DIN: 20200371MO00007A71EB

	OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS, CUSTOM HOUSE: MUNDRA, KUTCH MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421 Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62

A. File No.	:	F. No. VIII/48-64/Adj./ADC/MCH/2019-20
B. Order-in- Original No.	:	MCH/ADC/AK/124/2019-20
C. Passed by	:	Shri Ajay Kumar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order /Date of issue	:	23.03.2020/23.03.2020
E. Show Cause Notice No. & Date	:	VIII/48-332/LAR-10//18-19/Gr-III/Face Impex/MCH/2019-20 Dated 27.09.2019
F. Noticee(s)/Party/ Importer	:	M/s Face Impex Pvt. Ltd., 58-88, Shakti Chambers, 8-A, National Highway, Morbi, Gujarat-363642

1. यह अपील आदेश संबन्धित को नि:शुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए- 1- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

" सीमा शुल्क आयुक्त (अपील), कांडला
7 वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009"
"THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
Having his office at 7th Floor,Mridul Tower, Behind Times of India,
Ashram Road,Ahmedabad-380 009."

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए ।
Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –

(i) उक्त अपील की एक प्रति और
A copy of the appeal, and

(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं॰-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए ।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपील ज्ञापन के साथ ड्यूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये ।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम,1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए ।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (A) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

Sub.:- Show Cause Notice F. No. VIII/48-332/LAR-10//18-19/Gr-III/Face Impex/MCH/2019-20 dated 27.09.2019 issued to M/s Face Impex Pvt. Ltd., 58-88, Shakti Chambers, 8-A, National Highway, Morbi, Gujarat-363642

BRIEF FACTS OF THE CASE

M/s. Face Impex Pvt. Ltd., Plot No.19, 58-88, Shakti Chambers, 8-A, National Highway, Morbi, Gujarat-363642 (holder of IEC No. 2406000371) (hereinafter also referred to as "*the importer*"/Noticee") presented fifteen Bills of Entry detailed in Annexure-I to the Show Cause Notice, through their Customs Broker M/s Unique Speditorer Pvt. Ltd. , at Custom House, Mundra, for clearance of imported goods declared as "Alumina Ball, Alumina Brick , SISIC Burner Tube, SISIC Beam, Insulation Brick, Ceramic Roller with spring" classifying the same under Tariff Item 69022090 & 69039090 of first schedule of the Custom Tariff Act, 1975.

1.1 The subject fifteen Bills of Entry dated from 03.10.2017 to 22.12.2017 were assessed wherein benefit provided at serial No. 338 of Notification No. 50/2017-Cus dated 30.06.2017, of concessional rate of basic customs duty @ 5% was granted. The said entry 338 reads as under-

Sr. No.	Chapter or Heading or sub-heading or tariff item	Description of goods	Standard rate
338	6902 or 6903	*all goods*	*5%*

1.2 Under the impugned fifteen Bills of Entry, the importer imported "Alumina Ball, Alumina Brick , SISIC Burner Tube, SISIC Beam, Insulation Brick, Ceramic Roller with spring" and availed benefit of concessional rate of duty under the above notification by classifying the same under CTH 69022090 & 69039090 which is available only to refractory goods i.e. fired articles having the special property of resisting high temperatures as met in metallurgy, the glass industry etc.(e.g. of the order of 1500^0C and higher). The declared description suggests that the impugned imported goods were meant for Ceramic industries which require fired articles having the property of resisting temperatures 1000^0C to 1200^0C not more than that and should be classified under CTH 69149000. The Custom Tariff Item 69149000 contains " Other Ceramic Articles other than those of porcelain or china.". Thus, it appeared that in the subject fifteen Bills of Entry, the importer has wrongly classified the goods under 69022090 & 69039090 & availed the exemption under serial No. 338 of Notification No. 50/2017-Cus dated 30.06.2017 for imported goods i.e. "Alumina Ball, Alumina Brick , SISIC Burner Tube, SISIC Beam, Insulation Brick, Ceramic Roller with spring" which is not refractory goods and only refractory goods are covered under the said CTH. Therefore, it appeared that in the impugned fifteen Bills of Entry Basic Customs duty was liable to be charged at the prevailing tariff rate i.e. 10% .

1.3 Further, it appeared that though the importer was aware that the exemption under serial No. 338 of Notification No. 50/2017-Cus dated 30.06.2017, was not available to the impugned goods but the importer wrongly availed the exemption under said notification by mis-classifying the goods under 69022090 & 69039090. Thus, it appeared that the subject

Bills of Entry are liable to be reassessed by rejecting the classification and classifying under 69149000 & denying the exemption. The differential Customs duty totally amounting to Rs. 25,64,959/- is liable to be demanded and recovered from them under Section 28(1) of the Customs Act, 1962 along with applicable interest at appropriate rate under Section 28AA of the Customs Act, 1962. Further, it appeared that the importer has contravened the provisions of Section 17(1) of the Customs Act, 1962 and have rendered themselves liable to penalty under Section 117 of the Customs Act, 1962.

2. In view of the above, a Show Cause Notice F.No.VIII/48-382/LAR-10/18-19/Gr-III/Face Impex/MCH/2019-20 dated 27.09.2019 was issued whereby the importer M/s. Face Impex Pvt. Ltd., Plot No.19, 58-88, Shakti Chambers, 8-A, National Highway, Morbi, Gujarat-363642 was called upon to show cause to the Additional Commissioner of Customs (Import), Custom House, Mundra having his office at PUB Building 5B, Adani Port, Mundra, as to why:

(i) the classification under Custom Tariff item No.69022090 & 69039090 should not be rejected and classification under Custom tariff heading No.69149000 should not be made on re-assessment.

(ii) the exemption under serial No.338 of Notification No.50/2017-Cus dated 30.06.2017, claimed and availed by them in the fifteen Bills of Entries detailed in Annexure-I should not be denied and the said Bills of Entries should not be reassessed under CTH 69149000.

(iii) the differential Customs duty amounting to Rs.25,64,959/-, not paid by the importer in respect of the fifteen Bills of Entries mentioned in Annexure-I by wrongly availing exemption under serial No.338 of Notification No.50/2017-Cus dated 30.06.2017 should not be demanded and recovered from them under Section 28(1) of the Customs Act, 1962 along with interest at appropriate rate under Section 28AA ibid.

(iv) penalty should not be imposed on them under section 117 of the Customs Act, 1962.

PERSONAL HEARING

3. The personal hearing in the case was granted on dated 18.12.2019. The Noticee vide their letter dated 18.12.2019 informed that they are unable to attend the same on 18.12.2019 as their directors are out of station due to emergency and requested to provide them new date of personal hearing. Thereafter, next date of personal hearing was fixed on 08.01.2020. Shri Nitin Kantilal Bopaliya, Director of M/s Face Impex Pvt. Ltd., visited this office personally on 03.01.2020 and requested for early hearing and to conduct the hearing on 03.01.2020 itself. Considering his request, the personal hearing was conducted on 03.01.2020 wherein he submitted a written defence submission dated 03.01.2020. He also stated that he has already submitted a written submission dated 13.11.2019 and reiterated the facts made therein. He further stated that he has nothing more to add.

DEFENCE SUBMISSION

4. The Noticee vide their letters dated 13.11.2019, letter dated 03.01.2020 submitted personally by Shri Nitin Kantilal Bopaliya, Director at the time of personal hearing on 03.01.2020, and further vide letter dated 23.01.2020, received to the department on 27.01.2020, have submitted their defence reply. The Noticee, in their aforesaid submissions dated 13.11.2019, 03.01.2020 and 23.01.2020, have made submissions on the same set of issues with same contentions which have been placed as under-

4.1 The goods in question "Alumina Ball, Alumina Brick , SISIC Burner Tube, SISIC Beam, Insulation Brick, Ceramic Roller with spring" have been imported by them for captive consumption in their unit engaged in the manufacturing of tiles. The bill of entry was presented before the proper officer and only once he approved of the classification, the goods was released after payment of necessary duty.

4.2 The department's contention in the instant case is that the goods like bricks, block, tiles etc. would only be falling under CTH 6902. For a better understanding they are re-producing the relevant chapter title to CTH 6902 below:

"Refractory bricks, blocks, tiles and **similar refractory ceramic constructional goods..**."

General Rules of interpretation (GRI) clearly states that "the title of section, chapters and sub-chapter are provided for ease of reference only, for legal purpose classification shall be determined according to the terms of the headings and any relative section or Chapter Notes and ....."

They submit that from the above, it is very clear that the department's emphasis that 6902 covers only constructional materials appears to be misplaced since the same has been taken from the title the heading which as such has no legal standing when it comes to classification. In a scenario where neither the chapter note or section notes exclude non-constructional goods from CTH 6902, the case of the same being excluded from the heading and being classified under CTH 6914 or some other heading does not arise. Further even the headings states that the bricks and other shapes would be classified, in their case "Alumina Ball, Alumina Brick , SISIC Burner Tube, SISIC Beam, Insulation Brick, Ceramic Roller with spring" are of a definite shape i.e. oblong, spherical or cylindrical.

4.3 For a much better clarity the relevant tariff heading of 6902 (69022090 in the present case) is reproduced below:

6902	**refractory bricks, blocks, tiles and similar refractory ceramic Constructional goods, other than those of siliceous fossil Meals or similar siliceous earths**
6902 10	- Containing by weight, singly or together, more than 50% of the element Mg, Ca or Cr, expressed as MgO, CaO or Cr203
6902 10 10	---Magnesite bricks and shapes

6902 20	-Containing by weight more than 50% Alumina (A2O3), or of a mixture Or compound of Alumina and of silica (SiO3)
6902 20 10	--- Silica bricks and shapes
6902 20 20	--- High Alumina bricks and shapes
6902 20 30	--- Alumina Carbon bricks and shapes
6902 20 40	--- Silicon Carbide bricks and shapes
6902 20 50	--- Mullite bricks
6902 20 90	--- Other

4.4 As per General Explanatory notes of General Rules for the interpretation:

i) Where the description of an article or group of articles under a heading is préceded by "-", the said article or group of articles shall be taken to be sub-classification of the article or group of articles covered by the said heading.

ii) Where, however, the description of an article or group of articles is preceded by "-", the said article or group shall be taken to be a sub-classification of the immediately preceding description of the article or group of article which has " -"

iii) Where the description of an article or group of articles is preceded by -" or "-"the said article or group of articles shall be taken to be a sub classification of the immediately preceding description of the article or group of articles which is "-" or "-"

From the above, it is clearly seen that 6902 20 90 are preceded by "-" and therefore are the sub classification of heading 6902 20 which is preceded by"-". Thus any shaped goods with more 50% Alumina would be rightly classifiable under the sub classification of CTH 6902 20 and that would be 6902 20 90. In the instant case for classification under 6902 20 or any of its sub classification, the goods should be with a content of more than 50% alumina. In their case, the import documents clearly mention the fact that the % content of alumina is 68% and such would therefore merit to be classified under CTH 6902 20 90.

4.5 The contention of the department that the goods are rightly classifiable under CTH 6914 which happen to be a residual entry would be wrong in light of the below judgments.

In case of **Dunlop India Ltd. & Madras Rubber Factory Ltd. v. Union of India (UOI) and Ors., {(as reported in 1983 (13) E.L.T. 1566 (S.C.)},** Hon'ble Apex Court has held

> "37. [...] When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. [..]

In case of **Commissioner Of Central Excise Versus Wockhardt Life Sciences Ltd.{2012 (277) E.L.T. 299 (S.c.)},** it was held that

Classification of goods - Determination of - It cannot be under residuary entry in presence of specific entry, even if it requires product to be understood in technical sense - Residuary entry can be taken refuge of only in absence of specific entry.

In case of **Western India Plywoods Ltd. Versus Collector of Customs, Cochin {2005 (188) E.L.T. 365 (S.C.)}** it was held that

Classification of goods - Application of residuary entry to be made with extreme caution, being attracted only when no other provision expressly or by necessary implication applies to goods in question.

In case of **Commissioner of C. Ex., Bhubaneswar-I Versus Champdany Industries Ltd. (2009 (241) E.L.T. 481 (S.C.)}** it was held that

Classification of goods - Specific v. residuary heading - Supreme Court decisions holding when specific heading exists, goods not classifiable under residuary heading and such principle hardened into a rule of law by reason of consistent view taken by the Court.

4.6 If the argument of the department is to be accepted that only bricks, blocks, tiles are classified under CTH 6902, they would like to bring to kind attention that apart from these goods, the title mention similar refractory ceramics. This similar refractory ceramic would include any ceramic material which is refractory in nature. The explanatory notes clearly mentions the goods which can be termed as refractory. It has been settled by various judicial forums that Explanatory notes are a valuable guide when it comes to pre Issue of classification. Any goods which can withstand a temperature of 1500° C or more are termed refractory goods.

The assumption of the department that since the goods in question are to be used in ceramic industry wherein the working temperature is not more than 1200° C, they do not qualify being refractory goads withstanding more than 1500° C. It would be wrong to mention herein that the working temperature of a ceramic industry is only around 1000 ° C - 1200° C. Gone are the days when simple glazing was taking place in tile industry. Nowadays the process of vitrification which involves the fusing of glass frits itself would prove that this assumption of the department is wrong. Glass Frits normally fuse at a temperature of 1450 ° C to 1550° C. This fusing of glass frit is the reason of vitrification. Addition of a few frit vitrifying ingredients temperature by 100° C say around 1350 to 1400° C but definitely not to 1200° C. These conclusion of arriving to the working temperature of the goods in question by the department is merely based on assumption and has nothing to do with facts. There is no evidence available with the department in form of any test report wherein it is mention that the working temperature of the goods are below 1500 ° C. It would be correct to mention here that for a working temperature one would use a higher temperature product but for a higher working temperature using a product which can withstand a lower temperature is impossible.

4.7 In their case they had submitting the analysis certificate along with their imports and this clearly mention the working temperature of the imported goods. Only after being satisfied, the department in this regards had accepted their classification under CTH and the same is assessed to duty after granting the benefit under Sr. No. 338 of Notification No.

50/2017-Cus dated 30.06.2017. Under such circumstance, it would wrong to state that the goods are rightly classified under CTH 6914 since if this was the case it would had been changed at the time of assessment. The refractory goods can be defined as goods based on bauxite, mullite, corundum, kynite, sillimanite or sintered alumina. In the instant case what they have imported are goods based on sintered alumina. So classification of the said goods as other articles of ceramics in CTH 6914 is out of question and wrong. In any case when a specific entry exists one cannot resort to residual entries of the tariff.

4.8 It is a long running and accepted fact that Alumina Ball, Alumina Brick, SISIC burner tube, SISIC beam, insulation bricks and Ceramic Roller are classified under CTH 6902 and has been accepted by the department. They would like to bring on record the below judgment -

The Apex Court in its judgment in case of **Mauri Yeast India Pvt. Ltd. Versus State Of U.P. {as reported in 2008 (225) E.L.T. 321 (S.C.)}** held that :

> Classification of goods - Different construction to an entry cannot be resorted to only because the rate has been lowered - **Classification having been accepted by Revenue for a long time, the onus would be on it to show why a different interpretation thereof should be resorted to particularly when no change in statutory provision has taken place.**

4.9 They would like to draw attention to Board Circular No. 920/10/2010-CE dated 01.04.2010 wherein it was clarified as below (only relevant part reproduced):

It has been reported that Alumina Ball, Alumina Brick and Ceramic Roller/ceramic pebbles are essential to run the ball mill in the ceramic tile factory and the ball mill cannot function without the grinding media. Therefore, alumina balls/ ceramic pebbles which are grinding media should be considered as component part of the machines to be classified as capital goods for cenvat credit purposes

From the above, it becomes very clear that Alumina Ball, Alumina Brick SISIC Burner Tube, SISIC Beam, Insulation Bricks ,and Ceramic Roller/Pebble has to be considered as a part/component of a machine i.e. has to be classified as of capital goods. On the basis of the said circular it becomes very clear that once the goods are to be considered as a part/component. They would like to draw attention to the fact that Ceramic Roller, Burner Tubes, SISIC beam, insulation bricks are used in Kiln which in turn are used for firing of Tiles. These product form an integral part of the Kiln without which the said machine cannot work. As stated above when the tiles are fired at a temperature of 1350 to 1400° C in the kiln, it would be obvious that the roller should withstand a temperature of atleast 100° C above actual firing temperature of 1400° C. In case one goes in for the actual temperature the roller would melt or break. From this it Is very clear that the roller should withstand a temperature of above 1500° C if not less for working in a kiln. The above circular has not been rescinded and even today DGFT is issuing EPCG Licence for the import of same. The

said Export Promotion Capital Goods scheme is for import of capital goods only and a licence issued for import of the same means that it is a capital goods. Thus both DGFT and CBIC (earlier CBEC) have clarified their position on Alumina Ball, Alumina Brick, SISIC Burner Tube, SISIC Beam, Insulation Brick, and Ceramic Roller with spring being capital goods. A particular item cannot have two different definitions, one for cenvat and other for classification. Once an item is defined as a capital goods it is so for all purpose.

4.10 A part/component of a machine is to be classified as one under the respective heading in chapter 84. However the chapter notes 1(b) to chapter 84 excludes any part made of ceramic material and requires the same to be classified under chapter 69. This very exclusion of the chapter note therefore automatically qualifies any ceramic part to classified under chapter 69. Once the chapter has been determined it becomes very important to arrive to the conclusion as to whether the said Alumina Ball, Alumina Brick and Ceramic Roller with spring would qualify to be classified under CTH 6902. This requires the goods to fulfil two criterion

i. It should be made of ceramic and should be refractory by nature i.e. withstand a temperature of 1500° C or more.

ii. It should be a constructional material (as per the letter issued by the department)

In any case their imported goods fulfill both the above conditions even though the second one is a notional one (in terms of GRI). For the purpose of being a refractory goods, they have already submitting a certificate from the manufacturer at the time of assessment stating the working temperature of the material is above 1500 ° C. The said declaration on their part has at no time been challenged by the department and neither have they sent any samples for testing to ascertain the working temperature as declared by them. In view of this it appears that the department at the time of assessment was convinced with their declaration and accordingly had granted the exemption benefit. As of now with any evidence to prove otherwise, arriving to the conclusion based on some assumption that the goods in question would be rightly classified under CTH 6914 is not correct. As for being a constructional material, even though it is not legally binding on them for reason stated above, they have to mention here that any part/components of any machine would automatically qualify as constructional material.

Thus, the departments contention that their classification under CTH 6902 being wrong is totally misplaced and they are not liable for payment of any differential duty or interest payable thereon. In any case they would bring it on record that even in case of any wrong classification, it has been held in various judicial forums that such wrong classification would not attract any penalty since the same is a matter of interpretation. Further they at no stage has withheld or supress any facts from the department and the

goods in question have been released on acceptance of said classification by the department itself.

4.11 The department has further proposed to impose penalty under section 117 of the Customs Act, 1962 for the so called contravention of section 17(1) of the Act. In this regards as enumerated above they at no stage have supressed any detail from the department and neither have mis-declared or misclassified the goods under question. Misclassification is matter of interpretation and does not attract any penal action. They would like to rely upon a few judgment given by the higher fora in the matter.

(1) Misdeclaration can be of description but not of classification - **Bajaj Health & Nutrition Pvt Ltd vs. Commissioner,2004(166) ELT 189 (Tri)**

(11) Mens rea not attributable – if importer have claimed wrong classification according to his limited Understanding of the Customs Law- **Jay Kay Exports & Industries vs. Commissioner -2004(163) E.L.T. 359 (Tri-Kolkata)**

(iii) Demand on account of wrong classification -confiscation not resortable when description of goods given correctly- **Hindustan National Glass & Indus limited vs. Commissioner, Calcutta-2002(145) E.L.T.162(Tri-Kol)**

(iv) The Honourable High Court of Bombay ,in case of **Commissioner Of Central Excise Mumbai-V vs Guru Plastics Work, 2010 (261) E.L.T. 60 (Bom.),**uphold the view of leamed Tribunal that in the issue of classification, imposition of penalty was not called for.

4.12 They further contended that even if the department's contention regarding misclassification is to be accepted, no penalty can be imposed. In view of the above, they request that the said show cause notice may please be dropped and that they are not liable to pay any differential duty/interest/penalty.

DISCUSSION AND FINDINGS

5. I have carefully gone through the Show Cause Notice dated 27.09.2019, the written submissions dated 03.11.2019, 03.01.2020 and 23.01.2020 filed by the Noticee, oral submissions made during the course of hearing on 03.01.20020 and the available records of the case. I find that the following main issues are involved in the subject Show Cause Notice, which are required to be decided-

(i) Whether the classification under Custom Tariff item No.69022090 & 69039090 are liable for rejection and classification under Custom tariff heading No.69149000 is required to be made on re-assessment.

(ii) Whether the exemption under serial No.338 of Notification No.50/2017-Cus dated 30.06.2017, claimed and availed by the importer in the fifteen Bills of

Entries detailed in Annexure-I of the Show cause Notice is liable to be denied and the said Bills of Entries are liable for reassessment under CTH 69149000.

(iii) Whether the differential Customs duty amounting to Rs.25,64,959/-, not paid by the importer in respect of the fifteen Bills of Entries mentioned in Annexure-I of the Show Cause Notice by wrongly availing exemption under serial No.338 of Notification No.50/2017-Cus dated 30.06.2017 is required to be demanded and recovered from them under Section 28(1) of the Customs Act, 1962 along with interest at appropriate rate under Section 28AA ibid.

(iv) Whether the importer is liable for penalty under section 117 of the Customs Act, 1962.

5.1 The foremost issue before me to decide in this case is as to whether the goods imported by the noticee by declaring the same as "Alumina Ball, Alumina Brick , SISIC Burner Tube, SISIC Beam, Insulation Brick, Ceramic Roller with spring" are classifiable under tariff items 69022090 & 69039090 or under tariff item 69149000 of Customs Tariff Act, 1975 as alleged by the department in the Show Cause Notice. I find that the importer M/s Face Impex Pvt. Ltd. (holder of IEC No. 2406000371) had filed fifteen Bills of Entry as detailed in Annexure-I of the Show Cause Notice for clearance of goods declared as "Alumina Ball, Alumina Brick , SISIC Burner Tube, SISIC Beam, Insulation Brick, Ceramic Roller with spring". I find that they have classified the goods declared as **" Alumina Ball & Alumina Brick" under CTH 69022090** & **the SiSiC Burner Tube, SiSiC Beam, Insulation Brick & Ceramic Roller under CTH 69039090** of first schedule of the Custom Tariff Act, 1975 and availed the concessional rate of Basic Customs duty @ 5% under serial No. 338 of Notification No. 50/2017-Cus dated 30.06.2017. In this connection, firstly I have gone through the concerned statutory provisions as provided under chapter notes as well a HSN notes of chapter 69 (Ceramic Products). The explanatory notes to the subject heading codes for tariff item 6901, 6902, 6903, and 6914 under Chapter 69 of Customs Tariff Act, 1975 reads as under-

I. Goods of Siliceous Fossil Meals or of Similar Siliceous Earths, and Refractory Goods

6901	**Bricks, blocks, tiles and other ceramic goods of siliceous fossil Meals (for example, kieselguhr, tripolite or diatomic) or of similar siliceous earths**
690100	-- Bricks, blocks, tiles and other ceramic goods of siliceous fossil Meals (for example,kieselguhr, tripolite or diatomic) or of similar siliceous earths
690100 10	--Bricks
69010020	--Blocks
69010030	-- Tiles
69010090	-- Other

6902	**Refractory bricks, blocks, tiles and similar refractory ceramic constructional goods, other than those of siliceous fossil Meals or similar siliceous earths**

690210 - Containing by weight, singly or together, more than 50% of the element Mg, Ca or Cr, expressed as MgO, CaO or Cr_2O_3

69021010 ---Magnesite bricks and shapes

690220 -Containing by weight more than 50% of alumina (Al_2O_3), of silica (SiO_2) or of a mixture of compound of these products

69022010 -- Silica bricks and shapes

69022020 -- High Alumina bricks and shapes

69022030 -- Alumina Carbon bricks and shapes

69022040 -- Silicon Carbide bricks and shapes

69022050 -- Mullite bricks

69022090 -- Other

6903 **Other refractory ceramic goods (for example, retorts, crucibles, muffles, nozzles, plugs, support, cupels, tubes, pipes, sheaths and rods), other than those of siliceous fossil meals or of similar siliceous earths**

6903 10 - Containing by weight more than 50% of graphite or other carbon or of a mixture of these products

6903 10 10 --Magnesia carbon bricks , shapes & graphitised alumina

6903 10 90 --Other

6903 20 -Containing by weight more than 50% of alumina (A2O3), of silica (SiO2) or of a mixture of compound of alumina and of silica(SiO2)

6903 20 10 -- Silicon carbide crucibles

6903 20 90 -- Other

6903 90 -- Other

6903 90 10 -- Zircon/zircon-mullite refractories

6903 90 20 -- Basalt tiles

6903 90 30 -- Ceramic fibres

6903 90 40 --Monolithics/castables (fire-clay basic silica high alumina insulating)

69039090 ---Refractory bricks, blocks, tiles and similar refractory ceramic constructional goods

690390 90 --- Other

Whereas, the explanatory notes to the subject heading codes for tariff item 6914 under Chapter 69 of Customs Tariff Act, 1975 reads as under-

6914 Other ceramic articles

69141000 -of porcelain or china

69149000- Other

In view of the above, I find that the heading 6902 covers **Refractory bricks, blocks, tiles and similar refractory ceramic constructional goods,** other than those of siliceous fossil meals or similar siliceous earths and further the heading 6903 covers **Other refractory ceramic goods (for example, retorts, crucibles, muffles, nozzles, plugs, support, cupels, tubes, pipes, sheaths and rods),** other than those of siliceous fossil meals or of similar siliceous earths. I find that the chapter heading 6902 covers a group of refractory goods (other than those of 6901) normally used in the construction of ovens, kilns, furnaces or other plant for the metallurgical, chemical, ceramic, glass and other industries. It includes ,interalia: Bricks of all shapes(parallelepiped, wedge shaped, cylindrical, semi-cylindrical etc.), including keystones and other specially shaped bricks(e.g. runner bricks, concave on one face and rectilinear on the others) even if they are clearly recognizable as being of the kind specially designed for the construction of plant or machinery of Section XVL. I find that the composition and processing of refractories vary widely according to the application and the type of refractory. I find that alumina refractory Bricks are demanded in construction and maintenance fields for preparing heat resisting walls, roofs and other structures. I further find that activated alumina balls grade is used in PET drying, Polyester chips drying, manufacturing process of hydrogen peroxide. Activated alumina ball is a selective adsorbent for removal impurities like arsenics and fluoride from drinking water. Activated alumina balls grade is also used for drying of air, gases and liquids, purification and conditioning of insulating oil and industrial oils. However, I find that the impugned imported goods were meant for Ceramic Industries which require fired articles having the property of resisting temperatures 1000^0C to 1200^0C and not more than that. Hence, I find that the importer has wrongly classified the subject goods under Custom tariff item 69022090 of Customs Tariff Act, 1975. Thus as discussed above, the classification of the goods viz. "Alumina Ball & Alumina Brick " imported by the noticee by mis-declaring the same under Customs Tariff item No. 69022090 is liable for rejection and I hold that it should be re-classified under Customs tariff item No. 69149000 (other ceramic products other than those of porcelain or china), of the first schedule to the Customs Tariff Act, 1975 and should be reassessed accordingly. Further, in case of **imported goods declared as "SiSiC Burner Tube, SiSiC Beam and Insulation Brick"** and classified under Tariff item 69039090 of first schedule of the Customs tariff Act,1975. I find that the impugned imported goods are mainly composed of silica and are reaction-bonded (Silicon infiltrated) silicon carbide being formed zero porosity by filing up open porosity with Silicon, whereas **chapter heading 6903 covers Other refractory ceramic goods** (for example, retorts, crucibles, muffles, nozzles, plugs, support, cupels, tubes, pipes, sheaths and rods), **excluding those of siliceous fossil meals or of similar siliceous earths.** This heading also covers the group of refractory products other than those of 6901 and 6902. Hence, I find that the importer has wrongly classified the subject goods under Custom tariff item 69039090 of Customs Tariff Act, 1975. Thus as discussed above, the classification of the goods viz. **"SiSiC Burner Tube, SiSiC Beam and Insulation Brick"** imported by the noticee by mis-declaring the same under Tariff item

69039090 is liable for rejection and I hold that it should be re-classified under tariff item 69149000 (other ceramic products other than those of porcelain or china), of the first schedule to the Customs Tariff Act, 1975 and should be reassessed accordingly. Further, in respect of last item declared as "Ceramic Roller" and classifying the same under CTH 69039090 of first schedule of the Custom Tariff Act, 1975, I find that Ceramic Rollers are widely used in Kiln for fast firing of wall tiles, floor tiles, vitrified tiles etc and they need to satisfy specific criteria such as excellent thermal shock resistance, **high alumina content with superior strength in high temperature** are akin to the refractory ceramic products included under sub-heading 6903 . I also refer to the Notification No.27/2018-Customs (ADD) dated 17.05.2018 vide which the Government of India, Ministry of Finance(Department of Revenue), New Delhi has imposed definitive anti-dumping duty on goods having description as " Ceramic Rollers" falling under sub-heading 6903 of the First Schedule to the Customs Tariff Act,1975 originating in or exported from the Peoples Republic of China and exported in to India, in order to remove injury to the domestic Industry. In view of the above facts also, I find that the Ceramic Rollers being specifically mentioned under heading 6903, their correct classification has to be under CTH 69039090 of first schedule of the Custom Tariff Act, 1975.

5.2 The Show Cause Notice has proposed that the benefit of exemption under serial No. 338 of Notification No. 50/2017-Customs dated 30.06.2017 availed by the importer by paying basic customs duty @ 5% is not available on the impugned goods i.e. "Alumina Ball, & Alumina Brick" classified under tariff item No. 69022090, SiSiC Burner Tube, SiSiC Beam, Insulation Brick and "Ceramic Roller" classified under tariff item No.69039090 of Customs Tariff Act, 1975 and they are required to pay basic customs duty @ 10%. Relevant portion of the Notification No.50/17-Cus dated 30.06.2017, reads as under:-

S. No.	Chapter or heading or sub-heading or tariff item	Description of Goods	Standard Rate	IGST	Condition No.
1	2	3	4	5	6
338	6902, or 6903	All goods	5%	-	-

From the above, I find that the concessional rate of duty under serial number 338 of the said Notification is applicable to Customs tariff items falling under 6902, or 6903 whereas the imported goods declared as "Alumina Ball, Alumina Brick, SiSiC Burner Tube, SiSiC Beam and Insulation Brick" are correctly classifiable under tariff item 6914900. Thus, I find that in the subject **twelve Bills of Entry** detailed at Sr. No. 01 to 31 of the Annexure-I of the Show cause Notice , the importer has purposefully mis-classified the goods to wrongly avail the exemption under serial No. 338 of Notification No. 50/2017-Cus dated 30.06.2017. Since exemption under serial No.338 of Notification No. 50/2017-Cus dated 30.06.2017 is not available to the goods covered under tariff item 69149000, I hold that the claimed exemption is liable to be denied and the said twelve Bills of Entry are liable to be re-assessed under Section 17 of the Customs Act, 1962 by classifying impugned goods under tariff item

69149000 and accordingly, Basic Customs duty at the prevailing tariff rate i.e. 10 % is liable to be charged. However, in respect of goods declared as "Ceramic Roller" and classified under tariff item No.69039090 of Customs Tariff Act, 1975, I find that the same are correctly classifiable under tariff item No.69039090 and the exemption under serial No.338 of Notification No. 50/2017-Cus dated 30.06.2017 is available to such goods having description as "Ceramic Roller".

5.3 As regard proposal in the Show Cause Notice for demand of differential Customs duty along with applicable interest, I find that the Noticee in their defence submission have submitted that after due verification all the Bills of Entry were finally assessed by the proper officer/Customs authorities and Section 28 of the Customs Act, 1962 do not provide the authority to reassess the already finally assessed Bills of Entry. However, I find that with the introduction of self-assessment and consequent upon amendments to Section 17, since 8th April, 2011, it is the responsibility of the importer to declare the correct description, value, notification etc. and to correctly classify, determine and pay the duty applicable in respect of the imported goods. The importer failed to discharge the legal and statutory obligation in correct determination of description & classification of imported goods and duty payable. I find that the Noticee have self-assessed the said fifteen Bills of Entry in terms of Section 17 of the Customs Act, 1962, however, I find that in respect of twelve Bills of Entry detailed at Sr. No. 01 to 31 of Annexure-I of the Show Cause Notice, the Importer have contravened the provisions of Section 46 (4) of the Customs Act, 1962 in as much as they had intentionally availed/taken a wrong Customs duty benefit in terms of serial number 338 of the Notification No. 50/2017-cus dated 30.06.2017. I find no force in this contention because Section 28 of the Customs Act, 1962 does not differentiate or debar demand in such situation. The assessments under Section 17 are without prejudice to Section 46 and subsequent action including demand of differential duty with interest or any other action under the provisions of the Customs Act, 1962. Since exemption under serial No.338 of Notification No. 50/2017-Cus dated 30.06.2017 is not available to the impugned goods declared as "Alumina Ball, Alumina Brick, SiSiC Burner Tube, SiSiC Beam and Insulation Brick", and the said exemption is liable to be denied and accordingly, Basic Customs duty at the prevailing tariff rate i.e. 10 % is liable to be charged in respect of goods covered under Bills of Entry detailed at Sr. No. 01 to 31 of Annexure-I of the Show Cause Notice, I, therefore, hold that the importer M/s Face Impex Pvt. Ltd. is required to pay the differential Customs duty of **Rs.17,98,602/-[total differential duty for Bills of Entry detailed at Sr. No. 01 to 31 of Annexure-I of the SCN]** under Section 28(1) of the Customs Act, 1962 along with interest at appropriate rate on the said amount of **Rs.17,98,602/-**under the provisions of Section 28AA of the Customs Act,1962. Further, in respect of goods viz. "Ceramic Rollers" covered under only three Bills of Entry[**detailed at Sr. No. 32 to 58 of Annexure-I of the SCN]**, since the same are correctly classifiable under heading 69039090 and the exemption under serial No.338 of Notification No. 50/2017-Cus dated 30.06.2017 is available to the impugned goods, **the importer is not required to pay the remaining customs duty of Rs.**

7,66,357/- (Rupees Seven Lakh Sixty Six Thousand Three Hundred Fifty Seven only) under Section 28(1) of the Customs Act,1962. Consequently, they are also not liable to pay Interest at appropriate rate on the said **amount of Rs. 7,66,357/-** under provision of Section 28AA of the Customs Act, 1962.

5.4 As regard proposal in the Show Cause Notice for imposition of penalty on the importer under Section 117 of the Customs Act,1962, I find that Section 117 of the Customs Act,1962 stipulates that any person who contravenes any provisions of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding [four lakh rupees]. I further find that Section 17(1) of the Customs Act, 1962 authorises any Importer or exporter of the goods to self assess the duty leviable on the Import or export of goods. In the instant case, I find that the importer was aware that the exemption under serial No. 338 of Notification No. 50/2017-Cus dated 30.06.2017, was not available to the goods viz. "Alumina Ball, Alumina Brick, SiSiC Burner Tube, SiSiC Beam and Insulation Brick" but they deliberately assessed the concerned twelve Bills of Entry (mentioned at Sr.No. 01 to 31 in Annexure-I of the SCN) under Section 17(1) of the Customs Act, 1962 by wrongly availing the said exemption. Thus, I find that the importer has contravened the provisions of Section 17(1) of the Customs Act, 1962 and accordingly I hold that the penalty under Section 117 of the Customs Act, 1962 are attracted on the importer M/s Face Impex Pvt. Ltd., (IEC No.2406000371), 58-88, Shakti Chambers, 8-A, National Highway, Morbi, Gujarat-363642.

5.5 I find that the Noticee in their written defence submissions quoted and have placed reliance on various case laws/judgements in support of their contention on some issues raised in the SCN. In this regard, I am of the view that the conclusions arrived may be true in those cases, but the same cannot be extended to other case(s) without looking to the hard realities and specific facts of each case. Those decisions/judgements were delivered in different context and under different facts and circumstances, which cannot be made applicable in the facts and circumstances of this case. Therefore, I find that while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind. The Hon'ble Supreme Court in the case of CCE, Calcutta Vs Alnoori Tobacco Products [2004(170)ELT 135(SC) has stressed the need to discuss, how the facts of decision relied upon fit factual situation of a given case and to exercise caution while applying the ratio of one case to another. This has been reiterated by the Hon'ble Supreme Court in its judgement in the case of Escorts Ltd. Vs CCE, Delhi [2004(173) ELT 113(SC)] wherein it has been observed that one additional or different fact may make difference between conclusion in two cases, and so, disposal of cases by blindly placing reliance on a decision is not proper. Again in the case of CC(Port), Chennai Vs Toyota Kirloskar[2007(2013)ELT4(SC)], it has been observed by the Hon'ble Supreme Court that, the ratio of a decision has to be understood in factual matrix involved therein and that the ratio

of a decision has to culled from facts of given case, further, the decision is an authority for what it decides and not what can be logically deduced there from.

6. In view of the forgoing discussions and findings, I pass the following order:-

ORDER

(i) I reject the declared classification of imported goods viz. "Alumina Ball & Alumina Brick" under Custom Tariff item 69022090, SiSiC Burner Tube, SiSiC Beam and Insulation Brick" under Custom Tariff item 69039090 of the First Schedule to the Customs Tariff Act, 1975 and order to classify the same under Custom tariff item 69149000 and re-assess accordingly. I accept the declared classification of imported goods viz. "Ceramic Roller with spring" under Custom Tariff item 69039090 of the First Schedule to the Customs Tariff Act, 1975.

(ii) I reject the importers claim of exemption under serial No. 338 of Notification No. 50/2017-Cus dated 30.06.2017 in respect of only twelve Bills of Entry [as detailed at Sr.No. 01 to 31 in Annexure-I to the Show Cause Notice] and order to re-assess the said twelve Bills of Entry under Custom Tariff Item 69149000.

(iii) I confirm and order to recover the differential Customs duty amounting to **Rs.17,98,602.00(Rupees Seventeen Lakh Ninety Eight Thousand Six Hundred two only)**[total differential duty in respect of the twelve Bills of Entry detailed at Sr. No. 01 to 31 of Annexure-I of the SCN] from the importer M/s Face Impex Pvt. Ltd., (IEC No.2406000371), 58-88, Shakti Chambers, 8-A, National Highway, Morbi, Gujarat-363642, for wrongly availing exemption under serial No. 338 of Notification No. 50/2017-Cus dated 30.06.2017, under Section 28(1) of the Customs Act, 1962.

(iv) I drop the demand of remaining differential Customs duty of **Rs.7,66,357.00(Rupees Seven Lakh Sixty Six Thousand Three Hundred Fifty Seven only)** [total differential duty in respect of the three Bills of Entry detailed at Sr. No. 32 to 58 of Annexure-I of the SCN] from the importer M/s Face Impex Pvt. Ltd., (IEC No.2406000371), 58-88, Shakti Chambers, 8-A, National Highway, Morbi, Gujarat-363642, for correctly availing exemption under serial No. 338 of Notification No. 50/2017-Cus dated 30.06.2017, under Section 28(1) of the Customs Act, 1962.

(v) I order to charge and recover interest from the importer M/s Face Impex Pvt. Ltd., (IEC No.2406000371), 58-88, Shakti Chambers, 8-A, National Highway, Morbi, Gujarat-363642, on the confirmed duty at Sr. No. (iii) above under Section 28AA of the Customs Act, 1962

(vi) I also impose a penalty of Rs.2,50,00,000.00(Rupees Two lakh Fifty Thousand only) on the importer M/s Face Impex Pvt. Ltd., (IEC No.2406000371), 58-88,

Shakti Chambers, 8-A, National Highway, Morbi, Gujarat-363642 under Section 117 of the Customs Act, 1962.

7. This order is issued without prejudice to any other action which may be contemplated against the importer or any other person under provisions of the Customs Act, 1962 and rules/regulations framed thereunder or any other law for the time being in force in the Republic of India.

(Ajay Kumar)
Additional Commissioner
Custom House, Mundra

F. No. VIII/48-64/Adj./ADC/MCH/2019-20 Date: 23.03.2020

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS
28915
31 MAR 2020
INWARD SECTION
Custom House, Mundra

BY SPEED POST
To,
M/s Face Impex Pvt. Ltd.,
58-88, Shakti Chambers,
8-A, National Highway,
Morbi, Gujarat-363642

Copy to:

1. The Commissioner of Customs, Custom House, Mundra.
2. The Deputy/Assistant Commissioner (RRA), Custom House, Mundra.
3. The Deputy/Assistant Commissioner (TRC), Custom House, Mundra.
4. The Deputy/Assistant Commissioner (EDI), Custom House, Mundra.
5. The Deputy/Assistant Commissioner (GR-III), Custom House, Mundra.
6. The Deputy/Assistant Commissioner (Audit), Custom House, Mundra.
7. Guard File