CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH : MUMBAI

Customs Appeal No. 85173 of 2023

(Arising out of Order-in-Appeal No. 1058 (Gr.I&IA)/2022(JNCH)/Appeals dated 07.12.2022 passed by Commissioner of Customs (Appeals), Jawaharlal Nehru Customs House (JNCH), Nhava Sheva, Taluk Uran, District Raigad.)

.....Appellants

G.L. Khanna & Sons
Office No.402, Marigold, NECO Garden,
Viman Nagar, Pune - 411014.

VERSUS

Commissioner of Customs, Nhava Sheva **.....Respondent**
Jawaharlal Nehru Custom House (JNCH), Nhava Sheva,
TAluk Uran, District Raigad, Pincode–400 707.

Appearance:

Shri J.C.Patel, Advocate a/w Shri Lilesh Sawant, Advocate for the Appellants
Shri Sydney D' Silva, 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/85006/2024

Date of Hearing: 06.09.2023
Date of Decision: 05.01.2024

PER : M.M. PARTHIBAN

This is an appeal filed by M/s G.L. Khanna & Sons, Pune (herein after, referred to as 'the appellants' for short) assailing the Order-in-Appeal No. 1058 (Gr.I & IA)/2022(JNCH)/Appeals dated 07.12.2022 (referred to as 'impugned order') passed by the learned Commissioner of Customs (Appeals), Jawaharlal Nehru Customs House (JNCH), Nhava Sheva, Taluka Uran, District Raigad.

2.1 The brief facts of the case of appellants had imported 'Fuel oil' from Spain under four Bills of Entry (B/Es) No. 8066788 and 8066761, both dated 30.03.2022; 8110603 dated 01.04.2022 and 8169028 dated 06.04.2022 through the seaport of Nhava Sheva under Jawaharlal Nehru Custom House (JNCH). Initially, the DRI, Pune had intercepted the said imported consignments in four containers by putting these goods on hold on the reasonable belief that the said goods were mis-declared for 'Diesel oil', which is restricted for import. Accordingly, representative samples were drawn from the said goods under panchanama proceedings dated 19.04.2022 and were sent for chemical testing to Central Excise and Customs Laboratory, Vododara, to ascertain whether the said goods were 'fuel oil' as declared by the appellants or 'diesel oil'. Upon testing the goods, it was found that the imported goods are not diesel, and accordingly DRI had withdrawn the embargo on the said goods and allowed the same for further clearance by the jurisdictional customs authorities. However, JNCH customs authorities had raised an objection regarding the goods treating the same as hazardous substance and thereby treating the said imports as being prohibited under the provisions of Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008.

2.2 The appellants by their letter dated 11.07.2022 had requested to release of goods covered under B/Es No. 8110603 dated 01.04.2022 and No. 8169028 dated 06.04.2022, as the goods were reported to be 'fit for refining'; in respect of goods covered under B/Es No.8066788 and 8066761 both dated 30.03.2022, which are reported as 'not fit for refining', the appellants importer had requested for re–testing of samples. Further, the appellants had also requested that they do not want show cause notice in the matter, but requested for a personal hearing before the case is decided by the original authority. After giving a personal hearing to the appellants importer on 22.07.2022, the original authority viz., Joint Commissioner of Customs, Group I & IA, Nhava Sheva-I, JNCH had ordered for release of the goods covered under B/Es No. 8110603 dated 01.04.2022 and No. 8169028 dated 06.04.2022. Further, he confiscated the imported goods covered under B/Es No.8066788 and 8066761 both dated 30.03.2022 under Section 111 (d) of the Customs Act, 1962, and gave an option for redemption of the said goods only for Re-export, upon payment of fine of Rs.2,50,000/- under Section 125 ibid, besides imposition of penalty for an amount of Rs. 1,50,000/- under Section 112(a) ibid on the appellants importer. The appellant had preferred an appeal against the said order before the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, who confirmed the order of the original authority by upholding the same and rejected the appeal filed by the appellants in the impugned order. Being aggrieved against the impugned order, the appellants have filed this appeal before the Tribunal.

3. Learned advocate appearing for the appellants had stated that the finding of the lower authorities that 'fuel oil' imported under B/Es No.8066788 and 8066761 both dated 30.03.2022, being treated as hazardous waste is ex-facie incorrect and based on total misreading of the test reports and mis-understanding of the CBEC circular No.33/2001-Customs dated 04.06.2001. He further stated that it is not in dispute that the imported goods are fuel oil, which falls under Customs Tariff Item (CTI) 2710 19 51, which covers 'fuel conforming to the IS 1593 (Grade LV) standards. Under the ITC (HS) policy for sub-heading 27101951, fuel conforming to the IS 1593 are freely allowed for import. He further stated that out of the 9 parameters fixed for fulfilment of the requirement of IS 1593 standards, 7 parameters have a fixed value and for other two parameters, the values are only required to be reported. The very fact that imported goods conform to the IS standards would rule out the possibility that these being a hazardous waste. Thus they claimed that the imported goods fulfilled the conditions of IS standards, and these are not prohibited for import. Further they also emphasized that in none of the test reports, the imported goods have been mentioned as a 'hazardous waste'. Learned advocate also submitted that the density limits specified in Appendix-I to the CBIC circular dated 04.06.2001, is not a condition for determining the classification of a hazardous waste, but is only a criterion for determining whether the fuel oil can be re-refined or not. The contention that fuel oil is to be considered as hazardous waste merely because the density exceeds 0.95% is factually erroneous, as commercially available fuel oil supplied by leading suppliers such as Indian Oil Corporation Ltd., Reliance Industries Ltd., Mangalore refinery all have density above 0.95%. On the basis of above facts, learned advocate submitted that confiscation of the imported goods and imposition of penalty on the appellants is clearly unsustainable in law. Hence he prayed for setting aside the impugned order.

4. Learned Authorised Representative (AR) for Revenue had reiterated the findings made in the impugned order and stated that the confiscation of the goods by allowing the same on payment of redemption fine and imposition of penalty is on the basis of CBIC circular dated 04.06.2001 and the restrictions in terms of Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008. Thus, learned AR justified the action of Commissioner (Appeals) in confirming the original order in respect of confiscation, redemption fine and for imposition of penalty.

5. Heard both sides and perused the case records. We have also considered the additional written submissions given in the form of paper books by learned Advocates for the appellants as well as Authorised Representative for the Revenue.

6.1. The issue involved herein lies in the narrow compass of deciding whether the imported goods is a 'hazardous waste' in terms of legal provisions under the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 and the CBIC Circular No.33/2001-Customs dated 04.06.2001; and whether the imported goods are liable for confiscation and for imposition of consequential penalty under the Customs Act, 1962.

6.2 We find that the relevant legal provisions concerning classification of the goods for the purpose of determining whether such goods are prohibited or not; and testing of the samples of imported goods in order to determine its quality, characteristics etc. to decide the nature of the goods are contained in the following legal provisions of the Customs Act, 1962. The extract of the same as follows:

*"**Section 2. Definitions** -*

In this Act, unless the context otherwise requires,

xx xx xx xx xx

(2) "assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to-

(a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;

(b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;

(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;

(d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;

(e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;

(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;

Section 17. Assessment of duty. -

(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the entries made under section 46 or section 50 and the self assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

PROVIDED that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

Section 144. Power to take samples. -

(1) The proper officer may, on the entry or clearance of any goods or at any time while such goods are being passed through the customs area, take samples of such goods in the presence of the owner thereof, for examination or testing, or for ascertaining the value thereof, or for any other purposes of this Act.

(2) After the purpose for which a sample was taken is carried out, such sample shall, if practicable, be restored to the owner, but if the owner fails to take delivery of the sample within three months of the date on which the sample was taken, it may be disposed of in such manner as the Principal Commissioner of Customs or Commissioner of Customs may direct."

6.3 The factual matrix of the case indicate that Directorate of Revenue Intelligence (DRI), Pune Regional Unit, Pune had initially started the investigation on the imported goods under a reasonable belief that the imported goods could be 'diesel' mis-declared as 'fuel oil', and accordingly drawn representative samples from 28 containers covered under four B/Es. On the basis of test results obtained indicating that the imported goods are not diesel, the embargo of putting on hold of the imported goods were lifted by DRI, and the case was handed over to jurisdictional customs authorities for further necessary action as per law vide DRI MZU letter F. No. DRI/MZU/PURU/GLKS/169/2022 dated 17.06.2022. These details have been clearly recorded in the order of the original authority at paragraph No.3.5. From the perusal of the above details, it transpires that the imported goods were allowed for clearance by DRI, after being clarified that the same are not 'diesel' whose imports are prohibited. Thus the jurisdictional customs authorities were required to follow the extant legal provisions for clearance of imported goods. We are not examining about the aspect of whether the proper officer had at the time of assessment of the imported goods required the testing of the imported goods for the purpose of assessment and whether the proper officer had drawn the samples of imported goods, inasmuch as neither the appellants nor the Revenue had raised this issue as dispute and both of them have accepted the testing of representative samples of imported goods, which were initially drawn by DRI, Pune and later the same test results were used by the assessing officers and original as well as appellate authorities in deciding the issues in dispute.

6.4. In this regard we also find that the Central Board of Indirect Taxes and Customs (CBIC) had issued circular is on the various parameters and the facilities for testing furnace oil/waste oil, which have been prescribed after consultation and deliberations with the line Ministry i.e., the Ministry of Environment and Forests.

Furnace oil/waste oil — Parameters and facilities for testing:

"*Circular No. 33/2001-Cus.,*
dated 4-6-2001

F. No. 405/09/2000-Cus III
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject :Parameters and facilities for testing furnace oil/waste oil - regarding.

I am directed to invite your attention to Board's Circular No. 106, dated 22-12-2000 issued from F. No. 405/09/2000-Cus. inter alia enclosing the minutes of meeting of experts organized by Ministry of Environment to lay down certain guidelines for testing of fuel oil, LSWR & LSHS. From the feedback received, from the field formations certain doubts were raised regarding the testing parameters prescribed in the aforesaid Board's Circular and the matter was taken up with Ministry of Environment & Forests & other expert agencies (IOC Ltd., IIP Dehradun etc.) for issue of further clarification/instructions. The doubts raised and parameters/procedure for testing fuel oils and off-specification products imported into the country were discussed and critically further reviewed in a meeting held on 09-03-2001 in the Ministry of Environment & Forests, which was attended by experts from various reputed research laboratories.

After deliberations, stepwise procedure to be followed to determine whether an imported consignment is to be categorized as a fuel oil or off-specification product and further to classify an off-specification products as (i) off-specification fuel oil (ii) waste/used oil fit for re-refining and (iii) hazardous wastes whose imports were prohibited. A copy of the minutes of the meeting laying down these guidelines is enclosed for your guidance and necessary further action. In continuation of the earlier minutes essentially this is a further elaboration of the testing procedures etc., mentioned in the first minutes communicated in December, 2000.

Briefly, as you would observe, the following broad stepwise procedure has been laid down.

The product imported should be subject to certain minimum screening tests for acidity, ash contents, sediment and water to consider whether any imported product is a regular grade furnace oil or fuel oil and these should be classified as off-specification furnace oil or waste oil. The prescribed limits being as follows :-

S. No.	*Test*	*Prescribed Limit (Max.)*
1.	*Acidity (inorganic)*	*Nil*
2.	*Ash Content*	*0.1%*
3.	*Sediment*	*0.25%*
4.	*Water*	*1%*

2. Products/furnace oil which fail the screening test should be classified as off specification furnace oil/waste oil.

3. Products/furnace oil which pass the above screening test should be subject to further testing for the remaining BIS specifications. The products should be first tested for viscosity. Products/furnace oil which has a viscosity greater than 370 centistokes at 50 degree centigrade should be classified as off specification furnace oil/waste oil.

4. Products/furnace oil of viscosity below 370 centistokes should be categorized into the following four grades of fuel oils : (1) Viscosity upto 80 centistokes (Grade IV), (2) Viscosity 80 to 125 centistokes (Grade MV 1), (3) Viscosity 125 to 180 centistokes (Grade MV 2) , and (4) Viscosity 180 to 370 centistokes (Grade HV).

5. The above four grades could be tested for total sulphur per cent by weight (1) Grade LV viscosity up to 80 centistokes should confirm to a maximum of 3.5% sulphur by weight. (2)Grade MV1 viscosity 80 to 125 centistokes and Grade MV2 from 125 to 180 centistokes viscosity should confirm to a maximum total sulphur of 4% by weight.(3) Grade HV from 180 to 370 centistokes viscosity should confirm to a maximum total sulphur of 4.5% by weight.

6. Products/furnace oil not to confirming to the respective sulphur percentage by weight shall be considered as off specification furnace oil/waste oil.

7. Products/furnace oil confirming to the sulphur percentage for the grades mentioned above should be further tested for flash point.
1. Products/furnace oil having less than 66^{o}C flash point should be considered as off specification furnace oil/waste oil.
2. Products/furnace oil having a minimum of 66^{o}C flash point should be further tested for calorific value.
(i) Products/furnace oil having calorific value less than 10,000 Kcal/Kg should be classified as off specification furnace oil/waste oil.
(ii) Products/furnace oil which has calorific value of at least 10,000 Kcal/Kg could be classified as furnace oil and its density could be reported as per the BIS specification requirements.

8. Off specification furnace oil/waste oil needs to be further tested to classify it into (1) off specification furnace oil, (2) waste/used oil fit for re-refining, and (3) hazardous waste.

9. The off specification/furnace oil/waste oil to may be subject to an organic halide test (AOX analyzer). [As CRCL is in the process of acquiring the AOX analyzers, this test be got done through other authorized Govt./Private Laboratories for the time being].

(i) Off specification furnace oil/waste oil indicating absence of organic halide should be further tested for heavy metals (may not be tested for PCBs). Samples conforming to heavy metal concentrations listed in Appendix 1 for re-refining could be re-refined and those not confirming should be classified as hazardous waste.

(ii) Products/furnace oil indicating presence of organic halide should be tested for PCBs.
(iii) Samples testing negative for PCBs but showing presence of organic halides should be tested for heavy metals. Samples confirming to heavy metal concentration listed in Appendix I could be re-refined. Those not meeting the specifications laid down for heavy metals should be classified as hazardous waste.

10. Samples testing positive for organic halides and PCBs should be classified as hazardous waste.

The above procedure may be brought to the notice of all concerned for compliance. Board's Circular No. 106 dated 22-12-2000 stands modified to the above extent. Difficulties, if any, in following above procedure may be brought to the notice of the Board.

Please acknowledge receipt.

APPENDIX-1.

Used Oil Specification for Re-refining

Constituents/Property	***Acceptable Limits (Max.)***
Colour	*8*
Water	*15%*
Density	*0.85 to 0.95%*
Flash point COC	*Min. 94 Degree Centigrade*
Kinematic Viscosity c St at100 degree centigrades grades	*1.0 to 32*
Dilutents	*15% Vol.*
Neutralization No.	*3.5 mg KOH/g*
Saponification value	*18 mg KOH/g*
Total halogen	*4000 ppm*
PCBs	*Absent*
Lead	*100 ppm*
As	*5 ppm*
Cd+Cr+Ni	*500 ppm*
PAH	*6%"*

A plain reading of the above instructions of the CBIC, clearly indicate that a step-by-step procedure has been prescribed for determining whether the imported goods are (i) Fuel oil (ii) Off-specification product such as (a) Off-specification fuel oil (b) waste/used oil, fit for refining (c) hazardous waste, the import of which is prohibited. These procedure involved testing of 10 specific factors/features such as the following:

(1) Acidity
(2) Ash content
(3) Sediment
(4) Water
(5) Viscosity
(6) Total sulphur percentage
(7) Flashpoint
(8) Calorific value
(9) Absence of heavy metals concentration
(10) Presence of Poly Chlorinated Biphenyls (PCB).

The first of 4 features/specifications for which testing is conducted is in the nature of minimum screening tests. If the imported product/furnace oil fails the screening test, then the imported goods are declared as Off-specification furnace oil/waste oil. However, if they pass through a screening test, then the remaining BIS specifications are required to be tested one by one, as given in the said instructions. In each of the subsequent specified features, if the commodity fails or does not fulfill the threshold limit prescribed, by testing one-by-one, further testing is done on other features/specifications and in the end, samples tested and found to be positive for organic halides and PCBs shall be classified as 'hazardous waste'; similarly samples tested negative for PCBs but showing presence of organic halides, when tested for heavy metals concentration beyond the specified acceptable limits as in Appendix-1 to the said circular, is also classified as 'hazardous waste'.

6.5 Further, in compliance with the international agreement to which India is also a signatory, i.e., under Trade Facilitation Agreement (TFA) negotiated with World Trade Organisation (WTO), CBIC had also prescribed detailed guidelines for re-testing of the samples. These have been extracted and given below for ease of reference:

<u>Guidelines for re-testing of samples</u>:

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

F.No. 450/15/2017-Cus. IV
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Detailed guidelines for re-testing of samples - Regarding.

World Trade Organization (WTO) negotiated Trade Facilitation Agreement (TFA), which aims at simplifying the trade processes and bringing down barriers to trade has come into force w.e.f. 22nd February, 2017. India is a signatory to this agreement.

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

a. Customs officers may draw the samples from import consignments for testing in case of consignments wherever needed. The results of all test reports, adverse or otherwise, shall be communicated to the importer or his authorized representative/Customs Broker immediately on its receipt.

b. In case the importer or his agent intends to request the Additional/Joint Commissioner of Customs for a re-rest, then the same shall be made in writing to the said officer within a period of ten days from the receipt of the communication of the test results of the first test. Customs officers may take a reasoned view in case the importer or his authorized representative Customs Broker is unable to do so for reasons beyond his control.

c. Where the Additional/Joint Commissioner of Customs grants an opportunity for a second test, he must clearly indicate in writing the name and address of the laboratory/institution where the second test can be carried out. Such referral for re-testing may be made only after being reasonably sure that the desired re-testing facilities exist at the laboratory/institution.

d. Re-test should be made only on the remnants of the samples originally tested or on duplicate representative sealed samples in the custody of the Customs. Further, to avoid delays, samples for second tests shall be marked as "immediate" before sending to the laboratory. In a case it may so happen that fresh samples have to be drawn, then such sampling should be done in the presence of the importer or his representative/customs broker.

e. The requests for re-test of samples on the ground that the original sample was not representative should be entertained only if the consignment is still in Customs control. At the time of drawing the samples, the importer or his representative shall be present and certify that the samples drawn are representative.

f. The competent authority shall consider the results of the re-test without prejudice to the results of the first test. In case there is a variation in the results of the first test and the re-test, the competent authority shall take the decision relying upon either of the tests specifying the grounds in writing for the decision so taken. In case the competent authority is unable to decide whether to rely upon the first or the re-test results, then it may order a second re-test provided the consignment is still within the customs control. However, this option should not be resorted to in every case of variation between the first test and re-test results.

g. The facility of re-testing, is a trade facilitation measure, which should generally not be denied in the ordinary course. However, there might arise circumstances where the customs officer is constrained to deny the re-testing facility. Board expects that such denial would be occasional and on reasonable grounds to be recorded in writing.

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

3. Difficulties, if any, in implementation of this circular, should be brought to the notice of the Board."

6.6 We also find that the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 have provided the definition of the terms 'hazardous waste', 'used oil', and 'waste oil' under Rule 3(17), 3(36) and 3(39), respectively, as follows:

"Rule 3 (17) – 'hazardous waste' means any waste which by reason of characteristics such as physical, chemical, biological, reactive, toxic, flammable, explosive or corrosive, causes danger or is likely to cause danger to health or environment, whether alone or in contact with other wastes or substances, and shall include - (i) waste specified

under column (3) of Schedule I; (ii) waste having equal to or more than the concentration limits specified for the constituents in class A and class B of Schedule II or any of the characteristics as specified in class C of Schedule II; and (iii) wastes specified in Part A of Schedule III in respect of import or export of such wastes or the wastes not specified in Part A but exhibit hazardous characteristics specified in Part C of Schedule III;

Rule 3 (36) - 'used oil' means any oil-
(i) derived from crude oil or mixtures containing synthetic oil including spent oil, used engine oil, gear oil, hydraulic oil, turbine oil, compressor oil, industrial gear oil, heat transfer oil, transformer oil and their tank bottom sludges; and

(ii) suitable for reprocessing, if it meets the specification laid down in Part A of Schedule V but does not include waste oil;

Rule 3 (39)- 'waste oil' means any oil which includes spills of crude oil, emulsions, tank bottom sludge and slop oil generated from petroleum refineries, installations or ships and canbe used as fuel in furnaces for energy recovery, if it meets the specifications laiddown in Part-B of Schedule V either as such or after reprocessing.

SCHEDULE V
[See rules 3 (36) and 3 (39)]

PART A
Specifications of Used Oil Suitable for recycling

S.No.	**Parameter**	**Maximum permissible Limits**
(1)	**(2)**	**(3)**
1.	Polychlorinated biphenyls (PCBs)	< 2ppm *
2.	Lead	100 ppm
3.	Arsenic	5 ppm
4.	Cadmium+Chromium+Nickel	500 ppm
5.	Polyaromatic hydrocarbons (PAH)	6%

Part B
Specification of fuel derived from waste oil

S. No.	Parameter	Maximum permissible Limits
(1)	(2)	(3)
1.	Sediment	0.25%
2.	Lead	100 ppm
3.	Arsenic	5 ppm
4.	Cadmium+Chromium+Nickel	500 ppm
5.	Polyaromatic hydrocarbons(PAH)	6%
6.	Total halogents	4000 ppm
7.	Polychlorinated biphenyls (PCBs)	<2 ppm *
8.	Sulfur	4.5%
9.	Water Content	1%

*The detection limit is 2 ppm by gas Liquid Chromatography (GLC) using Electron Capture detector (ECD)"

6.7 The representative samples drawn under panchanama proceedings dated 19.04.2022 by DRI, Pune Regional Unit and sent to Central Excise & Customs Laboratory(CRCL), Vadodara was tested by them and the results were sent back duly addressed to the person who submitted the samples viz., Office of the Deputy Commissioner, DRI, Pune Regional Unit, Pune. In its initial Test Report for all 28 samples, which *inter-alia* include the 12 disputed cases, CRCL had sent their individual Test Result reports vide RCL 253 to 256, 260 all dated 20.05.2022;RCL 257 to 259, 261 to 264 all dated 23.05.2022 to DRI, Pune. The individual parameters as per the requirements for Fuel Oil in terms of BIS standards IS 1593:2018were given individually for each of these samples. These reports also provided with an indication that these samples have failed the minimum screening tests mentioned in para 3 of CBIC circular No.33/2001-Customs dated 04.06.2001, with respect to Gross calorific value and Density. Thus these samples are off-specification/waste oil. These samples are under further process of testing by CRCL, Vadodara as per the said CBIC circular for determining whether it is hazardous waste or fit for re-fining.

6.8 The various parameters so tested for the disputed imported consignments contained in 7 containers in respect of B/E No. 8066788 and in another 5 containers in respect of B/E No. 8066761 both dated 30.03.2022, reflected in Test result reports RCL 253 to RCL 264 have been extracted and are given below in the form of a Table, for better appreciation of the facts:

Test parameters for determination of Furnace Oil/ Water Oil – Test results reported by CRCL, Vadodara																
Sr. No.	Characteristics	Test Result Ref. No.	Acidity	Ash Content %by mass, **Max**	Sediment %by mass, **Max**	Water, % v/v	Viscosity, Kinematic at 50°C, cSt, **Max**	Total Sulphur % by Mass, **Max**	Flash Point by PMCC °C**Min**	Calorific Value Gross, kcal/kg	Density at 15°C g/cm^3	PAH % mg/kg	PCB mg/kg	Lead (Pb) mg/kg	Chromium Cadmium Nickel mg/kg	Arsenic (As) mg/kg
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)
	IS1593:2018 Standard Requirements for Fuel Oil		NIL	**0.10**	**0.25%**	**1%**	**380**	**4.5**	**66**	To be reported	To be reported	-	-	-	-	-
Bill of Entry No. 8066788 dated 30.03.2022																
1	IS1593:2018 Standard	RCL/253	NIL	0.03	0.04	NIL	40.20	0.0024	96.5	8818	1.0844	0.68	ND	ND	ND	ND
2	IS1593:2018 Standard	RCL/254	NIL	0.02	0.03	NIL	39.42	0.0016	101.5	8800	1.0848	0.35	ND	ND	ND	ND
3	IS1593:2018 Standard	RCL/255	NIL	0.04	0.04	NIL	40.23	0.0023	102.5	8789	1.0854	0.74	ND	ND	ND	ND
4	IS1593:2018 Standard	RCL/256	NIL	0.03	0.03	NIL	40.43	0.0014	103.5	8792	1.0854	0.06	ND	ND	ND	ND
5	IS1593:2018 Standard	RCL/257	NIL	0.04	0.04	NIL	40.88	0.0079	98.0	8788	1.0839	0.019	ND	ND	ND	ND
6	IS1593:2018 Standard	RCL/258	NIL	0.04	0.03	NIL	38.75	0.0203	98.0	8812	1.0841	0.28	ND	ND	ND	ND
7	IS1593:2018 Standard	RCL/259	NIL	0.03	0.03	NIL	37.12	0.0088	98.0	8797	1.0838	0.19	ND	ND	ND	ND
Bill of Entry No. 8066761 dated 30.03.2022																
1	IS1593:2018 Standard	RCL/260	NIL	0.02	0.03	NIL	41.25	0.0033	106.5	8784	1.0861	23.45	ND	ND	ND	ND
2	IS1593:2018 Standard	RCL/261	NIL	0.03	0.04	NIL	40.66	0.0004	99.0	8790	1.0838	1.05	ND	ND	ND	ND
3	IS1593:2018 Standard	RCL/262	NIL	0.04	0.04	NIL	39.22	0.0080	99.0	8789	1.0838	0.68	ND	ND	ND	ND
4	IS1593:2018 Standard	RCL/263	NIL	0.04	0.04	NIL	37.12	0.0156	98.0	8758	1.0840	0.39	ND	ND	ND	ND
5	IS1593:2018 Standard	RCL/264	NIL	0.03	0.04	NIL	38.71	0.0212	99.0	8759	1.0838	0.72	ND	ND	ND	ND

From a quick look at the test results in respect of all 12 samples, indicate that these are in conformity with the standard parameters prescribed for IS 1593:2018 with respect to Maximum limits in respect of specification at Col.5,6,8 & 9; and minimum limit for specification at Col.10. The test results for col. 11 & 12 are only required to be reported and are hence not determinative.

"FINAL REPOT" 17

केन्द्रीयउत्पादएवंसीमाशुल्कप्रयोगशाला
Central Excise & Customs Laboratory
केंद्रीयअप्रत्यक्षकरएवंसीमाशुल्कबोर्ड
Central Board of Indirect Taxes & Customs
राजस्वविभाग, वित्तमंत्रालय, भारतसरकार
Department of Revenue, Ministry of Finance
Government of India

Certificate No. TC - 8442

fssai Recognised

F. No. RCL/AZU/DRI/253 to 280

Dated: 06.06.2022

To

The Senior Intelligence Officer
O/o The Deputy Director,
Directorate of Revenue Intelligence,
Pune Regional Unit, Pune-411001

Sir,

Sub.: Testing of Sample-reg.

With reference to your letter F.No. DRI/MZU/PuRU/GLKS/169/2022/42 Pune, dated 19th April 2022 forwarding therewith 28 samples for testing. These samples were registered here under Lab registration no RCL/AZU/DRI/253 to 280 dated 21.04.2022. All these samples were tested here and due to matter is urgent, interim reports in this regard were issued on dated 12.05.2022, 20.05.2022 & 23.05.2022. PCBs, PAHs & Heavy metals of all the 28 samples were tested & further in continuation of previous report the pending parameters i.e. PCBs, PAHs & Heavy metals are as under:

Sr. No.	Lab No. RCL/AZU/DRI/ Dated 21.04.2022	B.E. No & Date	PCB mg/kg	PAH % /mg/kg	Lead (Pb) mg/kg	Chromium(Cr)+ Cadmium(Cd)+ Nickel (Ni) mg/kg	Arsenic (As) mg/kg
1	253	8066788/30.03.22	ND	0.68 mg/kg	ND	ND	ND
2	254	8066788/30.03.22	ND	0.35 mg/kg	ND	ND	ND
3	255	8066788/30.03.22	ND	0.74 mg/kg	ND	ND	ND
4	256	8066788/30.03.22	ND	0.06 mg/kg	ND	ND	ND
5	257	8066788/30.03.22	ND	0.019mg/kg	ND	ND	ND
6	258	8066788/30.03.22	ND	0.28 mg/kg	ND	ND	ND
7	259	8066288/30.03.22	ND	0.19 mg/kg	ND	ND	ND
8	260	8066761/30.03.22	ND	23.45mg/kg	ND	ND	ND
9	261	8066761/30.03.22	ND	1.05 mg/kg	ND	ND	ND
10	262	8066761/30.03.22	ND	0.68 mg/kg	ND	ND	ND
11	263	8066761/30.03.22	ND	0.39 mg/kg	ND	ND	ND
12	264	8066761/30.03.22	ND	0.72 mg/kg	ND	ND	ND
13	265	8110603/01.04.22	ND	0.14%	1.03	28.13	ND
14	266	8110603/01.04.22	ND	0.15%	0.25	13.22	ND
15	267	8110603/01.04.22	ND	0.16%	0.24	12.03	ND

18.

16	268	8110603/01.04.22	ND	0.18%	0.64	22.95	ND
17	269	8110603/01.04.22	ND	0.15%	0.80	27.32	ND
18	270	8110603/01.04.22	ND	0.21%	1.58	29.29	ND
19	271	8169028/06.04.22	ND	0.18%	ND	33.07	ND
20	272	8169028/06.04.22	ND	0.18%	0.32	30.64	ND
21	273	8169028/06.04.22	ND	0.17%	0.35	32.0	ND
22	274	8169028/06.04.22	ND	0.21%	ND	31.06	ND
23	275	8169028/06.04.22	ND	0.22%	ND	31.51	ND
24	276	8169028/06.04.22	ND	0.18%	0.82	22.88	ND
25	277	8169028/06.04.22	ND	0.18%	ND	27.70	ND
26	278	8169028/06.04.22	ND	0.18%	ND	27.20	ND
27	279	8169028/06.04.22	ND	0.19%	0.18	22.68	ND
28	280	8169028/06.04.22	ND	0.18%	0.19	24.25	ND

Conclusion:

1. All the above mentioned samples are fail in respect of the screening test for the Furnace oil/LSWR/Fuel oil/LSMS and also does not meet the requirement of Low Sulphur waxy residue (fuel oil). Thus all samples falls under the category of waste oil.
2. All these samples further tested to classify into (2) Waste oil/used oil fit for re-refining and (3) Hazardous waste as per the Board Circular 33/2001 dated 4th June, 2001. Samples were tested in respect of organic halides, water content, density, flash point (COC), kinematic viscosity at 100°C and heavy metals i.e. Lead, Arsenic, Cadmium, Chromium and Nickel content.

RCL/AZU/DRI/253 to 264: On the basis of analytical findings & Board circular No.33/2001-Cus.,4th June 2001, F. No. 405/09/2000-CUS.III, the samples RCL/AZU/DRI/253 to 264 do not meet the requirement in respect of the acceptable limit of Density at 15/15°c as prescribed for used oil specification for re-refining as mentioned under appendix-1 of Board circular No.33/2001-Cus.,4th June 2001, F. No. 405/09/2000-CUS.III.

RCL/AZU/DRI/265 to 280: On the basis of analytical findings & Board circular No.33/2001-Cus.,4th June 2001, F. No. 405/09/2000-CUS.III,it is concluded that samples u/r are off-specification furnace oil/waste oil in respect of ash content and sediment content & all these samples are fit for re-refining.

Sealed remnant samples returned herewith.

GOVT. OF INDIA No. 18 सत्यमेव जयते VADODARA CENTRAL EXCISE & CUSTOMS LAB.

Vinod 6/6/2022
(VINOD KUMAR) Vinod Kumar
Chemical Examiner Gr-II / Chemical Examiner Gr-II
Central Excise & Customs Laboratory
Central Excise & Customs Laboratory, Vadodara
बड़ोदरा / Vadodara

Despatch No. 276
Dt. 6/6/22
C.Ex. & Cus. Lab., Vadodara.

"End of Report"

6.9. By careful study of the above test results provided by CRCL. Vadodara, it is evident that these 12 samples have in fact passes in the minimum screening test for initial four parameters such (1) Acidity (2) Ash Content (3) Sediment (4) Water, inasmuch as these are conforming to the prescribed maximum limit. In the sample test results for all 12 disputed consignments Acidity is NIL; Ash content is less that 0.10; Sediment is less than 0.25% and Water content is NIL. However, it is reported in the Test report that further testing in being done. The further test reports also indicate that the parameters are within the limits prescribed; and there is no presence of heavy metals such as Polychlorinated Biphenyls (PCB), Poly Aromatic Hydro carbon (PAH); Lead, Chromium, Cadmium, Nickel; Arsenic as the results state that these have not been detected. Thus, we are of the considered opinion that the facts in terms of test results of these 12 samples taken from the imported goods in 12 containers cannot be treated as 'hazardous goods'. In fact, these products fall appropriately under the category of 'used oil' suitable for recycling.

7.1 In this regard we find that the original authority after giving an opportunity is for personal hearing had partly allowed the goods covered under B/Es No. 8110603 dated 01.04.2022 and No. 8169028 dated 06.04.2022. However, in respect of imported goods covered under B/Es No.8066788 and 8066761 both dated 30.03.2022, he had confiscated the same under Section 111 (d) of the Customs Act, 1962.The relevant paragraphs of the said Original order dated 29.07.2022 is extracted below:

Order-In-Original dated 29.07.2022:

"6. I find that the good covered under Bills of Entry Nos. 8110603 dt 01.04.2022 and 8169028 dt 06.04.2022 have been reported to be off specification furnace oil/waste oil fit for re-refining. I find that the importer has submitted sale agreement with M/s Sai Om Petro Specialties Ltd., who is dealing in refining of off specification fuel oil/waste oil, along with copy of Maharashtra Pollution Control Board (MCB) registration Certificate. In view of the same I find that the goods covered under Bills of Entry Nos. 8110603 dt. 01.04.2022 and 8169028 dt. 06.04.2022 may be released.

7. I find that as per final test report dated 06.06.2022 goods covered under BE Nos. 8066788 dt 30.03.2022 and 8066761 dt. 30.03.2022 are not found fit for re-refining. Therefore, I find that the goods under BE Nos. 8066788 dt 30.03.2022 and 8066761 dt. 30.03.2022 falls under the category of hazardous waste as per Board Circular 33/2001-Cus dated 04.06.2001. Accordingly, they cannot be released for home consumption.

8. I find that the importer has requested for re-testing of goods covered under BE Nos. 8066788 dt 30.03.2022 and 8066761 dt. 30.03.2022, I find that as per Board Circular No. 30/2017-Cus dated 18.07.2017 request for a re-test is to be made within a period of ten days from the receipt of the communication of the test results of the first test. However, the importer has not made request for re-test as per time limit of Board Circular. Further, they have not given any *reasons for delay. Accordingly, I reject their request for re-test of samples.*

9. In view of the above I find that the importer has attempted to clear prohibited goods vide Bills of Entry Nos. 8066788 dt 30.03.2022 and S066761 dt. 30.03.2022 as the goods under the said bills of entry has been found hazardous after testing. Accordingly, the goods declared as fuel oil having declared quantity of 288.58 MTs under Bills of Entry Nos. 8066788 dt 30.03.2022 and 8066761 dt. 30.03.2022 are liable for confiscation u/s 111 (d) of the Customs Act, 1962.

10. Accordingly, I hold the 288.58 MTS fuel oil having declared assessable value of Rs. 1,09,96,315/- imported vide 8066788 dt 30.03.2022 and 8066761 dt. 30.03.2022 liable for confiscation under Section 111(d) of the Customs Act 1962. For the same reasons, I hold that the importer is liable for penalty under Section 112 (a) of Customs Act, 1962."

7.2 The said order of the original authority was also confirmed by the learned Commissioner of Customs (Appeals) by dismissing the appeal filed by the appellants. He had addressed both the issues of test results of the samples and the classification of the imported goods on the said basis as well as the issue of allowing re-testing facility in his order.

7.3 Further, the learned Commissioner of Customs (Appeals) had also dealt with the twin issues of importability of the goods and the issue of re-testing facility sought by the appellants, in his order. The relevant paragraphs of the said orders which provide the factual matrix of the case are extracted below:

<u>Order-In-Appeal dated 07.12.2022:</u>

"6.3 From the above referred test report it is crystal clear that all the imported goods declared as "Fuel Oil" fall under the category of waste oil. Further, the goods pertaining to Bills of Entry No. 89066788 dated 30.03.2022 and 8066761 dated 30.03.2022 are not fit for re-refining as per Board Circular No. 33/2001-Cus dated 04.06.2001 (F. No. 405/09/2000-Cus. III). As per para 8 of the Board Circular No. 33/2001-Cus dated 04.06.2001 (F. No. 405/09/2000-Cus. III) "Off specification furnace oil/waste oil needs to be further tested to classify it into (1) off specification furnace oil, (2) waste/used oil fit for re-refining, and (3) hazardous waste. As mentioned above, goods pertaining to Bills of Entry No. 8066788 dated 30.03.2022 and 8066761 dated 30.03.2022 are waste oil not fit for re-refining. Thus, it obviously falls under the category of hazardous waste and cannot be allowed for home consumption.

xx xx xx xx xx

6.6 The appellant has contended that in the final test report it is not concluded that samples having Lab Sr. No. 252 to 264 are hazardous waste, but still the OA has concluded without any basis that *the goods are hazardous waste. The issue has been discussed in earlier para and hence, needs no further deliberation.*

6.7 The appellant has also contended that their request for re-testing of the impugned goods was rejected by the OA on the ground that request for re-test was not made in time as per the time limit in Board Circular, but, there is no mention of any time limit for request for re-test in the Board Circular No. 33/2001-Cus dated 04.06.2001 and the OA has not mentioned the number of the Board Circular being referred if it is other than the Board Circular No. 33/2001-Cus dated 04.06.2001. I find that this issue has been squarely dealt with in Para 8 of the impugned order with mention of the specific Circular number on the issue of detailed guidelines for re-testing of samples issued by the Board. The relevant Circular No. is 30/2017-Cus dated 18.07.2017. So, I do not find any substance in the contention of the appellant.

6.8 It is also contention of the appellant that final test report in respect of goods pertaining to Bills of Entry No. 8066788 dated 30.03.2022 and 8066761 dated 30.03.2022 mentions that they do not meet the requirements in respect of acceptable limit of density at 15/15° C as prescribed for used oil specification for re-refining as mentioned in the Appendix-1 of the Board Circular No. 33/2001-Cus dated 04.06.2001, however, fuel oil exceeding the limit of density at 15/15° C to the extent of 20/20 is also permissible for domestic consumption as can be seen from the certificate of quality of the similar goods issued by M/s Reliance Industries Ltd. In this regard it is worth noting that the Board has issued Circular No. 33/2001-Cus dated 04.06.2001 on the subject of "Parameters and facilities for testing furnace oil/waste oil". It is well settled law that the officers of the department are bound by the circulars/instructions issued by the Board unless shown to be contrary to any law laid down by Supreme Court or High Court.

6.9 Learned Advocate of the appellant has submitted a copy of the Order-in-Original No. MCH/ADC/AK/94/2019-20 dated 13.01.2020 passed by the Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra in support of their claim. On going through the said order, I find that the Joint Director, CRCL, Kandla has opined that the samples were found to be off specification furnace oil/waste oil of non-hazardous nature and fit for recycling. Further, CRCL, New Delhi has reported that the sample is off specification Furnace Oil/Waste Oil as per Circular No. 33/2001-Cus dated 04.06.2001. Neither of the two labs have reported that the samples tested were not fit for re-refining. But in the present case Central Excise & Customs Laboratory, Vadodara has clearly informed that on the basis of analytical findings & Board Circular No. 33/2001-Cus dated 04.06.2001 (F. No. 405/09/2000-Cus. III), the samples RCL/AZU/DRI 253 TO 264 do not meet the requirement in respect of acceptable limit of Density at 15/15° C as prescribed for used oil specification for re-refining as mentioned under appendix-I of Board Circular No. 33/2001-Cus dated 04.06.2001-Cus (F. No. 405/09/2000-Cus. III), which means that the concerned goods are not fit for re-refining. Officials of Central Excise & Customs Laboratory, Vadodara are experts in their field and after testing the samples they have given their expert opinion and I do not find any reason to disagree with the findings of the said report.

> *7. In view of the above discussions and findings, I am of the considered view that there is no infirmity in the impugned Order-in-Original No. 406/2022-23/JC/Gr.I&1A/NC-I/CAC/JNCH dated 29.07.2022 passed by the OA and hence I uphold the same and reject the appeal filed by the appellant M/s G.L. Khanna & Sons as I find it devoid of any merit."*

We find that the authorities below did not examine the various parameters for determination of the issue of classifying the imported goods as off-specification furnace oil/waste oil or hazardous waste in a systematic and detailed manner. Rather they simply went by the wordings mentioned in the test reports, without referring to the specific factors. The test report of CRCL dated 06.06.2022 for these 12 samples state as below:

> *"RCL/AZU/DRI/253 to 264 do not meet the requirement in respect of the acceptable limit of Density at 15/15 °c as prescribed for used oil specifications for re-refining as mentioned under Appendix-1 of Board Circular No.33/2001-Customs dated 4th June 2001, F. No. 405/09/2000-Cus.III".*

7.4 We also find though 'Density' is mentioned as one of the specification for Used oil for re-refining with acceptable limits as 0.85 to 0.95% in the CBIC circular dated 04.06.2001. However, under the relevant Rules governing the specifications of used oil suitable for recycling or fuel derived from waste oil defined under Rule 3 (36) and Rule 3(39) of the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, the specification provided under Schedule V of the said Rules, do not contain any such statutory requirement of 'Density' as one of the determining parameter. Even the original notification in S.O. 2265(E) dated 24.09.2008 which brought in force the original Rules in 2008 did not contain such a requirement under the specification mentioned for used oil for recycling or waste oil under Schedule V. Thus, we are of the considered opinion that the 'density' of the imported goods is not a determining factor/parameter for classifying the goods for considering an item as 'used oil' or 'off-specification furnace oil/waste oil'. Thus, from the above analysis of the legal provisions of the Rules of 2008, facts and specific test results of the 12 samples, we find that the imported goods are not 'hazardous waste' and the impugned order is factually incorrect.

8.1 We had also considered the Note 3 to chapter heading 27 providing the meaning of 'waste oils' and the meaning given for the phrase 'fuel oil' in the supplementary note (g) to Chapter 27 to the First Schedule to the

Customs Tariff. Inasmuch as any imported hydrocarbon oil conforming to the IS 1593:1982 standards would be treated as 'fuel oil'. The facts of the case, as evidenced in the test results of 12 samples in fulfilling the various parameters prescribed for IS 1593:1982 as per the table provided above, also bring to the conclusion that the imported goods are 'fuel oil'.

8.2. We further find that the CBIC had specifically provided for the facility of re-testing the samples in terms of the legal provisions under the international agreement under Article 5.3.1 and its acceptance under Article 5.3.3 of the WTO's Trade Facilitation Agreement. In terms of the said Article and CBIC instructions in Circular No. 30/2017-Customs dated 18.07.2017, an opportunity for a second test in case the first test result of a sample taken upon arrival of goods declared for importation shows an adverse finding, should be given by the Customs authorities. CBIC had also provided that in such cases, the importer or his agent who intends to request the Additional/Joint Commissioner for a re-test, then he shall submit a request for re-testing in writing to the said officer within a period of ten days from the receipt of the communication of the test results of the first test. Further, such CBIC circular also provide that the Customs officers may take a reasoned view in case the importer or his authorised agent/representative Customs Broker is unable to do so for reasons beyond his control.

8.3. It is on record that the test results have been sent by CRCL vide its letter dated 06.06.2022 addressed to SIO, DRI, Pune Regional Unit, Pune who received it later and after finding that the imported goods are not diesel oil, had informed the jurisdictional Customs authorities for taking further action as per law for clearance of the imported goods. Such an communication was sent by DRI vide its letter F. No. DRI/MZU/PURU/ GKLS/169/2022 dated 17.06.2022. The appellants on coming to know about the test results had applied for re-testing of samples vide their letter dated 11.07.2022 addressed to the Joint Commissioner, JNCH. However, we find that the Customs authorities and both the authorities below during adjudication of the case, without even recording the date of communication of the first test results by the department to the appellants importer; then the date of receipt of the request letter from the appellants by the Customs authorities, should have taken a reasoned view on allowing the facility of second test or retesting as per procedure. However, in complete disregard to the above provisions, the authorities below have simply dismissed the request for re-testing sought by the appellants. Thus, by not following the principles of natural justice and in complete disregard to the CBIC instructions, the impugned order has been passed by the learned Commissioner of Customs (Appeal).

9. 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 as 'fuel oil' and for resorting to classification of the goods as 'hazardous waste', stand the scrutiny of Law. We are of the considered opinion that the department had failed to substantiate the grounds for confiscation of the imported goods and for imposition of redemption fine and penalty. Hence, we have no hesitation in setting aside the impugned order and allowing the appeals in favour of the appellants.

10. Therefore, the impugned order passed by the learned Commissioner of Customs (Appeals), Jawaharlal Nehru Customs House (JNCH), Nhava Sheva, Taluka Uran, District Raigad, is set aside and the appeals filed by the appellants are allowed with consequential relief, if any, as per law.

(Order pronounced in open court on 05.01.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha