

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

REGIONAL BENCH- COURT NO.3

**Excise Appeal No.10553 of 2013**

Excise Misc. Application (ORS) No. 10377 of 2022

(Arising out of OIO-13-COMMR-SURAT-II-2013 dated 30/01/2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

**Shah Petroleums**

**.....Appellant**

401, Harmain Garden Apartment Opp Kakadia Complex,  
Above Central Bank Of India, Ghod Dod Road,  
Surat, Gujarat

*VERSUS*

**C.C.E. & S.T.-Surat-ii**

**.....Respondent**

New C.Ex Building...Opp. Gandhi Baug,  
Chowk Bazar,  
Surat, Gujarat-395001

**With**

**Excise Appeal No.10554 of 2013**

Excise Misc. Application (ORS) No. 10378 of 2022

(Arising out of OIO-13-COMMR-SURAT-II-2013 dated 30/01/2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

**Snehal Arvindbhai Shah**

**.....Appellant**

Partner -Cum-Authorised Signatory, M/S.Shah Petroleums 401,  
Harmain Garden Apartment, Opp Kakadia Complex,  
Above Central Bank Of India, Ghod Dod Road,  
Surat, Gujarat

*VERSUS*

**C.C.E. & S.T.-Surat-ii**

**.....Respondent**

New C.Ex Building...Opp. Gandhi Baug,  
Chowk Bazar,  
Surat, Gujarat-395001

**APPEARANCE:**

Shri Willingdon Christian, Advocate for the Appellant  
Shri Tara Prakash, Assistant Commissioner (AR) for the Respondent

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

**Final Order No. A/ 10192-10193 /2023**

DATE OF HEARING: 04.01.2023  
DATE OF DECISION: 01.02.2023

**RAMESH NAIR**

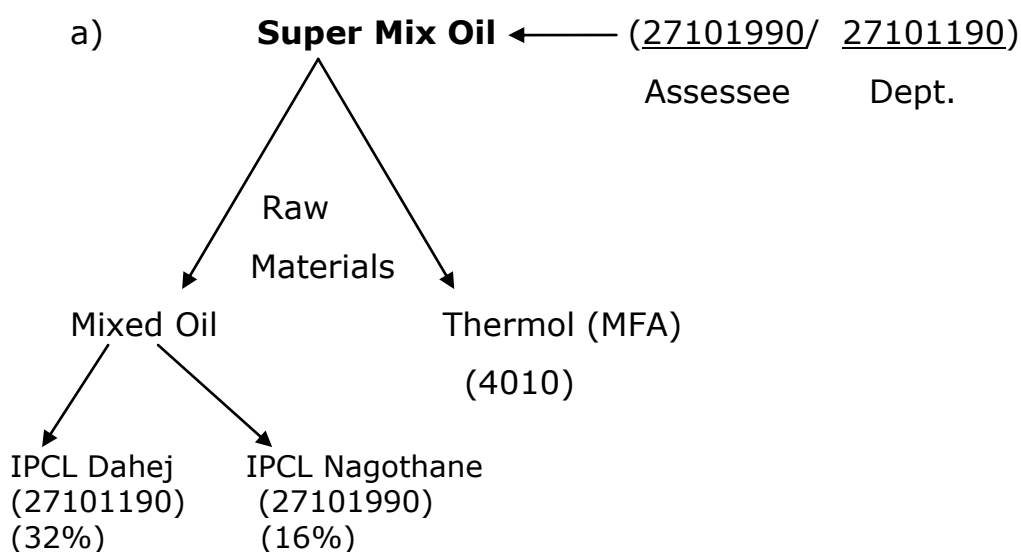
The issues involved in the present case are as under:-

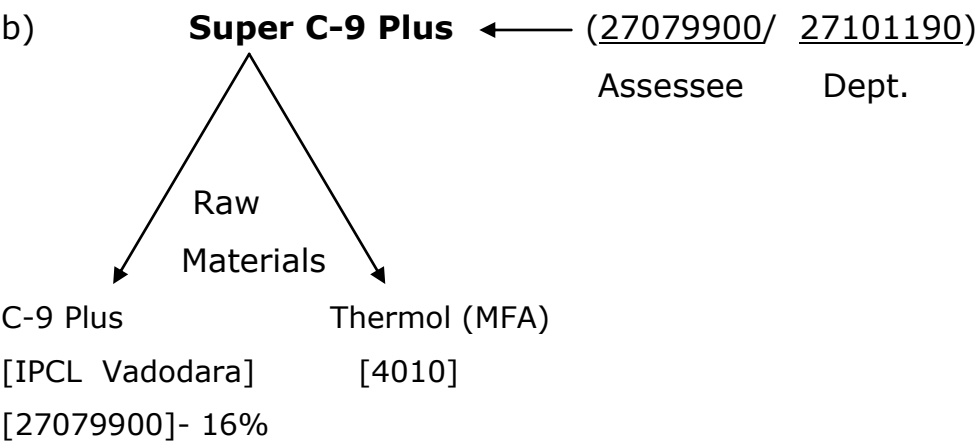
- a) Whether Super Mix Oil (first final product) is classifiable under CET 27101990 as claimed by the appellant or under CET 27101190 as claimed by the department.
- b) Whether Super C-9 Plus (second final product) is classifiable under CET 27079900 as claimed by the appellant or under CET 27101190 as claimed by the department.
- c) Whether the SCN dated 15.11.2011 covering the period from December, 2006 to March, 2008 is barred by limitation.
- d) Whether the appellant is liable to pay penalty equal to the duty amount (Rs.1,49,05,855/-) under Rule 25 read with Section 11AC.
- e) Whether the partner Shri Snehal Shah is liable to penalty of Rs.20,00,000/- under Rule 26 of the Central Excise Rules, 2002.

02. Shri Willingdon Christian, learned counsel appearing on behalf of the appellant made the following submissions:-

- i) The relevant period is from December, 2006 to March, 2008.
- ii) For the first final product, i.e. Super Mix Oil (CET 27101990 Vs. 27101190), the Appellant had procured mixed oil from IPCL, Dahej and IPCL, Nagothane respectively. While IPCL, Dahej classified the mixed oil under CET 27101190 charging excise duty @32%, IPCL, Nagothane classified the mixed oil under CET 27101990 charging excise duty @ 16%.
- iii) The Appellant added multifunctional additives, i.e. Thermol and cleared the same on payment of duty @ 16% under CET 27101990 after availing cenvat credit.

- iv) The Department's contention is that there is no change in the basic characteristics and structure of the raw materials by adding Thermol and that the raw material characteristics has remained the same in the finished product. Therefore, the final product Super Mix Oil will also merit classification under CET 27101190 (whereunder IPCL Dahej classified the raw material, mixed oil) attracting Central Excise Duty @ 32% and not 16%.
- v) For the second product, i.e. Super C-9 Plus, also the Department's contention is that by mere addition of Thermol (MFA), there is no change in the basic characteristics and structure of the raw material and, therefore, the said final product will be classifiable under CET 27101190 attracting Central Excise duty @ 32% and not under CET 27079900 under which the Appellant has cleared the said final product charging Central Excise Duty @ 16% after availing cenvat credit.
- vi) For better understanding, we give below graphical explanation about the aforesaid facts :-





c) Tariff Descriptions :

- 2707 - Oils and other products of the distillation of high temperature coal tar similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents
- 2707 10 00 - Benzol (benzene)
- 2702 20 00 - Toluol (toluene)
- 2707 30 00 - Xylol (xylenes)
- 2707 40 00 - Naphthelene
- 2707 50 00 - Other aromatic hydrocarbon mixtures of which 65% or more by volume (including losses) distils at 250°C by the ASTM D 86 method
- Other
- 2707 91 00 - Creosote oils
- 2707 99 00 - Other**

**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 -- Light oils and preparations :
- Motor Spirit:

.....

.....

**2710 11 90 -- Other**

2710 19 -- Other

**2710 19 90 -- Other**

-Waste Oil :

2710 91 00 -- Containing polychlorinated biphenyls (PCBs), polychlorinated terphenyls (PCTs) or polybrominated biphenyls (PBBs)

2710 99 00 -- Other

2.1 The Appellant had also at length pleaded that the Show Cause Notice dated 15.11.2011 is patently time barred because they had put forth all the facts about manufacturing process, raw materials, etc. and that mere misclassification as alleged by the Department does not amount to willful suppression of facts, etc. for justifying invocation of longer limitation period.

2.2 Rejecting the Appellant's submission both on merits and limitation, the learned Commissioner has passed the impugned Order confirming the duty demand with interest and penalties.

**PROPOSITIONS :**

**1. If no "manufacture" then no duty payable at all :-**

There is a categorical finding of fact in the impugned Order (as also in the Show Cause Notice) that the basic characteristics and structure of the raw material have not changed by adding Thermol as an additive and that the raw materials characteristics remain the same in the finished products. This finding of fact has remained unassailed, as the Department has not filed any Appeal against the impugned Order. When that is so, the entire demand becomes unsustainable in law.

**2. Department's classification claim - not correct :-**

The proposed re-classification of the two final products under sub-heading 27101190 cannot be sustained, because it applies to "light oils and preparations" vide sub-heading 271011. According to Chapter Notes-4 of Chapter 27, for the purposes of sub-heading 271011, "light oils and

preparations" are those of which 90% or more by volume (including losses) distil at 210°C (ASTM D 86 method). The Department has not carried out any test under ASTM D 86 and, therefore, the proposed classification under CET 27101190 cannot be sustained.

### **3. SCN is wholly time-barred :-**

The Show Cause Notice dated 15.11.2011 covering the period from December, 2006 to March, 2008 is patently time barred, because mere tantamount the alleged mis-classification cannot to wilful suppression of facts, etc. The Department was kept fully aware about all the relevant facts relating to manufacturing process, raw materials, invoices of raw materials and finished goods, respectively, etc. vide the following correspondence :-

- a) Department's letter dated 1.2.2007 requesting to supply details of manufacturing process, sample of inputs invoices, etc.
- b) The Appellant's reply dated 14.2.2007 providing the details of manufacturing process, invoices of inputs, invoice of finished products, etc.
- c) The Appellant's letter dated 17.12.2006 giving details of raw materials, multi-functional additive, etc.
- d) The Appellant's letter dated 16.7.2007 informing the Department about starting of producing the second final product, i.e. Super C-9 Plus and giving details of raw materials and final product.
- e) The Appellant's letter dated 25.3.2009 being reply to the Audit query vide Department's letter dated 5.3.2009 giving details of raw materials and their classification, rates of duty, manufacturing process, etc.

f) The Appellant's letter dated 6.1.2009 informing the Department for part payment of differential duty through Cenvat Credit Register.

g) In support of the submissions on limitation, the Appellant also rely upon the following judgments :-

- 1994 (4) RLT 526 (SC) Tamil Nadu Housing Board Vs. CCE
- 1995 (78) ELT 401 (SC) Pushpam Pharmaceuticals Company Vs. CCE
- 1995 (6) RLT 333 (SC) Cosmic Dye Chemical Vs. CCE
- 1989 (40) ELT 276 (SC) CCE Vs. Chemphar Drugs & Liniments

#### **4. No penalty is leviable :-**

For the aforesaid reasons, penalty imposed on the Company under Rule 25 read with Section 11AC is also not sustainable.

#### **5. No separate penalty on Partner is leviable :-**

For the aforesaid reasons and also for the reason that separate penalty cannot be imposed on the Partner as per the following judgments, the penalty of Rs.20,00,000/- imposed on the Partner, Shri Snehal Shah is also not sustainable.

- 2010 (258) ELT 204 (Guj.) CCE Vs. Jai Prakash Motwani
- 2010 (260) ELT 51 (Guj.) CCE Vs. Mahendra Kumar
- 2010 (259) ELT 179 (Guj.) Mohammed Farookh Mohammed Ghani
- 2014 (305) ELT 480 (Guj.) Pravin N. Shah Vs. CESTAT

03. Shri Tara Prakash, learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

04. On careful consideration of the submission made by both the sides and perusal of records, we find that the appellant have raised the very vital issue that it is an admitted fact by the department that by mixing of thermol and the input namely Mixed oil does not alter the nature of the product. If this be so, then how the activity amounts to manufacture however, the adjudicating authority without considering this vital issue jumped to the conclusion about the classification of the resultant goods. The classification will come into picture only once it is established that there is manufacturing however, in the present case the department itself is of contention that by entire process of mixing of thermol and mixed oil and any other product and thermol and C-9 Plus, there is no change in the nature of the product therefore, this aspect needs to be considered elaborately by the adjudicating authority. It is also not clear that the department has applied the classification of 27101190 on the basis that the input falls under the same CTH and due to no change in the nature of the product, the classification will remain same.

05. However, it is also a fact on record that input received by the appellant from IPCL Nagothane the classification was made under 27101990 then in such case how the resultant product attributed to the oil of IPCL Nagothane will be classified at par with the product arising out of oil of IPCL Dahej. This issue also needs to be reconsidered. The learned counsel vehemently argued on the limitation as the period involved is December, 2006 to March, 2008 whereas, the show cause notice was issued on 15.11.2011 i.e. much after the normal period of one year. It is the submission of learned counsel that there was chain of correspondence mentioned above in his submission therefore, there is no suppression of fact. This issue also to be reconsidered

by the adjudicating authority therefore, the appeal of M/s. Shah Petroleums needs to be remanded.

06. As regard the appeal of partner of M/s. Shah Petroleums, Shri Snehal Shah, we find that once a case was made out against partnership firm, no separate penalty can be imposed on the partner of such firm. This issue has been settled by the Hon'ble High Court of Gujarat in various judgments as cited by the learned counsel. Following the Hon'ble jurisdictional High Court's judgment, we are of the view that penalty imposed on partner Shri Snehal A. Shah is not sustainable accordingly, we set aside the impugned order and allow the appeal of partnership firm M/s. Shah Petroleums by way of remand to the adjudicating authority. The appeal of Shri Snehal Shah is allowed.

07. As regard the miscellaneous application filed by M/s. Shah Petroleums which is for change of address, the address of the appellant firm stand changed as under:-

"M/s. Shah Petroleums- A/101, Omraj Apartment, Opp. V R Mall, Dummas Road, Vesu, Surat- 395007".

08. The miscellaneous application is allowed in the above terms.

(Pronounced in the open court on 01.02.2023 )

**(RAMESH NAIR)**  
**MEMBER (JUDICIAL)**

**(RAJU)**  
**MEMBER (TECHNICAL)**

Mehul