

**In The Customs, Excise & Service Tax Appellate Tribunal  
West Zonal Bench At Ahmedabad**

**Appeal No.E/1104,1369,1417,1737/2009-DB**

[Arising out of OIO-53&54/VDR-II/GAIL/WAG/COMMR/08-09 dated 31.03.2009 passed by the CCE-Vadodara-ii]

[Arising out of OIO-04/VDR-II/GAIL/WAG/COMMR/09-10 dated 26.05.2009 passed by the CCE-Vadodara-ii]

[Arising out of OIO-11/VDR-II/GAIL/WAG/COMMR/2009 dated 28.08.2009 passed by the CCE-Vadodara-ii]

M/s Gail (India) Ltd.  
C.C.E & S.T. Vadodara-ii

Appellant

Vs

C.C.E & S.T. Vadodara-ii  
M/s Gail (India) Ltd.

Respondent

**Represented by:**

For Appellant: Mr. J. C. Patel (Advocate)

For Respondent: Mr. J. Nagori (AR)

**CORAM:**

**HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)**

**HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

Date of Hearing:05.09.2018

Date of decision:02.01.2019

**Final Order No. A/ 10013-10016 /2019**

**Per: Raju**

Appeal No.s E/1104,1369,1737/2009 have been filed by M/s Gail India Ltd. and appeal No. E/1417/2009 has been filed by Revenue.

2. Ld. Counsel for the Gail India Ltd. pointed out that they are engaged in manufacture of liquefied petroleum gas from natural gas. During recovery of LPG from Natural Gas in the fraction after the process of catalytic cracking, Aromatization, Alkylation and Isolation in the reactors/ vessels a product, namely, 'Mixed Fuel Oil' is obtained. He pointed out that mixed fuel oil is used in paint and similar industries. The appellant claimed the said product for classification under Central Excise Tariff Heading 2710.00. The appellant had submitted manufacturing process of said product vide their application dated 14.06.2004. In September 2005, the Central Excise officers visited the appellants premises and drew

samples. The samples were sent to Chemical Examiner located at Vadodara. The Chemical Examiner reported that the sample examined by them fulfils both requirements of motor spirit i.e. fresh point is below 20 Degree and it is suitable for use in spark ignition engine in admixture. The appellant sought certain clarification from the Revenue regarding the test conducted and Revenue vide letter dated 24.04.2006 clarified those doubts. He pointed out that one of the doubts raised by the appellant was the percentage of mixed fuel oil used in the motor spirit for testing the sample as admixture. The Superintendent vide letter dated 24.04.2006 clarified that the percentage of mixed fuel oil in mixture with motor gasoline for determining ROM was 10% V/V. Thereafter SCN for the period July 2004 to August 2006 was issued to the appellant on 06.01.2007 seeking to classify mixed fuel oil as motor spirit classified under Tariff heading 2710.19 (upto 31.03.2005) and w.e.f. 01.04.2005 it was sought to be classified under Heading 2710 11 19. The appellant had claimed classification under heading 2710.99 (prior to 31.03.2005) and under tariff Heading 2710 19 90 (after 31.03.2005). Further SCN was issued for the period September 2006 to August 2007 and September 2007 to March 2008, April 2009 to October 2009. He also pointed out that Revenue is also in appeal in respect of demand SCN for the period September 2007 to March 2008 wherein Revenue is seeking enhancement of penalty from Rs. 50 Lakhs to Rs. 2,86,93,458/-. Ld. Counsel pointed out that to classify for classification under heading 2710.99 (prior to 31.03.2005) and under tariff Heading 2710 19 90 (after 31.03.2005), the product should answer to the description of motor spirit. The expression motor spirit was defined as follows at the relevant time:

(a) "motor spirit" means any hydrocarbon oil (excluding crude mineral oil) which has its flash point below 250 C and which either by itself or in admixture with any other substance, is suitable for use as fuel in spark ignition engines.

2.1 Ld. Counsel pointed out that the term 'Suitable for use' as fuel in spark ignition engine has been interpreted in various judgments to mean 'actual, practical and commercially fit for the use described'. He argued that there is no evidence laid by Revenue to show that there is actual practical and commercial use of the product in question, either by itself or in admixture with any other substance, as fuel in spark ignition engine. He pointed out that the product is actually used in paint and other similar industry and not as Fuel Spark Ignition Engine. Ld. Counsel relied on the decision of Tribunal in case of Oil India Ltd. 2002 (148) ELT 802 wherein in para 8 of the Tribunal, it has been held that reference to admixture with any other substance is to be taken as substance other than mineral oil. He pointed out that the said decision in case of Oil India Ltd. has been affirmed by Hon'ble Supreme Court reported in 2004 (170) ELT A116.

2.2 Ld. Counsel further argued that the demand SCN invoked extended period of limitation. He argued that there was no wilful misstatement of suppression of facts or contravention with intent to evade payment of duty on part of the appellant. He argued that in application dated 14.06.2004 seeking central excise registration they had disclosed the entire manufacturing process and thus there cannot be any intention to evade payment of duty. He relied on the following case law.

- Ram Remedies (P) Ltd. 2010 (254) ELT 170
- Northern Plastic Ltd. 1998 (101) ELT 549 (SC)
- Gaurav Enterprises 2006 (193) ELT 532 (Bom)

2.3 Ld. Counsel further argued that Revenue in its appeal seeks to enhancement of penalty from Rs. 50 Lakh to equivalent penalty amounting to Rs. 2,86,93,458/- under Section 11CE of the Central Excise Act. He pointed out that the SCN for the period September 2007 to March 2008 was a 3<sup>rd</sup> SCN in a series of SCN. He argued that in these circumstances invocation of Section 11AC is incorrect.

3. Ld. AR Relies on the impugned order. He pointed out that earlier the matter was remanded by Tribunal in respect of OIO No. 10 & 11-Cum media-II/MP/2007-08 dated 20.12.2007. He argued that the matter was remanded for examination of the two points specifically mentioned in the said order. He pointed out that chemical examiners report has not been challenged by the appellant and no cross examination has been sought of chemical examiner. He further argued that Superintendent (Preventive) in his letter dated 28.04.2006 has clarified as follows after checking with Scientist of Indian Institute of Dehradun:

"5. Thus the contention made in the said letter that the product, as such, does not meet the requirements of M.S. as per BIS (IS 2796: 2000), does not hold good in context of the conditions laid down in CET-2006 whereas the product, when admixed with motor gasoline become suitable as a fuel for spark ignition engine."

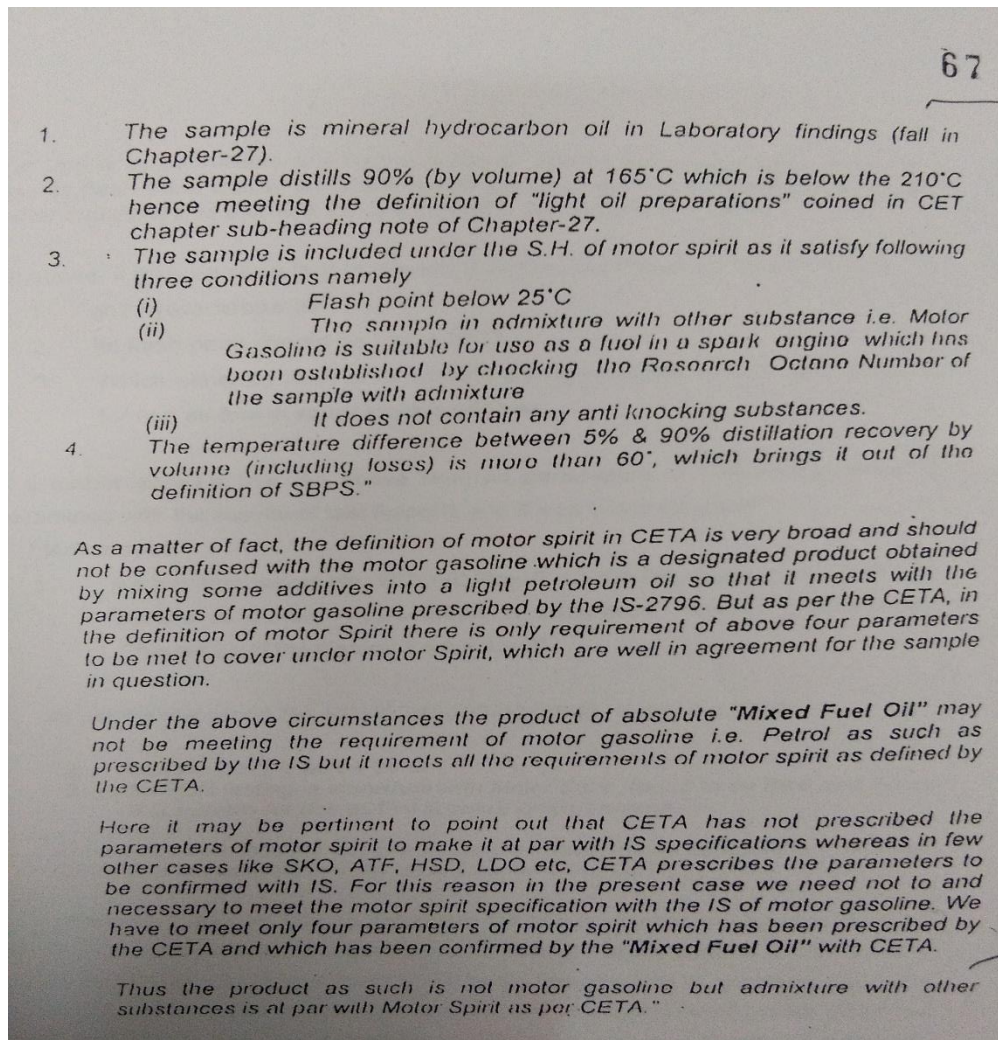
(emphasis supplied)

Ld. AR also relied on the letter dated 17.10.2006 of Chemical Examiners, Vadodora wherein he has clarified that:

*"Sub: Sample of MFO testing of test memo no.01/2006 drawn for checking classification dispute/duty liability of MFO, GAIL (I) Ltd. Waghodia m/r.  
Please refer to the above cited details.*

*The matter has been examined in the light of CETA 2006-2007, Laboratory findings, contentions submitted by the party and the standard literature available in the laboratory.*

*It is concluded from the above that sample under reference satisfy the condition/paramotors laid down for the products falling in category of SH 27101119 of Chapter-27 of CETA. The point wise clarification to justify the same is as under.*



He argued that the report of Chemical Examiner if not challenged cannot be brushed aside.

3.1 He further argued that in a case where Section 11AC has been invoked it is mandatory to impose penalty equal to the duty demanded. It is not open to the Adjudicating Officer to reduce the penalty imposed under Section 11AC.

4. Ld. AR relies on the impugned order. He also relies on the grounds of appeal in Revenue Appeal.

5. We have gone through rival submissions. We find that Revenue is seeking to classify the product as motor spirit under heading 2710.99 (prior to 31.03.2005) and under tariff Heading 2710 19 90 (after 31.03.2005). Prior to 01.03.2005 heading 2710 read as follow:

227.10	<p><b>Petroleum oils and oils obtained from bituminous minerals, other than crude; Preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations</b></p> <p><i>- Motor spirit, that is to say, any hydrocarbon oil (excluding crude mineral oil) which has its flash point below 25°C, and which either by itself or in admixture with any other substance, is suitable for use as fuel in spark ignition engines :</i></p>	
2710.11	-- Special boiling point spirits (other than benzene-Toluol) with nominal boiling point range 55-115°C	16%
2710.12	-- Special boiling point spirits (other than Benzene, Benzol, Toluene and Toluol) with nominal boiling point range 63-70°C	16%
2710.13	-- Other special boiling point spirits (other than Benzene, Benzol, Toluene and Toluol)	16%
2710.14	-- Naphtha	16%
2710.15	-- Natural Gasoline Liquid	16%
2710.19	-- Other	16%
	<i>- Other :</i>	
2710.91	-- Superior kerosene oil	16%
2710.92	-- Aviation turbine fuel	16%
2710.93	-- High Speed diesel oil	16%
2710.94	-- Light diesel oil	16% plus Rs. 1.50 per litre
2710.95	-- Lubricating oil	16%
2710.99	-- Other	16%

After 01.03.2005 the heading 2710 read as follows:

2710	Petroleum oils and oils obtained from bituminous minerals, other than crude; preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations; waste oils		
	- Petroleum oils and oils obtained from bituminous minerals (other than crude) and preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations, other than waste oils :		
2710 11	-- Light oils and preparations :		
	-- Motor Spirit :		
2710 11 11	--- Special boiling point spirits (other than benzene, toluol) with nominal boiling point range 55-115°C	kg.	Ψ[16% + Rs. 15.00 per litre]
2710 11 12	--- Special boiling point spirits (other than benzene, benzol, toluene and toluol) with nominal boiling point range 63-70°C	kg.	Ψ[16% + Rs. 15.00 per litre]
2710 11 13	--- Other special boiling point spirits (other than benzene, benzol toluene and toluol)	kg.	Ψ[16% + Rs. 15.00 per litre]
2710 11 19	--- Other . . . . .	kg.	Ψ[16% + Rs. 15.00 per litre]
2710 11 20	-- Natural gasoline liquid (NGL) . . . . .	kg.	Ψ[16% + Rs. 15.00

2710 11 90	--- Other . . . . .	kg.	per litre] Ψ[16% + Rs. 15.00 per litre]
2710 19	-- Other :		
2710 19 10	--- Superior kerosine oil (SKO). . . . .	kg.	16%
2710 19 20	--- Aviation turbine fuel (ATF). . . . .	kg.	16%
2710 19 30	--- High speed diesel (HSD). . . . .	kg.	Ψ[16% + Rs. 5.00 per litre]
2710 19 40	--- Light diesel oil (LDO) . . . . .	kg.	Ψ[16% + Rs. 5.00 per litre]
2710 19 50	--- Fuel oil. . . . .	kg.	16%
2710 19 60	--- Base oil . . . . .	kg.	16%
2710 19 70	--- Jute batching oil and textile oil . . . . .	kg.	16%
2710 19 80	--- Lubricating oil . . . . .	kg.	16%
2710 19 90	--- Other . . . . .	kg.	16%
	- Waste oil :		
2710 91 00	-- Containing polychlorinated biphenyls (PCBs), polychlorinated terphenyls (PCTs) or polybrominated biphenyls (PBBs)	kg.	#
2710 99 00	-- Other . . . . .	kg.	#

Supplementary note (a) to Chapter 27 defined 'Motor Spirit' as follows:

"Motor Spirit" means any hydrocarbon oil (including crude mineral oil) which as its flash point below 25 Celcius and which either by itself or in admixture with any other substance, is suitable for use as fuel in spark ignition engines. " Special boiling point spirits (tariff items 2710 11 11, 2710 11 12 and 2710 11 13)" means light oils as defined in sub-heading note 4, not containing any anti-knock preparations, and with a difference of not more than 60 Celcius between the temperatures at which 5% and 90% volume (including losses) distil;"

From the above it is seen that the definition of motor spirit essentially remains the same prior to and after 01.03.2005. Earlier the specific requirements of 'motor spirit' were part of the heading 2710 but after 1.3.05 the same were incorporated in supplementary note (a) to Chapter 27. Tribunal in the case of India Oil Corporation 1990 (45) ELT 134 has observed as follows:

**"6.** Yet another feature to be noted is that, as submitted by I.P.C.L., the department had tested the sample only for flash point. The tariff provides two criteria: one is the flash point; the other is that the mineral oil should, either by itself or in admixture with any other substance, be suitable for use as fuel for internal combustion engine. Satisfaction with both criteria is required. The departmental sample no doubt showed fulfilment of the flash point criterion. But, in a stoutly disputed case such as the present one, it was imperative on the part of the department to test the mineral oil also to determine whether it fulfilled the criterion of suitability for use as fuel in internal combustion engines. This, the department failed to do even though it was seeking to tax the oil as motor spirit."

(emphasis supplied)

Thus to qualify as 'motor spirit' the product has to answer to the two test prescribed in the aforesaid decision. In case of Oil India Limited 2002 (148) ELT 802 in para 8 following has been observed:

**"8.** In view of the Board's clarification dated 17-11-81 the Revenue cannot take up a contention that condensate will not come under Item 68 of the old Tariff. The above clarification further makes it clear that condensate is a petroleum in natural state and is crude oil. It is to be classified as crude mineral oil. If that be so, it would directly come under sub-heading 2709.00 which takes in petroleum oils and oils obtained from bituminous materials and crude. When we examine the Heading 2710 we find that the main heading makes a specific exclusion of crude. If that be so, there is no merit in the contention that because of an exclusion clause provided under Motor Spirit, condensate has to undergo

a test of flash point and use as a fuel in spark ignition engine for being excluded from the Heading 2710. Since the main heading itself excludes crude, it cannot be taken that a subsequent exclusion will bring it back under Heading 2710. There is also merit in the contention of the appellant that reference to admixture with any other substance is to be taken as substance other than mineral oil. The description under the heading 'Motor Spirit' tallies with the description under Item 6 in the old Tariff.”

(emphasis supplied)

Thus, to qualify for the phrase 'suitable of use as motor spirit' the product needs to be tested in admixture with anything other than 'mineral oil'. In the instant case, letter of the Superintendent (prev.) dated 20.04.2006 suggests that the product has been tested in admixture with motor gasoline in the ratio of 10% V/V. The said letter of the Superintendent is in respect to subsequent query of the appellant seeking this information. In this background, it is seen that the product has not been tested for its suitability for use in admixture with any substance other than mineral oil as required in terms of the decision of Tribunal in case of Oil India Ltd., upheld by Hon'ble Apex Court (supra). Thus Revenue has not produced the necessary evidence to classify the product as motor spirit falling under heading 2710.99 (prior to 31.03.2005) and under tariff Heading 2710 19 90 (after 31.03.2005). In these circumstances demand of duty and change of classification sought by Revenue remains unsubstantiated. Consequently, the demand is set aside and appeal of M/s Gail India Ltd. are allowed. The appeal of Revenue is dismissed as the demand of duty itself has been set aside.

*(Pronounced in the open court on 02.01.2019)*

**(Raju)**  
**Member (Technical)**

**(Ramesh Nair)**  
**Member (Judicial)**

*Neha*