CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 86344 Of 2021

(Arising out of Order-in-Original No. 65/SA(65)ADG(ADJ)/DRI,MUMBAI/2020-21 dated 09.11.2020 passed by Additional Director General, ADJ, Mumbai)

M/s SAF Petroleums **.....Appellant**
No. 16-23 D4, palam Raju nagar, 3rd Street,
Kakinada-533003.

VERSUS

Additional Director General-Adjudication-Mumbai **.....Respondent**
New Custom House, Ballard Estate, Mumbai-400 001.

WITH

Customs Appeal No. 86346 Of 2021

(Arising out of Order-in-Original No. 65/SA(65)ADG(ADJ)/DRI,MUMBAI/2020-21 dated 09.11.2020 passed by Additional Director General, ADJ, Mumbai)

M/s Mahommed Abdul Khader Ansari **.....Appellant**
No. 2/1 Chandran Street, Maduvankarai Guindy Chennai, Tamil nadu-600032.

VERSUS

Additional Director General-Adjudication-Mumbai **.....Respondent**
New Custom House, Ballard Estate,
Mumbai-400 001.

Appearance:

Shri Chirag Shetty Along with Ms. Diva Devarsha, Advocate for the Appellant

Shri Manoj Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M. M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86141-86142/2023

Date of Hearing: 12.05.2023
Date of Decision: 17.07.2023

PER : S. K. MOHANTY

These appeals of SAF Petroleums and Mohammed Abdul Khader Ansari (co-appellant) are directed against the Order-in-Original No.65/SA (65) ADG (ADJ)/DRI, MUMBAI/2020-21 dated 09.11.2020 (for short, referred to as the 'Impugned order'), passed by the Additional Director General, Directorate of Revenue Intelligence (DRI), Mumbai. The issue involved in the present case relates to classification of the goods imported by the Appellants. The Appellants had declared the same as 'Mineral Spirits'; whereas, the department had entertained the view that the goods are 'Diesel Oil-High Speed Diesel' (HSD) and accordingly, confirmed the adjudged demands on the appellants.

2. Brief facts of the case are that the Appellants are engaged in trading of goods such as lubricant, engine oil, Gas oil, Bio Diesel and Mineral spirit etc., and also used to trade in Gas oil in Dubai on profit sharing basis with Skynet Vault PTE Ltd, Singapore ('Skynet/foreign supplier'). The Appellants started importing Mineral Spirit Grade C from Skynet in the year 2017. The goods were sold as 'Mineral Spirit' by the Appellants to Real Fuel Tech and in turn, Real Fuel Tech sold the same to different buyers.

3.1 The present appeal relates to the goods imported vide 54 Bills of Entry (B/Es), where the same have been declared by the appellants as Mineral Sprit, falling under CTH 27101990 of the Customs Tariff Act, 1975 ("for short, referred to as "the Tariff Act"). Out of the aforesaid 54 B/Es, goods in relation to 51 B/Es were assessed and cleared by the Customs department as 'Mineral Spirit', based on the test reports issued by Bureau Veritas. The remaining 3 B/Es having Nos. 5967331, 5967362 and 5967418, all dated 13.04.2018 filed by the Appellants have been investigated by the DRI and as per them, the goods imported by the Appellants were HSD and not Mineral Spirit. The goods for the said 3 B/Es are yet to be cleared for home consumption.

3.2 DRI had gathered intelligence that one Mr. Nusumu Venkata Rambabu was involved in the smuggling of diesel, falling under Chapter Heading CTH 27101930 of the Customs Tariff Act into India by mis-declaring the same as 'Mineral Spirit'. Accordingly, goods imported vide 3 B/Es Nos. 5967331, 5967362 and 5967418, all dated 13.04.2018 filed by the Appellants were put on hold. These goods were examined and the samples drawn from 3 containers out of the 10 containers were sent to CRCL, Customs House Laboratory, Chennai for testing. The goods imported by the three bills of entry dated 13.04.2018 were seized vide Panchnama dated 23.04.2018, under belief that the same being Diesel were mis-declared as Mineral Spirit. The goods were sent to the Chemical Examiner, CRCL, Customs House Laboratory, Chennai for testing, who vide test report dated 20.04.2018 and dated 16.04.2019, based on testing 6 parameters concluded that '*the samples are other than Mineral Spirit and may be considered as 'Diesel Oil''*. The 6 parameters, tested by the CRCL Customs House Laboratory are as follows:

1. *Density @ 15 degree C*
2. *Flash Point (PMCC)*
3. *Kinematic Viscosity @ 40 degree C*
4. *Distillation @ 350 degree C*
   (Percentage recovered (v/v))
5. *Percentage of Ash*
6. *Acidity- Inorganic*

3.3 Concurrently, enquires were conducted by the DRI and search operations were carried out at various places. The department arrested the proprietor of Appellant's firm and his son Mr. Mohammed Abdul Khader Ansari, the Co-Appellant herein and recorded their statements on 17.04.2018. The aforesaid statements were retracted by both the individuals before the Magistrate at the time of the Bail hearing. The Learned Additional Chief Metropolitan Magistrate after hearing the rival submissions was pleased to grant bail to the Appellants vide order dated 22.05.2018 and 31.05.2018 respectively. Statements of the 13 Purchasers of the 'Mineral Spirit' were also recorded during the course of investigation by the DRI.

4.1. The aforesaid investigation culminated into issuance of Show Cause Notice (SCN) date 17.04.2019, wherein the Department had proposed to reject the classification of goods imported under the aforesaid 3 live Bills of Entry, and in respect of goods imported in the past vide 51Bills of Entry, the department had proposed re-classification of the same from 'Mineral Spirit' to 'High Speed Diesel'

(HSD) falling under CTH 27101930 of the Tariff Act, on the basis of the evidences: namely, (a) the test reports issued by the Customs Laboratory, Chennai relating to the live Bills of Entry, (b) statements of the Appellants, (c) statements of the purchasers, (d) invoices issued by Gulf Petrochem FZC to Skynet relating to the sale of ultra low sulfur gas oil/ gas oil recovered from the mail ID of the Appellants from the CPU seized by DRI, (e) diary for the year 2016 recovered from the residential premises of the proprietor of the Appellant, (f) diary of 2018 with the name of Trigel Petrochem Pvt. Ltd. and (g) marshal quality slip pad recovered from the residential premises of the proprietor of the Appellant. The Department also proposed to reject the valuation of the goods i.e., live as well as past imports on the basis that the goods are not 'Mineral Spirit' but 'HSD'.

4.2. The Appellants were called to show cause as to why:

(A) <u>With regard to the live consignment imported vide 3 B/Es</u>:

(i) the declared description of the goods as "Mineral Oil" pertaining to the Bills of entry Nos. 5967331 dated 13.04.2018, 5967362 dated 13.04.2018 and 5967418 dated 13.04.2018 should not be rejected and held as "Diesel Oil-High Speed Diesel Oil";

(ii) the declared classification should not be rejected and re-classified under CTH 27101930 of the Tariff Act;

(iii) the value of the goods improperly imported should not be determined as per Rule 9 of the Customs Valuation (Determination of value of imported goods) Rules, 2007;

(iv) the subject seized goods should not be confiscated under Sections 111(d), 111(e),111(f) 111(l) and 111(m) of the Customs Act, 1962 (for short, referred to as the "Act of 1962");

(v) Penalty should not be imposed under Section 112 and Section 114AA of the Act of 1962.

(B) <u>With regard to the consignments imported in the past by the Appellant vide 51 B/Es</u>:

(i) the declared description of the goods as 'Mineral Oil' should not be rejected and held as 'Diesel Oil-High Speed Diesel Oil';

(ii) the classification of the imported goods should not be rejected and re-classified as CTH 27101930 of the Tariff Act;

(iii) the value of the goods improperly imported should not be determined as per Rule 9 of the Customs Valuations (Determination of value of imported goods) Rules, 2007;

(iv) the quantity of 4330.345 MTs and 37.100 MTs of goods viz. Diesel Oil- High Speed Diesel Oil valued at Rs.13,49,08,070/- and Rs. 9,50,860 should not be held liable for confiscation under Sections 111(d), 111(e), 111(f), 111(l) and 111(m) of the Act of 1962;

(v) the differential duty should not be demanded from them under Section 28(4) of the Act of 1962;

(vi) interest under Section 28AA of the Act of 1962 should not be demanded;

(vii) penalty should not be imposed on them under Section 112, Section 114A, Section 117 and Section 114AA of the Act of 1962.

5.1 During the personal hearing, the Learned Additional Director General had acceded to the request of cross-examination sought by the Appellants and accordingly, the Appellants could cross examine 4 out of the 10 purchasers of goods. Remaining 6 purchasers did not turn up for cross-examination. During the cross-examination of the 4 purchasers, all of them categorically stated that their statements were recorded under the force and duress and they were not aware of the contents of the statements. They further stated that they had purchased mineral spirits from the Appellants and sold the goods as mineral spirits onwards.

5.2 The Learned Additional Director General also allowed cross examination of Mr V. Suresh, Joint Director of Customs Laboratory, Chennai. During the cross-examination, Mr.V.Suresh, had agreed that the results may vary, if a wrong procedure is used for collection of samples and also agreed that he only tested the samples for vital parameters of mineral spirits as well as vital parameters of diesel oil as per IS 1745:1978 and IS 1460:2005 respectively. He also admitted that it was not possible to conduct all tests prescribed under IS 1460:2005 pertaining to Diesel Oil.

5.3 The SCN was adjudicated by the Learned Additional Director General vide the Impugned order, in confirming the entire demand proposed for recovery in the SCN and also imposed penalties by relying upon the aspects namely, (a) the retracted statements of the Appellants, (b) the test reports of the Customs Laboratory, Chennai (c) the purchasers' statements and (d) documentary evidence i.e. invoices issued by Gulf Petrochem FZC to Skynet Vault Pte Ltd., for sale of gas oil/Ultra Low sulfur Gas Oil, master quality slip pad, diary for the year 2016 and diary for 2018 of Trigel Petrochem Pvt. Ltd.

6. We have heard both sides, examined the case records and the submissions made during the course of hearing of the captioned appeals by both sides.

7. Mr Chirag Shetty, learned Advocate appearing for the appellants made following submissions, assailing the Impugned order:

(a) the adjudicating authority was wrongly rejected the classification of the live consignment, on the basis of the test reports dated 20.04.2018 and 16.04.2019 as the same could not be relied upon. The Custom House Laboratory has conducted tests in relation to only 6 parameters out of the required 21 parameters as per IS 1460:2005. Therefore, the conclusion that the imported goods is not 'Mineral Spirts' but 'Diesel Oil' is based on incomplete testing.

(b) The issue is settled by the decision of Tribunal in following cases (a) Deep Water Specific 1 Inc, Transocean Offshore Deepwater Drilling Inc v CC, Vijaywada, 2019 (4) TMI 1704; (b) Transocean Discoverer LLC v Commissioner, 2015 (7) TMI 816; (c) CGG Marine v Commissioner, 2016 (6) TMI 709; (d) Schlumberger Solutions Pvt Ltd v CC (import), 2016 (11) TMI 170 (e) Commissioner of Customs v Roshan Petrochem, Final Order No. 40047-40050/2022 dated 04.02.2022.

(c) That out of the 6 parameters tested in the aforesaid test reports, 3 parameters i.e., Density, Flash Point and Distillation, fulfil the parameters of 'Mineral Spirit', hence even as per the test reports, the goods can be considered as 'Mineral Spirit'.

(d) That assuming without admitting that 6 parameters are vital for determining that the goods are HSD, even then the aforesaid test reports cannot be relied upon to hold that the Impugned goods are HSD. For goods to be considered as HSD, the minimum distillation percentage as per IS 1460:2005 is 95%. In the present case, the distillation percentage recorded in the test report is 90% i.e., less than 95%. Accordingly, the findings in the test report are *prima facie* incorrect.

(e) The test report is not conclusive in nature as the same uses the term 'may be' to conclude its observations. The test report admittedly records that *'the goods are other than Mineral Spirit and may be considered as Diesel Oil'*. The use of term 'may be' shows that the opinion/findings in the test report itself is inconclusive and the same cannot be relied upon to fasten any liability on the Appellant.

(f) The Customs Laboratory, Chennai did not have equipment/ facility to test the samples on HSD parameters during the period in dispute. Circular No. 43/2017 dated 16.11.2017 read with Circular No. 15/2019 dated 07.06.2019 clarifies that the Revenue Laboratories have now acquired i.e., on 07.06.2019 testing facilities for some of the samples listed in Annexure to the Circular following upgradation and the list included Diesel Oil i.e., both HSD and LDO. Hence, in terms of aforesaid circulars, the Chennai Customs laboratory did not have facility to test the samples for HSD before 07.06.2019. In the present case, aforesaid test reports were issued before 07.06.2019 when the said laboratory was not equipped to test samples for HSD and accordingly, the test report has been given without the same being equipped to carry out the required test.

(g) The samples imported under Bill of Entry Nos. 5967362 and 5967418 both dated 13.04.2018 were tested by the Customs Laboratory, Chennai after substantial lapse of time i.e., on 16.04.2019, almost a year, and it is settled law that no reliance can be placed on such report which has been issued pursuant to such delayed testing of goods. Reliance was placed on the decision of Tribunal in the case of *Shalimar Agro Tech (P) Ltd v CC 2007 (217) ELT 516 (Tri-Bang),* upheld by Hon'ble High Court of Andhra Pradesh, reported in 2015 (391) ELT A 64 (AP).

(h) Reliance placed by the adjudicating authority on cross examination of Mr V Suresh, Joint Director, CRCL in the cross examination to hold that the aforesaid test reports are conclusive, is bad in law as the same was contradictory to the test reports and Board Circulars mentioned above.

(i) The adjudicating authority erred in relying upon the purported statements of the proprietor of the Appellant and the Co-Appellant as the same were contradictory to the documentary evidences i.e., invoices, past test reports and were extracted under threat. In any event, it was submitted that the statements have been retracted at the first available opportunity before the Magistrate, which is evident from the bail orders.

(j) The adjudicating authority erred in placing reliance on invoices, which were printed from email id of safpetro555@gmail.com in the computer seized by the DRI during investigation inasmuch as the same was done without following the procedure mentioned in Section 138C of the Act of 1962.

(k) In any event, the documents retrieved from the email id does not further the case of the department. The foreign supplier of the Appellants is Skynet and the remittance for goods supplied i.e., 'Mineral Spirit' to the Appellants was made to Skynet in Singapore as in evident from their invoices. However, all the invoices that were retrieved from the aforesaid mail id were issued by Gulf Petrochem FZC to Skynet for the sale of Gas Oil or Ultra Low Sulfar gas oil. It is not in dispute that the Appellant has neither imported 'Gas Oil' or 'Ultra low sulfur gas oil' from Skynet. It is not even the case of department that what is imported by the Appellant is 'Gas Oil' or 'Ultra low sulfur gas oil'. Impugned order at Para 5.6.8 accepts that 'ultra low sulfur gas oil or 'gas oil' is not the same as 'HSD'

(l) In any event, the invoices issued by Gulf Petrochem FZC relates to the period prior to 13.04.2018 i.e., date prior to the import action of the live consignment. Hence, assuming without admitting that aforesaid invoices relate to the Appellants, even then, the same does not relate to live consignments as all the invoices were issued prior to 13.04.2018. For past consignment, the test reports clearly classify the goods as Mineral Spirit.

(m) For the past consignments, it was submitted that the goods were assessed on the basis of the test reports which categorically stated that the goods were 'Mineral Spirit'. There is neither any allegation in the SCN nor any findings recorded in the impugned order that the aforesaid reports are wrong. Since the correctness of the reports are not in dispute, the goods imported vide 51 bills of entry cannot be re-classified.

(n) 4 Purchasers in cross examination has admitted that their statement was recorded under duress and what is purchased by them from Appellant was Mineral Spirit only. Statement of balance purchasers could not be relied upon as they did not appear for cross examination.

(o) Without prejudice, test reports of live consignment cannot be used to reject the classification of past import. Reliance was placed on the following decisions:

(i) P. K. Exim v. CC Mundra, 2021 (9) TMI 142 - CESTAT Ahmedabad;

(ii) Shalimar Paints Ltd v/s Commissioner 2001 (134) ELT 285 (Tri-Kolkata), upheld by Hon'ble Supreme Court 2002 (145) ELT A242;

(iii) A.R Trading Company v/s Commissioner 2020 (372) ELT 388 (Tri-Bang).

(p) The adjudicating authority has wrongly placed reliance on the diary of 2016 mentioning some entries of Dubai payment/Dubai hawala to hold that the Appellants received HSD from Dubai. He ought to have appreciated that the diary does not mention anything on sale of HSD to the Appellants or by the Appellants. Furthermore, as per their invoices all payments were made in Singapore and not in Dubai.

8. Shri Manoj Kumar, learned Authorised Representative, appearing for Revenue submitted that the impugned order passed by Learned Additional Director General was proper and needs no interference. Furthermore, he submitted as under:

(a) Test Reports dated 20.04.2018 and 16.04.2019 issued for live consignments are correctly relied upon to confirm that the Impugned goods are 'Diesel Oil' and not 'Mineral Spirit'.

(b) Cross examination of Mr V. Suresh, Joint Director of Customs House Laboratory, Chennai, clarifies that the samples were tested for vital parameters of Mineral Spirit as per IS 1745: 1978 as also for vital parameters of Diesel Oil as per IS 1460:2005 and results showed that the product is Diesel Oil.

(c) the adjudicating authority rightly held that the aforesaid test reports are categorical in light of the confessional statements of the Appellants.

(d) invoices of M/s Gulf Petrochem, Sharjah retrieved from mail id safpetro555@gmail.com, show that Appellants have received Ultra Low Sulfur Gasoil which is nothing but Diesel Oil.

(e) Decision of Hon'ble Gujarat High Court in the case of Rajkamal Industrial Pvt. Ltd. was relied upon to submit that it was not necessary to test all the 21/22 parameters mentioned in IS for HSD, when the test reports state that the impugned goods are Diesel Oil on the basis of testing of vital parameters.

9. In counter, the Learned Advocate for Appellant stated that the aforesaid decision passed by Hon'ble Gujrat High Court is not applicable to the present case, because the facts are completely different than the present case. In any event, the dictum of the aforesaid case cannot be made applicable to past consignments as there is no test

report to state that the goods are other than Mineral Spirit. In fact, for the past imports, the test reports clearly stated that the goods are Mineral Spirit.

10. Before we consider the submissions made by both sides, it is important to note that the impugned order relates to:

(i) Imports made by 3 B/Es i.e., Nos. 5967331, 5967362, 5967418 all dated 13.04.2018, for which goods are yet to be cleared;

(ii) imports made by 51 bills of entry, for which the goods have already been cleared on the basis of test reports, certifying the goods to be mineral spirit.

11. The dispute between the parties is of classification of imported goods. The Appellant has declared the goods as 'Mineral Spirit' falling under CTH27101990, whereas the department is of the view that the said goods are 'High Speed Diesel Oil' falling under CTH 27101930 of the Tariff Act for the live consignment pertaining to three bills of entry referred to above, The adjudicating authority, has relied upon the test report of Custom House Laboratory, Chennai which certifies that the goods may be considered as Diesel Oil along with statements of the Proprietor of the Appellant, the Co-Appellant and the statement of purchasers of the goods to conclude that the goods were High Speed Diesel Oil. For the goods referred above, which were imported and cleared vide the 51 bills of entry pertaining to clearances made in the past during the period May 2017 to April 2018, the adjudicating authority has re-classified the goods as High Speed Diesel Oil by placing reliance on Test reports for live consignment, statements of Co-Appellant, statements of buyers, invoices of Gulf Petrochem FZC, diary of 2016, marshal quality slip pad and diary of 2018.

12. Before we deal with the submissions made by both sides, certain undisputed facts as highlighted by the counsel for the Appellant and not disputed by AR for the Revenue are summarised herein below:

(a) Mineral Spirit is freely importable and classifiable under CTH 27101990 of the Tariff Act.

(b) Test reports dated 20.04.2018 and 16.04.2018 issued for the live consignment only tested 6 out of the 21 parameters prescribed under IS 1460:2005 for concluding that the goods may be considered as Diesel oil. The test reports uses the term 'may be' while concluding the goods to be Diesel Oil.

(c) The said test reports do not state that the said goods are HSD. It is the submission of the Appellant that there is huge difference between HSD and diesel oil, as diesel oil in itself is of two variants viz. HSD or LDO.

(d) The test of live consignments was conducted by Customs Laboratory, Chennai prior to 07.06.2019 when they did not have equipment/facility for conducting test for HSD, as per the Board Circular No. 43/2017 dated 16.11.2017 read with Board circular No. 15/2019 dated 07.6.2019.

(e) For the past imports, goods were assessed and cleared on the basis of the test reports which categorically state that the imported goods are nothing but mineral spirit and the said test reports have neither been disputed in the SCN nor by the adjudicating authority or by the Learned AR for the Revenue.

(f) Documentary evidence in the form of diary 2016 does not mention anything about receipt or sale of HSD by the Appellants.

(g) As per the invoices of Skynet, the supplier, all payments were made in Singapore and not Dubai.

(h) That documentary evidence in the form of Marshal Quality slip pad had been relied upon in the show cause notice and impugned order, as it mentions sale of W. Diesel to support the allegation of receipt or sale of HSD by the Appellants. However, the said slip does mention anything about receipt or sale of HSD by the Appellants.

(i) That documentary evidence in the form of diary 2018 belonging to 'Trigel Petrochem P Ltd.' has been relied upon in the show cause notice and impugned order as it mentioned Diesel to support the allegation of sale of HSD to them by the Appellants. However, the said diary supports the case of the Appellants, as it mentions 'Loading of Mineral Spirit' which was supplied by the Appellants to them.

(j) M/s Gulf Petrochem FZC is not the supplier of the Appellants and the purported invoices recovered from the email relates to the sale of 'Gas Oil' or 'Ultra low Sulfur Gas Oil' by M/s Gulf Petrochem to Skynet. There is no documentary evidence showing sale of 'Ultra Low sulfur Gas Oil' or 'Gas oil' from Skynet to Appellants.

(k) Ultra Low sulfur gas oil is different than HSD, as the same does not fit into the Indian standards specification of IS 1460:2005 for HSD, as held by the Learned Additional Director General in para 5.6.8 of the impugned order.

(l) Neither M/s Gulf Petrochem nor Skynet Vault PTE Ltd. were questioned by the Department to ascertain whether the goods were supplied by them to the Appellants. However, as per documentary evidence, the Appellants received 'Mineral Spirit' from Skynet. Furthermore, as per documentary evidence i.e., invoices, the Appellant had sold 'Mineral Spirit' to their buyers directly or through Real Fuel Tech. The same have been accepted by 4 purchasers during cross examination.

(m) The statements of the proprietor of the Appellant and the Co-Appellant were retracted immediately before the Magistrate during bail hearing.

(n) Documentary evidence in the form of invoices raised by Real Fuel Tech or the Appellants showing sale of 'Mineral Spirit' on which GST was also paid on such sale. Few buyers retracted their statements during cross examination before the Learned Additional Director General by stating that their statements were recorded under duress and what was purchased and sold by them was not Diesel Oil. Balance buyers/purchasers did not appear for cross examination.

(o) Foreign supplier of the Appellants i.e., Skynet is not related to Appellants and there is no statement or evidence of any hawala transaction.

13. During the course of hearing, Learned AR was directed to reply to the undisputed facts and from the reply filed by the department, we note that apart from tax invoices issued by Gulf Petrochemical and statements, no other document like diary 2018 belonging to 'Trigel Petrochem P Ltd'., Master Quality Slip Pad has been relied upon by him. In short, the submissions made by the Appellant on undisputed facts have not been controverted by the department before us. In any event, since the said documents have been relied upon in the impugned order, it will be important for us to see if the same can be relied upon in support of the findings on mis-classification of goods as Mineral Sprit instead of High Speed Diesel.

14. To determine the characteristics of goods such as Mineral Spirit, Gas Oil, Diesel Oil, HSD, Standard of Measures have been prescribed by Bureau of Indian Standards (BIS). The same provide for product specifications on the basis of which the same can be classified under a particular entry. The disputed entries in the present case are of 'Mineral Spirit' and 'High Speed Diesel Oil'. Indian Standard for Mineral Spirit is IS 1745:1978 and the same provides for 9 parameters. Once all parameters are fulfilled, the product can be called as Mineral Spirit.

Similarly Indian Standard for HSD is IS 1460:2005 prescribing 21 parameters to be tested. Once all the parameters are as per the prescribed standards, the product can be classified as HSD. In the present case, for live consignments, test reports are issued by the Customs Laboratory, Chennai. The same after testing 6 parameters has concluded that the goods imported by the Appellant may be considered as Diesel Oil.

15. We are in agreement with the Appellant that the said Test cannot form the basis of re-classification of goods from Mineral Spirit to HSD for more than one reason.

16. On perusal of the test report annexed to the Appeal Memorandum, we note that the Joint Director, in both the test reports, after testing the samples on 6 parameters has concluded that *"the samples under reference is other than Mineral Spirit. Each of the two samples <u>may be</u> considered as Diesel Oil."* The use of term 'may be' goes on to show that the report issued by the Custom House is not conclusive and is a mere opinion. As per Britannica Dictionary, meaning of words 'may be' means 'possibly but not certainly, or perhaps'. Further, as per Macmillian Dictionary, word 'may be' is used for showing that one is not sure whether something is true or whether something will happen.

17. Considering the above, we are of the view that the adjudicating authority has committed an error to re-classify the goods imported vide the 3 bills of entry on the basis of a test report which on the face of it is non-conclusive. It is settled principle of law that classification is a departmental function. It is also a settled law that onus to prove a fact is on the person who asserts the same. In the present case, the department has relied upon a test report, which does not conclusively show that the goods imported merit classification under heading proposed by the revenue. The stand of the department that language used in the impugned test report is a general practice, itself is objectionable inasmuch as no documentary evidences were adduced for deciding the issue of classification contrary to the classification claimed by the appellants in respect of the impugned goods.

18. The reliance placed by the adjudicating authority on the cross-examination of the Joint Director is equally erroneous and deserves to

be rejected. The Learned AR in his submissions has placed reliance on the cross-examination of the Joint director to submit that the test report issued by him was conclusive. If the argument of the Learned AR is accepted, then the same will result in permitting the Joint Director to better or improve upon the faulty or inconclusive test report issued by him at the stage of cross-examination. In our view, the same cannot be permitted. It is not in dispute that the test reports in question were not withdrawn by the department and/or re-issued. The department cannot be permitted to improve upon the test report after more than one year of its issuance and that too by way of cross-examination inasmuch as the test reports as it stands, uses the words 'may be' which shows it is inconclusive in nature. Further, reliance has been placed by the Learned AR on the reply dated 30.06.2019 on the RTI query issued by CPIO, wherein it has been stated that Custom House Laboratory was having the required facility to test HSD. We note that the said reply is completely contrary to the clarification provided vide Board Circular No. 43/2017-Customs dated 16.11.2017 read with Circular No. 15/2019-Customs dated 07.06.2019. The said circulars were shown to us by the Appellant at the time of hearing and are attached to the compilation filed by the learned Advocate. Vide Circular No. 43/2017-Customs dated 16.11.2017, the Board has identified items whose samples cannot be tested at present and has given a list of laboratories functioning under other departments/ ministries where such samples can be tested. Sr. No. 10 (item 25 in column 3) of the annexure to the said Circular covers 'Diesel Oil'. Subsequently, another Circular No. 15/2019-Customs was issued, clarifying that the Revenue Laboratories have been acquired with such facilities for testing of the notified products including Diesel Oil during the period around June, 2019. The same therefore proves beyond doubt that the Customs Laboratory, Chennai did not have equipment/ facility to test the samples on HSD parameters before 07.06.2019. We find that in the present case, both the test reports have been issued before the said date of 07.06.2019. The contents of the statements provided by the Joint Director in cross-examination is to the effect that the goods have been conclusively tested at the Laboratory and that of the RTI reply given by CPIO therefore, cannot be relied upon as the same are contrary to the Board's Circular referred *supra*. In any event, it is a settled law that department is bound by the Board Circulars and it is not open for them to argue to the contrary. Hence, we are of the view that test reports issued during the period when the laboratory was not equipped to test the parameters of HSD cannot be relied upon.

19. The IS parameters for Mineral Spirit, HSD etc. have been placed before us by the Appellant in compilation submitted by the learned Advocate. We have gone through the 9 parameters mentioned for Mineral Spirit and 21 Parameters mentioned for Diesel Oil. On perusing the two test reports, we note that the custom house has tested 6 parameters of samples before providing a non-conclusive opinion that the goods may be treated as Diesel Oil. Out of the 6 parameters tested, 3 parameters i.e., Density, Flash Point and Distillation match the IS standard of 'Mineral Spirit'. Further, parameter relating to minimum distillation percentage for HSD as per IS 1460: 2005 is 95%. In the test reports the distillation percentage of the samples was found to be 90% i.e., less than 95%. Hence, even out of the 6 parameters tested by the Customs Laboratory, 3 parameters match the standards provided for Mineral Spirit and 1 parameter does not confirm to the standards prescribed in IS 1460: 2005 for HSD. Supplementary note (e) of chapter 27 states that for the goods to be considered as HSD, all the parameters stated in IS 1460:2005 needs to be satisfied. Even if, we consider the test report to be correct, the distillation parameter required for HSD does not match with the distillation parameter of the imported goods. For the above reasons, we are of the considered view that the test reports dated 20.04.2018 and 16.04.2019 cannot be relied upon to re-classify the goods from Mineral Spirit to HSD. The goods imported by the Appellant cannot be treated as Diesel Oil.

20. In any event, for a product to be considered as Diesel Oil, the same requires to fulfil all 21 parameters mentioned in IS 1460:2005. In the present case, the Custom House Laboratory vide aforesaid test reports have tested only 6 parameters. Hence, in other words, the Custom House Laboratory has not tested all the 21 parameters required in terms of IS 1460: 2005. We are of the view that without testing all the aforesaid parameters, the test reports cannot be considered to re-classify the imported goods as Diesel Oil. In this context, the Tribunal in the following cases have consistently taken a view that all the parameters stated under the Indian Standard needs to be tested for goods to be considered under that particular heading:

(a) Deep Water Specific 1 Inc, Transocean Offshore Deepwater Drilling Inc v CC, Vijaywada, 2019 (4) TMI 1704;

(b) Transocean Discoverer LLC v Commissioner, 2015 (7) TMI 816;

(c) CGG Marine v Commissioner, 2016 (6) TMI 709;

(d) Schlumberger Solutions Pvt Ltd v CC (import), 2016(11) TMI 170;

(e) Commissioner of Customs v Roshan Petrochem, final order no. 40047-40050/2022 dated 04.02.2022.

21. Learned AR had relied upon the judgement dated 20.01.2022 passed in R/TAX APPEAL NO.297 of 2021 by the Hon'ble Gujarat High Court in the case of Rajkamal Industrial Pvt Ltd. and submitted that it is not necessary to test all the 21/22 parameters mentioned in IS for HSD, when the test reports state that the Impugned goods are Diesel Oil on the basis of the testing of vital parameters. We find that the ratio of aforesaid decision passed by Hon'ble Gujarat High Court is not applicable to the present case because, the facts are completely different in such decided case vis-a-vis the facts involved in the present case and the same is evident from the table below.

Facts of Rajkamal Industries Pvt. Ltd.	**Facts of the present case**
The test reports including IOCL test report <u>categorically</u> stated that the goods are HSD as per 14 parameters applicable for IS 1460:2005.	The test reports of Custom House Laboratory states that goods may be 'Diesel Oil' and does not categorically state that the goods are HSD in terms of IS 1460: 2005. Furthermore, the test reports are not conclusive as held by us.
The goods were also tested by IOCL who were equipped to test the samples for HSD before 07.06.2019 in terms of aforesaid Board circulars.	In the present case the goods were tested by Customs laboratory alone who were not equipped to test the sample for HSD during the time there were tested as clarified in terms of aforesaid Board circulars.

Facts of Rajkamal Industries Pvt. Ltd.	**Facts of the present case**
The goods were tested for 14 parameters.	The goods were tested for only 6 parameters and even out of 6 parameters 3 parameters match with that of 'Mineral Spirit' as observed above and parameter for distillation did not confirm the prescribed parameter for HSD as observed above. Hence, the test reports were not conclusive as held by us.

22. In view of the above, the case of the department for the live consignment and for the past consignment should fail on the above ground itself, as the primary evidence in the form of test reports cannot be relied upon by the department as held in the preceding paragraphs. With respect to the goods imported by 51 bills of entry, the same in any event are well supported by independent test reports, which conclusively prove that the goods are Mineral Spirit. Neither have the department challenged the contents of the said Test Report nor have they provided any contrary test report to the one produced by the Appellant. In view thereof, the Appeals of the Appellants deserve to be allowed on the aforesaid ground alone. It is settled law that test report of live consignment cannot be used to reject the classification of past import. In this Context, Tribunal in the following cases have consistently held that test report of live bill of entry cannot be used to reject the classification of past import, which after due assessment by the proper officer have been cleared for home comsumption:

(a) Penshibao wang P Ltd v. Commissioner of Customs 2016 (338) ELT 597 (Tri);

(b) P. K. Exim v. CC Mundra, 2021 (9) TMI 142 - CESTAT Ahmedabad;

(c) Shalimar Paints Ltd v/s Commissioner 2001 (134) ELT 285 (Tri-Kolkata) upheld by Hon'ble Supreme Court 2002 (145) ELT A242;

(d) A.R Trading Company v/s Commissioner 2020 (372) ELT 388 (Tri-Bang).

23. Having held the above, it is important to deal with the other evidence relied upon by the Adjudicating authority in the form of statements, emails, diary entries, invoices of Gulf Petrochem issued to Skynet, diary for the year 2018, Marshal Quality slip pad to confirm that charge of mis-classification on both live and past consignment. We would like to note that at the time of hearing of appeal, the department was permitted to counter the arguments of the counsel for the Appellants on undisputed facts. In the reply filed by the Learned AR apart from test reports, cross-examination of Joint director, RTI reply from CPIO, he has placed reliance on statements of buyer, proprietor of the Appellant, co-Appellant and cash book maintained by few suppliers to support the order passed by Adjudicating authority. We have already held that test reports, cross-examination of Joint director, RTI reply from CPIO cannot be relied upon to confirm the charge of mis-classification. In relation to the other evidences, we note that the statements of proprietor of the Appellant and his son (co-appellant) were retracted by them on the first available opportunity before the Magistrate, which is evident from the respective bail orders. Hence, these retracted statements cannot form the basis to confirm the charge of mis-classification. The law is well settled that merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability, it cannot lead to self- assessment or self-ascertainment. In the case of Vinod Solanki [2009 (223) E.L.T. 157 (S.C.)], the Hon'ble Supreme Court has ruled that the initial burden to prove that the confession was voluntary is upon the department and that evidence brought by confession if retracted, must be corroborated by other independent and cogent evidence. The Hon'ble Madras High Court in the case of Senior Intelligence Officer, Director General of Goods and Services Tax Intelligence v Shri Nandi Dhall Mills India Private Limited 2022 (3) TMI 444 (Mad) held that merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability and has also made a few payments as per the statement, cannot lead to self-assessment or self-ascertainment. Though, the judgement was pronounced in respect of GST, it goes to indicate that acceptance by the appellant during the course of recording the statement is not just enough and the same has to be confirmed by

adducing independently corroborative evidence. The whole case cannot rest simply on the basis of a retracted statement. In the present case, we have perused the invoices on the basis of which the goods were cleared by the Appellants to its purchasers on payment of GST. The same have shown the goods as 'Mineral spirit' and the department has accepted the same. Even the purchasers who appeared for cross examination have stated that their statement were recorded in duress and the goods purchased from Appellant were Mineral Spirit and sold as mineral spirit only. It is in fact the Appellants, who have produced corroborative evidence showing clearance of goods as Mineral Spirit. It was not open for the adjudicating authority to simply brush aside the retraction and follow the retracted statements without any corroborative evidence.

24. We also find merits in the arguments of the Appellants that the adjudicating authority has erred in the impugned order by placing reliance on the invoices of Gulf Petrochem FZC to hold that the goods imported under live consignments were not mineral spirit but HSD. We find that these invoices cannot be relied upon to hold that the goods were mis-declared by the Appellants. On perusal of the records, we find that the aforesaid invoices were printed out from email id of safpetro555@gmail.com from the computer seized by the DRI during investigation. We find that the foreign supplier of the Appellants is Skynet and the remittance for goods supplied to the Appellants was made to Skynet in Singapore as is evident from their invoices submitted by the Learned Advocate during the course of hearing. However, all the invoices that were retrieved from the aforesaid mail id were issued by Gulf Petrochem FZC to Skynet for the sale of Gas Oil or Ultra Low Sulfar gas oil. On perusal of the records, we find that there is no invoice relating to sale of these 'Gas Oil' or 'Ultra Low Sulfur gas oil' from Skynet to Appellants nor is there any invoice from Skynet to Appellants for sale of HSD. The Department neither questioned Gulf Petrochem FZC nor Skynet to ascertain as to whether they supplied 'Gas oil' or Ultra Low Sulfur gas oil' to the Appellants instead of Mineral Spirit. We are of the view that in absence of any invoice from Skynet showing sale of goods other than Mineral Spirit and also in absence of aforesaid supplier being questioned, the invoices issued by Gulf Petrochem FZC cannot be relied upon to hold mis-declaration and consequent confirmation of the duty demand.

25. Furthermore, the invoices issued by Gulf Petrochem FZC relates to period prior to 13.04.2018 i.e., date prior to filing of live bills of entry. Hence, the said invoices cannot relate to the live consignments as all the invoices were issued prior to 13.04.2018. With respect to past consignments, we have noted above that the same were assessed and cleared on the strength of proper certificates/test reports certifying the goods to be Mineral Spirit. The said reports have not been questioned by the department in the SCN or the impugned order and therefore the question of Appellant's importing any other goods other than Mineral Spirit in the 51 bills of entry does not arise. In any event, the invoices in question are for 'Ultra Low Sulfur gas oil; or 'gas oil'. Adjudication authority in the impugned order in para 5.6.8 has accepted that 'Ultra Low Sulfur gas oil; or 'gas oil' is not the same as 'HSD'. Hence, for this reason as well, we are of the view that no reliance can be placed on the aforesaid invoices for demanding duty.

26. On reliance placed by the adjudicating authority on the diary of 2016 as it stated Dubai payment/Dubai hawala to hold that the Appellants received HSD from Dubai, on perusal of the said dairy we find that the same nowhere mentions about receipt or sale of HSD by the Appellants. Furthermore, the foreign supplier of the Appellants is Skynet and as per their invoices, all payments were made in favour of the supplier in Singapore and not Dubai. Hence, we are of the opinion that said Diary cannot be relied upon to dispute the classification of goods. We would like to add here that the Learned AR during the hearing had agreed that the said diary cannot be relied upon and hence did not place any reliance on it. Similarly, reliance placed on marshal slip pad diary belonging to Trigel Petrochem P Ltd. will not further the case of the department as the same does not mention anything about purchase of HSD by the Appellants.

27. Based on the aforesaid discussions, we hold that classification of goods imported under the 3 live bills of entry and 51 past Bills of Entry have been wrongly rejected.

28. Having held the above, the question of valuation will have to be allowed in favour of the Appellant as the same was disturbed by the department on the ground that goods imported were Diesel Oil and not Mineral Spirit.

29. In view of the above discussions and analysis, it is made clear that none of the evidences relied upon by the department, to allege the mis-classification and under valuation resorted to by the appellants, stand the scrutiny of Law. We are of the considered opinion that the department failed to substantiate the allegations by cogent and legally admissible evidences. Hence, under the facts and in the circumstances of the case, we have no hesitation in allowing the appeals in favour of the appellants.

30. Therefore, the impugned order passed by the learned adjudicating authority is set aside and the appeals filed by the appellants are allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 17.07.2023)

(S. K. Mohanty)
Member(Judicial)

(M. M. Parthiban)
Member (Technical)

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