Pvt. Ltd Vs. UOI 2022 (382) ELT 597(Del)*** the Hon'ble Delhi High Court while dealing with exactly similar situation under proviso to Section 28(1)(a) of the

Customs Act, 1962 held that the provisions of Pre-notice consultation is mandatory in character and held that the Revenue must scrupulously adhere to the same and due to non-compliance thereof the adjudication order is liable to be quashed (Refer Para 14.2, Para 18, Para 21 and Para 21.1).

Further, in the case of **Competent Authority Vs. Barangore Jute Factory** reported in **(2005) 13 SCC 477**, it has been held by the Hon'ble Apex Court that where statute requires an act to be done in a particular manner, the act has to be done in that manner along (Para 5).

Similar views have been expressed in the case of **A.K. Roy Vs. State of Punjab** reported in **(1986) 4 SCC 326** and **CIT Vs. Anjum M.H. Ghaswala** reported in **(2002) 1 SCC 633**.

28. In view of the aforesaid discussions and the judicial pronouncements in the background of the facts of this case, both these writ applications are allowed and pending I.A., if any, is also closed.

(Rongon Mukhopadhyay, J.)

(Deepak Roshan, J.)