## Customs, Excise & Service Tax Appellate Tribunal
## West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

**Custom Appeal No. 463 of 2010**

(Arising out of OIO-KDL/COMMR/09/DENOVO/10-11 passed by Commissioner of CUSTOMS-KANDLA)

**M/s. Neptune Trade Link Pvt Ltd** **.........Appellant**
7, Betwa Apartment Roshanpura,
Naka T T Nagarm, Bhopal, M P.

*VERSUS*

**C.C.-Kandla** **.........Respondent**
Custom House, Near Balaji Temple,
Kandala,
Gujarat

**And**
**Custom Appeal No. 465 of 2010**

(Arising out of OIO-KDL/COMMR/09/DENOVO/10-11 passed by Commissioner of CUSTOMS-KANDLA)

**M/s. Worldlink TC Bond Store** **.........Appellant**
Manali Chambers, Plot No. 306,
Sector 1a, Gandhidham, Kutch
Gujarat

*VERSUS*

**C.C.-Kandla** **.........Respondent**
Custom House, Near Balaji Temple,
Kandala,
Gujarat

**And**
**Custom Appeal No. 466 of 2010**

(Arising out of OIO-KDL/COMMR/09/DENOVO/10-11 passed by Commissioner of CUSTOMS-KANDLA)

**Dushyant R Patel** **.........Appellant**
Partner of M/s, Worldlink TC Bond Store
Manali Chambers, Plot No. 306,
Sector 1a, Gandhidham, Kutch

Gujarat

*VERSUS*

**C.C.-Kandla** **.........Respondent**
Custom House, Near Balaji Temple,
Kandala, Gujarat

**And**

**Custom Appeal No. 471 of 2010**
(Arising out of OIO-KDL/COMMR/09/DENOVO/10-11 passed by Commissioner of CUSTOMS-KANDLA)

**M/s. Hazoor Sahib Chemicals P Ltd** **.........Appellant**
774- Delhi Meerut Road,
Virat-Duhai, Ghaziabad,
Uttar Pradesh

*VERSUS*

**C.C.-Kandla** **.........Respondent**
Custom House, Near Balaji Temple,
Kandala, Gujarat

**WITH**

**Custom Appeal No. 472 of 2010**
(Arising out of OIO-KDL/COMMR/09/DENOVO/10-11 passed by Commissioner of CUSTOMS-KANDLA)

**Satender Kumar Gupta** **.........Appellant**
D-17, Rana Pratap Bagh
Delhi, 110007

*VERSUS*

**C.C.-Kandla** **.........Respondent**
Custom House, Near Balaji Temple,
Kandala, Gujarat

**APPEARANCE:**
Shri. Rajesh Rawal, Shri. S.J. Vyas, & Shri. R. Prajapati, Advocate for the Appellant
Shri. L. Patra, Authorized Representative for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
**HON'BLE MEMBER (TECHNICAL), MR. RAJU**

**Final Order No. A/11138-11142 / 2020**

DATE OF HEARING: 28.02.2020
DATE OF DECISION: 25.08.2020

**Raju**

This appeal has been filed by the M/s. Naptune Trade Link Pvt Ltd, M/s. Hemant Vyas, M/s. Worldlink T C Bond Store, M/s. Dushyant R Patel, M/s. Hazoor Sahib Chemicals P Ltd, M/s. Satender Kumar Gupta. It is a second round of litigation before this Tribunal. In the first round of litigation, the matter was remanded by the Tribunal for grant of cross examination of the Chemical Examiner. The facts as narrated by the appellants are as follows:-

1.1 Three parties viz. M/s. Neptune Tradelinks Pvt. Ltd., Gujarat, M/s. Hazoor Sahib Chemicals Pvt. Ltd., Ghaziabad, U.P and M/s. Worldlink T.C. Bond Store, Gujarat had imported 'Nephtha' from its foreign supplier.

1.2 Vessel loaded the cargo from Iran and reached at Kandla Port on 30.07.2004. The total quantity of the subject goods was 5872.881 Mts. Out of the said total quantity, 3472.881 Mts covered vide BL Nos. 83/01 to 83/20 all dated 25.07.2004 pertained to Appellant – M/s. Neptune Tradelinks Pvt. Ltd. 1650 Mts. Covered vide BL Nos. 83/21 to 83/23 all dated 25.07.2004 pertained to M/s. Hazoor sahib Chemicals Pvt. Ltd and balance 750 Mts covered vide BL Nos. 83/24 to 83/26 all dated 25.07.2004 pertained to M/s Worldlink T.C. Bond Store. The said cargo on discharge was stored in the tank terminals of M/s J.K. Synthetics Ltd. Kandla and M/s Friends Salt Works and allied Industries, Kandla. Appellant had entered into contract dated 8.7.2004 with its foreign supplier for import of the subject goods (page 177-181 vol.2 paper book)

1.3 Bills of Entry for warehousing bearing Nos. 011798, 011799,011800 all dated 30.07.2004 were filed by M/s. Neptune Tradelinks Pvt. Ltd., M/s. Hazoor Sahib Chemicals Pvt. Ltd and to M/s Worldlink T.C. Bond Store respectively, declaring the imported goods as 'Naphtha' while classifying the same under CTH 2710 11 19 attracting, besides others, basic customs duty @10%, while claiming benefit of Entry No. 74 of exemption Notification No. 21/2002-Cust dated 01.3.2002 as amended.

1.4 It is the case of revenue that representative samples of the imported goods were drawn on board the vessel on 31.07.2004. The two sealed samples so drawn were forwarded to the laboratory of Custom House, Kandla for testing vide letters dated 04.08.2004. In regard to the said samples, two reports were rendered by said Lab vide reports dated 11.08.2004. Kindly see 164 and 165 vol.2 paper book, both front and back of the said pages, The said reports were rendered by Sh. Dilip Mehta, Assistant Chemical Examiner.

1.5 Before making further submissions it would be relevant to refer here Sub heading Note 4 to Chapter 27 of the Customs Tariff Act, 1975 which reads as under:

"For the purpose of sub heading 2710 11 "light oils and preparations" are those of which 90% or more by volume (including losses)distil at 2110 degree centigrade (ASTM D 86 method)"

This is the method of testing that was to be performed to ascertain the nature and classification of the goods. As stated above, Appellant had claimed classification of the subject goods under CTH 2710 11 19 heading 2710 11 – Light oils and preparations and sub heading 2710 11 19 – other)

1.6 It has been further alleged by revenue that technical opinion of the said Assistant Chemical Examiner was also obtained in this regard, Kindly see page 163 vol. 2 paper book. The said Assistant Chemical Examiner viz. sh. Dilip Mehta rendered his opinion dated 17.08,2004 which is reproduced below for ready reference:

"Please refer to the Test Report of the sample registered under Lab No. Import (SIIB)-150/05-08-2004. As per discussion and direction of Honorable Commissioner opinion on the above report is given below:

1. Sub Heading Note No. 4 to 27 clearly stipulate the condition that "For the purpose of subheading 2710 11 "light oils and preparations" are those of which90% or more by volume (including losses) distill at 210 C (ASTM d86 Method)". The report does not meet this requirement.
2. Chapter Sub Heading 2710 19 10 to 2710 19 80 also does not meet necessary requirement of the boiling range and have flash point above 25C.
3. Chapter Sub Heading 2710 19 90 (other) appears more appropriate for the sample u/r… "

1.7 Further it is the case of revenue that composite sample were also drawn from the above shore tanks on 07.08.2004 and the same were sent for testing to M/s. IOC Limited, Kandla and Refinery Division Jamnagar of M/s. Reliance Industries Limited. In regard to the aforesaid sample, to reports dated 14.08.2004 (pages 121, 122 vol. 2 paper book) were rendered by IOC Limited and a report dated 12.08.2004 (along with covering letter dated 12.08.2004) was rendered by M/s. Reliance Industries Limited (pages 139- 140 vol. 2

paper book). As per revenue these reports were against the detailed submissions in this regard will be made herein after.

1.8 As per revenue in view of above, the imported goods were seized on 17.08.2004. However on request having been made by the Appellant and worldlink T.C. Bondstore, revenue permitted provisional clearance of the goods against bond and bank guarantees. Revenue conducted further investigation, while recording statements various persons. Basic case of revenue is that boiling range/distillation range is the main deciding factor for ascertaining the nature of the goods and its classification and as per the aforesaid reports and opinion the subject goods did not satisfy the said criteria since the final boiling range on testing was found to be more than 210 degree centigrade. It is the case of revenue that in view of the aforesaid test reports/observations / evidences it appeared that the imported goods do not fulfill the definition of "light oils and preparations" and the specifications of Naphtha and hence the said goods did not appear to be classifiable under CTH 2710 11 19 as declared. The imported goods being petroleum products appeared to be classifiable under sub heading 271019 – other. CTH 27101910 to 27101980 relate to specific products and the imported good do not meet the requirements of boiling range and flash point related with the said specific products, hence the imported goods do not appear to be classifiable unde the said entries. Accordingly the subject goods were alleged to be classifiable under CTH 27101990 as 'other'. It was alleged that Assistant Chemicals Examiner, Custom Lab Kandla, had rendered similar opinion dated 17.08.2004. Further it was alleged that the products falling under CTH 27101990 attract basic customs duty @ 20% and therefore it was alleged that the said imported goods were mis-declared and misclassified with intent to evade payment of duty.

1.9 Accordingly revenue issued show cause notice dated 19.01.2005 (page 54 to 98 vol. 2 paper book) calling upon the afore named importers, amongst others, as to show cause as to why"

a. Imported goods be not classified under CTH 27101990 – other and duty be demanded accordingly while denying the benefit of exemption notification as claimed;
b. Imported goods be not confiscated under Section111 (d), 111 (f) and 111(m) of the Customs Act, 1962;

c. Differential duty be not demanded viz. Rs. 63,85,663 – Appellant, Rs. 32,93,953 – M/s Hazoor Sahib Chemicals Pvt. Ltd. and Rs. 14,97,250/- M/s Worldlink T.C. Bondstore by invoking extended period of limitation under Section 28 of act, 1962;

d. Penal action be not taken as proposed in the said show cause notice.

1.10 Being aggrieved by the aforesaid order dated 29.03.2007 Appellants had preferred appeals before Tribunal. The said appeals were disposed of by this Tribunal vide Order dated 18.02.2008. Vide said order, amongst others it was held that the chemical examiner is required to give only the report on the chemical analysis conducted by him and therefore his opinion dated 7.8.2004 about classification should be ignored. While appreciating the submission of Appellant in regard to reports rendered by Reliance Industries Ltd. and IOC Ltd. it was held that the said reports cannot be the sole basis for coming to conclusion against the importers and that the said reports at best could be considered as supportive evidence. Further it was held that the report of Chemical Examiner did not indicate the method adopted in the analysis. Therefore, it was not clear whether the tests report was conducted as per ASTM D86 method prescribed under Note 4 of Chapter 27 and that the said information could have been elicited during cross examination of the chemical Examiner, under these circumstances cross examination of the chemical Examiner ought to have been allowed by the Ld. Adjudicating authority. Accordingly the impugned order was set aside and the matters were remanded for de-novo consideration after permitting cross examination of the 'Chemical Examiner' and in light of the observation made in the said order dated 18.02.2008

1.11 In remand proceedings Ld. Commissioner noted and reproduced the aforesaid directions of this Tribunal (in the remand order dated 18.2.2008) In para 16.1 of the order it was observed that in compliance with the aforesaid directions importers were allowed cross-examination of Sh. Dilip Mehta, Assistant Chemical Examiner on 10.3.2008) on the strength of cross examination of Shri Dilip Mehta it was asserted by appellants that the said chemical Examiner was not even aware of the prescribed test method voz. ASTM D86 method. Personal hearing was attended upon on 20.3.2010 and detailed argument was addressed on behalf of Appellants. On conclusion of arguments on 20.3. 2010, the adjudicating authority desired that the written submissions be filed within 10 days and the said written submission were filed on 30.3.2010 as desired.

1.12 However no order was passed by the Ld. Respondent. Almost after five months, Appellant was intimated that another witness Shri T.K. Myelvalganan Chemical Assistant Grade-I who carried the test under supervision of Shri. Dilip Mehta, Assistant Chemical Examiner was required to be cross examined by the notices / importers on 5.8.2010. Protest was lodged that the said witness was being introduced to cover up the lacunas brought on record in cross-examination or earlier witness Sh. Dilip Mehta, Assistant Chemical Examiner and that the procedure so adopted was not correct and in any case beyond the aforesaid remand order dated 18.2.2008 passed by the Tribunal. However, the said protest was neither considered nor any order was passed in that regard and there was no option left but to cross examine the subsequently introduced aforesaid witness. Shri T.K. Myelvalganan Chemical Assistant Grade-I Was cross examined on 5.8.2010 and the cross examination so conducted is reproduced at pages 61 to 68

1.13 The adjudicating authority relied solely on cross examination of Shri T.K. Myelvalganan Chemical Assistant Grade-I. And held that from the said cross examination it is apparent that the notices /importers could not discharge the onus that on chemical analysis ASTM D86 method was not followed. Further it was held that the test reports of Customs Lab, Kandla are in line with reports rendered by Reliance Industries Ltd. and IOC Ltd. and that the reports of Custom Lab, Kandla were correct. Consequently it was held that the notices. Importers had failed to extinguish the allegation of mis-declaration leveled against them in the impugned show cause notice. Accordingly the Ld. Respondent confirmed demand of duty, imposed redemption fine and penalties as was done vide initial order in original dated 29.3.2007, as stated above.

2. Ld. Counsel for the appellant argued that the Tribunal orders dated 18.02.2008 remanded the matter back for the de-novo consideration permitting cross examination of the Chemical Examiner. In this circumstances cross examination of Shri. Shri. T.K. Myelvalganan was

beyond the scope of remand. It was argued that no Reliance can be placed on the cross examination of Shri. T.K. Myelvalganan. It is argued that the second witness was introduced during the said remand proceedings only to cover up for the lacunas pointed out during cross examination of the Chemical Examiner, Shri. Dilip Mehta. Ld. Counsel further argued that Reliance Industries Limited and IOC Limited are in the nature of business competitors and no reliance on the tests reports made in the labs of the said companies can be taking on record.

3.1 Ld. Counsel further pointed out that there are following requirements for the standard tests method for ASTM D86.

- Page 107 where from the table: preparation of apparatus it is apparent that for the sample meant to be tested there are five groups i.e. group 0 to 4
- Page 108 para 4.1 and 4.2-summary of Test Method, wherein it has been stated that based on its composition, vapor pressure, expected IMP, or expected EP, or Combination thereof, sample is placed in one of five groups. Apparatus arrangement condenser temperature and other operational variables are defined by the groups in which the sample falls. Systematic observations of temperature readings and volumes of condensate are made, depending on the needs of the user of the data. The volume of the residue and losses are also recorded.
- Para 6.3 at page 108- Temperature Measuring Device, wherein it has been stated that mercury-in-glass thermometer if used, shall be filled with an inert gas, graduated on the stem and enamd bagged. They shall confirm to Specification E1 or IP Standard Methods for Analysis and Testing of Petroleum and Related Products 1996, Appendix A, or both, for thermometer ASTM 7C / IP 5C and ASTM 7F for low range thermometers and ASTM 8C/IP 6C and ASTM 8F for the high range thermometer.
- Para 7.2.1.1 and 7.2.1.2 and table 3 at page 111 wherein it has been stated that the sample that sample that needs to be tested is to be stored at a temperature below 10◦ centigrade. According to revenue the subject sample falls in Group 1 and according to Appellant the same falls under Group 0. As per the above method, in Group 0 the sample needs to be stored at a temperature below 5◦ and in Group 1 below 10◦ centigrade.

3.2 Thereafter Ld. Counsel pointed out that the following questions and answers made during Cross Examination of Shri. Dilip Mehta.

*Q32. What are the groups identified in ASTM D86 method for the distillation criteria?*

*A32. I am unable to understand the question.*

*Q33. I put to you that there are five group, 0,1.2.3. and 4. Are you aware of these groups?*

*A33. I am not aware of these groups. I may please be apprised of these groups.*

*Q50. I put to you that for the test as per ASTM D86 Method, Identification of Grouping is must or not?*

*A50. I am not aware about any grouping.*

*Hence Sh. Dilip Mehta was not even aware of the basic aspect of grouping as per ASTM D86 method.*

*He further argued that his answered to question no. 34, 35, 36 and 51 show that Shri. Dilip Mehta was not even aware that proper measuring device/ thermometer was required to be used in testing, as stated above,. In answer to question no. 45 he stated that the equipment used for testing the sample did not bear the nomenclature of mode of test of ASTM- D86. Further in contradiction to the prescribed temperature below 5/10◦ centigrade, as stated above, in answer to question no. 56 Shri. Dilip Mehta replied that the sample was cooled to 25 degree centigrade before commencing distillation. Further in answer to question no. 13 that whether the method of laboratory test carried out was mentioned in the report or not, Shri. Dilip Mehta replied that it is not mentioned.*

*Q37. In one of the test report(No. 150), you have reported the final boiling point is 223 C and you have also reported that the at the same temperature, the recovery is 69%. Please tell us what happened to balance 31%?*

*A37. Probably, they losses.*

*Q38. Did you record that it was due to losses?*

*A38. No.*

*Q39. How do you remember today after more than 6 years that it was due to losses?*

*A39. It is so written in the report.*

*From the above it is apparent that the losses were not recorded, which were required to be so recorded in view of the procedure of*

*ASTM D86 method, as stated above. The answers given are self contradictory. Further if going by what had been stated in the above questions and answers while aggregating the recovery of 69% and 31% losses, at the required 210◦ centigrade the recovery would have been 90% which is the required parameter.*

*These are few instances of crosss examination conducted of Shri Dilip Mehta and Appellant craves leaves to refer and rely on other portions of cross examination so conducted, at the time of hearing.*

4. Ld. Counsel argued that from the aforesaid it can be seen that they were lot of lacunas in the testing procedure emerged from the cross examination of Shri. Dilip Mehta and therefore a new witness Shri. T.K. Myelvalganan was introduced by the adjudicating authority. He further submitted that even the test report of customs labs of IOC and Reliance Industries Limited does not indicate method of ASTM D86 was followed or not. He further argued that there were following lacunas in testing

*"D. Submissions on Reports*

*i) Customs Lab Kandla (Page 164 and 165, both front and backside, vol. 2 paper book)*

*In the said reports it has been stated that ASTM D86 method was followed. From the perusal of said reports, it is apparent that samples were not subjected to 210◦ centigrade to ascertain the percentage by volume (including losses) which god distilled. Hence the said reports do not carry any evidentiary value. These submissions are in addition to the aforesaid submissions made in regard to cross examination of witnesses.*

*ii) IOC Limited (Page 212 and 122, vol. 2 paper book)*

*From the perusal of the said reports it is apparent that it has not been stated therein that ASTM D86 method was followed while testing the samples. Rather in the said reports it has been stated that 'latest methods used unless specified otherwise'. From the perusal of said reports, it is apparent that samples were not subjected to 210◦ centigrade to ascertain the percentage by volume (including losses) which got distilled. IOC Limited are also manufacturing and marketing Naphta, hence and interested party. Hence that said reports do not carry any evidentiary value.*

*iii) Report and Letter of Reliance Industries Limited (Page 139 and 140, vol. 2 paper book)*

*From the perusal of the covering letter it is apparent that only few tests were carried out and that too by the procedure followed for their captive samples. Further it was requested that the test results are confidential and same may kindly be used for internal purpose only. Along with the said covering letter, there is an unsigned test* *report and from the perusal of said covering letter, there is an unsigned test report and from the perusal of said report, it is apparent that samples were not subjected to 210◦ centigrade to ascertain the percentage by volume (including losses) which got distilled. RIL are also manufacturing and marketing Naphtha, hence an interested party. Hence that said report does not carry any evidentiary value."*

5. Learned Counsel pointed out that the impugned order solely relied on the cross examination of Sh. T.K. Myelvalganan and ignores the cross examination of Shri. Dilip Mehta, Chemical Examiner.

6. Ld. Counsel further argued that the redemption fine has been imposed arbitrarily without considering the margin of profit. Learned Counsel further argued that the penalty has been imposed without any reason. He argued that the appellant had entered into contract dated 08.07.2004 with the foreign supplier import of the subject goods and backed by Letter of Credit dated 12.07.2004. He further stated that the contract clearly specified the item which was to be imported therefore if any different item was found it cannot be attributed to the appellant.

7. Ld. AR relies on the impugned order. Ld. AR also submitted written submissions which are essentially reproduction of various paras to the impugned order.

8. We have considered the rival submissions, the appellant has imported the goods and declared the same as 'Naphtha' falling under Chapter 2710 11 19 of the first schedule of the Customs Tariff Act claiming benefit of Notification No. 21/2002-Cus dated 01.03.2002. After draw all of samples and testing Revenue sought to classify the same as "others" falling under heading 2710 19 90 instead of the same being treated as "Naphtha" falling under heading 2710 11 19 as declared in the Bills Of Entry. Revenue has got it samples tested in their laboratory as well as in the laboratories of M/s. Reliance Industries Limited and Oil India Limited.

9. From the above, it is seen that the primary defense of the appellant before original adjudicating authority was that as per Note 4 to Chapter 27 of the Customs Tariff Act, 1975, for the purpose of classification of the good under sub heading 2710 11 "light oils and preparations" the testing is to be carried out in the method prescribed under ASTM D 86. Since the case of the Revenue based on the chemical examination done by the office of Chemical

Examiner, the appellant sought cross examination of the Chemical Examiner which was denied in the first round by the original adjudicating authority. The original adjudicating authority confirmed the charges made in the SCN against these appellants and ordered confiscation of goods and imposed redemption fine. Personal penalty were also imposed. The appellant challenged the order of Commissioner in the Tribunal. Taking note of chapter note 4 to chapter 27 of the Customs Tariff Act, 1975, Tribunal remanded the matter back to the Commissioner directing commissioners to provide Cross Examination of the Chemical Examiner.

> *"6.5 The Chemical Examiner's report is admittedly against the imports. They have not asked for retest of the report. The submission that the Chemical Examiner should not have given the classification is relevant. The Chemical Examiner is required to give only the report on the chemical analysis conducted by him. Therefore, the suggestion about the classification should be ignored and should be considered by the adjudicating authority independently. The report of the Chemical Examiner does not indicate the method adopted by him in the analysis. Therefore, it is not clear whether the test report has been conducted as per ASTM D 86 method prescribed under Note 4 of Chapter 27. This information could been elicited during cross-examination of the chemical Examiner. Under these circumstances, the adjudicating authority ought to have permitted cross-examination of the Chemical Examiner.*
>
> *7. In the light of the above, we set aside the order of the commissioner and remand the matter for de-novo consideration after permitting cross examination of the Chemical Examiner and in the light of observations made in this order. The appellants are entitled to adduce further evidence in their support including evidence, if any, to show that the report of M/s Atlas Inspection Services Ltd., Iran relates to the disputed consignments. The Commissioner shall give a reasonable opportunity of hearing before deciding the issue."*

10. In the remand proceedings the Cross Examination of Shri. Dilip Mehta, Assistant Chemical Examiner was allowed and conducted on 10.03.2010. Thereafter, personal hearing was attended by the appellant. Thereafter, written submissions were filed by the appellant.30.03.2010. Five months after the personal hearing the appellant were informed by the Commissioner that another witness Sh. T.K. Myelvalganan Chemical Assistant Grade-I, who carried out the test under supervision of Sh. Dilip Mehta Assistant Chemical Examiner, was required to be cross examined by the notices/importer on 05.10.2010. The appellant lodged their protest that a

new witness was being introduced to cover up the lacunas brought on record during the cross examination of earlier witness Sh. Dilip Mehta. The appellants argued that said action was beyond the directions given in the remand order of tribunal dated 18.02.2008. The said protest was not considered by the lower adjudicating authority and the appellant cross examined Shri. T.K. Myelvalganan Chemical Assistant Grade-I on 05.08.2010. Ld. Counsel argued that the Revenue has solely relied on the cross examiner of Shri. T.K. Myelvalganan and on the strength of the said cross examination of Shri. T.K. Myelvalganan it was held that the appellant failed of establish of ASTM D86 method was not followed. During the investigation samples were also sent to the Labs of Reliance Industries Limited and IOC Limited. Relying on the reports of the said goods received from Reliance Industries Limited and IOC Limited as well as from the Chemical Examiner the charges leveled in the SCN against these appellant were upheld.

11. A perusal of the cross examination of Shri. Dilip Mehta, Assistant Chemical Examiner undertaken aware the order of Tribunal and extracts of which the reproduction in para 3.2 in above shows that Shri. Dilip Mehata Assistant Chemical Examiner was not aware of the ASTM D86 method of distillation. It is also seen that he was not aware of the devices/ thermometer required to be used for the testing as per ASTM D 86 method. It is also seen that in response to question 37 of the cross examination the Chemical Examiner was unable to explain the losses indicated in his report. From the above it is apparent that Shri. Dilip Mehta Chemical Examiner could not confirm that the ASTM D 86 method was followed by them for testing of the samples.

12. The adjudicating authority, in these circumstances decided to offer cross examination of Shri. T.K. Myelvalganan Chemical Assistant Grade-I. He was introduced as witness in the remand proceedings by the Commissioner. The appellant has strongly objected to the introduction of fresh evidence in the shape of the cross examination of Shri. T.K. Myelvalganan Chemical Assistant Grade-I. It has been argued that the direction of Tribunal was only to allow cross examination of Chemical Examiner and not of the Chemical Assistant Grade-I. The appellant are argued that the report was signed by Chemical Examiner and not by the Chemical Assistant Grade-I. On the other hand Revenue had argued that the entire procedures and testing was done of Chemical Assistant Grade-I and not by the Chemical Examiner himself and therefore only Chemical Assistant Grade-I could have answered the

question regarding the method adopted for the testing of the samples. It is notice that Shri. Dilip Mehta, Assistant Chemical Examiner whose cross examination, the appellant had accepted, is any 'Assistant Chemical Examiner' and not 'Chemical Examiner'. Moreover, it is seen that the report of the sample testing was signed by both 'Shri. T.K. Myelvalganan Chemical Assistant Grade-I' as well as 'Shri. Dilip Mehta, Assistant Chemical Examiner'. Thus, in these circumstances it is seen that the report was not signed by any 'Chemical Examiner'. In these circumstances the direction of the Tribunal to permit examination of 'Chemical Examiner' could not have been followed as test report was not sign by any 'Chemical Examiner'. Since, test report contains the signature of Shri. Dilip Mehta, Assistant Chemical Examiner as well as Shri. T.K. Myelvalganan, Chemical Assistant Grade-I cross examination of both of them would be relevant. On this ground, the objection raised by the appellant cannot therefore be sustained.

13. During the cross examination of Shri. T.K. Myelvalganan, Chemical Assistant Grade-I, interalia, following emerged:-

*Q. Is there any mention in the report as to under which system the tests were carried out?*

*A. No.*

*Q. Is it in your knowledge that the system prescribed for carrying out the test under ASTM id being modified form time to time?*

*A. Yes.*

*Q. Would you enlighten me as to "D 86" stand for?*

*A. It is a distillation method.*

*Q. You have just said that D 86 stand for distillation method. Is there any method other than D 86 under the ASTM system?*

*A. Yes.*

*Q. Please tell us about it?*

*A. It is ASTM D-216 and some other methods also.*

*Q. Is it that you have given the answer to the above question after looking into a book on ASTM method of 1980 edition?*

*A. Yes.*

*Q. Which method was adopted in carrying out the test for which you have signed the*

*A. ASTM D 86 for distillation.*

*Q. Is it that you claim to have adopted method for distillation as you stated i.e. ASTM D 86 on the strength of the publication of 1980 which is in your hand ?*

*A. Yes.*

Q. *Is it that distillation as you claim to have carried out is the sole criteria for finding out the nature of the disputed goods- whether it is Naphtha or otherwise ?*

A. *Yes.*

Q. *If I suggest to you that there are other various mandatory requirements for the test to be carried out to know the nature of the goods like Naphtha or otherwise, do you agree or not ?*

A. *Yes. I agree with it.*

Q. *Can you tell us what are the parameters in detailed hydrocarbon analysis?*

A. *Detail analysis of carbon chains form C to C. True Boilling point, flash point, Distillation range, Paraffinic, Olefinic, Naphthenic and Aromatic, content analysis by sophisticated instruments.*

Q. *Please tell us what is the significance of flash point for determining the nature of the goods under test?*

A. *flash point is not an important criterion for this sample even though in our Customs tariff, there are two types of classification- one flashing below 25 degree C and another, flashing below 25 degree C.*

Q. *What was the method used by you to determine the flash method?*

A. *Abel Closed cup Method.*

Q. *Which method was adopted for determining the flash point?*

A. *IP 170/95.*

Q. *what was the lowest temperature recorded by you?*

A. *-30 degree C to 70 degree C in practice -5 degree C to 66.5 degree C.*

Q. *As per your answer, if you can determine flash point as -5 degree C, why you are reporting flash point below 25 degree C?*

A. *For classification, Customs tariff required whether it is above 25 or below 25 degree C.*

Q. *you have been carrying all tests by being guided by Customs tariff or the classification made thereto?*

A. *Yes.*

Q. *I draw your kind attention to the report dated 11.8.2004. The initial Boiling Point is shown at 47 degree C and at 61 C, recovery has been shown of 10%. What time did it consume to report this recovery of 10%?*

A. *I followed the exact group prescribed in ASTM D 86 regarding the temperature and recovery. I have nothing to add.*

*Q. Is it that recording of duration referred in the above question is also very much an essential requirement?*

*A. Yes.*

*Q. You claim that you have been following the procedure of ASTM D 86 of 1980. Have you been following the instructions therein regarding various aspects of timing, etc?*

*A. Yes.*

*Q. Now you claim that you have been following the requirements. Did you make any note of the same either in the report or in any of the registers/log book, as you claim , are being maintained?*

*A. I have already answered.*

*Q. you have not answered that these requirements were noted except you said that registers/log book were being maintained?*

*A. It is duly recorded in the register (Chemist).*

*Q. The registers/log book is maintained as you suggested. Whether its pages are pagi-dated or not?*

*A. It is pagi-dated.*

*Q. Would you kindly tell us how long it will take to get the final boiling point after recovery of 95%?*

*A. 3 to 5 minutes.*

*Q. Please tell us during the distillation in what manner the rate of recovery is maintained?*

*A. I followed the exact group D-86 prescribed.*

*Q. In which group, the procedure for maintaining the recovery is mentioned?*

*A. Group I of ASTM D 86 method.*

*Q. Under which group the subject sample falls?*

*A. Group I as per ASTM D 86 method*

*Q. How would you decide which instrument like which type of thermometer is required to be used for recording temperature?*

*A. Any calibrated specified thermometers may be used according to the temperature range.*

*Q. When the subject test was carried out, which thermometer was put to use?*

*A. For distillation, I used calibrated 360 degree C thermometer.*

*Q. You just suggested in answer to the above question that the calibrated thermometer of 360 degree C was used. Does it fall under any specification given in ASTM D 86 method?*

*A. Calibrated thermometers will do the same job*

*Q. Is it mentioned in any of the provisions of ASTM D 86 method that any particular type of thermometer is required to be used or any calibrated thermometer can be used?*

*A. No. (usual practice).*

*Q. Is it your usual practice to defy the rules and justify on the strength of oral answers?*

*A. Because we follow the standard procedures as per ASTM, IP, BIS, etc. for all samples.*

*Q. Is it that particular group under ASTM D 86 Can Be Determined Only After Determining the Reid Vapour Pressure?*

*A. No. According to the distillation range, we used to decide the group under ASTM D 86. It is also one of the parameter to decide the group?*

*Q. Am I right that such approach is not permissible under ASTM D 86? Yes or No?*

*A. No. It is not correct.*

*Q. Is it that two samples having the density of 0.7249 and that of 0.6783 would have exactly the same aromatic contents to each other?*

*A. In both cases, the aromatic contents can be nearly same but the difference is due to the predominance of lighter hydrocarbons in the second case and moderately higher hydrocarbons in the previous case.*

*Q. What was the method adopted by you for finding the aromatic contents?*

*A. ASTM D-1019 (IP NO O. 145/69).*

*Q. Do you think that the contents of Sulphur and/ or Lead have any significance to determine the nature of the sample?*

*A. According to Customs Tariff classification, presence of Sulphur and Lead content is not important. There is no need to estimate these two parameters.*

*A. Is it that the testing of sample is carried out as per the approach for the Customs Tariff and otherwise?*

*A.* *The testing of the samples is carried out as per Customs Tariff and not for quality control level.*

*Q.* *As per ASTM D 86 method for distillation is it necessary to report the residue and/ or losses?*

*A.* *From the distillation range, the percentage of losses is self-explanatory.*

*Q.* *I again request you to please answer the earlier question as put to you?*

*A.* *Same answer as above.*

*Q.* *I put to your that since you have not laid down the procedure, as laid down under ASTM D 86 method, you are intentionally avoiding answering this question? Is it correct or not?*

*A.* *No. I did distillation of the above two sample as per ASTM D 86 method in our laboratory distillation apparatus especially for ASTM D 86 method.*

*Q.* *Is it correct or not that whatever method regarding various aspects of testing/temperature etc., which you claim to have stated to have recorded in either in log book or the register, before Ld. Adjudicating authority, these are not found in the report signed by you. Please clarify whether the same it recorded either in the log book or the register?*

*A.* *It is recorded in the register except ASTM numbers. In test report it is not a practice in our laboratory to mention the ASTM numbers.*

*Q.* *Is it that your substantial answers to the questions on the notes which you had brought ready with you?*

*A.* *I answered on my experience.*

*Q.* *Is it correct that your notes as you prepared were before you while giving answers?*

*A.* *Yes. Not all the answers."*

14. The perusal of the certain provisions of the ASTM D 86 method for distillation shows that following needs to be followed for the purpose of testing.

***TABLE 1 Preparation of Apparatus.***

| | Group 0 | Group 1 | Group 2 | Group 3 | Group 4 |
|---|---|---|---|---|---|
| Flask. ML | 100 | 125 | 125 | 125 | 125 |
| ASTM distillation thermometer | 7C (7F) | 7C (7F) | 7C (7F) | 7C (7F) | 8C (8F) |
| IP distillation thermometer range | Low | Low | Low | Low | high |
| Flask support board diameter of | A | B | B | B | C |
| note. mm | 32 | 38 | 38 | 50 | 50 |
| Temperature at start of test | | | | | |
| Flask | 0-5 | 13-18 | 13-18 | 13-18 | 13-18 |
| ◦C | 32-40 | 55-65 | 55-65 | 55-65 | 55-65 |
| ◦F | Not above | Not above | Not above | Not above | Not above |
| Flask support and shield | Ambient | ambient | ambient | ambient | ambient |
| Receiving cylinder and 100 mL | | | | | |
| Charge | | | | | |
| ◦C | 0-5 | 13-18 | 13-18 | 13-18A | 13- ambient A |
| ◦F | 32-40 | 55-65 | 55-65 | 55-65A | |
| | | | | | 65- ambient A |

***Summary of Test Method***

*4.1 Based on its composition, vapor pressure, expected PBP or expected EP, or combination thereof, the sample is placed in one of five groups. Apparatus arrangement, condenser temperature, and other operational variables are defined by the group in which the sample falls.*

***TABLE 3 Sampling, Storage, and Sample Conditioning***

| | | Group U | Group 1 | Group 2 | Group 3 | Group 4 |
|---|---|---|---|---|---|---|
| Temperature of sample bottle | ˚C | <5 | <10 | | | |
| | ˚F | <40 | <50 | | | |
| Temperature of stored sample | ˚C | <5 | <10^ | <10 | ambient | ambient |
| | ˚F | <40 | <50^ | <50 | ambient | ambient |
| Temperature of sample after Conditioning prior to analysis | ˚C | <5 | <10 | <10 | Ambient or | Ambient or 9 to 21˚C above pour point[B] |
| | ˚F | <40 | <50 | <50 | Ambient or | Ambient or 48 to 70˚F above pour point[B] |
| If sample is wet | | resample | resample | resample | dry in accordance with 7.5.3 | |
| If resample is still wet[c] | | dry in accordance with 7.5.2 | | | | |

A Under Certain circumstances, samples can also be stored at temperatures below 20 ˚C (68 ˚ F) See also 7.3.3 and 7.3.4.

a If sample is (Semi)-solid at ambient temperature, see also 10.3.1.1.

C. If samples is known to be wet, resampling may be omitted. Dry sample in accordance with 7.5.2 and 7.5.3.

***TABLE 2 Group characteristics***

| | Group 0 | Group 1 | Group 2 | Group 3 | Group 4 |
|---|---|---|---|---|---|
| Sample Characteristics | | | | | |
| Distillate type | Natural Gasoline | | | | |
| Vapor presure at | | | | | |
| 37.8°C. kPa | | ≥65.5 | <65.5 | | <65.5 |
| 100°F, psi | | ≥9.5 | <9.5 | | <9.5 |
| (Test Methods D 323, D 4953 D 5190, D 5191 D 5482, IP 69 or IP 394) | | | | | |
| Distillation,IBP°C | | | | ≤100 | >100 |
| °F | | | | ≤212 | >212 |
| EP°C | | ≤250 | ≤250 | ≤250 | >250 |
| °F | | ≤482 | ≤482 | ≤482 | >482 |

*"7.3.4 Group 2- Store the sample at a temperature below 10°C."*

From the cross-examination of Shri. Dilip Mehta, Assistant Chemical Examiner it the apparent that he has not conducted the test himself and the test was conducted by Shri. T.K. Myelvalganan Chemical Assistant Grade-I cross examination of the Chemical Examiner Grade-I shows that while he kept insisting that the ASTM D 86 method was followed. When asked to substantiate it, he would refer to some records and logs. No records were produced, no log book was produced. Even after the entire excise the cross examination done by Revenue the impugned order could only come to the conclusion that "thus during the cross examination the noticee have not be able to bring out the fact of Chemical Examiner had not followed the ASTM D 86 method". On the strength of above assertion the impugned order come to the conclusion that the ASTM D 86 method was followed.

From the above it is apparent that Commissioner after examining all the facts of the case and the cross examination of Assistant Chemical Examiner Chemical Assistant Grade-I could only reach to a conclusion that the appellant have failed to establish of ASTM D 86 method was not followed. Thus, we find the impugned order cannot be sustained in the present form. It is seen that during cross examination of the Chemical Assistant Grade-I has clearly stated that log books and the registers are maintained in their laboratory, however, appellants chose not to ask for the same and Revenue chose not to produce the same. It was upto the Commissioner to get the necessary log books and lab records to bring out the real facts. It was also upto appellants to demand the same to prove their point. The matter was earlier remanded by allowing cross examination in order to bring correct facts on record. The entire purpose of remanding the case is defeated if the facts are not brought out completely. In view of above we set aside the order and remand the matter for fresh adjudication after fresh cross examination of the Chemical Assistant Gr.-I, the person who actually undertook the tests. He will produce all the lab records necessary to ascertain actual reading recorded and equipment used during testing and to prove his assertions.

15. In view of above, the appeals are is allowed by way of remand.

(Pronounced in the open court on 25.08.2020)

**(RAMESH NAIR)**
**MEMBER (JUDICIAL)**

**(RAJU)**
**MEMBER (TECHNICAL)**

Diksha