

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI.**

Customs Appeal No. 86184 of 2021

(Arising out of Order-in-Appeal No.407 to 409 (Gr.I & 1A)/2021(JNCH)/Appeals dated 19.05.2021 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Dist. Raigad, Maharashtra]

Shri Jethanand Rohra,

Director of M/s. Jaymco Polymers Pvt.Ltd.,
Plot No.16, Additional Ambernath,
Anand Nagar, MIDC,
Ambernath-421 506.

Appellant

VERSUS

Commissioner of Customs (Import)

NS-I, JNCH, Nhava Sheva,
Dist.-Raigad-400 707.

Respondent

AND

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M/s Jaymco Polymers Pvt. Ltd.

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VERSUS

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Respondent

APPEARANCE:

Shri N.D. George, Advocate for the appellant

Shri Manoj Das, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NOS. A/85436-85437/2022

DATE OF HEARING:18.02.2022

DATE OF DECISION:09.05.2022

ANIL CHOUDHARY:

The appellant, M/s. Jaymco Polymers Pvt. Ltd. carries on business of manufacture, import, and trading of various Mixed Mineral Hydrocarbon oil, etc. The other appellant, Jethanand Rohra is the director of the appellant company.

2. The facts in brief are that the appellant in the normal course of business upon import filed 5 bills of entry during the period December, 2019 and Jan. 2020 for clearance of goods declared as "Mineral Hydrocarbon Oil" CTH 27101988/Mixed Mineral Hydrocarbon Oil - CTH 27101990, as freely importable. One of the raw materials, the appellant imports for final products is Mineral Hydrocarbon Oil, which is a solvent. The consignment /containers were put on hold for drawing samples as Revenue suspected mis-declaration. Initially, the Customs Authorities took a sample from import consignment with respect to the Bill of Entry No. 6110507 dated 17.12.2019 on Ist check basis and sent the same for testing to Dy. Chief Chemist, JNCH vide Test Memo No.1059045 dated 17.12.2019. Vide report dated 27.12.2019, it was opined as under:-

"The Sample is in the form other than light oil and preparations, Kerosene (SKO) and Diesel (HSD)".

The appellant paid duty on 31.12.2019 as the goods were found as declared. However, the said goods were not allowed to be cleared and put on hold by the Department. Thereafter, the sample was once again drawn on 07.01.2020 and again forwarded to the Dy. CC, JNCH for retesting. The same Dy.CC, JNCH vide his test report no.18/GIIB(I) dated 21.01.2020 opined as under:-

“The above tested parameters is in the range of diesel oil.

It is other than the light oil and preparations solvent (125/240), Kerosene (SKO) and Vacuum Gas Oil”.

Thereafter, samples were drawn under Panchnama for other 4 Bills of entry and forwarded to the DYCC, JNCH for testing. As per test report, it appeared to Revenue that the goods are Superior Kerosene Oil (SKO) - CTH 27101910 with respect to the three bills of entry and High Speed Diesel (HSD) of CTH 27101930 in case of 2 bills of entries, import of which is restricted and allowed only by the State Trading Enterprises. Thus, it appeared that the import made by the appellant in absence of specific authorisation by DGFT, is prohibited and as such, the same is in contravention of FTP, violating the provisions of Section 111 (d) & (m) of the Customs Act and thus, liable to confiscation. Show cause notice dated 14.10.2020 was issued and the goods were seized. The details Bill of entry wise are as follows:-

Table- A

Importer	M/s.Jaymco Polymers Pvt.Ltd.
IEC	0310057744
Bill of Entry	6356219 dated 04.01.2020
IGM No.	2243189 dated 2.1.2020
Country of Origin	Kuwait
Description of Goods & CTH	Mixed Mineral Hydrocarbon Oil- CTH27101988
Quantity	85370 Kgs.
Invoice No. & Date	MEDUKW032040 dated 04.12.2019
Declared Invoice Value (C&F)	50365.35 USD
Exchange Rate	1.00 USD = 72.15 INR
Supplier	M/s. Babji International, Kuwait

Container Nos.	CAI6215630, FCIU5874098, GLDU5286813, MSDU1184242 and TEMU1377294.
Goods- as classified by Revenue	Diesel CTH27101944
Declared Assessable Value	3636213
Re-determined value @Rs.43.14/Ltr.	4419434.16

Table- B

Importer	M/s. Jaymco Polymers Pvt. Ltd.
IEC	0310057744
Bill of Entry	6227454 dated 25.12.2019
IGM No.	2242451 dated 24.12.2019
Country of Origin	Kuwait
Description of Goods	Mineral Hydrocarbon Oil-CTH27101990
Quantity	167490 Kgs.
Invoice No. and Date	KW-SMB-INV-126 dated 03.12.2019
Declared Invoice Value (C&F)	99656.55 USD
Exchange Rate	1.00 USD = 71.90 INR
Supplier	M/s. SMB Golden General Trading Co. , Kuwait
Container No.	CAIU6217886, FCIU4319784, GLDU5499608, MEDU2231059, MEDU5444103, MEDU5461950, MEDU5586197, MEDU5599379, MEDU6772513 and MSDU1085208.
Goods as classified by Revenue	Kerosene CTH 27101910
Declared Assessable Value	71,69,963
Re-determined Value @Rs.37.23/Ltr.	79,81,635.46

Table- C

Importer	M/s. Jaymco Polymers Pvt.Ltd.
IEC	0310057744
Bill of Entry	6110507 dated 17.12.2019
IGM No.	2241551 dated 13.12.2019
Country of Origin	Kuwait
Description of Goods	Mixed Mineral Hydrocarbon Oil-CTH27101988

Quantity	73090 Kgs.
Invoice No. and Date	KW-SMB-INV-121 dated 13.11.2019
Declared Invoice Value (C&F)	43123.10 USD
Exchange Rate	1.00 USD = 72.40 INR
Supplier	M/s. Babji International Co. Kuwait.
Container No.	MEDU5654814, MEDU5861745, MEDU6929217 and TGHU0968761
Goods as classified by Revenue	Diesel CTH 27101944
Declared Assessable Value	31,24,128.44
Re-determined Value @ Rs.43.14/Ltr.	37,83,723.12

Table- D

Importer	M/s. Jaymco Polymers Pvt.Ltd.
IEC	0310057744
Bill of Entry	6024354 dated 10.12.2019
IGM No.	2241215 dated 10.12.2019
Country of Origin	Qatar
Description of Goods	Mineral Hydrocarbon Oil-CTH27101990
Quantity	160300 Kgs.
Invoice No. and Date	QT-SMB-INV-100 dated 02.12.2019
Declared Invoice Value (C&F)	95378.50 USD
Exchange Rate	1.00 USD = 72.40 INR
Supplier	M/s. SMB Golden General Trading Co., Kuwait.
Container No.	CAIU2271662, GLDU3898070, MRSU0280314, MSKU2315450, MSKU3569491, MSKU4125357, MSKU7994523, TCKU1625713, TTNU1078568 and TTNU1248474.
Goods as classified by Revenue	Kerosene CTH 27101990
Assessable Value	69,09,859
Re-determined Value @Rs.37.23/Ltr.	76,39,000.32

Table- E

Importer	M/s. Jaymco Polymers Pvt. Ltd.
IEC	0310057744
Bill of Entry	6025517 dated 10.12.2019
IGM No.	2241215 dated 10.12.2019
Country of Origin	Qatar
Description of Goods	Mineral Hydrocarbon Oil-CTH27101990
Quantity	169150 Kgs.
Invoice No. and Date	QT-SMB-INV-99 dated 02.12.2019
Declared Invoice Value (C&F)	100644.25 USD
Exchange Rate	1.00 USD = 72.40 INR
Supplier	M/s. SMB Golden General Trading Co., Kuwait.
Container No.	HASU1434878, MRKU7389958, MRKU7663800, MRKU7853020, MRKU8039574, MRKU8138561, MRKU8241332, MRKU8411491, MRKU8499163 and MRKU9748419.
Goods as classified by Revenue	Kerosene CTH 27101990
Assessable Value	74,37,174
Re-determined Value @Rs.37.23/Ltr.	80,60,741.76

3. The appellant importer's request to retest the samples, particularly for goods of Bill of Entry no.6024354 and 6025517, both dated 10.12.2019 (which were tested as Kerosene), as per Circular No.30/2017 dated 18.07.2017. However the request was denied by the Adjudicating Authority, relying on para 2 (g) of the said Board's Circular.

4. Statement of the Director/Jethanand Rohra, was recorded under Section 108 of the Act, wherein he, *inter alia*, stated that he had never visited any customs House or Bombay Test House and all the documents

were handled by the Customers Broker/ IOCC Shipping Company including the managing of the documents from Bombay Test House. He further stated that Shri Taranjeet Singh Rathore is the person in the Customs broker firm, handling all the customs clearances.

5. It appeared to Revenue that the appellants have been importing Kerosene /diesel by mis-declaring the same as MHO/MMHO and IMRO in connivance with the supplier and the Customs Broker. It further appeared that the appellants have admitted to the import of prohibited goods by way of mis-declaration and to get the same cleared for home consumption.

6. As the provisional release was not being given, the appellant had also approached the Hon'ble Bombay High Court for directions to allow proper storage of the consignment being inflammable and had also prayed for provisional release to be allowed by the Revenue. Thereafter, Revenue passed order dated 31.08.2020 for provisional release, subject to the conditions:-

- (i) Execution of bond of Rs. 2,90,36,082/-;
- (ii) Security deposit of Rs.3,77,32,753/- on account of differential duty, fine and penalty that may be levied at the time of adjudication; and
- (iii) Payment of self-assessed duty, where it is not paid.

7. The appellant objected to taking of assessable value of Rs.80.11/- per litre, determined by the Department for the purpose of provisional release, and in fact, the customs duty has been applied twice. The Hon'ble Bombay High Court, while passing the final order in respect of the Writ Petition No.2451/2020, observed as follows:-

- i. Petitioner is granted liberty to file appeal before the CESTAT under Section 129-A(1)(a) of the Customs Act against the order dated 31.08.2020.

- ii. If such appeal is filed within a period of four weeks from today and an application is made for early hearing, CESTAT shall decide the appeal within a period of four weeks thereafter considering the limited nature of the grievance of the petitioner.
- iii. In so far adjudication process is concerned let the Adjudicating Authority initiate the adjudication process by issuance of show cause notice under Section 124 of the Customs Act, and take the proceedings to its logical conclusion one way or the other by following the due procedure and principles of natural justice within a period of four weeks from the date of receipt of a copy of this order.
- iv. Petitioner is also granted liberty to file application before the respondents for sale for the seized goods and if such application is filed, respondent shall take a considered decision thereon in accordance with law, within a period of two weeks from the date of receipt of the application with due intimation to the petitioner.
- v. All contentions are kept open and we have not expressed any opinion on merit or otherwise."

8. In compliance to the direction issued by the Hon'ble Bombay High Court, appellant had filed an appeal bearing no. C/86035/2020 before the Hon'ble Tribunal challenging the Order-in-original dated 31.08.2020 (on pro. release) by the Commissioners of Custom, (NS(V) alongwith an early hearing application. Show Cause Notice No. 519/2020-21/SIIB (I) JNCH dated 13.10.2020 was issued upon the appellant as to why the seized goods should not be confiscated under Section 111(d) and (m) of the Customs Act, 1962, and also as to why Penalty should not be imposed on the Appellant under Section 112(a) and 114AA of the Customs Act, 1962. Personal hearing

in respect of the said Notice was scheduled on 22.10.2020 and duly attended by the Appellant's authorized representative. Pursuant to the hearing, the Appellant under cover of his email dated 23.10.20, filed its defence reply dated 22.10.2020 wherein categorically rebutted all the allegations and insinuations levelled against it in the Notice, as also adduced cogent reasons and submissions alongwith binding precedents to show and establish that the product in question was not kerosene / High speed diesel. Meanwhile the Hon'ble Tribunal was pleased to allow the early hearing application and the matter was ultimately scheduled for final hearing on 01.12.2020 on its specific prayers with regard to harsh and unreasonable conditions imposed by the Commissioner of Customs, NS(V) while permitting the provisional release of the consignment in question. The Appellant was shocked and surprised by the Adjudication Order dated 23.11.2020 passed by the Adjudicating Authority and thereafter apprised this Tribunal about the same, and withdrew its appeal filed before the Tribunal against the Order dated 31.08.2020 (prov. release).

9. In the Order-in-Original No. 427/2020/ADC/NS-I/Gr. I&IA/JNCH dated 23.11.2020, it was ordered:-

- a. Amendment of Description and CTH in the subject Bills of Entry and re-assessment accordingly;
- b. Rejected the declared value under Section 14 of the Customs Act, 1962 read with Rule 12 of Customs Valuation Rule and re-determined the same;
- c. Confiscation of the goods namely Keorsene (IS:1459) (changed classification) covered under 03 Bills of Entry No. 6227454/25.12.2019, 6022517/10.12.2019, 6024354/10.12.2019 having re-determined value of Rs. 2,36,81,377.54 u/s 111(d) and 111(m) of the Customs Act, 1962;
- d. Confiscation of the goods namely HS Diesel (IS:1460) (changed classification) covered under 02 Bills of Entry No. 6356219/04.01.2020

and 6110507/17.12.2019 having re-determined value of Rs. 82,03,157.28 u/s 111(d) and 111(m) of the Customs Act, 1962;

- e. Gave an option to the importer to redeem the confiscated goods on payment of Redemption Fine of Rs. 2,08,44,548/- under Section 125(1) of the Customs Act, 1962 and on payment of applicable duty in addition to redemption fine and penalty;
- f. Imposed a penalty of Rs. 64,00,000/- on the importer M/s Jaymco Polymers Pvt. Ltd. under Section 112(a) of the Customs Act, 1962;
- g. Imposed a penalty of Rs. 64,00,000/- on Shri Jethanand B. Rohra, Director under Section 112(a) of the Customs Act, 1962;
- h. Imposed a penalty of Rs. 48,00,000/- on Shri Jethanand B. Rohra under Section 114AA of the Customs Act, 1962;
- i. Imposed a penalty of Rs. 64,00,000/- on Shri Taranjeet Singh Rathore under Section 112(a) of the Customs Act, 1962;
- j. Imposed a penalty of Rs. 64,00,000/- on Shri Taranjeet Singh Rathore (staff of CHA) under Section 114AA of the Customs Act, 1962;

10. Being aggrieved, the appellants preferred appeals before the Commissioner (Appeals), *inter alia*, on the grounds that --

A. Onus is cast upon the Department to prove mis-declaration/ mis-classification, had not been discharged in the instant case, rendering the impugned order completely untenable. Reliance is placed on the case laws:

- i. HPL Chemicals Ltd. Vs. CCE 2006(197) ELT 324 (SC)
- ii Hindustan Ferodo Ltd. Vs CCE 1997 (89) ELT (SC)

B. The Test reports issued by DYCC, JNCH does not cover all the properties/parameters as enlisted under IS:1460 or IS:1459, rendering the same completely inconclusive and thus unreliable. The consignment imported vide Bill of Entry No. 6024354 dated 10.12.2019, 6025517 dated 10.12.2019 and 6227454 dated 25.12.2019 is alleged to be Kerosene. The Appellant urged that the DYCC, JNCH has failed to test material parameters such as burning Quality and Colour, which are otherwise mandated under IS:1459, to be satisfied for conforming whether a product is 'kerosene' or not.

The Appellant has relied upon settled law laid down by the Hon'ble Apex Court in the case of CCE vs Sushma Textiles Ltd 2004 (167) ELT 487 (S.C.)

C. The samples have not been drawn in accordance with the methodology in the prescribed containers as required under the BIS Specification IS 1447-1 rendering the Test Reports, a complete nullity.

D. Non-specification of method of testing in the Test Reports renders the same completely unreliable.

E. Case laws relied by court below in the impugned order are irrelevant.

- i. Reliance Cellulose Products Ltd. Vs CCE 1997 (93) ELT 646 (SC)
- ii. Anand Mohata Agro Indus P. Ltd. Vs C.C. Import 2019 (370) ELT 1656
- iii. Collector of Customs, Madras and ors Vs D. Bhoormull 1983 (13) ELT 1546 (SC)

F. The issue in dispute is no longer res-integra and stands decided by the Tribunal in favour of importer in the case of Swarna Oil Services Vs. CC in Final Order No. A/11026-11028/2020 dated 01.06.2020

G. Denial of re-testing in the instant case is against direction in Cir. No.30/2017, in violation of principles of N justice, hence completely untenable and vitiates the impugned order.

H. No reliance whatsoever ought to have been placed on the Appellant's statement dated 31.12.2019 having been recorded under force and duress, which have been retracted immediately.

I. Denial of cross examination in the instant case is denial of right to a fair trial, in violation of mandate of section 138 B, hence completely illegal and untenable. Reliance is placed upon case law laid down by the Hon'ble Madras High Court in the case of Thilagarathinam Match Works VS CCE 2013 (295) ELT 195 (Mad)

J. Non-furnishing of the documents, referred to and relied upon in the show cause notice

K. Re-determination of value in the instant case is completely bereft of any merits

L. There has been no violation of any policy condition and/or provisions of the Foreign Trade Policy.

M. The impugned order confiscating the consignments in question under Section 111(d) and 111(m) of the Customs Act, 1962 is completely untenable.

N. Imposition of Redemption Fine under Section 125 of the Customs Act, 1962 is bad.

O. Imposition of Penalty upon the Appellant under Section 112(a) & 114 AA of the Customs Act, 1962 is bad.

11. The Director, Shri Jethanand Rohra had also filed appeal before the Commissioner (Appeals) on the following grounds:-

A. The main Appellant has already laid down cogent reasons to prove that the said reliance placed by the OA on Test Reports and the consequent conclusions drawn thereto are completely untenable and devoid of merits. He requested to rely upon the said submissions urged by the main appellant in their appeal memorandum.

B. There is no evidence other than the statement dated 31.12.2019, which is relied upon in the instant case to impinge the Appellant. The said statement was recorded under force and duress; it was not voluntary and did not represent the correct factual position. He had duly registered his retraction of the said statement dated 31.12.2019, under cover of his letter dated 01.01.2020. The Appellant submits that it is a settled law that no reliance can be placed on a statement unless the same is corroborated with some reliable and independent evidence.

C. There was no connivance between the overseas supplier and the Appellant. The COO, Certificate of Analysis and other documents are prepared by the overseas supplier and admittedly no proceedings have been initiated against them.

D. The findings of the Adj. Authority that the Appellant had connived with the CHA in order to import prohibited goods is completely bereft of any merits and not supported by any evidence. No reliance ought to have been placed on the Statement of Shri Tarachand Rathod, staff of CHA as Shri Rathod had retracted from his statement dated 21.08.2020 under cover of his letter dated 24.08.2020. Shri Rathod has also filed an affidavit before the Hon'ble Bombay High Court during the course of proceeding with regard to provisional release of the goods, citing that his statement was recorded under-force and duress. The said affidavit and letter of retraction was duly filed before the OA.

E. Further the Cross examination of Shri Rathod was denied by the OA. In this regard, the Appellant has relied upon the judgment of the Hon'ble Madras High Court in the case of Thilagarathiam Match Works Vs. CCE 2013 (295) E.L.T. 195 (Mad) wherein the Hon'ble Court had held in no uncertain terms, that right to cross examine is a fundamental principle of fair trial covered within the ambit of principles of natural justice and Section 138 B of the Act.

F. The Appellant cannot be penalized under Section 112(a) of the Act as the appellant has not done any act or omitted to do any act, which has rendered the goods liable for confiscation under Section 111 of the Act. Penalty under Section 114AA of the Act is imposable only when a person knowingly or intentionally makes, signs or uses or causes to be made, signed or used any declaration, statement or document which is false or incorrect in any material particular in the transaction of any business for the purposes of the Act. As the Appellant was not concerned in making false statement or document, the imposition of penalty on the appellant is unsustainable.

12. Against the same impugned order-in-original dated 23.11.2020, the Revenue also filed appeal before the Commissioner (Appeals), *inter alia*, on the following grounds :-

A. Adjudicating Authority has ordered to release the goods on payment of Redemption Fine of Rs. 2,08,44,548/- to the importer.

Hon'ble Supreme Court in case of Atul Automations Pvt. Ltd. has *inter alia* held that - “A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the Redemption of such restricted goods imported without authorization, upon payment of the market value.”

B. The Adjudicating Authority did not take into consideration the ruling of the Apex Court and allowed Redemption of the goods on payment of redemption fine Rs. 2,08,44,548/- which was less than re-determined assessable value of the goods i.e. Rs. 3,18,84,535/-

C. Provided that where it is established to the satisfaction of the Adjudicating Authority that any goods or materials which are liable to confiscation under Rule 17(1) of the Foreign Trade (Regulation) Rules, 1993 had been imported for personal use and for any trade or industry such goods or material, shall not be ordered to be confiscated. Under Rule 17(2) of the said Rules, the Adjudicating Authority may permit the redemption of the confiscated goods or materials upon payment of redemption fine equivalent to the market value of such goods or materials.

D. The importer has violated the policy condition for import of SKO/Diesel and therefore is liable for confiscation under Rule 17(1) of the Foreign Trade (Regulation Rules, 1993). As per Rule 17(2) of the said Rules, the Adjudicating Authority was required to impose redemption fine equivalent to the market value of the goods.

13. The Commissioner (Appeals) was pleased to uphold the order-in-original dated 23.11.2020, and dismissed all the 3 cross appeals by these appellants and Revenue.

14. Being aggrieved, the appellant is before this Tribunal, *inter alia*, on the grounds urged before the Court below.

15. Ld. Counsel for the appellant further urges that the test reports issued by the DYCC/JNCH are not reliable for the reasons that firstly, the samples

were not drawn properly, as prescribed in IS 1447-1 and secondly, the test reports are not conclusive as the DYCC/JNCH have not tested all the parameters suggested in Indian Standards for petroleum products. It is urged that test of all parameters prescribed is mandatory to conclusively establish the identity of the alleged petroleum products (Diesel/Kerosene). Since the test reports of the so called representative samples have not been carried out in respect of the certain characteristics, the test reports are unreliable. Hence, the orders of the court below, relying on the test reports are vitiated and fit to be set aside. Evidently, the Court Below has relied upon unreliable test reports and thus, have failed to discharge the burden of proof in support of their allegations of mis-declaration or mis-classification of the goods under dispute.

16. Ld. Counsel relies on the ruling of the Apex Court in the case of **Sushama Textiles (supra)**, wherein it is held that for want of test of all the required parameters, the test reports are inconclusive and thus, unreliable to draw any adverse conclusion against the assessee. Ld. Counsel have further assailed the test report bills of entry-wise as follows:-

(16.1) Bill of Entry No. 6227454 dated 25.12.2019 and Test Report No. 19 SIIB (I) dated 07.01.2020

16.1.1 Insofar as the consignment imported vide the Bill of Entry No.6227454 dated 25.12.2019 is concerned, reliance has been placed on the Test Report No. 19 SIIB (I) dated 07.01.2020 by the Respondent to hold that the consignment imported is, one of kerosene. In addition, the Respondent has also tabulated the following parameters which according to him were tested and reported in the said Test Report dated 07.01.2020. Thereafter, the Respondent has held that *“As per above Test Reports, I find that tests have been*

carried out as per specification mentioned in IS 1459/1460 and tested all 10 parameters and confirms to Superior Kerosene Oil/Diesel. “

i.	Density at 15°C	= 0.7888 g/ml
ii.	K. V. at 40°C	= 1.15 cst
iii.	Flash Point	= 46°C
iv.	Acidity (inorganic)	= Nil
v.	Smoke Point	= 23 mm
vi.	Ash Content	= Nil
vii.	Initial Boiling Point	= 150.08°C
viii.	Volume distilled at 200°C	= More than 40%
ix.	90 % Distilled at	= 236.02°C
x.	Final Boiling Point	= 248.9°C

16.1.2. The Appellant submits that the aforesaid reliance placed by the Respondent on the Test Report and the consequent conclusions drawn in the impugned order, to hold the product in question is kerosene, are completely untenable. The Appellant submits that the Respondent has erroneously assumed that the parameter of acidity (inorganic) has been tested and reported in the Test Report. The Test Report is, in fact, completely silent and has not reported the said parameter, clearly evidencing the callous approach of the Respondent. In view thereof, the Respondent has erred in holding that 10 parameters have been tested and reported in the Test Report as per the Specification IS 1459.

16.1.3 What the Respondent has failed to appreciate is that there are 8 parameters/properties under the IS 1459: 1974 which are required to be tested and reported for confirming whether a product is kerosene or not and not 10, as otherwise held by him. What the Respondent has further failed to appreciate, that though the Test Report has reported 9 parameters, however, in effect these are only 6 parameters which have been tested and reported in the Test Report, as Initial Boiling Point, Final Boiling Point, Volume Distilled at 200°C and 90% distilled at, form part of a single parameter viz. Distillation Range.

16.1.4 Further, what the Respondent has failed to take cognizance of the fact, out of the said 6 parameters, only 3 parameters viz. Flash Point, Smoke Point and Distillation range, match the list of the parameters mandated under IS 1459: 1974. In other words, out of the

8 parameters mandated under IS 1459: 1974, only 3 parameters viz. Flash Point, Smoke Point and Distillation range have been tested and reported, and the rest 5 mandatory parameters have not been tested and reported at all. The other 3 parameters tested and reported in the Test Report viz. density, ash content and kinematic viscosity have not been envisaged by the IS 1459: 1974, and accordingly are inconsequential to the case at hand.

16.1.5 The mandatory 5 parameters/properties enlisted under IS 1459: 1974, which have not been tested and reported in the Test Report are as under:

- i. Acidity (inorganic)
- ii. Burning Quality, which includes testing the Char Value, mg/kg of oil consumed and Bloom on glass chimney
- iii. Color (Sayabolt)
- iv. Copper strip corrosion for 3h at 50°C
- v. Total Sulphur, percent by mass

16.1.6 In view of the aforesaid, inasmuch as the Test Report has not tested and reported the aforesaid 5 mandatory parameters/ properties, the said Test Report is completely inconclusive to hold that the consignment is one of kerosene. In view thereof, the said Test Report, by no stretch of imagination, could have been used as a reliable piece of evidence for seizing the consignment in question or draw any adverse inference/ conclusion against the Appellant. Thus, even if Color (Sayabolt) and Burning Quality test is not considered, still the Respondent has failed to show and establish the satisfaction of the other three mandatory parameters rendering the Test Reports completely inconclusive and thereby unreliable. The impugned order, thus, deserves to be quashed and set aside.

16.1.7 The Appellant had categorically urged and brought on record the aforementioned 5 mandatory parameters having not been tested,

reported and satisfied, however, the Respondent has chosen to ignore the same, rendering the impugned order completely untenable.

16.2 Bills of Entry No. 6024354 dated 10.12.2019 corresponding Test Reports No. 231 SIIB (I) dated 17.12.2019.

Insofar as the Bill of Entry No. 6024354 dated 10.12.2019 is concerned, reliance has been placed on the Test Reports No. 231 dated 17.12.2019 by the Respondent to hold that the consignment imported is Kerosene is bad and untenable for same reasons and errors, as enumerated in para 16.1.1 to 16.1.7.

16.3 Bills of Entry No. 6025517 dated 10.12.2019 and corresponding Test Report No. 232 SIIB (I) dated 17.12.2019

16.3.1 Insofar as the Bill of Entry No. 6025517 dated 10.12.2019 is concerned, reliance has been placed on the Test Reports No. 232 dated 17.12.2019 by the Respondent to hold that the consignment imported is Kerosene. In addition, the Respondent has, after tabulating the parameters tested and reported in the said Test Report dated 17.12.2019 held that “As per above Test Reports, I find that tests have been carried out as per specification mentioned in IS 1459/1460 and tested all 10 parameters and confirms to Superior Kerosene Oil/Diesel. “In this regards, the Appellant submits that the said reliance placed by the Respondent on the Test Report and the conclusions drawn thereon is completely untenable to say the least.

16.3.2. What the Respondent has failed to appreciate, there are 8 parameters/properties under the IS 1459: 1974 which are required to be tested and reported for confirming whether a product is kerosene or not and not 10 parameters, as otherwise held by him. What the Respondent has further failed to appreciate, that though the Test Report has reported 10 parameters, however, in effect these are only 7 parameters which have been tested and reported in the Test Report as Initial Boiling Point, Final Boiling

Point, Volume Distilled at 200°C and 90% distilled at, form part of a single parameter viz. Distillation Range. In view thereof, the Respondent has erred in holding that 10 parameters have been tested.

16.3.3. Further what the Respondent has failed to take cognizance of the fact that Out of the said 7 parameters, only 4 parameters viz. Flash Point, Acidity, Distillation range and Smoke Point match to those parameters which are required to be tested under IS 1459: 1974. In other words, out of the 8 parameters mandated under IS 1459: 1974, only 4 parameters have been viz. Flash Point, Acidity, Smoke Point and Distillation range have been tested and reported, and the rest 4 mandatory parameters have not been tested and reported at all. The other 3 parameters tested and reported in the Test Report viz. density, ash content and kinematic viscosity have not been envisaged by the IS 1459: 1974 and accordingly are inconsequential to the case at hand.

16.3.4 The mandatory 4 parameters/properties enlisted under IS 1459: 1974, which have not been tested and reported in the Test Report are as under:

- i. Burning Quality, which includes testing the Char Value, mg/kg of oil consumed and Bloom on glass chimney
- ii. Color (Sayabolt)
- iii. Copper strip corrosion for 3h at 50°C
- iv. Total Sulphur, percent by mass

16.3.5 In view of the aforesaid, inasmuch as the Test Report has not tested and reported the aforesaid 4 mandatory parameters/ properties, the said Test Report is completely inconclusive to hold that the consignment is one of kerosene. In view thereof, the said Test Report, by no stretch of imagination, could have been used as a reliable piece of evidence for seizing the consignment in question or draw any adverse inference/ conclusion against the Appellant. In addition, the Appellant submits that even if Color (Sayabolt) and Burning Quality test is not considered, still the Respondent

has failed to show and establish the satisfaction of the other two mandatory parameters rendering the Test Report completely inconclusive and thereby unreliable. The impugned order, thus, deserves to be quashed and set aside.

16.3.6 The Appellant had categorically urged that the said 4 mandatory parameters having not been tested, reported and satisfied, the Respondent has erred in ignoring the same, rendering the impugned order completely untenable.

17. It is further urged that the Revenue have mis-directed itself by presuming that the product imported is kerosene and thereafter, proceeded to refer and relied upon some literature to discuss the properties, which determine the quality of kerosene. It is further urged that that the parameters of burning quality in IS 1459, has clearly stipulated the true characteristics, which are required to be tested and satisfied i.e. CHAR value bloom on glass chimney. Instead of testing these prescribed particulars, the test report reports Flash Point, which is completely illogical, unintelligible and devoid of any merit.

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. Thus, the observation of the Court Below that all the tests have been carried out as per the specification mentioned in IS 1459/1460 and tested all the 10 parameters and confirms to Superior Kerosene Oil/Diesel, is evidently vague. The test reports are evidently inconclusive as for diesel IS 1460 requires testing, reporting and satisfaction of 22/21 parameters. Admittedly, in absence of such test reports, reliance placed by the Court below on the skeletal test report is vitiated.

19. Thus, the Id. Counsel further urges that two test reports dated 07.01.2020 and 10.01.2020 issued in respect of the two bills of entry dated 17.12.2020 and 04.01.2020 respectively are completely inconclusive and unreliable. He further urges that the Bill of Entry-wise submissions is as follows:-

19.1 Bill of Entry No. 6110507 dated 17.12.2019 and Test Report No. 18 dated 07.01.2020

- The Appellant submits that it had, in its reply, categorically brought on record that with regard to the product/ consignment imported under Bill of Entry No.6110507 dated 17.12.2020, the Customs had initially drawn samples and forwarded the same to DYCC, JNCH for ascertaining the true nature of the consignment in question. It is submitted that DYCC, vide its Test Report No. 2635 SIIB (I) dated 20.12.2019, had, after testing the parameters of “density, flash point (PMCC), kinematic viscosity, Ash content, temperature at 85% and 95% recovery, initial and final boiling

point”, clearly opined that the product is neither kerosene nor diesel.

19.2 It was submitted that even after obtaining the said Test Report, the Customs, without assigning any reasons thereto, had forwarded fresh samples once again to DYCC, JNCH for testing and ascertaining the nature of the consignment in question. It is submitted that the DYCC, JNCH thereafter, for the same consignment, issued another Test Report No18 dated 07.01.2020, which forms the basis of the impugned order, wherein it, after testing similar parameters to that of its earlier Test Report dated 21.12.2019 and finding almost identical values, opined that *“the above tested parameters are in the range of diesel oil. It is other than light oil & preparation, solvent (125/240), kerosene and vacuum gas oil”*.

19.3 In view of the aforesaid, it was submitted that inasmuch as the same Lab, on testing similar parameters and arriving at almost identical values, has arrived at two different conclusions, no reliance whatsoever is to be placed on the Test Report dated 07.01.2020 to draw any adverse conclusion or inference against the appellant. The Respondent ought to have appreciated the aforesaid submissions made by the Appellant, which goes to the root of the matter, however, he has completely ignored the same, rendering the impugned order completely untenable.

19.4 Even otherwise, what the Respondent has failed to appreciate is that the said Test Report does not lay down in concrete terms, that the product is diesel. It only lays down that *“the above tested parameters are in the range of Diesel Oil.”* In view thereof, inasmuch as neither all the parameters have been tested and reported nor that the Test Report has arrived at any concrete

findings, the said Test Report is completely inconclusive, having no evidentiary value.

19.5 The Appellant submits that what the Respondent has further failed to appreciate is that even otherwise the said Test Report dated 07.01.2020 is inconclusive and thereby unreliable to determine as to whether the product is diesel oil or not. In this regard, it is submitted that under IS 1460: 2005, there are 22 parameters which are required to be tested and reported in order to confirm whether a product is diesel oil or not. On a perusal of the Test Report dated 07.01.2020, it is observed that though the Test Report has reported 10 parameters, however, in effect these are only 6 parameters as IBP, FBP, temp. at 85%, 90%, 95% recovery form part of a single parameter viz. Distillation.

19.6. Further, what the Respondent has failed to appreciate is that out of the 22 parameters mandated under IS 1460: 2005, the said Test Report has tested and reported only these 6 parameters viz. Density, Kinematic Viscosity, Flash Point, Ash Content, Cetane Index and Distillation (IBP, FBP, temp. at 85%, 90%, 95% recovery). The rest 16 parameters mandated under IS 1460: 2005 have not been tested and reported, which have been enlisted herein below:

- i. Acidity, inorganic
- ii. Acidity, total, mg of KOH/gm
- iii. Carbon residue (Ramsbottom) on 10 percent residue
- iv. Cetane number
- v. Pour point
- vi. Copper strip corrosion for 3 h at 100°C
- vii. Sediment, percent by mass,
- viii. Total contamination
- ix. Total Sulphur

- x. Water content, percent (v/v), Water content mg 1 kg
- xi. Cold filter plugging, point (CFPP)
- xii. Total sediments
- xiii. Oxidation stability, g/m"
- xiv. Polycyclic aromatic hydrocarbon (PAH), percent by mass
- xv. Lubricity corrected wear scar diameter(wsd 1.4) at 60°C
- xvi. Oxygen content, percent by mass

19.7 In view of the aforesaid analysis, in as much as the Test Report has not tested and reported the aforesaid 16 mandatory parameters/ properties, the said Test Report is inconclusive to hold that the consignment is one of diesel oil. Thus the said Test Report, by no stretch of imagination, could have been used as a reliable piece of evidence for drawing any adverse inference/ conclusion against the Appellant.

20. Bill of Entry No. 6356219 dated 04.01.2020 and Test Report No. 30 SIIB (I) dated 10.01.2020.

20.1 Insofar as the consignment/ product imported under cover of Bill of Entry No. 6356219 dated 04.01.2020 is concerned, reliance has been placed by the Respondent on the Test Report No.30 dated 10.01.2020 to hold the consignment in question is one of diesel oil. In this regards, the Appellant submits that the reliance placed by the Respondent is untenable.

20.2 The Appellant submits that what the Respondent has failed to appreciate is the fact that there are 21 parameters/properties under the IS 1460 (as amended) which are required to be tested and reported for confirming whether a product is diesel oil or not. On a perusal of the Test Report dated 10.01.2020, it is observed that though the Test Report has reported 10 parameters, however, in effect these are only 5 parameters IBP, FBP, temp. at 85%, 90%, 95% recovery form part of a single parameter viz. Distillation and that the Test Report has reported the parameter of Flash

Point twice under two separate methods, whereas it was sufficient to report the same with any one such method.

20.3 Further, what the Respondent has failed to appreciate that out of the 21 parameters mandated under IS 1460 (as amended), the said Test Report has only tested and reported 5 parameters viz. Density, Kinematic Viscosity, Flash Point, Cetane Index and Distillation (IBP, FBP, temp. at 85%, 90%, 95% recovery). The rest 16 parameters mandated under IS 1460 (as amended) have not been tested and reported, which have been enlisted herein below:

- i. Acidity, inorganic
- ii. Acidity, total, mg of KOH/gm
- iii. Ash, percent by mass
- iv. Carbon residue (Ramsbottom) on 10 percent residue
- v. Cetane number
- vi. Pour point
- vii. Copper strip corrosion for 3 h at 100°C
- viii. Sediment, percent by mass,
- ix. Total contamination
- x. Total Sulphur
- xi. Water content
- xii. Cold filter plugging, point (CFPP)
- xiii. Oxidation stability, g/m"
- xiv. Polycyclic aromatic hydrocarbon (PAH), percent by mass
- xv. Lubricity corrected wear scar diameter(wsd 1.4) at 60°C
- xvi. Oxygen content, percent by mass

20.4 In view of the aforesaid analysis, inasmuch as the Test Report has not tested and reported the aforesaid 16 mandatory parameters/ properties, the said Test Report is completely inconclusive to hold that the consignment is one of diesel oil. In view thereof, the said Test Report, by no stretch of imagination, could have been used as a reliable piece of evidence for drawing any adverse inference/ conclusion against the Appellant.

20.5 Even otherwise, what the Respondent has failed to appreciate is that the said Test Report does not lay down in concrete terms that the product is diesel. It only lays down that “*on the basis of tested parameters, the sample under reference may be considered as diesel.*” In view thereof, the Respondent ought to have discarded such an inconclusive and unreliable test report, which, however, he has failed to do so. The impugned order, thus, deserves to be quashed and set aside.

20.6 Without prejudice to the above, the Appellant submits that it had in its reply categorically urged that no reliance whatsoever ought to be placed on the letter dated 11.02.2020 issued by the Jt. Director (NFSG), JNCH, NhavaShava in respect of the Test Report dated 10.01.2020. The Appellant had submitted that the Test Report and the conclusion drawn thereon are completely comprehensible and that there is no confusion as to the fact that the DYCC, JNCH in its Report had concluded that it may be diesel oil. In view thereof, the Appellant had submitted that since the conclusion is not specifically stating it is diesel oil, no adverse inference ought to be drawn against the Appellant. It is submitted that the Customs, on the other hand, has arbitrarily tried to impinge onto such conclusion and has therefore referred to and relied upon the letter dated 11.02.2020 to allege that the product imported is diesel oil.

20.7 It was therefore submitted that inasmuch as the said letter dated 11.02.2020 is at complete divergence to the conclusions drawn by the Chemical Examiner, DYCC, JNCH in its Test Report dated 10.01.2020, on identical parameters and values, no reliance whatsoever ought to have been placed on the said letter dated 11.02.2020. Accordingly, the Test Report opining that the product may be diesel oil is completely inconclusive and thereby unreliable to draw any adverse conclusion against the Appellant. The impugned order, thus, deserves to be quashed and set aside.

21. It is further urged that both IS 1459 and 1460 require that representative samples should be drawn in the manner prescribed under IS 1447-Part-I. It is pointed out that with respect to the four bills of entry, Revenue had drawn samples from the flexy tank of one container each per bill of entry. The sample so drawn could be by no stretch of imagination be considered as the true representative sample meeting the requirement of IS 1447-Part-I. Admittedly, the number of containers comprising each bill of entry vary from 4 to 10 and admittedly, Revenue has drawn samples from only one container. Thus, the samples so drawn are not true representative samples.

Thus, for want of drawing proper samples, the test reports are fit to be discarded. Further, as per the facts on record, the customs have drawn and stored the samples in plastic bottles, which is wholly contrary to IS-1447-I and thus, contrary to the requirements of IS 1459/1460. It is urged that IS-1447 in Part-I specifically prescribes that in no circumstances non-linear (conventional), polyethylene (plastic) containers shall be used to store the samples of liquid Hydrocarbons. For reference, the containers prescribed for drawing samples under IS 1447-Part I is reproduced as follows:-

4.1 Sample Containers

May be clear or brown glass bottles, or cans. *The clear bottle is advantageous because it may be examined visually for cleanliness and also allows visual inspection of the sample for free water or solid impurities. The brown glass bottle affords some protection from light. The only cans permissible are those with the seams soldered on the exterior surfaces with a flux of rosin in a suitable solvent. Such a flux is easily removed with gasoline, whereas many others are very difficult to remove. Minute traces of flux may contaminate the sample*

so that results obtained on tests of dielectric strength, resistance to oxidation, and sludge formation may be erroneous.

4.1.1 Plastic Bottles

Made of suitable unpigmented linear polyethylene may be used for the handling and storage of gas oil, diesel oil, fuel oil and lubricating oil. They **should not be used for** gasoline, aviation jet fuel, **kerosene**, crude oil, white spirit, medicinal white oil and special boiling point products **unless testing indicates there is no problem with solubility, contamination, or loss of light ends.**

NOTES

1 In no circumstances shall non-linear (conventional)polyethylene containers be used to store samples of liquid hydrocarbons. This is to avoid sample contamination or sample bottle failure.

22. In support of his contentions, Id. Counsel relies on the ruling of the Apex Court in the case of **Tata Chemicals Vs. CCE reported in 2015 (320) ELT 45**. It is further urged, that the observations in the impugned order by the Court Below- that samples were drawn in presence of the CHA, who are the authorised representative of the appellant and The said representative did not object to at the time of drawing the samples, is of no avail to Revenue. The Revenue cannot take advantage of its wrong. Further, such wrong committed goes to root of the matter, vitiating the Test reports. Thus, the very basis for the allegation of Revenue being un-reliable, the impugned order is vitiated and fit to be set aside. It is further urged that when law prescribes a certain thing, to be done in a prescribed manner, it should be done in that way or not done at all. It is not open to the Revenue to circumvent the statutory prescription for drawing samples.

23. Id. Counsel further points out that the appellant had admittedly requested the Revenue to draw fresh samples as prescribed, and thereafter send the same for re-testing. However, without any cogent reasons, the said

request was for arbitrarily rejected. Thus, the impugned order is also bad for not following the principles of natural justice.

24. Ld. Counsel also urges that the test reports are also not reliable for the reason that nowhere in the report the method of testing used by DYCC/JNCH has been mentioned, in arriving at the values reported. Thus, for this patent defect also, no reliance can be placed on the test reports. For instance, the standard/method prescribed for arriving at the reading of flash point under IS 1459 : 1974 is P:20. Thus, if any other standard/method is applied for arriving at the reading of flash point, the said reading may be incorrect and will not reflect the correct flash point of the sample. Thus, no logical conclusion can be drawn based on such test report. It is further urged that in view of the glaring mistakes pointed out, the test report may be held erroneous and inconclusive. Further, the court below has erred by discussing the individual values, which is wholly erroneous and leads to nowhere.

25. Accordingly, Id. Counsel prays for allowing their appeals with consequential benefits.

26. Ld. Authorised Representative relies on the impugned order.

26.1 Ld. Authorised Representative urged that due to price difference of HSD and SKO in India and other countries, there is frequent smuggling going on by way of mis-declaration. Further, urged that on the basis of the test reports, it was established that the subject 'Cargo' was not "Mixed Hydrocarbon Oil/Mineral Hydrocarbon Oil as declared, but was HSD/SKO. It is further urged that request of the importer for re-test was rejected relying on the directions in the Board's Circular No.30/2017-Cus. It is further urged that the Director of the appellant company – Mr. J. Roda has, *inter alia*, admitted his statement that they were resorting to mis-declaration and

forging of documents for importing the restricted goods. It is further urged that the appellant in collusion with customs brokers were getting manipulated test reports issued from the office of the DYCC-JNCH by braving the officers therein. It is further urged that in the retraction made by Mr. J. Roda, Director of the appellant company is of no avail and has been done only on legal advice by way of afterthought.

26.2 Similarly, Mr. Taranjeet Singh, G-Card Holder of the Customs Broker has also admitted such facts and has affirmed the statement of the Director, Mr. J. Roda. It is further urged that HSD and SKO are the restricted goods and importable only by State Trading Enterprises. Thus, the said goods are prohibited for the appellants, as per definition in Section 2 (33) of the Act of the Prohibited Goods. It is further urged that Revenue has rightly relied on the principle of preponderance of the probability in absence of comprehensive test report. It is further urged that reliance placed by the appellant on the ruling of the Apex Court in the case of **Sushma Textiles (supra)** is misplaced as the said ruling is in relation to textiles.

26.3 It is further urged that admittedly, all tests mentioned in IS Standard 1459 1460 have not been carried out, but submits that whatever tests have been conducted the results confirms to the specifications of the items as alleged.

26.4 Further, Id. Authorised Representative fairly admits that there has been error on the part of the Revenue in the method of sample collection. Such admission has also been made in their written submissions filed before the Tribunal. It is urged that such ground taken by the appellant is by way of clever afterthought. It is further urged that prayer for retesting by the appellant was rejected as the Director of the appellant in his statement recorded under Section 108 has admitted that they were

practising mis-declaration etc. for importing the restricted goods. Accordingly, he prays for dismissing the appeals.

27. Having considered the rival contentions, we find that the issue involved in these appeals is whether the Revenue was correct in re-classifying the imported goods declared as “Mineral Hydrocarbon Oil-CTH 27101988 and Mixed Mineral Hydrocarbon Oil-CTH 27101990” as diesel under CTH 27101944 and as Superior Kerosene Oil under CTH 27101932.

28. It is admitted position of law that for a product to be classified under CTH 27101944/27101932 as SKO, it has to meet with the specifications in Supplementary Note – (C) under Chapter 27 which reads as under:-

“Superior Kerosene Oil (SKO)” means Hydrocarbon Oil conforming to Indian Standards Specification of Bureau of Indian Standards IS 1459 : 1974(reaffirmed in 1996).”

29. Thus, the product or material shall consist of refined petroleum distillates. It shall be free from visible water sediments and suspended material. The material shall also comply with the requirements given in Table-I, when tested according to the appropriate method prescribed under ‘P’ Series of IS:1448, reference to which is given in Col.4 of the Table-I (provided at para-37 below).

30. It is also not the case of the Revenue that the said three parameters can be established by any inferential process or otherwise. So far as sulphur is concerned, though no testing has been undertaken, we, for the sake of discussion, assume that the said parameter have been met, as the same forms a part of the suppliers’ test reports and is within the parameters specified in IS 1459:1974.

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.

32. It is also not in dispute that for a product to be classified as diesel under CTH 27101944, it has to meet the specifications as per Supplementary Note (e) to Chapter 27, which reads as under:-

“High Speed Diesel (HSD) means any Hydrocarbon Oil conforming to the Indian specification/standard of BIS, IS:1460:2005.”

33. It is further evident that as per aforementioned IS 1460:2005, the product has to meet the prescribed 21 parameters, wherein in the present case, only six parameters have been tested. The Acidity, Ash%, Copper Strip Corrosion for 3 h at 50% C, total sulphur contents, etc. have not been tested so as to verify the product can be classified as diesel-HSD.

34. The law with respect to the burden of proof or classification is on the Revenue, is well settled by the Hon'ble Supreme Court as held in **HPL Chemicals Vs. CCE – 2006 (197) ELT 324**, wherein the Hon'ble Supreme Court has observed as follows:-

“29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is quite clear that the goods are

classifiable as "Denatured Salt" falling under Chapter Heading No. 25.01. The Department has not shown that the subject product is not bought or sold or is not known or is dealt with in the market as Denatured Salt. Department's own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject matter is to be treated as Sodium Chloride."

35. Similar view was also taken by the Apex Court in **Hindustan Ferodo Vs. CCE - 1997 (89) ELT page 16 (SC)**, wherein it was observed that, " it is not in dispute before us as it cannot be, that onus of establishing that the said rings fell within Item No.22 lay on the Revenue. Revenue has led no evidence. The onus was not discharged, therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellant, the appeal should nevertheless have been allowed."

36. We further, notice that the appellant had sought cross examination of the persons, whose statements were relied upon by the Revenue in support of its allegations. But the cross examinations have been denied arbitrarily. Thus the impugned order is bad for violation of principles of Natural justice as well as the mandate of sec. 138B of the Act.

37. We further notice that the issue of classification is well settled, as held by the Coordinate Bench of this Tribunal at Ahmedabad in **Swarna Oil Services Vs. Commissioner of Customs -2020 (6) TMI 70 -CESTAT-Ahmedabad**, wherein it has been held as under:-

Quote

11. It can be seen from the said BIS that for a product to be classified as Kerosene, it has to meet the following specifications^{1459:1974} "2.1 The material shall consist of refined petroleum distillates. It shall be free from visible water, sediment and suspended matter. 2.2 The material shall also comply with the requirement given in Table I, when tested according to the appropriate methods prescribed under 'P' series of IS: 1448, reference to which is given in column 4 of the table."*

TABLE 1 REQUIREMENT FOR KEROSENE

Sl. No.	Characteristic	Requirement	Method of Test (Ref.to 'P' of IS:1448
1.	Acidity, inorganic	Nil	P:2
2.	Burning Quality a) Char value, mg/kg of oil consumed, Max. b) Bloom on glass chimney	not darker than grey.	
3.	Colour (Saybolt)+	Min+10	P:14
4.	Copper strip corrosion	For 3h at 50°C	P:15
5.	Distillation: a)Percent recovered below 20 b) Final boiling point, °C,	Min.200°C Min.300°C	P:18
6.	Flash point (Abel), °C,	Min 35	P:20
7.	Smoke Point,mm,	Min 18	P:31
8.	Total,sulphur,percent by mass	0.25 Max	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 From a perusal of the test reports of CRCL Delhi and CRCL Kandla, assuming the same to be correct, notwithstanding the difference in the test results between the two qua the parameter regarding final boiling point. It is seen that out of the 8 parameters on which the sample has to be tested for

determining whether or not the same meets with the specifications of Kerosene, it is seen from both the test results that test have not been undertaken with respect to the following 3 parameters.:

- (i) Burning quality
 - (a) Char value, mg/kg of oil consumed, Max
 - (b) Bloom on glass chimney
- (ii) Colour (Saybolt)
- (iii) Total, sulphur, percent by mass, Max

12. It is also not the Revenue's case that the said three parameters can be established by any inferential process or otherwise. Insofar as sulphur is concerned, though no test have been undertaken, we will for the sake of our discussion assume that the said parameters have been met, as the same forms a part of the suppliers test reports and is within the parameters specified in IS 1459:1974 (reaffirmed in 1996). 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. The revenue has neither through test results nor otherwise lead any evidence to show that the said two parameters were also met with.

Unquote

38. Under the facts and circumstances and the evidences on record, we find that in absence of evidences that the imported goods meet all the specifications as laid down in Supplementary Note (c) to Chapter 27 for classification of a product as Kerosene and Supplementary Note (e) so as to classify a product as diesel, the case made out by the Revenue cannot be sustained.

39. We also find that the test reports are vitiated and not reliable as sampling has been done improperly and not in conformity to the prescribed

specifications. We further find that there is miscarriage of justice by denying the prayer for retest.

We further hold that in the facts of the present case there is no scope for applying preponderance of probability or the principle of probability, as there are explicit rules and or instructions laid down for classification. We also hold that the Test reports relied upon by Revenue are inconclusive.

40. In view of our findings we allow the appeals and set aside the impugned order. The goods under import are to be classified as per CTH heading claimed/declared by the appellant in the bills of entry. Accordingly, we hold that rejection of transaction value is also bad and thus, declared value has to be accepted. Redemption fine and penalties on the appellants are also set aside.

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.

42. Thus, the appeals are allowed with consequential relief.

[pronounced on 09/05/2022]

(C. J. MATHEW)
MEMBER (TECHNICAL)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)