

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85316 OF 2024

[Arising out of Order-in-Appeal No: 152 (Gr.IIC-F)/2024 (JNCH)/Appeals dated 05th February 2024 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Ideal Impex

1711, 1st Floor, Outram Lane, Hakikat Nagar
Delhi-110009

... Appellant

versus

Commissioner of Customs (NS-I)

Jawarharlal Nehru Customs House, Nhava Sheva, Uran,
Raigad, Maharashtra – 400707

...Respondent

APPEARANCE:

Shri S Jaikumar, Advocate for the appellant

Shri Krishna Murari Azad, Assistant Commissioner (AR) for the respondent

CORAM:

**HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

FINAL ORDER NO: 85660/2024

DATE OF HEARING:	28/02/2024
DATE OF DECISION:	01/07/2024

PER: C J MATHEW

The appeal of M/s Ideal Impex assails order¹ of Commissioner

¹ [order-in-appeal no. 152 (Gr.IIC-F)/2024 (JNCH)/Appeals dated 05th February 2024]

of Customs (Appeals), Mumbai – II, Jawaharlal Nehru Customs House (JNCH), Nhava Sheva for having upheld the finding of the original authority that goods imported by them merited re-classification solely, and even that erroneously, from exclusion attributed to threshold presence of ‘petroleum oil or oil from other bituminous mineral’ in the description corresponding to declared heading to not only fasten differential duty liability beyond ₹ 54,34,636/- as assessed by them but also other consequences, related and unrelated, stemming from such revision. The fiscal stake, in consequence, is duty liability of ₹ 1,27,19,657/- besides payment of fine of ₹ 10,00,000/- under section 125 of Customs Act, 1962 and penalties under section 114A and 114AA of Customs Act, 1962 before compliance with direction to re-export the goods confiscated under section 111(d) and section 111(m) of Customs Act, 1962. The first appellate authority reduced the redemption fine to ₹ 5,00,000/- and penalty on the individual under section 114AA to ₹ 10,00,000/-.

2. The core of the issue is that the goods claimed by the importer to be ‘penetrating oil – 60 (for industrial use)’, conforming to description corresponding to tariff item 3403 9900 of First Schedule to Customs Tariff Act, 1975, was held to be ‘diesel oil’ chargeable to duty corresponding to tariff item 2710 1990 of First Schedule to Customs Tariff Act, 1975 by relying upon test reports of the Central Revenue Control Laboratory (CRCL) and, thereby, in violation of ‘canalising’

restriction in the Foreign Trade Policy. Further relying on the tests, the original authority also held it to be ‘adulterated’ and, thus, also in contravention of municipal laws enacted for control of petroleum products in the domestic market. The imports had been effected by the appellant against bill of entry no. 8511565/28.10.2023 and it is on record that, relying upon intelligence of ‘petroleum oil’ being misdeclared, the goods were subject to sampling as set out in public notice no. 34/2019-20-JNCH dated 27th March 2020 and public notice no. 8/2020-JNCH dated 31st January 2022, for testing by Deputy Chief Chemist, Central Revenue Control Laboratory (CRCL) as well as state level coordinator – oil industry, Maharashtra and, on recommendation in report of the former, the goods were classified under heading 2710 of First Schedule to the Customs Tariff Act, 1975.

3. According to Learned Counsel for appellant, that justification in the impugned order is not tenable as the Deputy Chief Chemist (Dy CC) had categorically reported that the samples did not match the standards for automotive diesel fuel IS:1460 and that it was only from subsequent correspondence that the adjudicating authority was enabled to obtain ‘so called’ technical opinion conducive to altering of classification. It was further contended that the state level coordinator, viz. , Quality Assurance Laboratory of Bharath Petroleum Corporation Ltd (BPCL) was no less categorical that the goods did not confirm to high speed diesel. Learned Counsel contends that the products, intended for industrial use, are

specifically included in the description corresponding to heading 3430 of First Schedule to Customs Tariff Act, 1975 despite which the second leg in the description was prioritized in the impugned order for ignoring clearance of the same goods regularly in the past without any impediments from customs authorities; it was also argued that the rate of duty prescribed for goods under the declared heading was higher than the rate applicable to the revised heading owing to which alone value was targeted for enhancement. It is also submitted by him that the manifold Rules and Regulation pertaining to handling and sale of diesel oil had been erroneously applied to their imports without authority of law inasmuch as the goods imported by them were not diesel oil. It was also pointed out that the adjudicating authority had gone beyond the test report to insinuate that 'presence of hydrocarbons' in diesel oil to conclude that imports were adulterated. He contended that the original authority had exceeded its jurisdiction in re-classification of the imported goods erroneously as diesel oil and then posited that the presence of other substance adulterated the diesel oil rendering it liable to be denied clearance for home consumption as the goods contravened the laws pertaining to handling of diesel which the first appellate authority upheld.

4. According to Learned Authorised Representative, the test report made it abundantly clear that the goods were a mixture of hydrocarbons with more than 70% by weight of 'petroleum oil or oil from other bituminous mineral' and, thereby, warranted classification within

heading 2710 of First Schedule to Customs Tariff Act, 1975. He submitted that diesel is 'canalized' for import and, consequently, could be permitted for import only by designated agency.

5. It would appear that the differential duty was fastened by recourse to rejection of declared value under rule 12 and under the authority of rule 3(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as consequence of re-classification rendering the invoice to be invalid. The confiscation of impugned goods, with attendant ramifications, appears to have stemmed from ineligibility to import diesel oil and adulteration being in breach of regulatory framework in handling and sale of diesel oil. Our first task in disposing off this appeal is determining correctness of the classification adopted by the lower authorities.

6. The adjudicating authority has drawn support from contents of a test report which, though, is categorical in concluding that samples of the impugned goods do not conform to standards prescribed for automotive diesel oil. It is also clear that this test report of 6th November 2023 was not conclusive enough for the adjudicating authority to decide the issue as evident by embarking on further correspondence to culminate in email of 17th November 2023 which, while conceding that the laboratory lacked instruments and expertise to determine use of the product in automobile vehicles fitted with spark

ignition engines or compression ignition engines, did, nevertheless, go on to report that

‘4. The sample is a complex mixture of hydrocarbons. There is no fixed, absolute percentage of its constituents in Diesel fuel. However, lower boiling range compared to CRM of Diesel (155°C-365°C, Approx.), indicates the presence of lighter hydrocarbon constituents in the sample under reference. There is no method available in this laboratory to determine the exact percentage of these lighter constituents.’

which, for the adjudicating authority, was reason enough to conclude that ‘lighter hydrocarbon constituents’ were adulterants. The use of report obtained after correspondence initiated to determine correctness of the declared classification to conclude that adulterated product was to be assessed is beyond the scope of section 12 of Customs Act, 1962. It is also ironical that the adjudicating authority has held the diesel oil – such as it is – to be adulterated and yet proceeded to classify the goods as diesel. Goods may be either diesel oil or adulterated diesel oil; the latter could not be the former except by imperiling the integrity of the tariff to fit adulterated products along with prime. It is indeed travesty of assessment under Customs Act, 1962 for purportedly unlawful goods to be regularized by determination of liability to duty. Indeed, despite holding that the impugned goods were adulterated diesel oil with only one possible consequence, the adjudicating authority has proceeded to not only re-classify the goods but also to undertake re-valuation which are pre-requisites of assessment to enable clearance for

home consumption. A shakier foundation for adjudicatory consequence is difficult to contemplate. The ‘proper officer’ was required to ascertain correctness of declaration of ‘rate of duty’ and ‘value’ for assessment of duty liability under section 17 of Customs Act, 1962 and the ‘proper officer’ under section 47 of Customs Act, 1962 was to allow clearance for home consumption after ascertainment that duty as assessed had been discharged and the goods are not prohibited. From that responsibility to ordering re-export after confiscation of goods for the observed breaches is a long trek outside the framework of law.

7. Without deliberating further on this mis-adventure, we turn to the classification exercise undertaken by the lower authorities. We have, time and again, set out the rules for engagement in classification disputes which the Hon’ble Supreme Court has set out in *Hindustan Ferodo Ltd v. Collector of Central Excise* [1997 (89) ELT 16 (SC)] thus

‘It is not in dispute before us as it cannot be, that onus of establishing that the said rings fell within Item No. 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.’

and in *HPL Chemicals Ltd v. Commissioner of Central; Excise, Chandigarh* [2006 (197) ELT 324 (SC)] thus

‘28. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub- heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue.....’

8. The show cause notice proposed that

Petroleum oils and oils obtained from bituminous minerals, other than crude; preparations not elsewhere specified or included, containing by weight 70 % or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations; waste oils’

corresponding to heading 2710 of First Schedule to Customs Tariff Act, 1975 was apt considering that the test report demonstrated the sample to contain more than 70% of petroleum oils or oils obtained from bituminous minerals. Leaving aside that inference from the test report for the nonce, we take note that the said heading is delineated not just at the usual ‘sub-heading’ and ‘tariff item’ levels but that these are fitted within sub-classifications, excluding waste oil, as containing ‘biodiesel’ and others conforming to the description. The adjudicating authority narrowed down the residual ‘sub-heading’, comprising of other than ‘light oils and preparations’ of the latter sub-classification

which appears to be illogical inasmuch as ‘diesel oil’ of both types fall within the other sub-heading. It would, therefore, appear that the adjudicating authority has chosen not to classify the impugned goods as ‘diesel oil’ and took recourse to the residual tariff item within the residual sub-classification merely to deny the declared classification and to insist on re-export. This is not in conformity with neutrality envisaged in the General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975 and is in discord with the onus devolving on ‘proper officer’ in the decisions of the Hon’ble Supreme Court *supra*.

9. From a perusal of the finding of the original authority, and sustained in the impugned order, which relied upon the test reports for overruling the declared classification solely by the content of ‘petroleum oils or oils obtained from bituminous minerals’ being above 70%, the test report, at serial number 11, offers no clue about the manner of computation or conformity thereof with the heading proposed in the show cause notice. In both the test reports relied upon, besides indicating lack of conformity with IS:1460 in that of their own laboratory and in that of the state level coordinator – oil industry of sample not meeting the test of high speed diesel, the possibility of conforming to the other tariff line for diesel oil had not been considered. That is a flaw in the classification exercise which the lower authorities were required to in the light of the reports of non-conformity. Without

support of ascertainment of one, and despite the reported non-conformity with the other, the lower authorities sustained finding of the impugned goods being diesel oil and, yet, resorted to an unrelated sub-heading to determine rate of duty. The impugned order may be set aside on this count alone.

10. The adopted tariff item is not intended to cover adulterated diesel oil but ‘oils and preparations’ other than ‘light oils and preparations’ and, in the absence of clear finding of not being ‘light oil’ as to merit classification under sub-heading 2710 19 of First Schedule to Customs Tariff Act, 1975, the only available fitment is as ‘preparations’ which was the claim of appellant too, *albeit* in a different heading. It would, thus, appear that customs authorities and the appellant are at one – the latter by deliberate choice attended with validation of past clearances and the former serendipitously by holding the goods to be diesel but unable to classify it accordingly for being adulterated and having no alternative but to proceed with ‘preparations’ that, as claimed by appellant, could not be allowed. Consequently, this finding of the impugned goods as ‘preparations’ has not been subjected to conformity with the text of the adopted description. This is yet another ground for invalidating the classification adopted by the lower authorities.

11. The adopted heading, for ‘preparations’, requires the article to comprise not only 70% or more by weight of ‘petroleum oils or oils

obtained from bituminous minerals’ but also of these as the basic constituents; the second qualification is not evident in the reports. The report of the ‘state level coordinator’ is even lacking in reference to weight and, despite lack of whisper even about basic constituent, the lower authorities were not constrained in presuming so. More probably, it was not even taken into consideration as the original authority had set out on a path that had diesel oil as trajectorial culmination and not preparations. The test reports are lacking in isolation of the source as petroleum oil or bituminous oil and the lower authorities appear not to have noticed that heading 2710 of First Schedule to Customs Tariff Act, 1975 is not restricted to petroleum or bituminous sources; it was, therefore, necessary to identify the specific source before venturing upon the residual sub-heading below. Furthermore, for fitment within ‘preparations’ of this heading, it should have been taken note of that it was intended for such as were not specified elsewhere and the range of specifications elsewhere, other than under the claimed heading, was not examined. The adjudicatory exercise was not sufficiently exhaustive and the affirmation in appellate disposal was flawed for that reason justifying invalidation of the adopted classification.

12. The appellant had, and in accordance with the past practice, sought coverage within

‘Lubricating preparations (including cutting-oil preparations, bolt or nut release preparations, anti-rust or

anti-corrosion preparations and mould release preparations, based on lubricants) and preparations of a kind used for the oil or grease treatment of textile materials, leather, furskins or other materials, but excluding preparations containing, as basic constituents, 70 % or more by weight of petroleum oils or of oils obtained from bituminous minerals

- *Containing petroleum oils or oils obtained from bituminous minerals:'*

corresponding to heading 3403 of First Schedule to Customs Tariff Act, 1975. The essence of this classification is not only, as far as the impugned goods are concerned, that it covers 'lubricating preparations' but also, parenthetically, specifies certain applications before excluding 'preparations containing, as basic constituents, 70% or more by weight of petroleum oils or of oils obtained from bituminous minerals' which was the sole thread, and by exclusive reliance on the 'implied speculation' in the test reports, by which re-classification has been strung up. The several deficiencies in the test reports on each aspect of the exclusion here with corresponding inclusion in the other has already been elaborated *ibid* for us to reiterate it. Suffice it to say that the adopted classification fails not only by rule 1 of General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975 but also by rule 3 thereof.

13. It is clear that the test for validation of re-classification devolving on the proper officer of customs by judicial mandate *supra* and by legislative obligation *supra* has not been conformed to and, consequently, the

classification adopted by the lower authorities is not in accordance with law. We, therefore, find that the classification declared in the bill of entry would suffice for assessment. The lower authorities have ventured upon rejection of declared value under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 solely on the finding that the impugned goods are diesel oil. We do not have to examine the correctness of the rule applied for re-determination of value inasmuch as the foundation for proceeding to rule 3(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 has been displaced by our finding *supra*. Consequently, re-determination of value as well as re-assessment of the duty liability do not have any basis in law.

14. The goods having been correctly declared, both in terms of description as well as value, case for confiscation under section 111(d) of Customs Act, 1962 and section 111(m) of Customs Act, 1962 as the goods imported are neither adulterated nor canalized, does not have authority of law.

15. In view of our finding *supra*, the impugned order is set aside and appeal allowed.

(Order pronounced in the open court on 01/07/2024)

(AJAY SHARMA)
Member (Judicial)

**/as*

(C J MATHEW)
Member (Technical)