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

REGIONAL BENCH- COURT NO.3

CUSTOMS Appeal No. 10663 of 2023
(Arising out of KDL-ADC-RHM-08-2023-24 dated 25.07.2023 passed by Commissioner of Customs - Kandla)

ALKA PETRO GLOBAL PRIVATE LIMITED ...Appellant
408 A, SHIVALIK-5, MAHALAXMI CROSS ROAD
PALDI, AHMEDABAD-380007

VERSUS

C.C. KANDLA ...Respondent
CUSTOM HOUSE,NEAR BALAJI TEMPLE,
KANDLA, GUJARAT

(i) Customs Appeal No. 10713/2023 (Shri Tofik A Memon);
(ii) Customs Appeal No. 10714/2023 (Shri Sajid Yunusbhai Memon);
(iii) Customs Appeal No. 10715/2023 (Shri Ahmed Abubakker Lakadia);
(iv) Customs Appeal No. 10720/2023 (Zavery Petrochemical Trading LLC)

(Arising out of KDL-ADC-RHM-08-2023-24 dated 25.07.2023 passed by Commissioner of Customs - Kandla)

APPEARANCE:
Shri Paritosh Gupta, Advocate appeared for the Appellant
Shri H.P. Shrimali, Superintendent (Authorized Representative) for the Respondent

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

Final Order No. 10036-10040/2024

DATE OF HEARING: 08.11.2023
DATE OF DECISION: 04.01.2024

RAJU

These appeals are filed by M/s Alka Petrol Global Private Limited against change of classification of goods imported by the appellant and confiscation and imposition of redemption fine thereof. Appeal has also been filed by Shri Tofik A Memon, Shri Sajid Yunusbhai Memon, Shri Ahmed Abubakar Lakadia and Zavery Petrochemical Trading LLC against imposition of penalties under Section 112A(1), 112B(1), 114AA, 117 & 114III of the Customs Act.

2. Learned counsel for the appellant pointed out M/s Alka Petro Global Private Limited are engaged in trading of various products including “GTL Light Paraffin”, the said product is exclusively procured from the overseas supplier from Shell Refinery.

2.1 During the period September to October 2021 various quantities of GTL Light Paraffin were imported by appellant, the details are as follows:

- MT Hanyu Camellia – 2501.731 MT
- MT Eva Hongkong – 3999.083 MT
- MT FSL London – 2998.095 MT

2.2 In light with the reports issued from the load port by the supplier and also the lab report of CRCL Kandla, the goods were described as GTL Light Paraffin and classified as under CTH 27101990. Investigation was conducted by DRI and notice was issued alleging that the product has been mis-declared and the goods were in the nature of light diesel oil, (LDO) which can be imported only by authorized agencies. In October 2021 sample were taken from goods imported by the appellant and sent for retesting to CECL Vadodara. Report received from the said importers suggested that the parameters of the goods met with requirement of Light Diesel Oil (LDO). Learned counsel pointed out that the said report was not supplied or intimated to the appellant. The goods imported by the appellant were thereafter seized. At the time of seizure appellants came to know about the existence of the test report of CECL Vadodara on the strength of which the goods were seized. Of 14.11.2021, the appellant requested revenue for re-export of the goods and also for supply of test reports and to retest of the samples. Permission for re-export was given to the appellant however no response was given in respect of request of supply of test report and of retest of samples. Another request to retest was made on 30.11.2021.

3. Learned counsel pointed out that other importers namely, M/s Yug International and M/s Shivtek Industries, who had comingled cargo imported along with goods imported by the appellant in MT Hanyo Camellia, had approached Hon’ble High Court. During the pendency of proceedings, they requested that the reports issued by CECL Vadodara can be verified by sending the samples for re-testing to CRCL, New Delhi. Pursuant to the directions issued by Hon’ble High Court, the goods were retested and it was affirmed that the said goods were in the nature of liquid paraffin and do not meet the specifications of LDO etc.

4. Learned counsel pointed that another vessel MT FSL London was also seized by department and the owner of the vessel also approached Hon’ble High Court of Gujarat for re-testing of samples by CRCL – New Delhi. CRCL, New Delhi in the said case also confirmed that the goods were in the nature of liquid paraffin and do not meet the specification of LDO.

5. Thereafter show cause notice was issued to the appellant alleging that the appellant had imported light diesel oil in the garb of light paraffin in the vessel MT Hanyu Camellia and also in the vessel MT Eva Hongkong. The common investigation was conducted. In respect of imports made by MT FSL London no proceedings were initiated. He argued that this was done because the retest reports issued by CRCL New Delhi contradicted the reports issued by CECL Vadodara. Learned counsel argued that departmental chemical examiner in the said case had clearly certified that the goods imported are “Liquid Paraffin” and other than Automative Diesel Fuel’ (IS-1460:2017), HFHSD (IS-16861:2018), Diesel Fuel (ASTM D975-21) and Light Diesel Oil (IS-15770:2008) as suggested by department.

6. He pointed out that the consignment was part of the co-consignment imported by other importers namely M/s Yug International Private Limited and M/s Shivtek Industries Limited on the same vessel. He pointed that on the directions of Hon'ble High Court of Gujarat samples taken from the comingled cargo were sent for retesting to CRCL New Delhi. On 31.10.2022 and in response to which reports dated 14.12.2022 were received by the department confirming that the goods in question were nothing but liquid paraffin and were not in the nature of 'Automative Diesel Fuel' (IS-1460:2017), HFHSD (IS-16861:2018), Diesel Fuel (ASTM D975-21) and Light Diesel Oil (IS-15770:2008) as suggested by department.

7. He pointed that the Hon'ble High Court of Gujarat had permitted retest of the goods on the basis of these reports submitted before the Hon'ble High Court vide affidavit dated 16.10.2022. Learned counsel pointed out that the proceedings initiated in respect of MT Hanyu Camellia in the instant case were dropped on the ground that on the retesting done by M/s Yug International and M/s Shivtek Industries Private Limited, who had imported liquid paraffin in comingled state with the appellant by the same vessel, were found to be liquid paraffin. The test report of CRCL in he said case supported appellant.

8. Learned counsel pointed out that the charges in respect of imports made by MT Eva Hongkong were however confirmed. He pointed out that the investigation in both the cases were common. He pointed out that in both the cases, the request for retest by appellant was not given due attention and was ignored by the Revenue. He pointed that in the case of imports made by vessel MT Hanyu Camellia the importers who had imported cargo in comingled state in same vessel had approached Hon'ble High Court and retesting was done by CRCL- New Delhi on the

direction of Hon'ble High Court and it was found that the goods were liquid paraffin and not 'Automative Diesel Fuel' (IS-1460:2017), HFHSD (IS-16861:2018), Diesel Fuel (ASTM D975-21) and Light Diesel Oil (IS-15770:2008).

9. Learned counsel pointed out that in respect of goods imported by vessel MT Eva Hongkong, the goods were tested by CRCL Kandla and thereafter at the request of DRI by CRCL-Vadodara. The appellant vide letter dated 14.11.2021 sought re-test of samples on the ground that the report of CRCL- Kandla and CRCL Vadodara gave different findings on the same goods. Vide letter dated 30.11.2021, the appellant again sought retest of goods.

10. Apart from retest of samples, the appellants also sought cross examination of the chemical examiner. Learned counsel therefore pointed out that only the appellant sought retest of samples but also cross examination of the chemical examiner. He pointed out that during cross examination, the chemical examiner could not explain the reason of difference in the report of CRCL Vadodara from the report of CRCL-New Delhi, in respect of the product meeting the requirement of Paraffin diesel fuel as per the standards of DIN EN-15940:2019.

11. Learned counsel further pointed out that the declared value of the goods was also rejected and enhanced by the adjudicating authority on the strength of the report of Shri Bhaskar G Bhat, Chartered Engineer and Government/DGFT approved valuer. Learned counsel pointed out that Shri Bhaskar Bhat, the Government approved valuer was also cross examined. He particularly pointed out to question No. 7, 8, 9.

12. Learned counsel pointed out that the impugned order does not recognize the statutory right conferred on the importer for retesting of goods. He argued that if such request is discarded by the authorities, the

disputed test report cannot be an admissible piece of evidence and the same cannot be relied by the department. He pointed out that revenue have not denied that the request for retest was made. He argued that it is incorrectly mentioned in the impugned order that the appellant remained silent on the issue of retesting, he pointed out that two specific requests were made for retest of goods by written letters. Learned counsel pointed out that wherever retest was done, the reports received after retesting were found to be confirming declaration made by the appellant as is admitted in the impugned order itself, wherein the proceedings made in respect of imports made vide vessel MT Hanyu Camellia were dropped.

13. Learned Authorized Representative relies on the impugned order.

14. We have considered the rival submissions. We find that the appellant had made imports and declared the goods as liquid paraffin. The investigation were started in respect of imports made by the appellant in vessel MT Hanyu Camellia and MT Eva Hongkong In both the cases, the goods were tested by CRCL Kandla where no discrepancy was found. In both the cases, the samples were retested at the behest of DRI by CRCL Vadodara. It was found that CRCL Vadodara report was different from the report of CRCL Kandla. The report of CRCL Vadodara came to the conclusion that the imported goods were LDO.

15. Certain other importers who had imported goods vide the Vessel MT Hanyu Camellia in comingled state with the appellant's cargo also faced similar inquiries from DRI. The impugned order holds as follows in respect of the consignment imported by the appellant vide vessel MT Hanyu Camellia

> "33. I find that IGM for the vessel MV Hanyu Camellia was filed by M/s. Samudra Marine Services Pvt. Ltd. as per the Bill of Lading provided by the vessel owner/agent. On going through the IGM, it is

found that similar type of goods were imported by many importers and M/s. Yug International and M/s. Shivtek Industries were also one of them as quoted in the defense submission given by the importer as well as other co-noticees.

> 34. 1 find that importer M/s. Shivtek Industries Pvt. Ltd chose to file appeal before Hon'ble Gujarat High Court when the investigating agency got their imported goods samples tested from CECL, Vadodara. Hon'ble Gujarat High Court vide Order dated 19.10.2022 ordered for re-testing of the samples. Accordinglly, re-testing was allowed to the said importers and samples were sent to CRCL, New Delhi. CRCL, New Delhi confirmed that the samples they received meets the requirement of Paraffinic Diesel Fuel and are other than Light Diesel Oil. Therefore, it is clear that the goods imported by M/s. Yug International and M/s. Shivtek Industries were other than the Light Diesel Oil. It is alleged in the show cause notice that as per the opinion given by the CECL, Vadodara, the goods imported by M/s. Alka Petro Global Pvt. Ltd. are not GTL Light Paraffin but are Light Diesel Oil. Now, in respect of goods imported per vessel MT Hanyu Camellia, re-test report is available of CRCL, New Delhi. The goods being in commingled state, for the present case, whatever test results given by CRCL, New Delhi in case of M/s. Yug International and M/s. Shivtek Industries also applies to M/s. Alka Petro Global Pvt. Ltd.
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> 34.2 Further, the noticee in their defense submission submitted Annexure-D which is test memo and screenshot of test report result (CRCL, Kandla) in respect of samples of the goods pertaining to BE 5577815 dated 24.09.2021 filed by M/s. Alka Petro Global Pvt. Ltd. The said test report clearly states that goods imported are other than Light Diesel Oil. Now, for the present vessel, goods being in commingled state, two test reports i.e. CRCL Kandla and CRCL, New Delhi are available. Both the test reports have the same results that the goods are other than Light Diesel Oil. Thus, relying on these test report results, I find that the impugned goods imported by M/s. Alka Petro Global Ltd. per vessel MT Hanyu Camellia as detailed in Table-I are GTL Light Paraffin as declared by them not as Light Diesel Oil..

35. Further, the statements of end users have been relied upon where it is stated by the end users that the imported goods are generally used as fuel. I find that both GTL Light Paraffin and Light Diesel Oil may be used as fuel but since they are classified under different CTH under Customs Tariff Act, 1975. And now it has been established that the impugned goods imported per vessel MT Hanyu Camellia are GTL Light Paraffin, these statements are not relevant for the discussion in respect of goods imported per vessel MT Hanyu Camellia.

36. Since, for the present vessel, now goods have been found as GTL Light Paraffin, allegation of confiscation, undervaluation, mis-declaration while re- export of goods become also null and void and therefore goods imported per vessel MT Hanyu Camellia are not liable for confiscation and no penalty can be imposed upon the importer M/s. Alka Petro Global Pvt. Ltd. and other co- noticees as mentioned at Sr. No. 1 to 10 in table of para 27.2 of the show cause notice, under section 114(iii), 112, 117 and 114AA of the Customs

> Act, 1962 to the extent of goods imported per vessel MT Hanyu Camellia."

It is seen from the above observations in the impugned order that Hon'ble High Court had directed retesting of the samples which were earlier tested by CRCL Kandla and CRCL Vadodara. The test report of CRCL Delhi obtained on retesting of samples indicated that the goods were indeed 'Liquid Paraffin'. Since the goods were imported in comingled state with the imports made by others namely, M/s Shivtek Industries Private Limited and M/s Yug International, it was held that the report of CRCL obtained in case of M/s Shivtek Industries Private Limited would equally apply to the imports made by the appellants. It is also noticed that in para 35 of the impugned order, the statements recorded during investigations have also been held to be not relevant.

16. The only difference between the imports made by the appellant vide vessel MT Hanyu Camellia and MT Eva Hongkong is that in the case of MT Hanyu Camellia retest report was available whereas in the case of appellants made by MT Eva Hongkong, the retesting request was ignored by Revenue despite repeated requests made by the appellants. The appellant has also pointed out that in case of imports made by the appellant vide vessel MT FSL London also, the goods were seized by the department. Owner of the vessel approached Hon'ble High Court of Gujarat. In the said case also similar request for retesting was made and the report received from CRCL New Delhi indicated that the goods were liquid paraffin. He had also pointed out that in the case of imports made by vessel MT FSL London also no show cause notice was issued to the appellant.

17. During cross examination of the chemical examiner at CRCL Vadodara following emerged:

> "79) What is the Central Revenue Control Laboratory in New Delhi ?
> It is the headquarters of CRCL.
>
> 80) How is the Central Excise and Customs Laboratory, Vadodara different from the Central Revenue Control Laboratory with respect to the available equipment and testing methods for oil cargoes?
> Central Excise and Customs Laboratory, Vadodara is a part of CRCL. There is a difference between Central Excise and Customs Laboratory, Vadodara and CRCL in terms of available equipment. Testing methods are the same.
>
> 81) Are you aware of the retest report dated 08.04.2022 issued by Sreenivasa Rao, Joint Director (NFSG), Central Revenue Control Laboratory?
> No
>
> 82) Are you aware of the standards, DIN EN 15940:2019?
> Yes
>
> 83) Why did you not test the samples under DIN EN 15940:2019?
> When the samples matched with IS 15770:2008 and ASTM for LDO, we did not test the samples under DIN EN 15940:2019.
>
> 84) Do you disagree with the observations of the retest report dated 08.04.2022 issued by Sreenivasa Rao, Joint Director (NFSG), Central Revenue Control Laboratory?
> I have not seen the report.
>
> 85) Why do you disagree with the observations of the retest report dated 08.04.2022 issued by Sreenivasa Rao, Joint Director (NFSG), Central Revenue Control Laboratory?
> I have not seen the report.
>
> 86) How is it possible for the Central Excise and Customs Laboratory, Vadodara and Central Revenue Control Laboratory to come to different conclusions with respect to the same cargo?
> I am not aware. If I see the report, I can explain the differences."

From the above it is apparent that the goods were not tested against the parameter DIN EN 15940:2019 by CRCL Vadodara. The test against the standard of DIN EN 15940:2019 by the CRCL was useful for determination of the actual character of the goods as per the CRCL New Delhi. It appears that the said standard for testing was ignored by the CRCL Vadodara and therefore the reports of CRCL Vadodara were at odds with the report of CRCL New Delhi.

18. Learned counsel has also relied on the decision of Tribunal in the case of York Exports 2004 (169) ELT 175 and in the case of Garg

Industries 2007 (208) ELT 535 to hold that the denial of retest goes against the principles of natural justice and in these circumstances the test reports need to be discarded. In para 3 and 4 of decision in the case of York Exports following has been observed:

> "**3.** We note that only two test reports covering two shipments, out of the sixteen export consignments from which samples were drawn, showed adverse reports viz., presence of acrylic fibres. In all eighteen consignments were exported and no samples were drawn from two export shipments. The Commissioner accepted the description of export consignments from which no samples were drawn. Thus, out of eighteen shipments only two shipments are under dispute.
>
> **4.** As soon as these adverse findings of the test report were brought to the notice of the appellants, they contested the correctness of the test reports and requested the concerned authorities to subject the remnants of samples or the duplicate samples for a re-test. This request, we note, has not been acceded to. Instead, the contents of the test report are justified in the impugned order by saying that the laboratory could not have recorded the presence of "acrylic fibre" if the same was not present in the export product. In this connection, we would like to emphasise that the appellants have a right to contest the correctness of the test report. Denial of this right is denial of natural justice. In the absence of a re-test report, the findings of the said test report have to be discarded as also the findings based on the said report."

In para 4 and 5 of decision in the case of Garg Industries following has been observed:

> "**4.** We find that the above contention stands accepted by the adjudicating authority in so far as the same relates to the scrap being heterogeneous in nature. The adjudicating authority has observed that the importer's contention that the scrap is not uniform in nature and it is difficult to draw a sample which could correctly show the exact percentage of the entire lot, is not totally out of place. In spite of that he has relied upon the test report on the sole ground that the representative samples were drawn in the presence of the importer or his authorized representative and as such, it is not open to them to contest the finding of the test report at this stage. He has also rejected the appellant's prayer for re-test of the samples.
>
> **5.** We do not find the above reasoning of the adjudicating authority to be appropriate. The entire case of the revenue is based upon the test report results. As such, it is necessary that such results are correct. The adjudicating authority has himself expressed doubt about the correctness of the samples drawn from the scrap, which may be rich in copper content at one particular place and poor in copper concentration at other place. Denial of the request of re-test on the ground that the appellants have accepted the finding of the test report is not in accordance with the equity principles of adjudication. The appellants have a right to contest the correctness of the test report and to ask for retest. In the absence of retest report, findings of the first test, when there is an expressed doubt about the same, cannot be made the basis for enhancing the value of the goods or for upholding the charges of mis-declaration. We also do not

> find any other corroborative evidence to show that the goods were undervalued. We also note at this stage, the samples are not available with the department as contended by the Ld. DR in the previous proceedings. As such, we find no justification for upholding the impugned order, the same are accordingly set aside and all the appeals allowed with consequential relief to the appellants."

From the above, it is seen that the failure to allow retest of samples creates a serious doubt in the original test reports. We also find that original test reports of CRCL have not factor in the standards required DIN EN 15940:2019 as per the test report of CRCL New Delhi. In these circumstances, we hold that the test report of CRCL Vadodara cannot be relied for initiating action against the appellant.

19. In these background, we cannot hold that there was any mis-declaration in description of goods. It is seen that the change of value of import is also based on the assumption that the goods were mis-declared. We find that there is no mis-declaration established by Revenue and therefore, there can be no question of rejection of declared value and revaluation of goods. In this background, the impugned order cannot be sustained. The impugned order is set aside. Consequently the penalties on co-noticees also cannot be sustained and are therefore, set aside. Appeals are allowed.

(Pronounced in the open court on 04.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha