

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

Customs Appeal No. 10626 of 2021

[Arising out of OIA-KDL-CUSTM-000-APP-48-19-20 dated 12/09/2019 passed by
Commissioner of CUSTOMS-KANDLA]

P D INDUSTRIES

104 Shivlok House Ii Commercial Complex Karampura Moti Nagar
New Delhi

.....Appellant

VERSUS

C.C.-KANDLA

Custom House,
Near Balaji Temple,
Kandla, Gujarat

.....Respondent

APPEARANCE:

Mrs. Nisha Bineesh, Advocate for the Appellant
Shri. J.A Patel, Superintendent (AR) for the Respondent

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

FINAL ORDER NO.A / 10072 /2022

DATE OF HEARING: 14.12.2021

DATE OF DECISION: 03.02.2022

RAMESH NAIR

The brief facts of the case are that the appellant had filed bill of Entry No. 8594079 dated 24.10.2018 wherein the goods imported by the appellant was declared as "Petroleum Hydrocarbon Solvent". The samples of the product were drawn and sent to CRCL, Kandla for testing. The CRCL Kandla under test report confirmed that the goods imported are having characteristics of Superior Kerosene Oil and falling under custom tariff heading 27301910 as against the description of Petroleum Hydrocarbon Solvent classified under No. 271019990 as declared by the importer. On this basis the appellant was informed since the import goods is Superior Kerosene. Hence, it has not been cleared by the department from its out of charge. The appellant thereafter had filed the special civil application No.

1829 of 2018 before the Hon'ble High Court of Gujarat at Ahmedabad. The Hon'ble High Court vide order dated 23.02.19 disposed of the said petition with the direction to the Indian department to send the sample of the goods in question to the Indian Institute of Petroleum Dehradun Laboratory on or before 28.01.2019 and on receipt of the sample, the said Laboratory shall carry out requisite test and render, its clear opinion as to whether the sample received by them is that of Superior Kerosene Oil (SKO) or Petroleum Hydrocarbon Solvent within 4 weeks from the date of receipt of the sample. Consequent to the order of Hon'ble Gujarat High Court the sample were sent to Indian Institute of Petroleum, Dehradun. The institute stated that analysis of sample cannot be conducted due to adequate testing facilities not available. Thus, by Dehradun that the product imported is Kerosene and/ or Superior Kerosene or Petroleum Hydrocarbon Solvent could not be determined. Mean time before outcome of the SLP filed before the Hon'ble High Court and its decision, an order in original No.KDL/ ADC/ AK/ 31/ 2018-19 dated 17.12.2018 came to be passed by the Additional Commissioner of customs house, Kandla, whereby the classification claimed by the appellant as Petroleum Hydrocarbon Solvent under CTH 27101990 was rejected and classified the said goods under CTH 27101910 relying on test memo dated 25.10.2018. Aggrieved by the said order in original appellant preferred an appeal before the Commissioner of Customs (Appeals) Ahmedabad. The learned Commissioner (Appeals) rejected the appeal. Being aggrieved by the order in appeal, the appellant filed the present appeal.

2. Mrs.Nisha Bineesh, learned Counsel appearing on behalf of the appellant submits that the impugned order in appeal was passed without considering facts and the submission and settled law in the present case accordingly, the order lacks the judicial discipline and deserves to be set aside on this ground alone. She submits that in the impugned order, learned

Commissioner arrived at the conclusion only on reasons suggested in Deputy Chief Chemists report relied upon by the original authority to hold it as Superior Kerosene. She submits that the import goods are not understood as Kerosene Oil nor as Superior Kerosene Oil as there is no evidence brought out in the orders except an opinion in the test report. She submits that in the present case, all the parameters for Kerosene as specified under IS1459:1974 were not tested therefore, in absence of testing of all the parameters it cannot be concluded that the product is Superior Kerosene Oil. In this regard she placed reliance on this tribunal's decision in the case of M/s. Swarna Oil Services Custom Appeal No.12496 of 2019 vide Final Order No. A/11026-11028/2020 dated 01.06.2020. She submits that in the said judgment also identical facts were involved in as much as all the parameters of Kerosene Oil were not tested. On that basis, the tribunal has rejected the claim of the revenue for classification of goods as Kerosene Oil. She further submits that the direction given by the Hon'ble High Court to the department for fresh test of the product by Indian Institute of Petroleum, Dehradun could not be complied with as though the sample was sent to Dehradun but the department vide letter dated 1.05.2019 informed that the institute has returned the sample sent for analysis stating that adequate testing facilities for this type of work are not available with them. Hence, the department could not discharge the burden for classification of goods as claimed by them. On the query from the bench regarding the end use of the imported goods. Learned Counsel Mrs. Nisha submits that the goods imported by the appellants is only meant for use as raw material in the manufacture of the final products i.e. solvent. She undertakes to submit relevant documents in support of her claim of use of the goods, she submits that in absence of any conclusive evidence that the product is Superior Kerosene Oil. The impugned order is illegal and incorrect and as the same be set aside and appeal be allowed. The appellant post hearing submitted certificate dated 15.12.2021

and some sample invoices of their final product and also process flow chart. Showing the process of the imported goods and the resultant product i.e. solvents, thinner, industrial solvent, etc.

3. Shri J.A Patel, learned Superintendent (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that the department has challenged the classification only on the basis of one test report of the goods in question which was issued by CRCL Kandla wherein the following parameters were tested:

"Initial Boiling Point : 135 Degree Celsius

Final Boiling Point : 234 Degree Celsius

Density at 15 Degree Celsius : 007992 gm/ml

Distill at 210 Degree Celsius : 83%

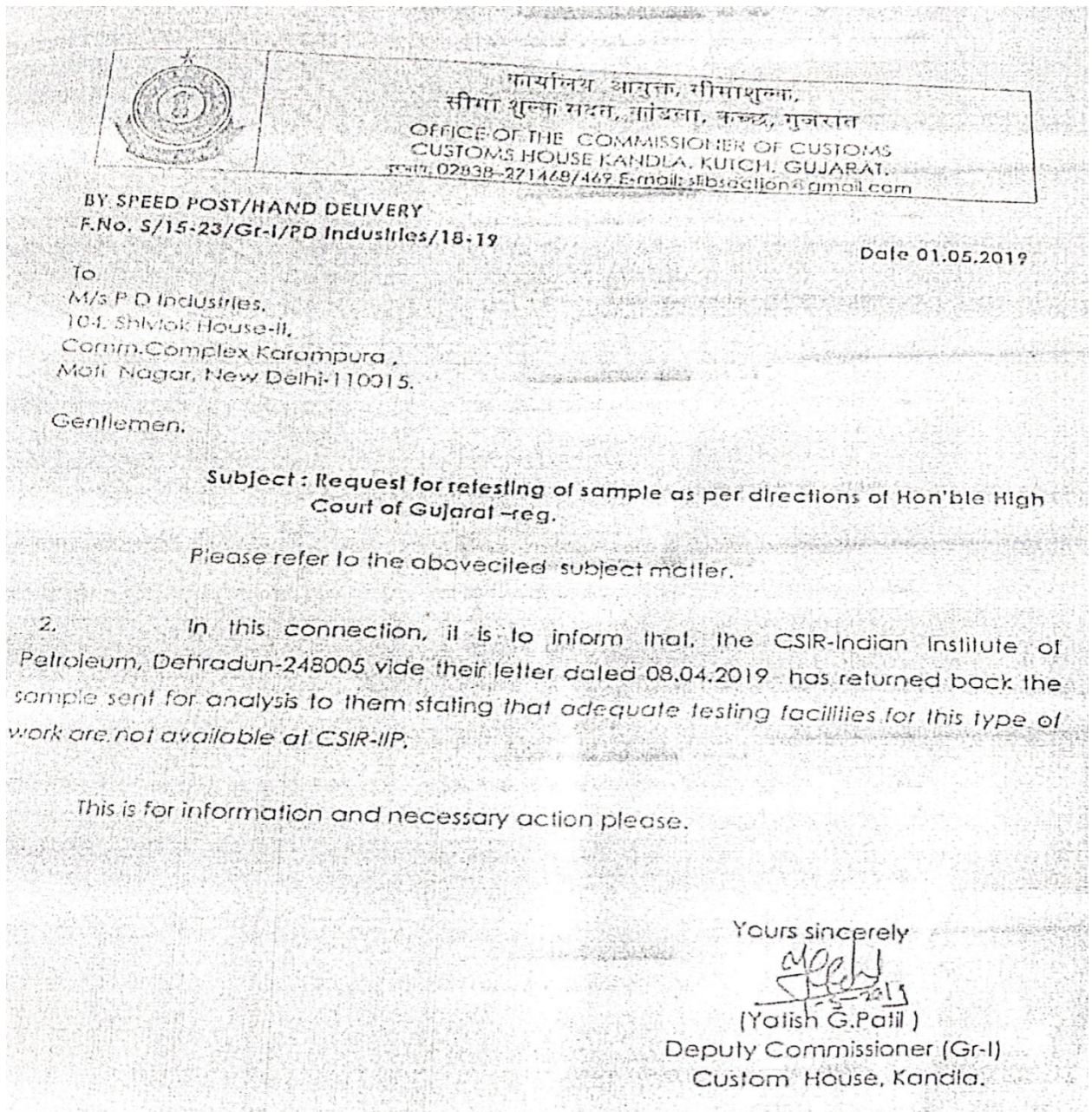
Distill at 200 Degree Celsius : 63%

Flash Point : 43 Degree Celsius

Smoke Point : 19mm"

4.1 As per the IS specification for Kerosene i.e. 1459:1974 total eight parameters need to be tested. However, in the test report of CRCL Kandla all the parameters were not admittedly tested. In view of these facts the Hon'ble High Court of Gujarat directed the revenue to get the goods tested from Indian Institute of Petroleum, Dehradun. Though the samples were sent for testing to Indian Institute of Petroleum, Dehradun but the department vide letter dated 01.05.2019 intimated the appellant that testing

facilities for this type of work are not available at CSIR-IIP. The said letter is reproduce below:



From the above communication of the department, it is clear that the IIP Dehradun could not test the parameters of Kerosene. In this fact the test of parameters of Kerosene could not be done conclusively. Therefore, the department did not discharge the burden to prove their case of classification. We find that in the identical facts and situation this tribunal has considered the case of Swarna Oil Services (Supra) wherein the following order was passed:

“9. Heard both the sides and carefully considered the submissions made. The limited issue that arises for our consideration is whether the Revenue was correct in re-classifying the imported goods under chapter heading 27101910 as Superior Kerosene Oil.

10. It is not in dispute that for a product to be classified under 27101910 as SKO, it has to meet with the specifications in supplementary Note ‘C’ to Chapter 27 which reads as under:

“Superior kerosene Oil (SKO) means any hydrocarbon oil conforming to Indian Standards Specifications of Bureau of Indian Standards IS 1459:1974 (reaffirmed in the year 1996)”

11. It can be seen from the said BIS that for a product to be classified as Kerosene, it has to meet the following specifications1459:1974

“2.1 The material shall consist of refined petroleum distillates. It shall be free from visible water, sediment and suspended matter.

2.2 The material shall also comply with the requirement given in Table I, when tested according to the appropriate methods prescribed under ‘P’ series of IS: 1448*, reference to which is given in column 4 of the table.”

TABLE 1 REQUIREMENT FOR KEROSENE

Sr.No .	CHARACTERISTIC	REQUIREME NT	METHOD OF TEST, REF To ‘P’ OF IS: 1448*
(1)	(2)	(3)	(4)
i)	Acidity, inorganic	Nil	P:2
ii)	Burning quality: a) Char value, mg/kg of oil consumed, Max	20	
	b) Bloom on glass chimney	Not darker than grey	
iii)	Colour (Saybolt) +, Min	+10	P:14
iv)	Copper strip corrosion for 3 h at 500 C	Not worse than No.1	P:15
v)	Distillation : a) Percent recovered below 200o C Min b) Final boiling point, 0C, Min	20 300	P:18
vi)	Flash point (Abel), 0C, Min	35	P:20
vii)	Smoke Point, mm, Min	18	P:31
viii)	Total, sulphur, percent by mass, Max	0.25	P:34

* Methods of test for petroleum and its products.
+ Where Saybolt chromometer is not available. Lovibond colour of the sample kept in an 18-in cell may be measured according to IS:1448 [P:13]-1960 ‘Methods of test

for petroleum and its products, P:13 Colour by Lovibond tintometer' in which case, the colour shall not be deeper than Standard White (IP 4.0).

For supplies to Defence, the smoke point of the product shall be 21 mm, Min and for Railways it shall be 20 mm, Min.

For supplies to Defence, total sulphur content, percent by mass, of the product shall be 0.20, Max

From a perusal of the test reports of CRCL Delhi and CRCL Kandla, assuming the same to be correct, notwithstanding the difference in the test results between the two qua the parameter regarding final boiling point. It is seen that out of the 8 parameters on which the sample has to be tested for determining whether or not the same meets with the specifications of Kerosene, it is seen from both the test results that test have not been undertaken with respect to the following 3 parameters.:

(i) Burning quality

(a) Char value, mg/kg of oil consumed, Max

(b) Bloom on glass chimney

(ii) Colour (Saybolt)

(iii) Total, sulphur, percent by mass, Max

It is also not the Revenue's case that the said three parameters can be established by any inferential process or otherwise. Insofar as sulphur is concerned, though no test have been undertaken, we will for the sake of our discussion assume that the said parameters have been met, as the same forms a part of the suppliers test reports and is within the parameters specified in IS 1459:1974 (reaffirmed in 1996). However in respect of the other two parameters regarding burning quality and colour there is absolutely no evidence that the revenue has produced to establish that the said two parameters are met with. The revenue has neither through test results nor otherwise lead any evidence to show that the said two parameters were also met with.

13. The law on the question that the burden of classification is on the Revenue is well settled by the Apex Court in the case of HPL Chemicals vs CCE reported in 2006 (197) ELT 324. The relevant observations of the Honble Apex Court are reproduced for better appreciation:

"29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is quiet clear that the goods are classifiable as "Denatured Salt" falling under Chapter Heading No. 25.01. The Department has not shown that the subject product is not bought or sold or is not known or is dealt with in the market as Denatured Salt. Department's own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject matter is to be treated as Sodium Chloride."

Dealing with the similar fact, the ratio laid down by the Apex Court in its judgment in the case of Hindustan Ferodo vs. CCE 1997 (89) ELT 16. The relevant observations of the Apex Court read as under:

“It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.”

14. *In our view, in the absence of evidence that the imported goods meet with all the specifications laid down in supplementary note (c) to chapter 27, for a product to be classified as Kerosene, the case made out by the revenue cannot be sustained. Accordingly the impugned orders are set aside and appeals are allowed with consequential reliefs, if any arise, in accordance with law.”*

From the above judgment it can be seen that the facts of the above case and the claim of the revenue are identical to the present case therefore, the ratio of the above judgment is directly applicable.

4.2 Without prejudice, to our above finding, we find force in the argument of the appellant that the goods imported by them are used as raw material in the manufacture of their final product i.e. solvent. In this regard the appellant post hearing submitted certain documents such as certificate issued by the appellant, invoices copies of their final product and the process flow diagram. The same are scanned below:

GSTIN : 06AAPFP5515J1ZX



Office : 011-41041751
Mobile : 9350582456
9811988164

PD INDUSTRIES

Manufacturers of all kinds of Solvents, Thinners & Reducers

Head Office :

104, Shivlok House-II,
Comm. Complex Karampura
Moti Nagar, New Delhi - 110015
E-mail : pdindustries104@gmail.com

Works :

Sampla Beri Road,
Village - Ismailia-11 BISHWA
Tehsil - Sampla, Distt. Rohtak (Haryana)

Ref. No.

Date .../.../...2021

TO WHOM IT MAY CONCERN.

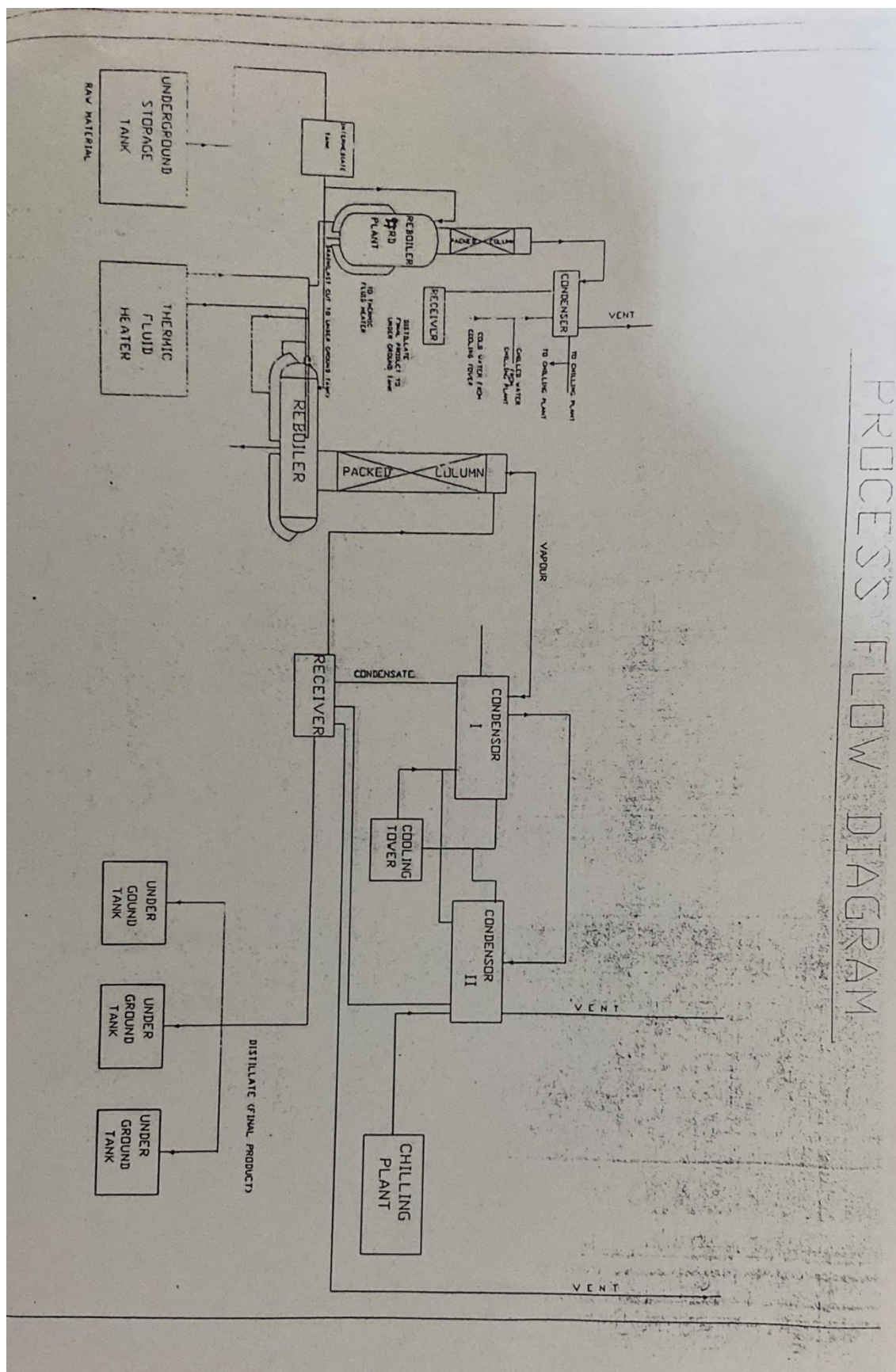
THIS IS TO CERTIFY THAT WE PURCHASE DIFFERENT KIND OF RAW MATERIAL SUCH AS PENTANE, HPG, NAPTHA, PHS, ETC AND WE DISTILLIED ITS ALL THIS IN OUR PLANT AT SAMPLA BERI ROAD, VILLAGE ISMAILIA-11, BISHWA, SAMPLA ROHTAK HARYANA.AND WE MANUFACTURE DIFFERENT KIND OF PRODUCTS SUCH AS INDUSTRIAL SOLVENT AND WE BLEND DIFFERENT KIND OF MATERIAL TO MANUFACTURE DIFFERENT KIND OF THINNER IN OUR PLANT.

FOR PD INDUSTRIES

For P D INDUSTRIES

Partner/Auth. Sign.

AUTH.



From the above documents it is established that raw material i.e. Petroleum Hydrocarbon Solvent imported by the appellant is their raw material which is used in the manufacture of their final product such as industrial solvent, thinner etc. This fact also strengthen the case of the appellant that the goods imported by them is not Superior Kerosene Oil.

5. As per our above discussion and finding we are of the view that declaration of the goods and classification made by the appellant in the bill of entry is correct and the department's claim of classification as Superior kerosene Oil could not be established. Therefore, the impugned order is set aside appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 03.02.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)