IN THE CUSTOMS, EXCISE AND SERVECE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI
COURT NO. IV

APPEAL NO. E/823/07

(Arising out of Order-in-Original No.R-13/CCO-II/MCX/2007 dated 11.05.2007passed by the Chief Commissioner of Central Excise, Mumbai-II.)

CCE, Mumbai-II — Appellant

Vs.

M/s Bharat Petroleum Corpn. Ltd. — Respondent

Appearance:

Shri K.M. Mondal, Special Counsel (A.R.) — for Appellant

Shri V. Sridharan, Senior Advocate — for Respondent
Ms. Anjali Hirawat, Advocate

CORAM:

HON'BLE SHRI RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE SHRI RAJU, MEMBER (TECHNICAL)

Date of Hearing: 07.12.2017
Date of Decision: 23.03.2018

ORDER NO. A/85734/2018

Per: Raju:

This appeal has been filed by the Revenue against order of Commissioner dropping the proceeding initiated against M/s Bharat Petroleum Corporation Ltd. (BPCL) and Shri R. Ganesh, Project Manager of BPCL.

2. The respondent M/s BPCL manufactures various petroleum products from crude hydrocarbon oils or crude oils. During the period October 2000 to February 2006, one of the products manufactured by the respondent was described as Low Aromatic Naphtha (LAN). The respondent classifiable as 'Naphtha' under sub-heading 2710.14 of the CETA, 1985, while Revenue sought to classified the said product under sub-heading 2710.13 as "Other Special Boiling Point Spirit".

Prior to 01.03.2005 the relevant headings were as follows:-

Heading No.	Sub-heading No.	Description
27.10		**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.**
		- 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:
	2710.11	-- Special boiling point spirits (other than Benzene-Toluol) with nominal boiling point range 55-115°C.
	2710.12	-- Special boiling point spirits (other than Benzene, Benzol, Toluene and Toluol) with nominal boiling point range 63-70°C.
	2710.13	**-- Other special boiling point spirits (other than Benzene, Benzol, Toluene and Toluol)**
	2710.14	**-- Naphtha**
	2710.15	-- Natural Gasoline Liquid
	2710.19	-- Other

After 01.03.2005 the relevant headings were as follows:-

Tariff Item	Description of goods
27.10	**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.
2710 11 12	---- Special boiling point spirits (other than benzene, benzol, toluene and toluol) with nominal boiling point range 63-70°C.
2710 11 13	**---- Other special boiling point spirits (other than benzene, benzol toluene and toluol)**
2710 11 19	**---- Other**
2710 11 20	--- Natural gasoline liquid (NGL)
2710 11 90	--- Other

Chapter heading 27.10 defines **Motor Spirit** as follows:

> *"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".

Supplementary Note (a) to Chapter 27 defines "Special Boiling Point Spirits" as follows:

"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 60oC between the temperatures at which 5% and 90% by volume (including losses) distil;"

Sub-heading note 4 to Chapter 27 defines 'light oils and preparations" as follows:

"4. For the purposes of sub-heading 2710.11, "light oils and preparations" are those of which 90% or more by volume (including losses) distil at 210°C (ASTM D 86 method)."

2.1 Learned AR pointed out that there are three kinds of Special Boiling Point (SBP) spirits under sub-headings 2710.11, 2710.12 & 2710.13. Volume sub-headings 2710.11 & 2710.12 boiling point range, these entries that for classification of the product under sub-heading 2710.13, no boiling point range is specified. He argued that since sub-heading 2710.13 no boiling point range is specified. Thus, boiling point range is no criterion for its classification.

2.2 Learned AR argued that SBP spirits are Hydrocarbon oils having boiling point range from 35 Degree Celsius to 165 Degree Celsius. Criterion for its classification being for a volumetric distillation test as per which 5% volume to 90% volume of the product should distil out within 60°C temperature difference. As per prescribed under supplementary note (a) to Chapter 27 referred in above.

2.3 Learned AR pointed out that Shri R. Ganesh, Project Manager of BPCL statement dated 8/11/2004 had stated that to make LAN, the following streams are taken to LAN pool.

(i) 'Splitter I Top' stream from Reformer Feed Unit (RFU) with IBP-FBP as 26-59°C.

(ii) 'Splitter II Top' stream from New Solvent Unit (NSU) with IBP-FBP as 32-56°C

(iii) 'Splitter III Bottom' stream from New Solvent Unit (NSU) with IBP-FBP as 83-117°C and

(iv) HCP Stabilized Naphtha with IBP-FBP as 43-126°C

2.4 Learned AR pointed out that the DGCEI Officer had taken samples of the aforesaid four streams which go into the LAN pool as well as sample of LAN and caused their analysis at the Laboratory of BPCL. The following test results are as under:-

ANALYSIS OF SAMPLES
(LAN TK,SP 1 TOP,SP 2 TOP,SP3 BOTTOM, STAB.NAP.)

	LAN from Tank TK 521	SP I Top (RFU)	SP 2 Top (NSU)	SP 3 Bottom (NSU)	Stab. Nap. (HCP)
Date	30.05.05	31.05.05	31.05.05	31.05.05	31.05.05
Time	1430 Hrs	1300 hrs	1335 hrs	1345 hrs	1230 hrs
Distillation by **ASTM D:86**					
IBP °C,	41	31	35	85	43
5%v recovered @°C,	56	34	41	88	59

10%v recovered @°C,	59	35	42	89	61
20%v recovered @°C,	63	36	42	91	66
30%v recovered @°C,	68	37	43	93	70
40%v recovered @°C,	72	38	45	95	76
50%v recovered @°C,	77	39	46	97	82
60%v recovered @°C,	82	40	48	100	88
70%v recovered @°C,	87	42	50	103	95
80%v recovered a@°C,	94	45	54	107	103
90%v recovered @°C,	105	51	60	114	112
95%v recovered a@°C,	114	57	64	120	119
FBP °C,	128	61	66	129	127
Recovery, %v	98	98	98	98	98
Residue+ Loss, %v	2	2	2	2	2
%v recovered @IBP+60 °C,	87%	--	--	--	--
Flash Point °C,	<0	<0	<0	<10	<0

He pointed out that from the above table it can be seen that 5% volume of LAN distils at 56°C, and 90% volume distils at 105°C. The difference between 5% and 90% volumetric distillation testis 49°C, which is less than the statutory limit of 60°C difference required to qualify as SBP spirits. He argued that in this circumstance, it cannot be denied the product samples of the day of visit that was SBP spirits followed under sub-heading 2710.13/2710 1113. Learned AR also argued that even individually satisfies the volumetric distillation test for SBP spirits and thus merits to be classified as SBP spirit. For this circumstance, he has relied on the table derived from the test results as under:-

Name of the stream	Temperature at which 5% volume is distilled	Temperature at which 90% volume is distilled.	Difference between two temperatures.
SP 1 Top	34 deg. C.	051 deg. C.	**17 deg. C.**
SP 2 Top	41 deg. C.	060 deg. C.	**19 deg. C.**
SP 3 Bottom	88 deg. C.	114 deg. C.	**26 deg. C.**
Stab. Nap.	59 deg. C.	112 deg. C.	**53 deg. C.**

2.5 Learned AR further pointed out LAN is a product different from the Naphtha. He argued that Naphtha is obtained by cracking of crude oil and as boiling range of temperature from 30°C to 325°C. He argued that LAN manufactured by BPCL is a blend of specified refined streams having boiling point range of 34°C to 160°C. He argued that the product manufactured by BPCL is actually 'Other Special Boiling Point Spirits'.

2.6 Learned AR relied on the decision of the Tribunal in the case of *Saurashtra Chemicals, Porbandar Vs. Collector of Customs, Bombay – 1986 (23) ELT 283* to assert that the relevant headings in the tariff have to be interpreted and applied in the light of the Section Notes and Chapter Notes which are statutory and binding like the headings themselves. Learned AR also relied on the decision of Hon'ble Apex Court in the case of *Collector of Central Excise, Hyderabad Vs. Fenoplast (P) Ltd. – 1994 (72) ELT 513 (SC)*, wherein the Hon'ble Apex Court has held that if any term or expression has been defined *in the* *enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the enactment the meaning of the term in common parlance or commercial parlance has to be adopted".*

2.7 Learned AR further pointed out that the Adjudicating Authority has failed to appreciate that the statute has already prescribed specific tests for Motor Spirits as well as for SBP Spirits:

(a) Tests relevant for Motor Spirit.

i) It should have flash point below 25 degree Celsius.

ii) It, either by itself or in admixture with other substances, should be suitable for use as fuel in spark ignition engines.

(b) Tests relevant for SBP Spirits :

i) It should be 'light oil' as per sub-heading Note 4 i.e. it should distils 90% or more by volume at 210 degree Celsius.

ii) It should not contain any anti-knock preparation, and,

iii) The difference between temperature at which 5% and 90% by volume it distils, shall not be more than 60 degree Celsius.

The disputed product, i.e. LAN has satisfied all the above statutory tests, because

i) Its maximum recommended/accepted FBP by BPCL is 160 degree Celsius, inter-alia, denoting that whole of LAN will distil by volume below 210 degree Celsius so as to qualify as light oil as per the sub-heading Note 4.

ii) LAN does not contain any anti-knocking preparation as proved by various test certificates of LAN relied upon in the SCN. Even otherwise, BPCL has not disputed this aspect.

iii) As per results of volume distillation analysis relied upon in the SCN and admitted by BPCL, the difference between temperature at which 5% and 90% by volume LAN distils, is 49 degree Celsius.

2.8 Learned AR further pointed out that it is not necessary for Revenue established that the disputed product is suitable for use as fuel in spark ignition engines. In view of the fact that the disputed product classified by themselves, the product within the sub-classification of 'Motor Spirit' under Chapter heading 27.10. Learned AR argued that the respondent themselves had classified the disputed product as Naphtha under the same brought classification of motor spirits where the 'Other Special Boiling Point Spirits' are classified.

2.9 Learned AR further pointed out that the Learned Commissioner has referred to certain notifications, namely, Notification Nos. 190/75, 75/84, 27/89 and 102/90 which exempted naphtha used in the manufacture of certain specified final products. The method as explained in the notification, for example, Notification No. 27/89 was as follows:

> "*The amount of naphtha consumed in the manufacture of the products shall be calculated by subtracting from the quantity of naphtha received by the factory manufacturing the products, the quantity of naphtha returned by the factory to the refinery..........*"

Learned Commissioner has accepted the contention of the assessee that the remnant naphtha, returning to the refinery after extraction of certain specified product is naphtha only. It is submitted that notification does not settle the classification of the product. Hence reference to the notification(s) is not appropriate.

2.10 In the impugned order, learned Commissioner has relied upon the Tribunal's decision in the case of *Indian Petrochemicals Corpn. Vs. CCE.– 2005 (186) ELT 81* holding that return stream naphtha is nothing but naphtha classifiable under sub-heading 2710.14. Facts of this case have been recorded in para 2 of the Tribunal's Order. As per the said facts, IOC supplies raw naphtha to IPCL for manufacture of petrochemicals by thermal cracking. The bulk of the naphtha so supplied gets consumed in the process of manufacture at IPCL, while some quantity remains unused. That quantity is returned to IOC, and IOC disposes it of as motor spirit after blending. Both the supply of Naphtha to IPCL and return of the consumed quantity to IOC are by pipeline. The return is called "Naphtha Return Stream". Hence the Hon'ble Tribunal held that Return Stream Naphtha is nothing but naphtha. Facts of this case are clearly distinguishable from those of the case in hand. Therefore, this case has no application to the present case.

3. We have gone through rival contentions. We find that the issue that if the product which the appellants claimed to be Naptha classifiable under heading 2710.14 is actually classifiable as "Other Special Boiling Point Spirit" or is it classifiable as 'Naptha' under heading 2710.19 prior to 1.3.2005 and as 'Naptha' under 2710 11 90 after 1.3.2005. Thus the issues which need determination are as follows:

i) Is the product 'Naptha' or 'Special Boiling Point Spirit'

ii) Having themselves classified their product under heading 2710.14 under the following single dash entry of the tariff

'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:'

Can the respondents now claim that the product manufactured by them does not answer to this description?

3.1 Chapter heading 27.10 defines **Motor Spirit** as follows:

"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".

Supplementary Note (a) to Chapter 27 defines "Special Boiling Point Spirits" as follows:

"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 60oC between the temperatures at which 5% and 90% by volume (including losses) distil;"

Sub-heading note 4 to Chapter 27 defines 'light oils and preparations" as follows:

"4. For the purposes of sub-heading 2710.11, "light oils and preparations" are those of which 90% or more by volume (including losses) distil at 210°C (ASTM D 86 method)."

So far as the first issue is concerned the revenue had relied on the following test reports of the four streams which go into the LAN pool as well as sample of LAN

ANALYSIS OF SAMPLES
(LAN TK, SP 1 TOP, SP 2 TOP, SP3 BOTTOM, STAB. NAP.)

	LAN from Tank TK 521	SP I Top (RFU)	SP 2 Top (NSU)	SP 3 Bottom (NSU)	Stab. Nap. (HCP)
Date	30.05.05	31.05.05	31.05.05	31.05.05	31.05.05
Time	1430 Hrs	1300 hrs	1335 hrs	1345 hrs	1230 hrs
Distillation by **ASTM D:86**					
IBP °C,	41	31	35	85	43
5%v recovered @°C,	56	34	41	88	59
10%v recovered @°C,	59	35	42	89	61
20%v recovered @°C,	63	36	42	91	66
30%v recovered @°C,	68	37	43	93	70
40%v recovered @°C,	72	38	45	95	76
50%v recovered @°C,	77	39	46	97	82
60%v recovered @°C,	82	40	48	100	88
70%v recovered @°C,	87	42	50	103	95
80%v recovered a@°C,	94	45	54	107	103
90%v recovered @°C,	105	51	60	114	112
95%v recovered a@°C,	114	57	64	120	119
FBP °C,	128	61	66	129	127
Recovery, %v	98	98	98	98	98
Residue+ Loss, %v	2	2	2	2	2
%v recovered @IBP+60 °C,	87%	--	--	--	--
Flash Point °C,	<0	<0	<0	<10	<0

As per the definition of the '*Special Boiling Point Spirits' have to be light oils, that is to say 90% or more by volume (including losses) distil* *at 210°C. It is seen from the data above that 90% or more distils at 51 to 114 °C. Thus each of the stream independently qualify the definition of 'light oil' which is one of the requirements to qualify as 'Special Boiling Point Spirits'. The second requirement is that it should not contain any 'anti knock compound'. Ld AR has argued that this has not been disputed by the respondents. The third criteria to qualify as 'Special Boiling Point Spirits' is that* the difference between temperature at which 5% and 90% by volume it distils, shall not be more than 60 degree Celsius. The following of test result shows that the test result of each stream qualifies on this criterion.

	LAN from Tank TK 521	SP I Top (RFU)	SP 2 Top (NSU)	SP 3 Bottom (NSU)	Stab. Nap. (HCP)
5%v recovered @°C,	56	34	41	88	59
90%v recovered @°C,	105	51	60	114	112
Difference	49	24	19	26	53

However to fall under the heading 2710.13 (prior to 1.3.2005) the product also needs to answer to the following description as well

> '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:'

Similarly to fall under the heading 2710 11 12 to 2710 11 19 (after 1.3.2005) the product also needs to answer to the definition of 'motor spirit'. Chapter heading 27.10 defines **Motor Spirit** as follows:

> *"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".*

From the above analysis it is apparent that the test results prove that the products answers to the definition of "Special Boiling Point Spirits" in all respects except the description that appears in the single dash entry in the heading. However, for classification under 2710.13 (prior to 1.3.2005) or to fall under the heading 2710 11 12 to 2710 11 19 (after 1.3.2005) the product also needs to answer to the definition of 'motor spirit' or to the description appearing in the single dash entry. Revenue has not undertaken any tests in this regard on the pretext that the original classification claimed by the respondents, i.e. 2710.14, was under the same single dash entry, a description which qualified the definition of 'motor spirit'. Thus there was no need to prove the same as it was an admitted position of the appellants. We find that it is not correct position in law. The onus is on revenue to establish that the goods answer to the description given in single dash entry (upto 1.3.05) and to the definition of motor spirit after (1.3.05). Since revenue has not even attempted to test the goods for this purpose it has failed to establish its claim to classification under that entry. In view of above we do not find any merit in the revenue appeal. The same is dismissed.

(Pronounced in Court on 23.03.2018)

(Ramesh Nair) **Member (Judicial)**	**(Raju)** **Member (Technical)**

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