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

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10619 of 2020

(Arising out of OIA-JMN-CUSTM-000-APP-337-19-20 dated 20/03/2020 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

OIL ENERGY **......Appellant**

Survey No. 30/1, Plot No. 39, Nirmala Nagar, Meghpar Kumbhardi, Anjar
Kutch
Kutch, Gujarat

VERSUS

C.C.-JAMNAGAR(PREV) **......Respondent**

Sharda House...Bedi Bandar Road,
Opp. Panchavati,
Jamnagar, Gujarat

APPEARANCE:

Shri Vikas Mehta, Consultant for the Appellant
Shri Vinod Lukose, Superintendent(AR) for the Respondent

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

Final Order No. A/ 10968 /2022

DATE OF HEARING: 27.06.2022
DATE OF DECISION: 10.08.2022

RAMESH NAIR

The brief facts of the case are that the appellant M/s. Oil Energy have filed bill of entry no. 7736631 dated 22.08.2018 seeking clearance of 117.86 MT of Low Aromatic White Spirit packed in flexi pack, by classifying the same under customs tariff heading 27101990 of the First Schedule to Customs Tariff Act, 1975 and declaring its assessable value of Rs. 68,39,640/-. Based on the intelligence regarding imported kerosene in guise of Low Aromatic White Spirit the representative sample of goods contains any of these containers were drawn under Panchnama and were tested by the chemical examiner, Customs House Laboratory, Kandla and they vide their report clarified that the goods meet the requirement of Kerosene as per IS 1459:2016. Accordingly, the goods were placed under seizure. Thereafter, the matter has been decided vide the order in original whereby the Adjudicating Authority held that 117.86 MT imported by the appellant is Superior Kerosene Oil and not Low Aromatic White Spirit. Accordingly the Classification of Goods claimed by the appellant under

Custom Tariff Heading No. 27101990 has been rejected and ordered it to be classified under Custom Tariff Heading No. 27101910 of the first schedule of Custom Tariff Act, 1975. He ordered for confiscation of 117.86 MT. of Superior Kerosene Oil value at Rs 68,39,640 imported by the appellant under section 111(d),111(m) and 111(o) of the Customs Act, 1962. The penalty of Rs. 6783960 was imposed upon the appellant under section 112 (a) (1) of Customs Act, 1962. Being aggrieved by this adjudication order the appellant filed an appeal before the Commissioner (Appeal) who vide the impugned order in appeal no. JMN-COSTM-000-APP-337-19-20 dated 20.03.2020 rejected the appeal filed by the appellant. Therefore, the present appeal.

2. Shri Vikas Mehta, Learned Consultant appearing on behalf of the Appellant submits that the lower authorities accepted the test report of the goods imported whereas the test report is not conclusive and the same is defective in as much as firstly in test memo the requirement of test was for the purpose to ascertain that the goods imported is Low Aromatic Spirit is a solvent. The Chemical Examiner without answering the query raised in the test memo but he on his own decided that the product is Kerosene. Secondly, the test required for establishing that the goods is Kerosene has not been performed correctly. The chemical examiner has not tested the vital parameters and jumped to the conclusion that the goods imported is Superior Kerosene Oil. Therefore, the test report which is sole basis of the case being inconclusive and defective, the case of the department do not sustain. He submits that the Lower Authorities have relied upon test results dated 16.102018 and 17.102018 issued by chemical examiner, Grade II, Customs House Laboratory, Kandla to order absolute confiscation of the goods on the ground that the same are Superior Kerosene Oil, a restricted item imported into India and not Low Aromatic White Spirit as declared by the appellant. He submits that the Learned Adjudicating Authority merely relied upon 2 parameters namely, Final Boiling Point (Maximum) and Flash Point (Minimum) to hold that goods are Superior Kerosene. He referred to the test report and draw our attention to the comparison between specifications of Kerosene set out under IS 1459:1974 with the actual testing carried out by the Chemical examiner and the parameters based on which the Adjudicating Authority has held that goods are Superior Kerosene. He submits that out of 8 Parameters the chemical examiner tested only 3 parameters (Distillation, Flash Point and Smoke Point). Out of this, Learned Adjudicating Authority has cited only 02 Parameters (Final Boiling Point and Flash Point) for concluding that goods

are superior Kerosene. He submits that the Learned Adjudicating Authority held that the Flash Point is between 40 to 43 degree Centigrade as against 35 (minimum) prescribed for solvent under IS 1745:1978. In as much as there is no prescribed upper limit for this parameter, adverse inference drawn by Learned Adjudicating Authority on this account is misplaced. He submits that the entire case of the department in holding that the goods are Superior Kerosene Oil is based on only 01 Parameter i.e. Final Boiling Point as against 08 Parameters that are required to test as per requirement of IS prescribed in the Supplymentary note.

2.1 He submits that as regard the issue that whether all the test prescribed under IS are not carried out by department in order to decide the classification, Hon'ble High court of Gujarat, in the judgment dated 20.01.2022 in the case of Rajkamal Industries applied the principles of "reasonable doubt" and "preponderance of probability" in the case where 14 out of 21 tests were carried out . However, in the respectful submission of appellant, the same when applied to the case in hand would make it absolutely clear that only 01 parameter, i.e. Distillation (Flash Point being the second and common between solvent and kerosene) cannot give rise to any reasonable doubt and preponderance of probability that goods under consideration are Superior Kerosene Oil. He submits that as regard the specifications for the Petroleum Hydrocarbon solvents under IS : 1745-1978 submitted by the Learned AR that there are 07 grades of solvent and items having final boiling point of above 205 degree centigrade is also considered as solvent under column 9 only. It will per se not to make it Superior Kerosene Oil. Hence, in the respectful submission of appellant, distillation range cannot be considered as kind of differentiating factor between solvent and Superior Kerosene Oil.

2.3 It is the submission that without testing the samples with references to i) Acidity ii) burning quality iii) colour iv) Copper strip corrosion and v) Sulphur content and by citing only, distillation, the criteria of reasonable doubt and probability laid down by the Hon'ble High Court of Gujarat in the case of Rajkamal Industrial Pvt. Ltd (Supra) is not satisfied. He also referred to a book titled "Significance of Tests for Pertroleum Products", seventh edition by Salvatore J.Rand, in chapter 7 dealing with Burner, Heating and Lighting Fuels.

2.4 He submits that the parameters prescribed for kerosene (not for solvent) in the given fact kerosene is used as illuminant and fuel. He submits that all the parameters have not been tested and the parameters that are tested do not satisfy the criteria. The impugned order passed by Learned Commissioner (Appeals) is liable to be quashed and set aside. He also submits that due to illegal absolute confiscation of the goods in question, the appellant is suffering heavy detention and demurrage charges which may be ordered to be waived. In support he placed reliance on the following judgments :-

- Shri. Jethanand Rohra and M/s. Jaymco Polymers Pvt. Ltd vide Final Order No.A/85436-85437/2022 dated 09.05.2022
- Swarna Oils Services vs. Commissioner of Customs , Mundra – 2020-TIOL-970-CESTAT-AHM

3. Per Contra, Shri Vinod Lukose appearing on behalf of the Revenue reiterates the finding of the impugned order. He submits that as per the test report the chemical examiner has given a clear report that the goods imported by the appellant are meeting with the specification of Kerosene. He submits that the appellant made submission is that all the parameters of kerosene have not been tested. The vital parameters have been tested and it was found that the product in question is Kerosene. He placed heavy reliance on the decision of Hon'ble High Court of Gujarat in the case of Rajkamal Industrial Pvt Ltd wherein the Hon'ble High court of Gujarat Held that even though all the parameter are not tested and only on the basis of 14 parameters it was held in favour of the Revenue therefore applying the ratio of this High court judgment the appeal filed by the appellant is not sustainable. Hence, same is liable to be dismissed.

4. We have carefully considered the submission made by both sides and perused the records. We find that the goods imported by the appellant have been absolutely confiscated on the ground that the same is Superior Kerosene Oil and not Low Aromatic White Spirit as declared by the appellant. The Superior Kerosene Oil is a restricted item therefore the same was absolute confiscated. In this regard the department has conducted the chemical test of the product for which the representative sample was drawn and sent to the chemical examiner, Custom House Laboratory, Kandla. The test memo whereby the sample was sent is scanned below:-

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उप आयुक्त कार्यालय सीमा शुल्क 'सीमा शुल्क सदन' पीपावाव
OFFICE OF THE DEPUTY COMMISSIONER OF CUSTOMS, 'CUSTOM HOUSE', PIPAVAV
T. No.: 02794 302400; FAX: 02794 286028; e-mail: cus-pipavav@nic.in

By Hand Delivery / Regd. Post A.D.

TEST MEMO NO.: IMP/ 135 /18-19 DATED: 08/10/2018

प्रेषित
रसायन परीक्षक
सीमा शुल्क प्रयोगशाला
कांडला – 370210
महोदय

Customs - House
Pipavav Port
INWARD No.:
INWARD Dt.:

विषय: Forwarding of samples for chemical examination – m/r.

Kindly find enclosed herewith representative sample drawn in respect of import consignment for chemical examination. It is requested to expedite the submission of test result as early as possible. Details of which are as under;

(1)	Particulars of Import			
	(i)	Name of the Importer		M/S.OIL ENERGY, KACHCHH
	(ii)	Name of CHA		M/S. CHINUBHAI KALIDASS & BROS.
	(iii)	Name of Supplier		ELEXON TRADE LINKS
	(iv)	Bill of Entry No. & Date		7736631 DT.22.08.2018 (SUDU1906149)
(2)	Particulars of Goods			
	(i)	Description of Goods (represented by sample as given by Importer)		LOW AROMATIC WHITE SPIRIT
	(ii)	Test Query	(a)	Whether sample conform the description of goods as above or otherwise?
			(b)	
			(c)	
(3)	Package no., marks & nos. from which sample drawn			
(4)	List of Literatures as enclosure to Test Memo			
(5)	Date of drawl and dispatch of sample with Test Memo			

भवदीय
8-10-2018
अधीक्षक सीमा शुल्क पीपावाव

Representative sample drawn & sealed in presence of representative of CHA/Importer and customs. (PAN)

8/10/18
निरीक्षक सीमा शुल्क पीपावाव

सी।एच।ए। व आयातक के प्रतिनिधि के नाम व हस्ताक्षर

P.1.
P.1
25.10.18

P.2
25/10/2018

From the above memo it can be seen that the query for testing of the product was made as " Whether sample confirm the description of goods as above or otherwise?" from this test query the department wanted to confirm whether the product imported by the appellant is Low Aromatic White Spirit or otherwise. However against the said test memo the following report was given by the chemical examiner.

नि.सी.शु.प्र.सं.आयात। 2960 19 OCT 2018

प्रा. क्र. 7736631/22-8-18

Report:-

The sample is in the form of colourless liquid
It is composed of mixture of mineral hydrocarbons
having following constants
IBP = 145°c FBP = 252°c
Density at 15°c = 0.7859 gm/ml
Distill at 210 degree = 72 %
flash point = 42°c
Smok point = 23 mm
The above reported parameters meets the requirement of kerosene as per IS 1459-2016.
Sealed remnant sample returned herewith.

15/10/18

16/10/18
V. P. BAHUGUNA
वी. पी. बहुगुणा
CHEMICAL EXAMINER GRADE-II
रसायन परीक्षक ग्रेड-II
CUSTOM HOUSE LABORATORY, KANDLA (GUJARAT)
कस्टम हाउस लैबोरेटरी कांडला (गुजरात)

P.1 25.10.18 P.2 25/10/2018

The chemical examiner instead of answering the query that whether sample confirmed the description of goods as Low Aromatic White Spirit. The chemical examiner reported that parameter meets the requirement of Kerosene as per IS- 1459:2016. From the above we find that there may be a possibility that on the basis of the parameters tested by the chemical examiner the same also match with the parameter of the product imported by the appellant. Therefore, it was important on the part of the chemical examiner to first check as per the query raised by the custom that whether the sample conformed to the description of the goods as Low Aromatic White Spirit or not. Further as per the department's claim that the Superior Kerosene oil is specified under BIS 1459:1974, the said Specification is scanned below:

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IS : 1459 - 1974

2.2 The material shall also comply with the requirements given in Table 1, when tested according to the appropriate methods prescribed under 'P' series of IS : 1448*, reference to which is given in col 4 of the table.

TABLE 1 REQUIREMENTS FOR KEROSINE

Sl. No.	Characteristic	Requirement	Method of Test, Ref to 'P' of IS : 1448*
(1)	(2)	(3)	(4)
i)	Acidity, inorganic	Nil	P : 2
ii)	Burning quality:		P : 5
	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 50°C	Not worse than No. 1	P : 15
v)	Distillation:		P : 18
	a) Percent recovered below 200°C, *Min*	20	
	b) Final boiling point, °C, *Max*	300	
vi)	Flash point (Abel), °C, *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*.

*Methods of test for petroleum and its products.

From the above specification it can be seen that to arrive at the conclusion that the product is Superior Kerosene Oil there are 8 Parameters which needs to be tested but as per the test report only 3 Parameters were tested. For this reason the test report of chemical examiner reporting the product as Kerosene cannot be taken as conclusive. Moreover, the appellant have rightly pointed out that the Adjudicating Authority has based this finding only on 1 parameter i.e. "Distillation" out of 8 Parameters for holding that goods are SKO. We find that Learned Commissioner (Appeals) finding only on the basis of 1 parameter i.e. distillation which cannot lead to the conclusion that the product in question is SKO . The counsel referred to the book titled "Significance of Tests for Petroleum Products", seventh edition by Salvatore J.Rand the relevant portion of the book is reproduced below:-

i. Colour is an indication of the overall purity of the product
ii. Burning quality test-by verifying Char value would indicate the chemical composition of the Kerosene. Similarly, the bloom on glass chimney test require that there should not be any appreciable formation of deposits or "bloom" on the lamp glass chimney during burning under normal operating conditions
iii. The copper strip corrosion test is carried out to ascertain the tendency to corrode copper and copper-alloy components present in the kerosene handling and burner systems
iv. Sulphur content have a bearing on air pollution

4.1 We find that the above parameter have been prescribed for the kerosene (not for solvent). It is undisputed that the kerosene is used as illuminant and fuel. To arrive at the conclusion that the goods are kerosene which is used for illuminant and fuel the above parameters have to be tested. We find that the decision of Mumbai Tribunal dated 09.05.2022 in the case of Shri. Jethanand Rohra and M/s. Jaymco Polymers Pvt. Ltd (Supra) supports the case of the appellant wherein on the issue of classification of imported goods as kerosene it was held as under:

> "18. Although the adjudicating authority have referred to characteristics- CHAR value, bloom on glass chimney, but have failed to show how the said characteristics, which governed the parameters, - burning quality has been satisfied. Further, Revenue have failed to appreciate that these characteristics determine not the quality but the burning quality of kerosene which is an important parameter for determination of kerosene. The test reports being the only evidence relied upon by Revenue in the instant case to allege mis-declaration/mis-classification, are wholly inconclusive and unreliable. It is further urged that the court below have erred in holding that the two

> characteristics viz. CHAR value and bloom on glass chimney are secondary in nature, which is contrary to the prescription under IS1459. These characteristics are of prime importance in determining - whether a sample of product is kerosene or not...
>
> ……
>
> 31. 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. Thus, Revenue has failed to demonstrate how the other two said parameters were also met."

In view of the above decision of the tribunal the classification claimed by the appellant appears to be correct. We find that the appellant also relied upon the decision of this tribunal in the case of Swarna Oil Services (Supra) wherein the appeal filed by the importer was allowed after noticing that no test was undertaken for 3 parameters that were required under IS standard to establish that imported goods were SKO. In this case as many as 6 test have not been carried out for the same commodity. Therefore, we find that the case of Swarna Oil Service (Supra) is directly applicable to the facts of the present case. As regards the heavy reliance made by the revenue on the judgment of Hon'ble High Court in the case or Rajkamal (Supra) we find that in the said judgment the Hon'ble High Court applies the principle of "reasonable doubt" and "preponderance of probability". In that case out of 21 parameter only 14 parameter were tested however in the present case the only parameter relied upon by the adjudicating authority is Distillation out of 2 (final boiling point and flash point). On the basis of this it will not lead to any "reasonable doubt" and "preponderance of probability" that goods under consideration are SKO. We are therefore of the view that without testing the samples with reference to i) Acidity ii) burning quality iii) colour iv) Copper strip corrosion and v) Sulphur content and by citing only, distillation, the criteria of reasonable doubt and probability laid down by the Hon'ble High Court of Gujarat in the case of Rajkamal Industrial Pvt. Ltd (Supra) is not satisfied.

4.2 As regard the submission of the appellant regarding wavier of detention and demurrage charges the tribunal in the case of Shri. Jethanand Rohra and M/s. Jaymco Polymers Pvt. Ltd held in para 41 as under:-

> "41. As the goods are lying under seizure and subsequent confiscation by the Customs Department for more than two years, for no fault of the appellant, grant of waiver of detention and demurrage charges is appropriate and direct that the proper certificate shall be issued by the

> concerned authority. We also direct that the goods in dispute be delivered to the appellants forthwith, within a period of two weeks from the date of receipt or service of this order."

4.3 We are of the view that the department must give effect of the above order for wavier of detention and demurrage charges. As per our above discussion and finding we are of the view that department could not establish that the goods in question is SKO therefore, the classification claimed by the appellant needs to be maintained.

5. Accordingly, impugned order is set aside and giving effect of this order the department shall vacate the absolute confiscation and penalty imposed is set aside. Appeal is allowed with the consequential relief in accordance with law.

(Pronounced in the open court on 10.08.2022)

RAMESH NAIR
MEMBER (JUDICAL)

RAJU
MEMBER (TECHNICAL)

Geeta