

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

EXCISE Appeal No. 10425 of 2023

(Arising out of Order No. OIO-AHM-EXCUS-003-COM-008-22-23 dated 30.03.2023 passed by Commissioner of CGST & Excise-Gandhinagar)

ARHAM PETROCHEM PVT LTD

...Appellant

SURVEY NO. 1163/A, VILLAGE MOTIBHOYAN
GOTA ROAD, TAL. KALOL
DIST GANDHINAGAR

VERSUS

C.C.E.-AHMEDABAD-II

...Respondent

CUSTOM HOUSE... 2ND FLOOR,
OPP. OLD GUJARAT HIGH COURT, NAVRANGPURA,
AHMEDABAD, GUJARAT-380009

APPEARANCE:

Shri H.D. Dave, Advocate appeared for the Appellant
Shri Ashok Thanvi, Superintendent (Authorized Representative) for the Respondent

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

Final Order No. 12208 /2023

DATE OF HEARING: 19.09.2023
DATE OF DECISION: 05.10.2023

RAMESH NAIR

The present appeal is filed against Order-in-Original No. AHM CEX/003-COM-008-22-23 dated 30.3.2023 passed by the Commissioner of Central Excise, Gandhinagar confirming demand and recovery of Central Excise duty of Rs.1,72,87,474/- with interest under Section 11AB and equal amount of penalty under Section 11AC.

1.1 The impugned Order involves following 4 Show Cause Notices:

Show Cause Notice No. & Date	Period	Duty (Rs.)
15-52/Dem/OA/ 2007-08 dated 3.9.2007	August, 2006 to October, 2006	41,80,367/-
15-78/Dem/OA / 2007-08 dated 6.12.2007	September, 2006 to December, 2006	59,52,050/-

15-112/Dem/ OA/ 2007-08 dated 6.2.2008	January 2007 to March 2007	39,89,573/-
15-123/Dem/OA/ 2007-08 dated 30.4.2008	April to September, 2007	31,65,484/-
		1,72,87,474/-

1.2 The dispute in this case is about correct classification of a product described as ARH-C Crude Oil (Residue Oil obtained from distillation of Water in the Raw material Comingled Crude Oil purchased by the Appellant). The Tariff entry and chapter heading is “Petroleum Oils and Oils obtained from bituminous minerals, crude - 27090000” as claimed by the Appellant and *“Other Petroleum Oils and Oils obtained from bituminous minerals (other than crude) - 27101990”* as contended by the Department.

2. Shri H D Dave, Learned Counsel for the Appellant submits that earlier this case has been remanded 3 times by this tribunal and lastly the case was heard and allowed by way of remand of all 4 SCN’s vide Order dated 11-4-2022 passed by this Bench, specifically directing Cross Examination of the Chemical examiner which was denied earlier.

2.1 He submits that upon this remand, finally after some deliberation the Cross examination of the Chemical Examiner (MR G P Sharma) was duly conducted on 11-4-2022, by the Advocate of the Appellants. He submits that the net result of the cross-examination of the said chemical examiner is clearly now in favour of the appellant, as he was not able to entirely support his own Opinion dated 5-1-2007 for his Test Report dated 3/10/2006, suggesting the impugned product to be classifiable as other petroleum product. Essentially he was also not able to disprove the other 3 test reports clearly existing in this case in favour of the Appellant already. It is also submitted

that the role of the Chemical Examiner is only to give opinion on the test result and not classify the goods himself.

2.2 He also submits that the personal hearing of the adjudication upon this remand was granted by the adjudicating authority on 7-3-2023, when detailed submissions were made of all the grounds and contentions made out in their reply and earlier appeals. Also written submissions were filed on the said date with a set of relied upon judgments before him.

2.3 He submits that however the Ld Adjudicating authority in spite of such clear classification being correctly adopted by the Appellant under 2709000 (Crude oil), yet based on complete mis-interpretation of the Test reports already in favour of the Appellant and the various case laws supporting the same, yet simply reiterating the findings of the earlier adjudicating authority, without independent application of mind has now again confirmed the impugned demand by seeking to classify the product as Other than Petroleum/Crude Oil under CETA 27101990 attracting 16% excise duty.

2.4 He further submits that the DGCEI, Ahmedabad Zonal Unit had simultaneously at the relevant time, also conducted inquiry against the Appellant vide Panchnama dated 6.12.2006, and for that purpose they had also drawn samples of Commingled Crude Oil and ARH-C Oil on 6.12.2006 from the factory premises of the Appellant and sent the same for testing to the Chemical Examiner at the Central Excise Laboratory Vadodara.

2.5 As per this test report F. No. RCL/DGCEI/28-30 dated 18.4.2007, the learned Chemical Examiner (Grade I) Dr. T. A.

Sreenivasa Rao reported that the ARH-C Oil was composed of "Crude Mineral Hydrocarbon Oil". He, however, further suggested that to indicate the exact description of the samples, they have to be tested at other laboratories on payment basis.

2.6 Accordingly, the DGCEI also sent the samples to M/s Caleb Brett India Pvt. Ltd., Mumbai (Govt accredited Laboratory for Oils & Petroleum Products) who also opined that the sample comes in the category of "Crude Oil". There upon the DGCEI dropped the proceedings and closed the investigation at that stage.

2.7 Learned Counsel for the Appellant has taken us through the relevant test reports dated 3-10-2006 of Regional Laboratory Central Excise & Customs Vadodara, the Opinion given upon the said Test Report dated 5-1-2007 by the Chemical Examiner (Grade II) Mr G P Sharma, the Test Report dated 28-9-2007 given by the Chemical Examiner Dr T A Sreenivasa Rao, Test Report of Caleb Brett India Pvt Ltd dated 24-7-2007 and the comparison done of the test reports by the DGCEI under letter dated 5-10-2007.

2.8 The Learned Counsel for the Appellant also took us through the Tariff heading 29 along with the explanatory notes to Chapter 29.

2.9 He submits that the Ld Commissioner is in clear error to find, only upon the opinion of the Chemical Examiner (Grade II Mr G P Sharma) and not above 3 clear test reports to seek a different classification. He submits that all these test reports of the product sample are that the same is a derivative of "Petroleum Crude oil". It therefore only warrants clear classification only under CETH 27090000 which defines other oils and not under CETH 27101990 suggested by the Revenue, which are for petroleum products derived

from other than Crude. Hence the entire attempt to seek to classify products obtained from "Crude and bituminous minerals" under Chapter 27101990 which is for "other than Crude" is a clear case of seeking to do mis-classification when the exact chapter exists to define these products under Central Excise Tariff item 27090000.

2.10 Shri Dave, referring to the explanatory notes and its interpretation is given in paragraphs 50.5 to 50.8 of chapters 2709 & 2710 submits that admittedly when even the explanation clearly suggests these products to be classifiable under CETH 27090000, since it is obtained by the processing of Crude oil of decantation and distillation (Dehydration) which is specifically covered under the 7 processes defined in the explanatory notes to Chapter 2709.

2.11 That therefore the interpretation of the Ld Commissioner that if crude oil is subjected to any process not defined in this explanation the same may go under Ch 2710 is not correct. He submits that clearly when in Appellant's case the processes are clearly defined under the explanatory notes already covering Decantation & Dehydration process, which do not change the essential character of the Product, it will not take it out of purview of chapter 2709.

2.12 Learned Counsel further submits that admittedly since the ARH C Oils are obtained from the processing of Comingled Crude Oil & Condensate Crude Oil, as per processes already mentioned under the Explanatory note to Ch.29 and are pre-dominant with "Crude" alone and not obtained from any other product or minerals they merit classification under CETH 27090000.

2.13 He submits that to suggest that ARH C Oil even when obtained from processing of "residue crude oil" in appellants case (merely

bottom 3 to 5%) would not remain Crude oil and will come under Ch 2710 as petroleum oils and other waste oils, is a clear fallacy and complete mis-reading and mis-classification being adopted by the Revenue. He has also taken us through their entire processing of the same as disclosed to the department under their letter dated 25-7-2006 attached to the show cause notice dated 30-4-2008.

2.14 He submits that the Learned Commissioner has wrongly sought to distinguish the settled judicial precedents and decisions under the impugned order, by anyhow seeking to classify the products only as other petroleum products under 2710, when the said chapter clearly says other than crude and 27090000 clearly says petroleum oils obtained from minerals and Crude. Once the original product is subjected to the defined processes what remains is Crude oil itself, having majority ingredient of Crude alone. And therefore any derivative obtained from the same has to come under the category of Oils obtained from Crude only.

2.15 He submits that the Ld Commissioner finds only on further opinion of the Chemical Examiner dated 5-1-2007 and not 3 clear test reports read with the explanatory notes (Supra). He submits that when all test reports of the products are that the same is a derivative of Petroleum crude oil there cannot be any other classification. It therefore only warrants clear classification only under 27090000 which defines other oils and not under 27101990 which are for "others" i.e. products derived other than from Crude. Hence the entire attempt to seek to classify products obtained from crude under chapter 2710 which is for other than Crude under the impugned order, is a clear case of seeking to do mis-classification, when the

exact chapter exists to define these products under Chapter 27090000.

2.16 He further submits that equally the adjudicating authority has erred in paragraph 51 of his findings under the Order-In-Original, that the decision of Punjab Aromatics V/s State of Kerala & Appellant's own case as issued by the Gujarat VAT Tribunal, would not apply here, even when it was similarly found that the process of "re-heating and removing of water & impurities" as in their case, would not amount to manufacture. Hence yet to hold that the resultant comingled crude oil and ARH C oil is now a different product, after removing the water content from it, is absolutely a clear error committed by the Ld Commissioner under the impugned Order-In-Original.

2.17 Learned Counsel for the Appellant further relies upon the following decisions submitted with his synopsis during the hearing of this appeal.

- MVR Chemicals & Oils vs. CCE Bangalore- I 2019(26) GSTL 108 (TRI Bang)
- CCE Kanpur vs. Bajrang Petrochemicals Private Limited 2017(4) GSTL 397 (TRI All)
- *[Commissioner v. Oil India Ltd. - 2004 (170) E.L.T. A116 (S.C.)]*
- Essar Oil Limited vs. CCE Jamnagar 2015(326) ELT 310 (TRI Ahmd)
- CCE Mumbai Vs. Rajpurohit GMP India Ltd 2008(231) ELT 577 (SE)
- Rudhraksh Petrochem Private Limited vs. CCE Indore 2016(342) ELT 393 (TRI DEL)
- CCE VS Jayant Oil Private Limited 2004(164) ELT A69 (SE)
- Sah Petroleum Limited vs. CCE JNCH Navaseva 2017(358) ELT 483 (TRI MUM)
- RCF Limited vs. CCE Navaseva 2005 (189) ELT 215 (TRI MUM)

- Puma Ayurvedic Herbal Private Limited Vs. CCE Nagpur 2006 (196) ELT 3 (SC)

3. Per contra, Shri Ashok Thanvi, Learned Superintendent(AR) appearing for the Revenue supports the findings of the Ld Commissioner of the impugned order and submits that the processes undertaken by the Appellant of Decanting, Distillation (Dehydration) & Blending are not covered under the explanatory notes to Chapter 29 and therefore the same would not merit classification thereunder and would be covered under CETH 29100019. He reiterates the discussions and findings of the Order-In-Original.

3.1 Shri Thanvi, post hearing submitted the synopsis of the case on 23.09.2023 wherein in addition to his submission, he also relied upon the following judgments:

- Indian Oil Corporation Ltd. 2018 (363) ELT 718 (Tri. Chennai)
- KRAP Chem P Ltd. 2015 (325) ELT 339 (Tri-LB)
- SRK Petrochemicals Ltd. 2022 (381) ELT 353 (H.P.)

The aforesaid submission has been taken on record and considered the same carefully.

4. The Learned Counsel for the Appellant in rejoinder submits that it is crystal clear that the whole manufacturing process is divided in two parts, i.e. decantation and distillation (Dehydration) & blending. The first part i.e. decantation, is for the entire quantity of crude oil (Raw material), by which water content in the bought out crude oil is removed by simple decantation. Thereafter, comes the second part of the process i.e. distillation (Dehydration).

4.1 There is absolutely no dispute that this distillation/dehydration process is carried out, not for the entire quantity, but only for the

miniscule quantity (2 to 5% of the whole quantity) of crude oil, which is the bottom water obtained through the aforesaid decantation process. The remaining 95 to 98% of the quantity of crude oil which is obtained through decantation by removal of water, is not subjected to this second part of the process i.e. distillation.

4.2 The aforesaid bottom water in the miniscule quantity (2 to 5%) is subjected to distillation for sole purpose of removal of water by evaporation and then this remainder quantity is again remixed with their basic raw material Comingled Crude Oil which is the blending process. He has again taken us through their entire processing of the same.

5. We have carefully considered the rival submissions and perused the records. The issue before us is for classification of the product "ARH C Oil" obtained from processing of appellant's raw material "comingled crude oil & condensate crude oil", whether falls under CETH 27090000 as sought by the Appellant and or the same would fall under CETH 27101990 as classified under the OIO by the Ld Commissioner in his adjudication.

6. We find that the production of the disputed product was commenced for the first time in or around July, 2006, when the Appellant addressed letter dated 22.7.06 to the Assistant Commissioner of Central Excise, Kalol Division, requesting for inclusion of a new product, namely, "ARH-C Oil" in their registration certificate. They also gave complete details of raw materials, manufacturing process, specifications of the product, etc. This is the same product which is in dispute in this appeal and which is described as ARH-C Oil and which was claimed to be classifiable and chargeable

to NIL rate of duty under sub-heading 27090000. The said disputed product had been cleared without payment of duty under statutory Central Excise invoices, treating the same as attracting NIL rate of duty under Chapter heading 27090000.

7. The Officers of the Range Office of Kalol Division, Ahmedabad-III Commissionerate visited the Appellant's factory on 20.9.2006 in order to examine the process and characteristics of the disputed product. They drew samples of the disputed product and sent it for testing vide letter F. No. C. Ex. /KLL/ AR/AR-II/Sample/06-07 dated 20.09.06 to determine whether the product was manufactured or obtained from Bitumen mineral, crude.

8. In response, the Regional Laboratory, Central Excise & Customs, Vadodara vide their office letter F. No. RCL/AH/C. Ex. 41/545 dated 3.10.2006 reported that *"the sample is in the form of Black coloured free flowing liquid. It is a mixture of Mineral Hydrocarbon oil having flash point below 25 Degree Centigrade. It is obtained from Bitumen Mineral Crude."*

9. However when the department sought a clarification vide letter F. No. IV/16-67/PI/06-07 dated 05.01.2007, the RCL through the Chemical Examiner Mr G P Sharma who had done the test and given the above Test Report, replied on the very same day vide their letter F. No. RCL/AH/C. Ex./41/05-06 dated 5.1.07 as under :

- (i) *The product in question, i.e. the said disputed product is not a crude mineral Hydrocarbon oil and*
- (ii) *The product i.e. the said disputed product is a derivative of Petroleum Crude Oil and such product cannot be categorized in Chapter Sub-heading No. 27090000 of the Central Excise Tariff Act, 1985".*

10. Accordingly the department had issued 4 different Show Cause Notices (Supra) involving different periods of demand, in which it was contended that tariff item 27090000 is exclusively for “crude petroleum oils and crude oils obtained from bituminous minerals”, whereas on the other hand tariff heading No. 27101990 is for other products which are processed/obtained/derived from the products falling under 27090000, i.e. crude petroleum oils and from crude oils obtained from bituminous minerals.

11. It also appears to be the contention of the department that crude oil is subjected to the processes, other than those mentioned in the HSN Explanatory Note of Ch 2709, which clarifies that natural/crude oil even if subjected to any one or more of the seven processes specified there in will remain classified under the heading 27.09. However since in the present case, the product is subjected to the processes of decanting, distillation/blending and since the processes of distillation and blending are not the specified processes, the disputed product cannot be considered and classified as falling under heading 2709.

12. At this stage we again take note of the entire process adopted by the Appellant as described in the appeal papers. The same is firstly “Decanting” of their raw material Comingled Crude Oil & Condensate Crude Oil. In this process they remove the Crude oil obtained from the tankers of their suppliers and store it in their storage tanks in the factory and allow it to settle down for a few days. Thereafter the water contained in the bottom of the tanks is removed through drain valves or pumps.

13. Thereafter the bottom residue of this oil with water (2 to 5% residue only) is separated and heated in their distillation tower. Thereupon the light petroleum fractions contained therein are cooled in the condenser and collected separately in receiver. The distilled water is collected in separate receivers. Thereafter this bottom oil upon distillation along with the light petroleum fractions is transferred back to the comingled crude oil and condensate crude oil (their basic raw material) which they call blending. However no new product or any derivative etc is added to this Oil. Accordingly in this process no new product emerges, but what is called as ARH C Oil is the bottom residue, which is processed in such manner and re-mingled/ blended to the original raw material. Accordingly the product remains to be crude oil only and no new product emerges there from.

14. We take note of the fact that the process adopted by the Appellant is essentially "Decanting & Distillation" of a very minor/miniscule (2 to 5%) quantity of the bottom residue oil left in their storage tanks as received from their suppliers. This is essentially done to remove the water content & other impurities from the said bottom oil only to make it usable with their basic raw material which is comingled/condensate crude oil. Blending here is nothing but remixing of the processed residue oil back with their basic raw material and not any new product.

15. At this stage we take note of the fact that an identical issue of the very residue/bottom crude oil had come up before the Tribunal in the case of MVR Chemicals & Oils V/s CCE Bangalore (Supra) relied upon by the Appellant, wherein in paragraphs 5.1 & 5.2 the this Tribunal observed as follows:

5.1 The appellants vide their letter dated 2-3-2007 have intimated to the Department that they were intending to procure Commingled Crude Oil and after exposing the same to certain process such as Dehydration, they would clear the same to their customers; in this process there was no change in the characteristics of the raw materials and our product i.e., Commingled Crude Oil and Petroleum Oil respectively. They have also enclosed test reports in support of the same. Further, vide their letter dated 30-3-2007, they have intimated the Superintendent that they processed Dehydrating Plant Flow Diagram, Plant Operating procedures and copy of invoice. It has been submitted by them that the Crude Oil received from the Tank Lorries were allowed to settle down and then unloaded to Crude Oil tanks. Then it is heated up to temperature of 150°C to vaporize the water in the Crude Oil; the water vapours evaporated from the Re-boilers are separated from the top. The separated water vapours are circulated through condenser. From the above said, it appears that the process undertaken is only Dehydration and not akin to Distillation. We find that in the above process, only water is removed from the Crude Oil and is collected and rechanneled. As normally understood, Distillation is the technique of heating a liquid to create vapour which is collected when cooled separate from the original liquid. It is based on the different boiling point or volatility and values of the components, the technique may be used to separate components of a mixture or to add in purification.

5.2 So, in industrial process, distillation is used to separate the desired product from a mixture of liquid. In the above process though water is coming out as vapour; however, it cannot said to be a desired product. The desired product is the remaining Crude Oil. Had it been the intention of the appellants to produce water from the Crude Oil; the process undertaken by them could have been technically called Distillation. However, no prudent person would produce water in a commercial manner by distilling Crude Oil, therefore, the process undertaken by the appellants is nothing but removal of water from the Crude Oil, it can alternatively be called Dehydration. It is not the case of the Department that they have subjected the process undertaken by the appellants to an expert opinion. It is also not clear whether the Superintendent has visited the factory and has given any report on the process undertaken by the appellants.

The Tribunal thereafter under paragraphs 5.4 & 5.5 found as under:

5.4 For a proper appreciation of the classification, we turn to the relevant chapters or section notes. We find that Tariff Heading 2709 00 00 refers to petroleum oils and oils obtained Bituminous Minerals, Crude. We find that HSN 8379 reads as under :

This heading covers crude petroleum oils and Crude Oils obtained from bituminous minerals (e.g., from shale, calcareous rock, sand), i.e., natural products, whatever their composition, whether obtained from normal or condensation oil-deposits or by the destructive distillation of bituminous minerals. The Crude Oils thus obtained remain classified in this heading even when they have been subjected to the following processes :

- (i) Decantation.
- (ii) De-salting.
- (iii) Dehydration.
- (iv) Stabilization in order to normalize the vapour pressure.
- (v) Elimination of very light fractions with a view to returning them to the oil-deposits in order to improve the drainage and maintain the pressure.
- (vi) The addition of only those hydrocarbons previously recovered by physical methods during the course of the above mentioned processes.
- (vii) Any other minor process provided it does not change the essential character of the product.

5.5 It is also seen that HSN 27.10 categorically states that the products covered by this heading are those who have undergone any process other than those specified in the Explanatory Note to Heading 27.09. In view

of the above, it is clear that for the products to fall under 27.10 they have to undergo the processes which are other than those listed under 27.09. We find that in the instant case, the processes undertaken by appellants are not those beyond the cases listed therein. Therefore, we have no hesitation in holding that the impugned product is rightly classifiable under CTH 2709 00 00. We also find that the case law submitted by the Learned Counsel for the appellants in this regard is squarely applicable.

In yet another decision relied upon by the Learned Counsel for the Appellant in the case of Rudraksh Petroleum V/s CCE Indore (Supra) we find the same identical to this case. The issue before the Tribunal in this case was:

"2. The matter here concerns mainly with the classification of the item namely "Residual Crude Petroleum Oil" (RCPO)/"Residual Fuel Oil" (RFO)/"Residual Bottom Oil" (RBO). The Commissioner through his respective impugned orders-in-original held the classification of the item commonly called RCPO/RFO/and RCBO under Chapter Heading 2710 19 50 of the First Schedule to the Central Excise Tariff Act, 1985. Ld. Advocates submitted that the right classification for this item is 2709 00 00 as Petroleum Crude Oil and inter alia plead as follows :

- (i) The Residual Crude Petroleum Oil (RCPO) was classified under chapter sub-heading 2709 00 00 and cleared without payment of duty since no manufacturing process took place.*
- (ii) By distillation of commingled oil they obtain various products such as (i) Organic Composite Ligorin & (ii) Residual Crude Petroleum Oil/Residue of Waste Oil.*
- (iii) By distillation the top lighter fraction i.e. Lingorin was removed, such removing of top lighter fraction from crude by undertaking only condensation does not bring any change of chemical composition in Crude Oil. It remains as such. Heating and condensating is only a physical process. Since after removal of Lingorin, the Crude Oil has remained as such and therefore, it cannot be said that the manufacturing took place.*
- (iv) The contention of the Revenue that the residual Crude Oil is classifiable under Chapter Heading 27.10 as 'Topped crude' i.e. fuel oil is wrong.*
- (v) As per the definition of Petroleum Crude Oil in Standard Technical Hand Books i.e. Mc. Graw Hills Technical Encyclopedia, Hawley's Condensed Chemical Dictionary, the residual oil has all the characteristics of Crude Oil. The report of chemical examiner is only on two parameters out of 18-20 parameters of Crude Oil. Even the parameters of Chemical Examiner are so close that the Residual oil merits classification under Chapter Heading 27.09.*
- (vi) In the instant case, the Residual Crude Petroleum Oil is admittedly not a distillate product but a residuary material which is a residue and crude. Such a residuary material cannot be considered as Petroleum Oils other than crude. Hence, its use as fuel cannot be a clinching factor to conclude its classification under the Heading 27.10. Reliance is placed in this context on the judgment of the Hon'ble Supreme Court in case of Hindustan Petroleum Corporation Ltd. v. UOI - [1999 \(112\) E.L.T. 8 \(S.C.\)](#).*
- (vii) In para 7.9 of the notice, it has been stated that as per the test report of Chief Chemical Examiner, CRCL, New Delhi the flash point of Crude Oil is 25 deg. C whereas the flash point of residual crude petroleum oil/residual waste oil is 40 deg. C. which is mineral hydrocarbon oil. It has therefore been contended that the same has the characteristics of 'Fuel Oil'. The department did not mention the flash point of 'fuel oil' before concluding that RCPO has the characteristics of Fuel oil. The Flash point of 'Fuel oil' is 66 centigrade hence obviously does not conform to the characteristics of residual crude petroleum oil. Besides, the Supplementary Note (g) under Chapter 27 denotes that :*

"Fuel oil means any hydrocarbon oil conforming to the Indian Standards specification of Bureau of Indian Standards IS : 1593 : 1982 (Reaffirmed in the year 1997)".

or condensate crude oil is not any new product identically, but crude oil only which merits classification under CETA Ch 27090000 as already held in above identical cases.

17. We at this stage now take note of the Test reports and the Explanatory notes (HSN) to CETA 27. We find that the 1st test report issued by the Regional Laboratory of Central Excise & Customs, Vadodara dated 3-10-2006 as issued by Chemical Examiner Mr G P Sharma reports that *"the sample is in the form of free flowing liquid. It is a mixture of mineral hydrocarbon oil, having flash point below 25 Degree Centigrade. It is obtained from bitumen mineral crude."* Thereafter the test report obtained by the DGCEI on their simultaneous investigation dated 28-9-2007 issued by the same laboratory but through its Senior Chemical Examiner (Grade I) Dr T A Sreenivasa Rao states that *"the sample is in the form of dark coloured free flowing liquid. It is composed of crude mineral hydrocarbon oil."*

18. On the further query by the DGCEI to the above test report under their letter dated 16-1-2007 Dr Rao reported under his reply dated 18-4-2007 that to indicate the exact description of the samples they have to be tested at other laboratories on payment basis. Upon which the DGCEI sent the same samples to M/s Caleb Brett India Pvt. Ltd. another accredited laboratory having testing facilities for petroleum products. Caleb Brett under their Letter dated 24-7-2007 reported that upon testing ARH C Oil they found that *"since the above samples doesn't match with any of the finished petroleum products, the sample comes in the category of Crude Oil."*

19. Hence both the test reports obtained by the DGCEI as compared by them categorized the product ARH C Oil in the category of crude oil. We therefore find that the DGCEI in their file noting found the product to be composed of crude mineral hydrocarbon oil. Accordingly we find that all the above 3 test reports i.e. 2 from the Central Excise Laboratory Vadodara and 1 from Caleb Brett found the samples to be clearly of Crude oil and not other petroleum product.

20. We find that the revenue in spite above clear position, had issued the notices only upon the further Opinion obtained by the Department to the 1st Test Report dated 3.10.2006 issued by the Chemical Examiner, Mr G P Sharma, Regional Laboratory Vadodara. Mr G P Sharma had upon being asked to clarify suggested in his letter dated 5-1-2007 that:

- a. The Product in question is not a Crude mineral hydrocarbon oil.
- b. The Product is a derivative of Petroleum Crude Oil and such product cannot be categorized in CH 27090000 of the CET.

Accordingly it was only upon this further opinion and not the test reports that the department issued the notices and seeks to classify the product as derivative of Other Petroleum products under CH 2710191990.

21. However we find that the Chemical Examiner firstly himself cannot classify the goods in question as is done by him. He can only give his opinion. Equally we find that the Department cannot ignore the 3 test reports and seek to classify the product differently merely on such opinion of the Chemical Examiner without further evidence.

22. We extract the decision of the bench of this Tribunal here besides as laid down in many cases as below:

ESSAR OIL LTD.

Versus

COMMR. OF CUS. (PREVENTIVE), JAMNAGAR (Reported in 2015 (326)

ELT 310 (Tri Ahmd)

Final Order Nos. A/12311-12312/2014-WZB/AHD, dated 18-12-2014 in Application Nos. C/MA Extn/15593-15594/2014 in Appeal Nos. C/11971-11972/2013

Gas condensate - Qatar Low Sulphur Condensate (Qatar LSC) - Processes viz. de-calcination, de-salting, dehydration, stabilisation, elimination of very light fractions, cooling and de-pressurization, etc., for obtaining condensable hydrocarbons (C4 to C20) from wet natural gas does not take end gas condensates out of Heading 2709 of Customs Tariff Act, 1975 - Harmonized System Committee of World Customs Organization, Brussels on classification of 'gas condensates' reported that 'gas condensates' of Heading 2709 ibid are similar in composition to some of products of Heading 2710 ibid - Dispute/confusion internationally accepted by World Customs Organization - Literature supplied by Department when confirmed that samples are of crude petroleum classifiable under Heading 2709 of HSN, chemical analyst could not have reported that goods are 'other than petroleum oil' and simultaneously asking for literature/related documents when difficulty in distinguishing 'gas condensates' of Heading 2709 ibid and similar synthetic products of Heading 2710 ibid internationally accepted - Denial of cross-examination of chemical examiner whose reports are only evidences with Revenue for re-classification of goods, not right - Settled proposition of law that chemical examiner can give opinion on chemical nature of goods tested and not on classification of goods - No enquiry made with supplier of goods - No case that appellant provided fake or forged documents deliberately giving a wrong description - No evidence that goods are of refined category falling under Heading 2710 ibid - No case that imported goods undervalued - No case that imported goods sold as such - No evidence that supplier of goods done any major processes on natural product other than those specified in HSN explanatory notes under HSN Heading 2709 - Goods rightly classifiable under Heading 2709 ibid. [paras 6.3, 7, 8, 8.1, 9]

Testing of goods/samples - Chemical examiner can give opinion on chemical nature of goods and not on classification of goods. [para 8.1]

Also in the case of R.C.F. LTD. Versus COMMISSIONER OF CUSTOMS, NHAVA SHEVA reported in 2005 (189) ELT 215 (Tri Mum) it was held as under:

Muriate of potash - Test by Fertilizer Control Lab and statement of foreign supplier indicating it to be only Muriate of potash and not Industrial Grade Potassium Chloride - Same confirmed by Dy. Chief Chemist of Customs Laboratory in his cross-examination - HELD: In absence of its definition of composition, it was to be understood as per people dealing with it - Benefit of Notification No. 11/97-Cus. allowed. [para 2]

Samples - Testing - Two samples drawn from same lot - Different results given by a professional laboratory and Customs House Laboratory - HELD : Results of former to be given preference as latter is only a general purpose laboratory. [para 2.1]

23. We also find that the Senior Chemical Examiner (Grade I) Dr Rao had clearly tested and opined that the product comes in the category of Crude oil. So had been the test report of Caleb Brett. In fact the test report of Caleb Brett clearly found that the sample does not match with any of the finished petroleum products but comes in the category of Crude oil. Hence once these 2 reports coupled with the 1st test report of Mr G P Sharma, when all showed the product sample to be in the category of Crude Oil, the examiner Mr Sharma could not have opined differently.

24. We find that upon our earlier remand order when Mr G P Sharma was cross examined by the Appellant before the adjudicating authority, where under for question No. 3 he replies that "*no test was conducted only clarificatory answer was given to letter dated 5/01/2007*". Under Q.4. He could not contradict his Senior's Report (Dr T A Sreenivasa Rao).

25. Importantly under answer to Question 8 that "*Whether by simple distillation of remaining quantity of 3 to 5 %, water is removed. Do you consider such distillation will change the basic characteristics of Crude Oil because water content is removed through distillation process?*" He clearly said "*it will not change*". Equally under Questions 8 & 9. He gave contradictory answers. Under Q.11 & 12 he could not give any answer. Hence, we find that even

the Cross Examination of this Chemical Examiner who opined otherwise, now proves the Appellant's classification to be correct based on all these test reports.

26. We find in view of the CETA & its explanatory notes the issue here about classifying Residue of Oil (ARH C Oil), obtained from Distillation of Comingled/Condensate Crude oil remains and continues to merit classification under Ch 2709. The issue is also directly covered in various decisions (Supra) and also these decisions suggest that distillation/dehydration does not bring out any new commodity and Residue comingled crude oil remains same after such process, which is already covered under Explanation of the 7 processes for the same under Chapter heading 2709.

27. Admittedly the Explanatory note of HSN 2709 clearly covers "decantation, distillation (Which is actually dehydration) and elimination of light fractions and also any other minor process, which does not change the essential character of the product.

28. Admittedly the CH 2710 explanatory note C only covers those oils which have 70% more weight of petroleum oil. Hence, the petroleum oil is to be in majority for any Oils to go under 2710.

29. We also find that the said Chapter note C covers only those products under Ch 2710 *"which contain by weight 70% or more of petroleum oils or oils obtained from bituminous minerals which are not covered by more specific heading"*.

30. Equally under Part II Note (b) there is a clear exclusion to “products and preparations containing less than 70% by weight of petroleum oils or similar oils from bituminous minerals”.

31. Hence we find on detailed analysis that not only the explanatory note to Ch 2709 covers the appellant’s residue bottom oil to be same as crude oil but the Note to Ch 2710 only covers within its ambit products and preparations which by weight have more than 70 % of petroleum oil or oils from bituminous minerals. And in fact there is a clear exclusion to products below 70% of such weight content.

32. Also the 1st test Report dated 3/10/2006 of CRC Vadodara shows ARH - C Oil to be mixture of “Crude Mineral Hydrocarbon having Flash Point below 25% C obtained from Bitumen Mineral Crude. However thereafter only the Opinion of Chemical Examiner cannot decide classification, when the same is also contradictory to his own report dated 3/10/2006.

33. Also the Test report dated 28/09/2007 by the Chief Examiner (Grade I) of the very same Vadodara Laboratory clearly shows ARH-C Oil as Crude mineral Hydrocarbon Oil. Also the Comparison of both test reports obtained by the DGCEI at the same time and its analysis clearly show ARH-C (Residue Oil), to be same as commingled crude oil since both are composed of “crude mineral Hydrocarbon oil” and not of any finished petroleum product and they are clearly shown to be in category of crude oil based on which the Additional Director General of DGCEI also remarked that when 2 test reports are in the favor of the appellant how can the demand be even raised and case was dropped.

34. We also find from the relevant pages from the Petroleum Handbook which clearly define that upon distillation the distilled product remains the same as the principal product whereas water separated is distilled water. Admittedly in the Appellant's case also the balance 5% quantity of ARH-C oil (Residue) so obtained from distillation is again mixed with their raw material commingled crude oil.

35. We also find the issue clearly covered in the favour of the appellant in the cases of *Commissioner v. Oil India Ltd. - 2004 (170) E.L.T. A116 (S.C.)* while dismissing the appeal, the Supreme Court passed the following order :

"The Civil Appeal is dismissed on the ground of delay as well as on merits."

36. *The Appellate Tribunal in its impugned order had held that petroleum products, condensate formed by condensation of lighter fraction of crude oil during process of separation is petroleum in natural state, and crude oil classifiable as crude mineral oil under sub-heading 2709.00 of Central Excise Tariff Act, 1985.*

In *Collector v. Jayant Oil Products (P) Ltd. - 2004 (164) E.L.T. A69 (S.C.)*] While dismissing the appeal, the Supreme Court passed the following order :-

"We see no reason to interfere with the decision of the Tribunal. The civil appeal is accordingly dismissed.

There shall be no order as to costs."

The Appellate Tribunal in its impugned order by a majority decision had held that process of dehydration of castor oil does not result in oil losing identity and that the conversion of the castor oil into dehydrated castor oil will not result into a new, different and separate commercial product and it will not change the classification of the product under Tariff Item 12 of the erstwhile Central Excise Tariff and the same would be eligible for benefit of Notification No. 69/84-C.E.

In *CCE Kanpur vs. Bajrang Petrochemicals Private Limited 2017(4)*

GSTL 397 (TRI All) held as per the caption as under:

Petroleum Crude Oil - 'Residual Crude Petroleum Oil' or 'Reduced Crude

Petroleum Oil’ - Classification of - Residue of crude petroleum oil leftover arising during process of manufacture of ‘Organic Composite Solvent’ - Report issued by IIT, New Delhi indicating that ‘reduced Crude Oil’ was in fact crude oil relied on by Commissioner (Appeals) to classify item under Tariff Item 2709 00 00 of First Schedule to the Central Excise Tariff and to reject classification under Tariff Item 3814 00 10 ibid - No ground put forth to refuse certificate issued by IIT, New Delhi about nature of goods - Order of Commissioner (Appeals) affirmed. [paras 3, 4]

As regard the judgments relied upon by the learned AR for the revenue, on going through the same, we find that the facts of those cases are much different from the facts of this case, the ratio of those judgments are not applicable in the present case.

37. In view of the above discussions, analysis and various judicial pronouncements discussed above, we find the product ARH C Oil (Residue bottom Oil) obtained by such processing of the comingled/condensate crude oil is nothing but Crude oil itself and not any new product which accordingly merits classification under Chapter 27090000 as classified by the Appellant and not under Chapter 27101990 as done by the Revenue.

38. Accordingly, we set aside the impugned order and allow the appeal with consequential relief.

(Pronounced in the Open Court on 05.10.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha