

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA**

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 76079 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS(Port)/KS/806/2023 dated 16.10.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. Krishna Technochem Private Limited Vill. & P.O.: Kandua Sulati, PS.: Sankrail, Rani Hati, Howrah, West Bengal – 711 302	: Appellant /Importer
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VERSUS

Commissioner of Customs (Port) Custom House, 15/1, Strand Road, Kolkata – 700 001	: Respondent
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AND

Customs Appeal No. 75923 of 2024

(Arising out of Order-in-Appeal No. KOL/CUS(Port)/KS/806/2023 dated 16.10.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Commissioner of Customs (Port) Custom House, 15/1, Strand Road, Kolkata – 700 001	: Appellant
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VERSUS

M/s. Krishna Technochem Private Limited Vill. & P.O.: Kandua Sulati, PS.: Sankrail, Rani Hati, Howrah, West Bengal – 711 302	: Respondent /Importer
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APPEARANCE:

Shri Rajesh Chhibber, Advocate for the Assessee/Importer

Shri Subrata Debnath, Authorized Representative for the Revenue

CORAM:

**HON’BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON’BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)**

FINAL ORDER NOs. 76749-76750/ 2024

DATE OF HEARING: 26.07.2024

DATE OF DECISION: 29.08.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

There are two appeals filed by M/s. Krishna Technochem Private Ltd. (the 'Appellant-importer'). Customs Appeal No. 76079 of 2023 has been filed by the Appellant-importer against the Order-in-Appeal No. KOL/CUS(Port)/KS/806/2023 dated 16.10.2023 passed by the Commissioner of Customs (Appeals), Kolkata, against imposition of Redemption Fine for allowing clearance of the impugned goods for home consumption. The Appellant-importer also prayed for setting aside the penalties imposed. Customs Appeal No. 75923 of 2024 has been filed by the Revenue against the same Order-in-Appeal. Revenue appeal has been filed against allowing clearance of the impugned goods for home consumption as against re-export as ordered by the adjudicating authority. As the issue involved in both the appeals arose against the same Order-in-Appeal, they were taken up together for disposal by a common order.

2. The facts of the case are that the Directorate of Revenue Intelligence (DRI), Kolkata Zonal Unit vide letter dated 28.09.2020 had informed the Principal Commissioner of Customs (Port), Custom House, Kolkata that Intelligence gathered by them indicates that "Mineral Hydrocarbon Oil" (MHO) under classification 2710 1990 imported by the Appellant-importer has been mis-declared and hence the consignments imported by the Appellant-importer are required to be examined 100% in the presence of DRI officers.

2.1. The Appellant-importer had imported consignments of Mineral Hydrocarbon Oil (Other than

transformer oil) from Bahrain and filed a Bill of Entry 8789922 dated 12.09.2020 classifying the impugned goods under Tariff Item No. 2710 1990 for clearance for home consumption. The goods imported were examined under Panchnama, on 100% basis by the Shed Officers posted in CFS – Century Ply JJP, Kolkata in the presence of officer of SIB (Special Investigation Branch), DRI officers, and officer of CRCL (Central Revenues Control Laboratory), Kolkata, the importer and their authorised Customs Broker.

2.2. Samples of the imported goods were drawn and Test Memos against all the samples were generated and sent to CRCL, Kolkata, to ascertain the nature and exact description of the goods. The CRCL, Custom House, Kolkata vide its Test Reports dated 20/25/26/27.11.2020 reported that the goods are in the form of 'Mineral Hydrocarbon Oil (more than 70% by weight). The findings in each of the Test Reports are summarized as under:

- (a) Each of the samples does not meet the criteria of light oil and its preparation mentioned in the Sub Heading Note 4 of Chapter 27
- (b) Each of the samples does not meet the criteria of Special Boiling Point Spirit,
- (c) Each of the samples does not meet the criteria of 'Petroleum Hydrocarbon Solvent' as per IS 1745:2018.
- (d) Each of the samples under reference, is Petroleum Class A as per the Petroleum Act, 1934.

2.3. Scrutiny of the Test Reports reveal that CRCL, Kolkata has not provided the actual chemical name of the imported goods. The Test Reports only indicated that the imported goods belonged to the category Petroleum-A. Accordingly, the Chemical Examiner, CRCL, Kolkata was requested, vide letter dated 17.02.2021, to clarify as to whether the goods can be considered as those meeting the criteria of the description of the goods that can be imported through State Trading Enterprises.

2.4. CRCL, Kolkata, vide their letter dated 19.02.2021, clarified that

(i) The sample u/r does not meet the criteria of the goods as Petroleum Hydrocarbon Solvents (IS1745:1978)/ Motor Gasoline/ E20 Fuel/ M15 Fuel/ SKO/ Kerosene & intermediates/ ATF/ Aviation Gasoline/ Automotive Diesel Oil/ Diesel Fuel Blend (B6-B20)/ HF HSD/ LDO/ Waste Oil as laid down in Indian Standard. There is no available literature / specifications for description Gas Oil and Vacuum Gas Oil.

(ii) The description of the goods as "Mineral Hydrocarbon Oil" was already ascertained, if required, the samples may be sent to IOCL/HPCL/BPCL/IIP Dehradun for specific name as desired and further stated that executive decision may be taken at the end of the Commissionerate.

2.5. As advised by CRCL, Kolkata, samples were sent to IOCL, Haldia vide letter dated 08.03.2021, with a request to conduct detailed analysis and to provide specific name of the petroleum product.

2.6. Anupam Aash, Quality Control Manager, IOCL, Haldia Refinery vide his Test Report dated 16.03.2021 reported as follows:

Colour	Density @15Kg/M3	Fl. Pt. (°C)	Viscosity @400c	Class of Petroleum Product	IBP (°C)	10% (°C)	50% (°C)	90% (°C)	FBP (°C)	Aromatics (%w)	Remarks w.r.t. Refinery Products
ASTM-D-156/1500	ASTM-D-1298	IS:1448 (P-15)	ASTM-D-445		ASTM-D-86	ASTM-D-86	ASTM-D-86	ASTM-D-86	ASTM-D-86	IP-391	
ASTM 2	765.5	<0	No suitable apparatus	A	51	95	148	204	248	0.64	Naphtha mixed with Kerosene

2.7. The IOCL has reported that the imported refinery product as 'Naphtha mixed with Kerosene', but has not provided the any specific name. Hence, it was felt that the test report of IOCL was of no help in reaching a conclusion regarding the classification of the impugned goods.

2.8. The copies of the Test Reports of IOCL, Haldia and CRCL, Kolkata were forwarded to the Joint Director, CRCL, New Delhi vide letters dated 17.03.2021 and 19.03 2021, with a request to provide their opinion/ clarification on the said reports for the purpose of ascertaining appropriate classification vis-a-vis Import Policy. Further, they were also requested to confirm whether the goods fall under the specified descriptions which are to be imported through STE as per latest ITC (HS) Import Policy of DGFT (Directorate General of Foreign Trade).

2.9. CRCL, New Delhi vide letter dated 31.03.2021 has opined that as per tested parameters, the sample is 'light oil preparation'.

2.10. 'Light Oil Preparation' except Naphtha are allowed to be imported only through STE or person authorized by DGFT. Accordingly, vide letter dated 23.04.2021, the Appellant-importer was asked to submit the requisite documents. The Appellant-importer submitted that they have imported 'Mineral Hydro Carbon Oil' falling under Petroleum Class-A product, for which no approval from Chief Controller is required. Regarding the requirement of PESO license, they submitted that they will apply for amendment in their PESO license.

2.11. Since CRCL, Delhi has not tested the samples and gave their opinion on the basis of the test report of IOCL, Haldia, the Appellant-importer requested for drawal of samples again and get it tested at any other lab at the choice of the department. The Joint Commissioner of Customs allowed re-testing of the samples available with the department in terms of Circular No.30/2017-Cus dated 18.07.2017. Accordingly, samples available with the department was sent to CRCL, New Delhi vide letter dated 02.08.2021, for detailed analysis. The report of CRCL, New Delhi received vide letter dated 24.11.2021, reported that the sample is mainly 'Mineral Hydro Carbon Oil, having mineral Hydro carbon content more than 70% by weight, having the following characteristics:

S. No.	Characteristics	Test Result CLR-103	Test Result CLR-104
1	Acidity	Nil	Nil
2	Flash Point (abel) in °C	Less than 25°C	Less than 25°C
3	Ash (% by wt.)	Nil	Nil
4	Density at 15 °C (kg/ M3)	773.1	782.7
5	API gravity	51.44	49.19
6	Water content	Nil	Nil
7	Total Sulphur content, mg/ kg	130	153.78
8	Distillation Initial boiling point (°C) Final Boiling Point (°C) % recovery at 210°C	75.0 254.0 More than 90%	109.0 259.0 More than 90%
9	Colour (Saybolt)	-17	-17
10	%Aromatics	29.0	34.7
11	%Olefins	2.09	2.30
12	%Saturates	68.9	62.90

2.12. Light oils and Preparations' is defined at Sub-Heading Note 4 of Chapter 27 of the Customs Tariff Act, 1975 which is reproduced below:

4. For the purposes of sub-heading 2710 12, "light oils and preparations" are those of which 90% or more by volume (including losses) distil at 210 °C according to the ISO 3405 method (equivalent to the ASTM D 86 method).

2.13. From the plain reading of the above definition, it is apparent that the petroleum products which get distilled by 90% or more by volume at 210°C are '**light oils and preparations**' for the purpose of Chapter 27 sub-heading 2710 12. In the instant case, the retest report dated 24.11.2021 revealed that the distillation recovery at 210°C is more than 90%. IOCL's report revealed that 90% of the goods were distilled at 204°C. On the basis of these test reports, the departmental officers opined that at 210°C, more than 90% of the goods were distilled. The CRCL, Kolkata has not provided the distillation detail at 210°C. However, CRCL, New Delhi has reported that the goods are light oils and preparations'. As per the test report of IOCL, Haldia and CRCL, New Delhi, the Department held the view that the goods imported by the Appellant-importer can be categorized as 'light oils and preparations' in terms of Sub-Heading Note 4 of Chapter 27 of the Customs Tariff Act, 1975. Accordingly, the department concluded that the goods imported by the Appellant-importer are appropriately classifiable under the Chapter heading 2710 1290.

2.14. The importer has classified the goods under Tariff Item No.27101990 which are freely importable, whereas 'light oils and preparations' are classifiable under the chapter heading 2710 12 and except Naphtha, all other light oils and preparations are allowed to be imported only by STE or persons authorised by DGFT. As the importer is neither STE nor authorised by DGFT, the department held the view that the Appellant-importer has violated the provisions of Import Policy and various provisions of Petroleum Act, 1934.

2.15. Accordingly, a Show Cause Notice dated 06.01.2022 was issued to the Appellant-importer, which was adjudicated by the adjudicating authority vide the impugned order dated 10.03.2023, wherein the Ld. adjudicating authority has passed the following order:

"(i) I reject the declared description of the goods imported vide Bill of Entry No. 8789922 dated 12.09.2020 as "Mineral Hydrocarbon Oil (Other than transformer oil)" and re-determine the same as "Mineral Hydrocarbon Oil

(Light oils and preparations)"

(ii) I reject the declared classification of the goods imported vide Bill of Entry No. 8789922 dated 12.09.2020 under Customs Tariff Item 2710 1990 and re-determine the same under Customs Tariff Item 2710 1290, as the goods have been found to be "Mineral Hydrocarbon Oil (Light oils and preparations)", which are appropriately classifiable under Customs Tariff Item 2710 1290.

(iii) I order for confiscation of subject goods imported vide Bill of Entry No. 8789922 dated 12.09.2020 valued at Rs.70,94,571/-(Rs. Seventy Lakh Ninety Four Thousand Five Hundred and Seventy One only) under Sections 111(d) & 111(m) of the Customs Act, 1962. However, I allow the importer to re- export the subject goods imported vide Bill of Entry No. 8789922 dated 12.09.2020 upon payment of Redemption Fine of Rs. 10,00,000/- (Rs. Ten Lakh only) under Section 125 of the ibid, subject to the importer discharging other statutory obligations. Further, in terms of Section 125(3) ibid, if such option is not exercised within a period of One Twenty (120) days from the date of this order, the goods shall stand confiscated absolutely.

(iii) I impose Penalty of Rs.7,00,000/- (Rs. Seven Lakh only) under Section 112(a)(i) of the Customs Act, 1962 on M/s Krishna Technochem Pvt. Ltd. (IEC- 0203011601) for their acts of omission and commission rendering the goods liable to confiscation under Sections 111(d) & 111(m) ibid."

2.16. Aggrieved against the impugned order, the Appellant-importer has filed appeals before the Commissioner (Appeals). The appellate authority agreed with the contention of Appellant-importer on classification of goods under heading 27101990, but maintained confiscation and penalty for import of goods for violation of Petroleum Act, 2002. However, he allowed the goods for clearance to home consumption on payment of fine and penalty as imposed by the original authority. Against this order of the Commissioner (Appeals), both the Appellant-importer and Revenue filed appeals before this Tribunal.

3. The Appellant-importer submits that seizure of the impugned goods was not legal as the report of CRCL, Kolkata categorically ruled that the imported goods are not 'light oil and preparations'. IOCL Haldia vide its report dated 08.03.2021, apart from other parameters specified the recovery of more than 90% at 204 degree. The department sent the two reports of CRCL, Kolkata and IOCL, Haldia to Delhi CRCL, who declared that the goods are 'light oil and preparations' without even testing the same. The Appellant-importer submits that they requested for re-drawl of samples, as the testing was done after 5 months but the department again sent duplicate/triplicate samples and the CRCL Delhi vide its report dated 24.11.2021 i.e. after more than 12 months from the drawal of the samples, opined that the goods are light oil and preparations. The Appellant-importer submits that the reports of IOCL and CRCL, New Delhi differ on many parameters. Regarding evaporation, the IOCL test indicates evaporation of 90% at 204 degree whereas the CRCL Delhi report shows the evaporation of 90% at 210 degree; in both the reports, there is no mention of any method of testing adopted by them. The CRCL tested the IBP ranging from 58 to 76 and FBP from 223 to 236 whereas CRCL Delhi tested the IBP as 75 and 109 and FBP as 254 and 259 in two samples (duplicate). Thus, it is contended that the variation was due to such a large gap of time between the date of drawl of sample and testing and that too only of two samples; there was no mention about rest of the samples.

3.1. The Appellant-importer has pointed out that the appellate authority has held that the report of CRCL Delhi suffered from inherent contradiction as neither the CRCL Kolkata nor IOCL classified the goods as light oil but on their report, the CRCL Delhi declared the goods to be light oil. He categorically observed that though the report of CRCL Kolkata and IOCL were having overlapping references, but there was much variance in the report of CRCL Delhi; he also observed that the very fact of time gap was sufficient to not to follow the report of CRCL Delhi as the goods in question were volatile in nature. Accordingly, the Appellant-importer prayed for adopting the CRCL, Kolkata reports and classify the goods as declared by the Appellant-importer under the Chapter Heading 27101990.

3.2. Regarding the requirement of PESO license, the Appellant-importer submits that they were not aware that they cannot import materials in drums and if they import the same in drums of capacity less than 1000 litres, then the same cannot be considered as 'bulk'. The Appellant-importer submits that they were having PESO license to import Petroleum A, B & C in bulk but in the instant case, the goods were imported in drums having capacity of 220 Litres; however, as per sub rule 5 of Rule 5 of Petroleum Rules, the capacity of any container, other than those approved by the Chief Controller for specific purpose, shall not exceed 300 litres and it is an admitted fact that the drums in dispute were of capacity of 220 Litres and hence no approval was required; In any case it was contention of Appellant-importer that they were having license to import and store the goods in their own name and they were not

aware of the so called restriction of import in drums in less than 100 Litres and they applied for amendment in PESO license . It is stated by the Appellant-importer that the concerned authority vide letter dated 14.06.2022 has granted license to import in goods 'other than bulk' in class A Petroleum; the goods are still lying seized and after 14.06.2022 the Appellant-importer is allowed to import in non-bulk quantity. Hence, it is their contention that the confiscation and penalty on this count does not survive. Even otherwise, the Appellant-importer submits, confiscation under 111(d) could be made only for prohibited goods. Under Rule 3 of Petroleum Rule 2002, there were conditions for import in a particular manner and as such there was no prohibition; under section 3 of the Foreign Trade (Development and Regulation) Rules, the provisions are to be made for prohibiting, restricting or otherwise regulating. It is contended that since the original authority allowed for re-export and appellate authority allowed for home consumption, the goods were not prohibited goods; once the goods are not considered as prohibited goods, the same could not be confiscated under 111(d) and so penalty was also not imposable. Further, the Appellant-importer had PESO license to import Petroleum Class A and for storage of the goods and PESO doesn't approve all the drums. The Appellant-importer also submits that even if the stand of department is accepted, no differential duty has been demanded; the violation could be procedural in nature not depriving department of its revenue; it is submitted that it is a settled law that

the substantial benefit cannot be denied for procedural violations.

3.3. In view of the above submissions, the Appellant-importer prayed for allowing clearance of the goods without payment of redemption fine or penalty.

4. The Ld. Authorized Representative for the Revenue submits that the classification of the goods under CTH 27101290 has been arrived by the adjudicating authority as per the Test Reports received from CRCL New Delhi. He submits that in the Test Report, CRCL, New Delhi has categorically stated that the impugned goods are 'light oil and preparations' and classifiable under the CTH 27101290, which can be imported only by STE or persons authorised by DGFT; as the importer is neither STE nor authorised by DGFT, they violated the provisions of Import Policy; They have also violated various provisions of Petroleum Act, 2002. Accordingly, the adjudicating authority has ordered re-export of the goods on payment of redemption fine and penalty. It is his contention that the Appellate Authority has wrongly held that the said goods cannot be classified under the CTH 27101290 and allowed clearance of the goods for home consumption. Thus, he argued that the impugned order passed by the Appellate Authority is liable to be set aside. Accordingly, he prayed for allowing Revenue's appeal.

5. Heard both sides and perused the appeal records.

6. From the facts of the case narrated above, we observe that the Appellant-importer is a regular importer of MHO in metallic drums . In the instant case, they filed bill of entry dated 12.09.2020 declaring the same under heading 27101990 along with supporting documents. DRI, Kolkata informed the Pr. Commissioner of Customs about mis-declaration of classification and the impugned goods were examined 100% . Seven samples were drawn and sent for testing to Kolkata CRCL to know whether the sample was light oil, its petroleum class and chemical name, to which it reported the goods to be MHO and Class A Petroleum but does not meet the criteria of light oil and its preparation. Subsequently, reports were received from IOCL and CRCL, New Delhi also.

6.1. We observe that on the basis of tests conducted at CRCL, Kolkata, IOCL and CRCL, New Delhi, the Id. adjudicating authority has considered the impugned goods as "Light oils and preparations" under Chapter Heading 2710 1290 and accordingly re-classified the goods under the above Chapter Heading. The Id. adjudicating authority has also ordered confiscation of the goods imported vide Bill of Entry 8789922 dated 12.09.2020. However, he allowed the importer to re-export the goods upon payment of redemption fine of Rs.10,00,000/-. He also imposed a penalty of Rs.7,00,000/- for the various offences committed.

6.2. On appeal, the Ld. Commissioner (Appeals) held that the imported goods are appropriately classifiable under Chapter Heading 2710 1990, as declared by the importer. He set aside the order passed by the Id. adjudicating authority allowing re-export of the

goods on payment of redemption fine. The Ld. Commissioner (Appeals) has allowed the imported goods to be cleared for home consumption. However, the penalty imposed under Section 112(a) of the Customs Act, 1962 for violation of the provisions of the Petroleum Act, 2002 has been upheld vide the impugned order. Aggrieved by the impugned order, the Appellant-importer has filed this appeal against the imposition of penalty. The Revenue is in appeal against the setting aside of the order of the Id. adjudicating authority for re-export and allowing the goods to be cleared for home consumption.

7. Thus, we observe that the issues to be decided in both the appeals together are:

- (1) Whether the goods imported are appropriately classifiable under Chapter Heading 2710 1990, as 'Other' as declared by the importer or under Chapter Heading 2710 1290 as "Light oils and preparations", as claimed by the Revenue;
- (2) Whether the impugned order is correct in setting aside the order of re-export and in allowing the goods to be cleared for home consumption.
- (3) Whether the Appellant-importer is liable for imposition of penalty for violation of the provisions of the Petroleum Act, 2002.

7.1. Issue No. (1) Whether the goods imported are appropriately classifiable under Chapter Heading 2710 1990 as "Other", as declared by the importer or under Chapter Heading 2710 1290 as "Light oils and preparations", as claimed by the Revenue:

With regard to classification of the imported goods, we observe that initially, samples were drawn and the goods were sent to CRCL, Kolkata for analysis. The test report received from CRCL, Kolkata categorically stated that the samples do not meet the criteria of light oil and its preparations. Subsequently, the report received from CRCL, Kolkata was sent to IOCL for their opinion. The report of IOCL also could not provide any specific name for the petroleum product imported by the importer so as to ascertain the proper classification of the goods. Subsequently, the test reports were sent to CRCL, New Delhi. Vide their Report dated 31.03.2021, CRCL, New Delhi have opined that the impugned goods meet the parameters of light oil and its preparations. However, the assessee have not accepted the aforesaid report of CRCL, New Delhi and asked for re-testing of the samples. The Ld. Joint Commissioner has allowed re-testing of the samples. Accordingly, representative samples available with the Department were sent to CRCL, New Delhi for re-testing. On the basis of the retest report received from CRCL, New Delhi, the Department has come to a conclusion that the petroleum products in this case get distilled by 90% or more by volume at 210°C and hence classified the impugned goods as "Light oils and preparations" falling under Chapter Heading 2710 1290.

7.1.1 The Appellant-importer has questioned the method of sampling and tests conducted by CRCL, New Delhi, on the basis of which the Id. adjudicating authority had come to the conclusion that the goods are liable for classification under the CTH 2710 1290. We observe that the report of IOCL Haldia was sent to CRCL Delhi for clarification, who clarified the impugned goods to be light oil without carrying out any testing. We observe that the department did not take action for almost 9 months and sent two duplicate samples to CRCL Delhi vide letter dated 09.08.2021. CRCL, New Delhi vide its report dated 24.11.2011 gave the opinion that the samples sent are light oil and preparations and accordingly, the adjudicating authority classified the goods to be light oil under the CTH 2710 1290. We observe that there was no mention of method of testing of the old samples lying with the department drawn after 12 months. The Appellant-importer submitted that the department has not followed the instructions issued by Board vide Circular No. 30/2017-Cus. Dated 18th July, 2017, for re-testing the samples. For the sake of ready reference the contents of the said circular is extracted below:

Circular: 30/2017-Cus, dated 18-Jul-2017

Samples Guidelines for re-testing of samples

Circular No. 30/2017-Cus, dated 18-7-2017

F.No. 450/15/2017-Cus. IV

Government of India

Ministry of Finance (Department of Revenue) Central
Board of Excise & Customs, New Delhi

Subject: Detailed guidelines for re-testing of samples - Regarding World Trade Organization (WTO) negotiated Trade Facilitation Agreement (TFA), which aims at simplifying the trade processes and bringing down barriers to trade has come into force w.e.f. 22nd February, 2017. India is a signatory to this agreement.

2. India has placed a number of trade related measures negotiated under the TFA in Category A. Article 5.3.1 envisages granting an opportunity for a second test in case the first test result of a sample taken upon arrival of goods declared for importation shows an adverse finding Further Article 5.3.3 makes it obligatory to consider the result of the second test, if any, for the release and clearance of goods, and, if appropriate, may accept the results of such test. The aforementioned Articles have been placed in category A. In order to have uniformity in approach among the field formations with regard to re-testing of samples, the following procedure is prescribed

- a. Customs officers may draw the samples from import consignments for testing in case of consignments wherever needed. The results of all test reports, adverse or otherwise, shall be communicated to the importer or his authorized representative/Customs Broker immediately on its receipt.
- b. in case the importer or his agent intends to request the Additional/Joint Commissioner of Customs for a re-test, then the same shall be made in writing to the said officer within a period of ten days from the receipt of the communication of the test results of the first test. Customs officers may take a reasoned view in case the importer or his authorized representative Customs Broker is unable to do so for reasons beyond his control
- c. Where the Additional/Joint Commissioner of Customs grants an opportunity for a second test, he must clearly indicate in writing the name and

address of the laboratory/institution where the second test can be carried out. Such referral for re-testing may be made only after being reasonably sure that the desired re-testing facilities exist at the laboratory/institution.

- d. Re-test should be made only on the remnants of the samples originally tested or on duplicate representative sealed samples in the custody of the Customs. Further, to avoid delays, samples for second tests shall be marked as "immediate" before sending to the laboratory. In a case it may so happen that fresh samples have to be drawn, then such sampling should be done in the presence of the importer or his representative/customs broker.
- e. The requests for re-test of samples on the ground that the original sample was not representative should be entertained only if the consignment is still in Customs control. At the time of drawing the samples, the importer or his representative shall be present and certify that the samples drawn are representative.
- f. The competent authority shall consider the results of the re-test without prejudice to the results of the first test in case there is a variation in the results of the first test and the re-test, the competent authority shall take the decision relying upon either of the tests specifying the grounds in writing for the decision so taken in case the competent authority is unable to decide whether to rely upon the first or the re-test results, then it may order a second re-test provided the consignment is still within the customs control. However, this option should not be resorted to in every case of variation between the first test and re-test results.
- g. The facility of re-testing, is a trade facilitation measure, which should generally not be denied in the ordinary course. However, there might arise circumstances where the customs officer is constrained to deny the re-testing facility Board

expects that such denial would be occasional and on reasonable grounds to be recorded in writing

- h. Where the re-testing procedure is done at the instance of the department instead of the importer, the above procedure shall be followed *mutatis mutandis*.

3. Difficulties, if any, in implementation of this circular, should be brought to the notice of the Board.
4. Hindi version of the circular will follow.

7.1.2. From the guidelines issued for re-testing of samples, we observe that the Appellant-importer has considered the samples already drawn as not representative samples, because of lapse of more than 12 months from the date of drawal of samples. We observe that the Ld. Joint Commissioner has allowed re-testing of the samples. The Appellant-importer has specifically asked for drawal of fresh samples for re-testing, since the consignment is still under the control of customs. The Appellant-importer was of the view that the earlier samples were drawn 12 months before and hence they would have lost many of its properties, as the goods are volatile in nature. The Appellant-importer was of the view that retesting the samples available with the Department would not give the desired results. Thus, as per the Circular cited above, fresh samples could have been drawn since the consignment is still available with customs. However, the department has not drawn fresh samples and sent two sets of representative samples drawn earlier to CRCL, New Delhi for re-testing. On the basis of the retest report received from CRCL, New Delhi, the Department has come to the conclusion that the petroleum products in this case get distilled by 90% or more by volume at

210°C and hence to be classified as “Light oils and preparations” falling under Chapter Heading 2710 1290.

7.1.3. We observe that the Appellant-importer requested for re-drawl of samples as the testing was done on old samples would not give the desired result. However, the Department again sent duplicate/triplicate samples and the CRCL Delhi vide its report dated 24.11.2021 i.e. after more than 12 months from the date of drawal of samples opined that the goods to be light oil and preparations. We agree with the submission of the Appellant-importer that the goods being volatile in nature, testing of samples drawn 12 months before would not give the desired results. The department could have drawn fresh samples for testing, as the goods are still available with customs. Thus, we observe that the Ld. Commissioner (Appeals) has rightly rejected the Test Report of CRCL, New Delhi.

7.1.4. We observe that the Ld. Commissioner (Appeals) has relied upon the Note 4 to Chapter 27 for classifying the impugned goods under the CTH 27101990. The Ld. Adjudicating authority also relied upon the same Note 4 to classify the impugned goods under the Chapter Heading 2710 1290 For the sake of ready reference the said Note 4 is reproduced below:

“Note 4. For the purposes of sub-heading 2710 12, light oils and preparations” are those of which 90% or more by volume (including losses) distil at 210 C according to the ISO

3405 method (equivalent to the ASTM D 86 method)”

7.1.5. From the plain reading of the above definition, it is apparent that the petroleum products which get distilled by 90% or more by volume at 210°C are '**light oils and preparations**' for the purpose of Chapter 27 sub-heading 2710 12. The tests are to be conducted as per the Methods prescribed in the Note 4. We observe that none of the reports have specified exactly what percentage of the goods are distilled at 210 degrees, for meeting the requirements as specified under Chapter Note 4 of Chapter 27. The IOCL report specifies 90% distillation at 204 degree and the CRCL, New Delhi report says that more than 90% distilled at 210 degree. However, the method of testing was not declared in CRCL New Delhi report. We observe that the goods being volatile in nature, the quality of the samples deteriorate over a period of time. The test report received from the sample drawn immediately after import will display the correct features than the test conducted on the sample drawn earlier and tested after 12 months. In this respect, we observe that the CRCL, Delhi report is not a reliable report as it is based on the samples which were drawn 12 months before. The report received from CRCL, Kolkata will have the correct features as this test was done on the samples drawn immediately after import of the goods. The test report received from CRCL, Kolkata categorically states that the samples do not meet the criteria of light oil and its preparations. We find that the adjudicating authority has not given any valid reason to reject this report. On the contrary, the Ld. Commissioner (Appeals) has

analysed all the Test Reports received in this case and conducted a comparative analysis and concluded that the report received from CRCL, Kolkata is more relevant for determining the classification of the impugned goods in this case. The relevant paragraphs from the impugned order passed by the Commissioner (Appeals) are reproduced below for ready reference: -

"7.2 In this regard, I observe that it is important to understand the definition of Light oils and preparations", which is mentioned in Sub Heading Note 4 to Chapter 27 of the Customs Tariff that is reproduced below for ready reference:

**4. For the purposes of sub-heading 2710 12, "light oils and preparations are those of which 90% or more by volume (including losses) distil at 210 °C according to the ISO 3405 method (equivalent to the ASTM D 86 method)"*

Therein, it is explicitly mentioned that "Light oils and preparations" are those of which 90% or more by volume (including losses) distil at 210 °C, however, the IOCL Test Report dated 16.03.2021 has mentioned that the impugned goods are 90% distilled at 204 °C, which negates the impugned goods to be covered under the said definition since the primary & paramount condition has not been fulfilled.

It is observed that the adjudicating authority has relied upon the test report of CRCL, Delhi and did not take cognizance of the test reports of CRCL, Kolkata and IOCL, Haldia on its own discretion arbitrarily. It failed to observe the comments/observation of CRCL, Kolkata, wherein it has mentioned the impugned goods as Mineral Hydrocarbon Oil' and further mentioned that samples of the impugned goods be sent to IOCL/HPCL/BPCL/IIP for identifying the specific name of the goods. The excerpts of the CRCL, Kolkata letter dated 19.02.2021 are as under:-

".... The description of the goods as "Mineral Hydrocarbon Oil was already ascertained, if required, the samples may be sent to JOCL/HPCL/BPCL/IIP Dehradun for specific name as desired and further stated that executive decision may be taken at your end."

I also find that reports of CRCL (Kolkata) & IOCL (Haldia), and CRCL (Delhi) suffer from inherent contradictions, as CRCL (Kolkata) Test Reports dated 20/25/26/27.11.2020 reported that the samples (goods) do not meet the criteria of 'Light Oil and its Preparation' and IOCL has also never suggested the said goods to be falling under the same. But CRCL, Delhi categorized it to be falling under Light Oil and its Preparation.

In a wider spectrum, I observe that the Test reports of CRCL, Kolkata & IOCL are probably comprise of the tests of more pure sample,

thus tends to be more accurate since the Test report of CRCL, Kolkata was generated in November, 2020 and IOCL in March, 2021 but the report of CRCL, Delhi was generated in November, 2021, which is after one (1) year of the test happened in CRCL, Kolkata and also after more than one (1) year of the importation of the impugned goods. Since, it cannot be ignored that the impugned item is of volatile nature and it is the disposition of such substances that they change their characteristics with time depending on their storage conditions. It can be inferred from the test results parameters mentioned below.

As it can be observed from the test results, the parameters obtained in respect of CRCL, Kolkata & IOCL are overlapping but there is much variance in report obtained from the test at CRCL, Delhi when compared with the test results of CRCL (Kolkata) & IOCL. The data tabulated below expresses it clearly as under:-

Comparison chart of the test results of CRCL (Kolkata) & IOCL and CRCL (Delhi)

Characteristics	CRCL, Kolkata	IOCL	CRCL, Delhi
Flash Point (°C)	4	<0	<25
IBP (°C)	52-78	51	109
90% (°C)	-	204	210
FBP (°C)	226-238	248	254,259
Light Oil and its Preparation	No	No	Yes
Density at 15°C (Kg/ m3)	761.2-787.8	765.5	773.1, 782.7
Aromatics		0.64(%w)	29.0%, 34.7%
Description	Mineral Hydrocarbon Oil	Naphtha mixed with Kerosene	Light oils and preparations

Though, it is evident from the above table that there is substantial variation in Flash Point and IBP in CRCL, Delhi report. Still, the lower adjudicating authority has totally neglected the

findings of CRCL (Kolkata) & IOCL to rely upon the findings of CRCL (Delhi) incoherently.

*7.3 Further, I find that the CRCL, Delhi report is inconclusive to some extents, as it has not determined the Flash Point on exact basis, as it has provided the Flash point to be < 25 deg * C and the flash point is required to determine the class of the petroleum product.*

As such the Petroleum Class A, B and C are defined in the Petroleum Act, 1934, which are as given below:

(i) "petroleum Class A ^ prime prime means petroleum having a flash-point below 23 °C.

*(ii) "petroleum Class B" means petroleum having flash-point of 23 deg * C and above but below 65 deg * C*

*(iii) "petroleum Class C ^ prime prime means petroleum having a flash-point of 65 deg * C and above but below 93 deg * C*

On the basis of analytical observations, it is observed that the CRCL, Kolkata and IOCL report are conclusive to determine the impugned goods to be falling under "petroleum Class A ^ prime prime but report of CRCL, Delhi is inconclusive in this regard.

*Further, as per Chapter Note of Chapter 27 of the Customs Tariff, for the purposes of sub-heading 2710 12, "light oils and preparations" are those of which 90% or more by volume (including losses) distil at 210 deg * C*

*according to the ISO 3405 method (equivalent to the ASTM D 86 method). In this regard, IOCL report determines that 90% distillation happens at 204 deg * C but CRCL, Delhi did not determine the temperature at which the 90% distillation takes place but report that the more than 90% recovery happens at 210 deg * C which seems to nothing but an attempt to affirm the case against the importer in the instant the case, which perceives to be a prejudiced action hampering the interest of natural justice.*

7.4 As such, under the above given circumstances, I find that the adjudicating authority wrongly re-determined the impugned goods as "Light oils and preparations, when the IOCL report elaborately defined the distillation percentage at multiple & sequential stages i.e. IBP @51°C, 10% @95°C, 50%@148°C, 90% @204°C & FBP @248°C, according to which the impugned can't be identified as "Light oils and preparations" in terms of Sub-Heading Note 4 of Chapter 27 of the Customs Tariff Act, 1975, which states 90% or more distillation volume (including losses) at 210 °C is mandatory to be categorized as 'Light oils and preparations'.

7.5 In this regard, I find that the Hon'ble Supreme Court has also discussed the similar issue in the case of Commissioner of Central Excise versus M/s. Krishna Technochem Pvt. Limited and Anr., wherein it observed as follows:

"2. We have heard Mr. Balbir Singh, learned ASG appearing on behalf of the Appellant. We have gone through the impugned judgment and order passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata, (for short "the Tribunal") more particularly, the reasoning given in para 8. We have also considered the sub-heading notes and as per the said sub-heading notes, for the purposes of sub-heading 2710-12, "Light Oils and Preparations" are those of which 90% or more by volume (including losses) distilled at 210 degree Celsius.

3. In the present case, even as per the Chemical Examiner's Report, the range of distillation of the product in question was between 35 degree to 58 degree Celsius which is much below 210 degree Celsius and the word used in sub- heading notes referred to herein above is "at" and not "up to". Therefore, we see no reason to interfere with the impugned order(s) passed by the Tribunal."

7.1.6. We observe that the Ld. Commissionr (Appeals) has given a categorical finding and classified the impugned goods under the chapter heading 27101990. We find that the reasoning given by Ld. Commissioner (Appeals) to arrive at the classification is more appropriate and we do not find any reason to interfere with the same. Accordingly, we uphold the classification of the goods approved in the impugned order and hold that the goods imported are appropriately classifiable under Chapter Heading 2710 1990 as declared by the importer.

8. Issue Nos.

(2): Whether the impugned order is correct in setting aside the order of re-export and in allowing the goods to be cleared for home consumption or not. and

(3) Whether the Appellant-importer is liable for imposition of penalty for violation of the provisions of the Petroleum Act, 2002 or not.

8.1. We observe that the Appellant-importer imported the goods in used and reusable drums having capacity of 215-225 litres. As per Rule 2(1)(xix), petroleum in bulk means petroleum contained in a tank irrespective of the quantity of petroleum contained therein. The goods imported by the Appellant-importer in drums do not fall under the ambit of 'bulk' and the same are classified as 'Other than bulk'. The Appellant-importer was having a PESO license valid up to 31.12.2025 for import of 1200.KL petroleum Class A - 1050 KL in bulk, Class B - 100 KL in bulk and Class C - 50 KL in bulk and Nil for petroleum 'Other than bulk'. Thus, the department opined that the PESO license in their possession does not adequately cover the import made under the bill of entry referred above, which renders the goods liable for confiscation. For confiscation of the goods, the findings given by the Ld. adjudicating authority is reproduced below:

"61. Rules 4 & 5 of the Petroleum Rules, 2002 applicable in the present cases of import prescribe that:-

.....

I find that Rule 4(1) of the Petroleum Rules, 2002 mandates that containers exceeding one litre in capacity for petroleum Class A shall be of a type approved by the Chief Controller. Further, Rules 5(1) & 5(4) ibid prescribe the constituent material of the containers, their thickness based on capacity and the requirement of a type approval from the Chief Controller. From a combined reading of Rules 4(1), 5(1) and 5(4) of the Petroleum Rules, 2002, I find that the containers more than 1 litre in capacity and upto 300 litres in capacity shall be of a type approved by the Chief Controller. However, no such documents showing type approval from the Chief Controller w.r.t. the drums used for import have been submitted by the importer in respect of the subject Bill of Entry. Further, I find that the importer has also failed to furnish the requisite documents viz. Certificate of storage accommodation in Form II as required under Rule 19 of the Petroleum Rules, 2002 and has also failed to take permission of the Commissioner of Customs to land the impugned goods, as required under Rule 20 of the Petroleum Rules, 2002. Therefore, in view of the foregoing discussions, I find that the importer has violated the provisions of Section 3 of the Petroleum Act, 1934 and those of Rules 4, 5, 14, 19 and 20 of the Petroleum Rules, 2002 which has rendered the impugned goods liable to confiscation under Section 111(d) of the Customs Act, 1962 and I hold accordingly. Further, for their acts of omission and commission rendering the impugned goods liable to confiscation under Section 111(d) of the Customs Act, 1962, the importer is also liable to penal action under Section 112(a)(i) ibid and I hold accordingly.”

8.2. On the basis of above findings, the adjudicating authority has held that the goods are liable for confiscation. However, he ordered for re-export of the impugned goods on payment of redemption fine. We observe that the adjudicating authority has ordered for confiscation of the goods for violation of the provisions of Petroleum Act 2002.

8.3. Regarding the violations of Petroleum Act, 2002 and the requirement of PESO license, the Appellant-importer submits that they were not aware that they cannot import materials in drums and if they import the same in drums of capacity less than 1000 litres, then the same cannot be considered as 'bulk'. We observe that the Appellant-importer was having PESO license to import Petroleum A, B & C in bulk. In the instant case, the goods were imported in drums having capacity of 220 Litres. We observe that the Appellant-importer were having license to import and store the goods in their own name. Further, we observe that the Appellant-importer has applied for amendment in PESO license and the concerned authority vide letter dated 14.06.2022 has granted license to import the goods other than bulk in class A Petroleum. We also observe that the goods are still lying seized and after 14.06.2022 the Appellant-importer is allowed to import in non-bulk quantity also. Accordingly, we hold that there is no violation of the provisions of the Petroleum Act, 2002 and hence the confiscation and penalty imposed on the Appellant-importer does not survive. Even otherwise, confiscation under 111(d) could be made only for prohibited goods. Under Rule 3 of Petroleum Rule 2002, there were conditions for import in a particular manner and as such there was no prohibition. Under

section 3 of the Foreign Trade (Development and Regulation) Rules, the provisions are to be made for prohibiting, restricting or otherwise regulating. Since the original authority allowed for re-export and appellate authority allowed for home consumption, the goods were not prohibited goods. Once the goods are allowed for clearance for home consumption, the same could not be confiscated under 111(d) and so penalty was also not imposable. Further, we observe that the Appellant-importer had PESO license to import Petroleum Class A and for storage of the goods and PESO doesn't approve all the drums. Thus, we agree with the submission of the Appellant-importer that the violation, if any, is only procedural in nature, which has also been rectified latter by getting the permission for import of 'Other than bulk' also. It is a settled law that the substantial benefit cannot be denied for procedural violations.

8.4. Thus, we hold that there is no violation of the provisions of Petroleum Act, 2002 in this case. Accordingly, we hold that the goods are not liable for confiscation and hence, the redemption fine imposed in the impugned order for allowing clearance of the goods for home consumption is not sustainable. Since there is no violation of Petroleum Act, we uphold the order of the Ld. Commissioner (Appeals) in allowing the goods for clearance to home consumption. Accordingly, we hold that no penalty imposable on the Appellant-importer under section 112(a)(i) of the Customs Act, 1962 and hence we set aside the penalty imposed. For the same reasons, we hold that there is no merit in the appeal filed by Revenue and hence the same is liable for rejection.

10. In view of the above discussions, we pass the following order: -

(i) The goods imported are appropriately classifiable under Chapter Heading 2710 1990, as declared by the Appellant-importer.

(ii) The order of the Ld. Commissioner (Appeals) in allowing the clearance of the goods for home consumption is upheld.

(iii) The penalty imposed on the Appellant-importer for violation of the provisions of the Petroleum Act, 2002 is set aside. The penalty imposed under section 112(a)(i) of the Customs Act, 1962 is also set aside.

11. In view of the above discussions, the appeal filed by the Appellant-importer is allowed and the appeal filed by the Revenue is dismissed.

(Order pronounced in the open court on **29.08.2024**)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)