

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10240 of 2020

Customs Misc Application (ORS) No 10131 of 2020

(Arising out of OIO-KND-CUSTM-000-COM-12-2019-20 dated 03/12/2019 passed by the Commissioner of Central Excise, Customs and Service Tax-KANDLA)

RAJKAMAL INDUSTRIAL PVT LTD

.....Appellant

401, Dev Arc Corporate, Above Croma, Iscon Cross Road, Sg Highway
Ahmedabad, Gujarat

VERSUS

C.C.-KANDLA

.....Respondent

Custom House,
Near Balaji Temple,
Kandla, Gujarat

WITH

Customs Appeal No.10291 of 2020

Customs Misc Application (ORS) No 10199 of 2020

(Arising out of OIO-KND-CUSTM-000-COM-14-2019-20 dated 05/12/2019 passed by the Commissioner of Central Excise, Customs and Service Tax-KANDLA)

GASTRADE INTERNATIONAL

.....Appellant

443, Mathura Road, Bhogal
New Delhi, Delhi

VERSUS

C.C.-KANDLA

.....Respondent

Custom House,
Near Balaji Temple,
Kandla, Gujarat

AND

Customs Appeal No.10298 of 2020

Customs Misc Application (ORS) No 10205 of 2020

(Arising out of OIO-KND-CUSTM-000-COM-13-2019-20 dated 05/12/2019 passed by the Commissioner of Central Excise, Customs and Service Tax-KANDLA)

DIVINITY IMPEX

.....Appellant

A 303 Shetrunjay Residency, B/H Dev Aurum,
Nr Maruti Nandan Hotel, Anandnagar Road, Satellite
Ahmedabad, Gujarat

VERSUS

C.C.-KANDLA

.....Respondent

Custom House,
Near Balaji Temple,
Kandla
Gujarat

APPEARANCE:

Shri S. Jaykumar, Shri M. Karthikeyan and Shri R. Subhramanya, Shri Hardik Modh
Advocates for the Appellant

Shri Vinod Lukose, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 12392-12394 /2021

DATE OF HEARING: 08.09.2021

DATE OF DECISION: 28.09.2021

RAMESH NAIR

Since the issue involved in all the three cases is common and the goods is in the form of comingled oil in a common storage, for the ease of reference we are taking the facts from the appeal of M/s Rajkamal Industrial Pvt. Ltd. The appellant had imported base oil SN50 vide vessel Al Heera and had filed bills of entry by classifying the above product under CTH 27101960. On an intelligence that the product is HSD and not base oil, the DRI officers boarded the vessels and drew the representative samples from each of the 10 tanks contained in the vessel vide panchnama dated 05/05/2018 and sent one set (10 bottles) of sample to Customs lab at Vadodara vide Test Memo 1 to 10 dated 07/05/2018. The said imported goods were seized by the DRI vide Seizure Memo dated 15.05.2018. The Chemical Examiner at Customs Lab Vadodara vide his test reports dated 10/05/2018 had communicated that the samples have characteristics of HSD/Automotive Fuel Oil confirming to IS 1460:2005 and the samples were other than Base Oil. The appellant requested for retest of the samples at Central Revenues Control Laboratory (CRCL), New Delhi or Indian Institute of Petroleum, Dehradun and accordingly the second set of samples (10 bottles) were sent to CRCL, New Delhi who vide their report dated 3.7.2018 confirmed that the analytical parameters of each of the ten samples conformed to the specifications of HSD/Automotive Fuel as per IS 1460:2005 and the samples were other than base oil. The appellant preferred a Special Civil Application No. 10882 of 2018 before the Hon'ble High Court of Gujarat demanding retesting of samples by a reputed Independent institution and the Hon'ble High Court vide their interim order

dated 30.7.2018 directed the department to send the requisite quantity of samples to the IOCL, Mumbai which is one of the notified laboratories as per department circular dated 16.11.2017.

1.2 Central Laboratory, IOCL, Mumbai gave their report dated 14/8/2018 wherein it was stated that the samples meet the specification for 14 parameters (out of 21/22 parameters) tested as per IS 1460:2005 and they did not have the facility for testing the balance parameters. In the meanwhile the appellant had requested for provisional release of the imported cargo which was denied by the department vide letter dated 13.7.2018. The appellants filed an application dated 10.9.2018 in the above SCA 10882 of 2018 requesting the Hon'ble High Court to direct the DRI/Department to permit the appellant to re-export the goods and Court vide its order dated 17.9.2018 directed the Department to file their representation within one week and directed the authority/ department to consider such representation for provisional release or alternatively permit the appellant to re-export the goods. The Commissioner of Customs considered the representation dated 24.9.2018 and denied provisional release vide letter dated 22/11/2018. The appellant had preferred an appeal against the said denial before this Tribunal who vide their Final Order No. A/10302/2019 dated 13.2.2019 allowed the appeal and directed the adjudicating authority to order for provisional release of goods for re-export within a period of one month from the order. The adjudicating authority vide their letter dated 27.3.2019 ordered for provisional release but subject to execution of bond for 100% of the value and bank guarantee for 50% of the value. The appellant preferred an appeal against the said order before the Tribunal who vide their Final order no. A/10848/2019 dated 3.5.2019 reduced the bank guarantee amount to 25% of the value of the goods.

1.3 Further, the Commissioner of Customs, Kandla in exercise of the powers vested with him under the first proviso to Section 110(2) of the

Customs Act extended the time limit for issuance of SCN in respect of seized goods for a further period of 6 months upto 3/5/2019 and the same was communicated to the appellant vide letter dated 26/10/2018. The appellant had preferred an appeal against the said letter before this Tribunal who heard the matter finally on 12/3/2019 and vide their Final Order No. A/10953/2019 dated 3.6.2019 set aside the impugned order and allowed the appeal.

1.4 In the meanwhile, the Directorate General of Revenue Intelligence (DRI) issued the SCN dated 22/4/2019 on the appellant proposing to classify the imported goods under CTH 27101930 as High Speed Diesel (HSD) and to confiscate the imported goods which were seized vide panchanama dated 15.5.2018 under Section 111(d) & (m) of the Customs Act and to impose penalty on the appellant under Section 112(a) and (b) of the Act. The notice also proposed to impose penalties under Section 112(a) & (b), Section 114AA and Section 117 of the Customs Act on the directors of the appellant, on the foreign suppliers M/s. Kelorex Energy FZE, UAE, M/s. Renish Petrochem FZE, Dubai and Shri Rajesh Shah of Kelorex Energy FZE, UAE and Shri Hitesh Mehta of M/s. Renish Petrochem FZE, Dubai, and on the co-importers namely Shri Gastrade International and M/s. Divinity Impex.

1.5 After due process of law, the Commissioner of Customs, Kandla passed Order in original No. KND-CUSTM 000-COM-12-2019-20 dated 3.12.2019 wherein he reclassified the imported goods under CTH 27101930 as HSD and confiscated the imported goods with an option to re-export on payment of fine of Rs. 3.50 Crores and imposed penalty of Rs. 2 crores on the appellant and Rs.50 Lakhs each on the two directors of the appellant under 112(a) of the Customs Act. Further, the order also imposed penalty of Rs. 30 Lacs each on the above two directors under Section 114AA of the Act. Further various penalties have been imposed under Section 112(a) and Section 114AA on the foreign suppliers and their representatives and Rs. 5

lakhs on Gastrade International and Rs. 2 Lacs on Divinity Impex under Section 112(a) of the Act. Being aggrieved by the aforesaid OIO dated 03.12.2019 and similar orders passed against other appellants M/s. Gastrade International and M/s Divinity Impex, the present appeals have been filed.

2. On behalf of the appellant namely M/s Rajkamal Industrial Pvt. Ltd. and Gastrade International, Shri S. Jaykumar, Shri M. Karthikeyan and Shri R. Subhramanya, advocates and on behalf of the appellant M/s Divinity Impex, Shri Hardik Modh appeared. Shri S. Jaykumar submitted a written submission along with some documents and case laws on the date of hearing. He argued that base oil is specifically covered under tariff item no. 27101971. However, there is no note available defining the same in the First Schedule to the Customs Tariff Act and there is no BIS standard available for it. In the Show Cause Notice, the only point DRI is emphasizing is that the imported base oil satisfies all the characteristic parameters of HSD except flash point. He submits that HSD should confirm to the BIS standard IS 1460:2005 as per the said standard 21/22 parameters must be satisfied to call an oil as HSD. In the first test report dated 11.5.2018, of the chemical examiner, Customs laboratory, Vadodara, the samples were tested only for 8/7 parameters as against 21/22 parameters and it has been concluded that the samples has the characteristics of HSD/Automotive Fuel Oil and it is other than base oil. In the second test report dated 3.7.2018, of the chemical examiner, CRCL, New Delhi, the samples were tested only for 10 parameters and on that basis itself it has been concluded that the samples conforms to HSD/Automotive Fuel as per IS:1460:2005 and it is other than base oil. He submits that neither it has been clarified by the above laboratories as to why only 8/7 or 10 parameters were tested nor it has been substantiated as to how it can be concluded that the imported oil is only HSD on the basis of 8/7 or 10 parameters alone. Further it has also

been stated in the test report that the imported oil in question is other than Base oil but without discussing as to how it was ascertained that the imported oil is not Base Oil. In the Third test report dated 14/8/2018, the Central Laboratory, IOCL, Mumbai, who have carried out the test on the basis of the direction the Hon'ble High Court of Gujarat, also have tested the samples only for 14 out of 21/22 parameters and it was stated that they do not have facility for testing the balance parameters. It is clearly mentioned that the samples tested met the specification only for 14 parameters for which it was tested. However, the test report did not state whether the sample tested is HSD or it is not base oil.

2.1 On cross examination of Dr. Gobind Singh, DGM (Lab), IOCL, Mumbai, he categorically put forth that the samples were tested only for 14 parameters as against 21/22 parameters specified in IS 1460:2005 for HSD and they do not have the facility to test for the balance parameters in their lab and he cannot comment on the relevance of such parameters for which tests were not conducted. When he was questioned as to whether the samples are automotive diesel, he could only state that they have conducted the test as per the above standard and he could not confirm or conclusively say so. For the above reasons, though the samples drawn were tested in three different laboratories none of the laboratories could conduct the test for all the 21/22 parameters prescribed under the standard IS:1460:2005 in order to categorically state the sample is nothing but HSD and neither any test or reasons have been put forth to say conclusively that the samples is not base oil. The Commissioner has concluded that the Imported oil is nothing but HSD and it is not base oil as declared merely based on the above test reports alone.

2.2 In support of the submission, he placed reliance on the following judgments:

1. Deepwater Pacific 1 Inc, Transocean Offshore Deepwater Drilling Inc vs CC, Vijaywada 2019 (4) TMI CESTAT Hyderabad
2. Petroplus International Marketing FZCO vs C.C. Mangalore 2006 (105) ELT 1041(Tri Bang.)
3. Jagdamba Petroleum P. Ltd. vs Commissioner of Central Excise, Noida 2004 (163) ELT 88 (Tri. Del.)
4. The above case upheld by the Hon'ble Supreme Court reported at Commissioner of Central Excise, Noida vs Jagdamba Petroleum P. Ltd. 2007 (212) ELT A112 SC

Taking support of the above judgments he submits that in the instant case also, the Commissioner has merely relied on the 3 test reports to conclude that the imported product is HSD even though none of the laboratories were able to test the samples for all the 21/22 parameters as prescribed under IS 1460:2005 and no test was conducted by department whether the product is base oil. The DRI has not let any evidence to substantiate their claim that imported product is HSD. The DRI/Customs Department ought to have established that the imported base oil can be used a HSD or Automotive Fuel in internal combustion engines but neither the DRI nor the Adjudicating Authority is able to establish that the imported products can be used as HSD or automotive fuel. As such the ratio of the above decision is applicable in this case also and in the absence of conclusive evidence to hold that the imported product is HSD and can be used a automotive fuel, the imported base oil cannot be reclassified as HSD with incomplete test reports alone.

2.3 He submits that the Hon'ble Supreme Court has been repeatedly holding that the onus is on the department to prove that the goods are classifiable under a particular tariff entry and the following are some the citations in this regard:

1. Hindustan Ferodo Ltd. – 1997 (89) ELT 16
2. Garware Nylons Ltd. 1996 (87) ELT 12

3. Calcutta Steel Industries- 1989 (39) ELT 175

He also placed reliance on the decision of the larger bench of this Tribunal in the case of Brindavan Beverages Pvt. Ltd. reported in 2019 (29) GSTL 418.

2.4 He further submits that for fuel oils, there is a BIS standard namely IS: 1593. As per the said standard, 9 characteristic requirements are prescribed. He submits that except for the parameter "Gross Calorific value" all other parameters are covered within the 21/22 parameters prescribed for HSD under IS:1460:2005. The Flash point is 66°C for both HSD under IS: 1460 as well as for Fuel Oils under IS: 1593. Further, all the 8/7 parameters out of the 9 parameters stands already tested in view of the aforesaid test reports and the samples meets the requirement in respect of such 8/7 parameters. The samples have not been tested for gross calorific value alone. From the above requirements stipulated under IS:1593 for "Gross Calorific Value" the stipulation is "Not limited, but to be." Note 1 of IS 1593 reads as "Normally the gross calorific value is of the order of 10000 cal/g". From this, it is clear that normally the gross calorific value of fuel would be 10000 Cal/g but the standard does not impose any limits for such parameter and the value of such parameter is only required to be reported. As such, even though the samples drawn in these proceedings have not been tested for such "Gross Calorific value", it is not going to take away the product from being called as "Fuel Oil". He submits that the value prescribed for flash point is same for both HSD and Fuel oil and almost all the parameters prescribed for Fuel Oil is commonly prescribed for HSD also. Why the DRI has not considered testing the samples of the imported product for the parameters prescribed for Fuel Oil under IS:1593 and why they have pre-supposed that the imported product is only HSD and not fuel oil? It is considered that since Fuel Oil is freely importable into India, it appears DRI has not followed the BIS standard for Fuel oil.

2.5 He also referred to section 2 of Petroleum Act, 1935 whereby he submits that from the definition it is lucid and clear that various classes of Petroleum are determined on the basis of flash point. Petroleum have flash point above ninety three degree centigrade is construed as "Heavy Oils" and in terms of Section 11 of the Act, no license is required under Chapter I of the said Act for Heavy Oils. In the instant case, the Central laboratory, IOCL, Mumbai which had tested the samples for 14 parameters out of 21/22 parameters has determined the flash point of the samples as 112 under Pensky Martens method. As such the Imported base oil does not fall under any of the above defined classes such as Class A, Class B or Class C and instead it is construed as Heavy Oils. Further the Commissioner in the impugned order holds that HSD falls under the category of Class B petroleum products i.e., having a flash point of sixty-five degree centigrade or less. Despite the above test report as well as the Commissioner's finding, it is not known as to how the Commissioner has finally concluded that the imported oil in question having a flash point of 112 degree centigrade (heavy oil) is HSD class B petroleum. This is contradicting both, the test reports as well as his understanding and reasoning. In view of the above, the impugned order holding the imported base oil as HSD meriting classification under CTH 2710 1930 is not sustainable at all and merits to be set aside. For the same reason, the imported goods are not confiscable and the redemption fine and penalties imposed are not sustainable. He submits that even though the appellants have strong prima facie case on merits in their favour but they are prepared to re-export the goods.

2.6 Though the learned counsel in his submission raised the issue about jurisdiction that DRI is not proper officer for issuing the show cause notice, but on the query from the bench the learned counsel withdrawn this submission and submitted that he is not taking up the question of jurisdiction.

2.7 He also argued that in view of the facts the goods are not liable to confiscation therefore, the demurrage/detention charges also required to be set aside.

2.8 Shri Hardik Modh, learned counsel appearing on behalf of the appellant M/s Divinity Impex adopted the argument made by learned counsel Shri S. Jaykumar. Subsequent to the hearing he filed a written submission dated 15/09/2021. In his submission he submits that burden lies on the Revenue as held in the following decisions to prove the classification of the goods claimed by the importer is wrong it falls under the particular heading of the Customs Tariff Act. The Revenue fails to discharge the burden in the present case and therefore, the impugned order is required to be set aside:

1. HPL Chemical Ltd. vs Commissioner of Central Excise 2006 (197) ELT 324 (SC)
2. Puma Ayurvedic Herbals Pvt. Ltd. vs C.C.Ex. 2006 (196) ELT 3 (SC)

2.9 He further submits that supplementary notes to Chapter 27 of First Schedule to the Customs Tariff Act, 1975 defines the meaning of HSD. It means any Hydrocarbon oil conforming to the Indian standards specifications of Bureau of Indian Standards IS: 1460:2005. IS:1460:2005 prescribes the requirements, sampling procedure and test methods of automotive diesel fuel. It is applicable to automotive fuel for use of diesel engine vehicles designed to run on automotive diesel fuel. The standard prescribes 21/22 parameters for coming to conclusion that whether the product is HSD or not. The said specification has been amended by IS:1460:2017.

2.10 In the present case, the impugned order mainly relied upon the test report issued by IOCL for examination of goods. The test report issued by the IOCL shows that the laboratory tested only 14 parameters out of 21/22 as prescribed under IS: 1460:2005. The reason for non-examination of

balance 8/7 parameters is that the facilities for testing of these goods were not available which has been specified in the report also. Since all the 21/22 parameters have not been tested, conclusion that the goods under dispute is HSD is wrong and contrary to the IS specifications. The said 8/7 parameters are also very relevant to come to the conclusion that the product is HSD or otherwise.

2.11 He also referred to the cross examination of Shri Gobind Singh, Manager, IOCL who tested the goods at the time of adjudication in the case of Rajkamal Industrial Pvt. Ltd. He also submits that the samples drawn from the impugned goods tested at IOCL shows flashpoint of the impugned goods at above 112°C. IS 1460:2005 provides that the minimum flashpoint for Abel method requires 35°C whereas Pensky Martens closed cup method requires minimum 66°C. Since the product in dispute exceeds threshold limit of flashpoint as prescribed under IS 1460:2005, IOCL certified that the product as HSD.

2.12 He referred to the Petroleum Act, 1934. As per the meaning of Petroleum as defined under Section 2 of the Petroleum Act which means any liquid Hydrocarbon or mixture of hydrocarbon and any inflammable mixture (liquid, viscos or solid) containing in any liquid Hydrocarbon. He submits that any petroleum product exceeding the threshold limit of 93°C, it should not be called petroleum item. He also referred to the work order under the Petroleum Act Explosive Safety Organization (PASO)- Ministry of Commerce and Industry and submits that in the present case, flashpoint of the disputed goods is above 93°C and therefore, cannot be classified as HSD.

2.13 He once again referred to the cross-examination of Shri Gobind Singh, Manager, IOCL regarding classification, regarding flashpoint and answers given by him and submits that the answers given by Shri Gobind Singh who tested the goods reveal that he has not considered the flash point

as important parameter for testing the goods. According to him, irrespective of the flash point of goods, it remains HSD.

2.14 As regard the criterion of flashpoint to decide the product, he referred to the case of Gulf First Petro Product Pvt. Ltd vs C.C. Ex 2014 (310) ELT 393. In view of above submission that the test report submitted by IOCL, Mumbai does not have facilities to test 21/22 parameters as specified under IS: 1460:2005. The chemical examiner did not conduct test of all parameters as to decide whether the product is HSD or not. Similarly, none of the test reports examined by the Central Excise Customs Laboratory at Vadodara and CRCL, New Delhi examined its 21/22 parameters. Hence, in view of the decision of Deep Water Pacific Inc., Transocean Offshore, Deep Water Drilling Inc. Vs. CC Customs - 2019 (4) TIMI 1704 and the submissions made hereinabove, the impugned order is required to be quashed and set aside.

3. Shri. Vinod Lukose, Superintendent (AR) appearing on behalf of the revenue submits that the Learned Commissioner has classified the imported consignment of base oil SN 50 under chapter hearing 27101960 of CTA based on certificate of analysis furnished by the overseas supplier; that the chief chemist of Central Excise and Customs Laboratory tested only 8/7 parameter against 21/22 parameters; that the impugned order mainly relies upon the test report of IOCL Mumbai which tested only 14 out of the 21/22 parameters; that they have also heavily relied upon section 2 of Petroleum Act, 1934 to substantiate the point that if a petroleum product exceeds threshold limit of 93°C it would not be called as petroleum item they have also relied upon various case laws. He submits that appellant's primary and only grouse which is oft repeated is that the samples were not tested for all the 21/22 parameters. However the appellants has no where shown that for a product to be classified under HSD (IS:1460:2005) all the parameters are

to be invariably satisfied. In this connection it is important to refer to the cross-examination of Dr. Gobind Singh, DGM (Lab.), IOCL held on 07.11.2019 wherein the experts states that the test was conducted in accordance with parameter prescribed under (IS:1460:2005); that the samples meets the standard set vide the 14 parameters; laid out in (IS:1460:2005); that in their laboratory there is facility of testing only 14 parameters that based on 14 parameters tested. The goods are HSD that only minimum flash point mentioned in parameter and there is no maximum limit prescribed in the standard for flash point; that flash point is not the only parameter used for measuring the sample as per (IS:1460:2005). He submits that the entire submission of the appellant only harps on the parameter relating to flash point. The appellant is silent on the fact that the report of the IOCL gives finding on 13 other parameters. There is no averment raised by the respondent that in respect of 13 parameters which has been tested (other than flash point) the characteristics does not fulfill the requirement. Further, even if in respect of the flash point the appellant's averment does not stand on legal test; The DGM of IOCL clearly states that the parameter only gives the minimum flash point. As regard reliance of the appellant on section 2 of Petroleum Act, 1934, he submits that the classification was to be done not as per the petroleum act, 1934 but based on tariff which clearly states that high speed diesel means any hydrocarbon oil conforming to the BIS 1460; 2005. As against the appellant's primary ground that owing to the flash point, the goods do not fall within the ambit of HSD in terms of BIS 1460:2005 which stands suitably answered by none other than a technical expert. It goes without saying that IOCL as the testing laboratory was selected by the Hon'ble Gujarat High Court itself it being one of the notified laboratory. Therefore, the test report of IOCL clearly established that imported goods declared as base oil SN 50 is in fact HSD which is restricted goods hence, the goods was rightly confiscated and imposed redemption fine and penalties.

3.1 As regard the judgment of Hon'ble Supreme Court in the case Canon India Ltd he referred to status report of Hon'ble Supreme Court whereby he submitted that revenue has filed a review petition under diary no 9580 /2021. He also referred the letter dated 11.06.2021 issued by the office of Customs Commissioner, Customs House Kandla. Wherein it was submitted that the cases involving issue of jurisdiction covered by Canon India Pvt. Ltd may be kept pending till review petition filed in Supreme Court in the case Canon India Pvt. Ltd. is disposed of.

4 We have carefully considered the submission made by both the sides and perused the records. The issue to be decided in the present case is that whether the imported goods is the Base Oil SN 50 classifiable under Customs Tariff chapter heading 27101960 as claimed by the appellant in the bill of entry or the same is classifiable as HSD under Chapter heading 27101930 of Customs Tariff Act, 1975 as claimed by the revenue. The respondent Commissioner vide impugned order ordered for confiscation of the goods under the warehouse bill of entries under section 111 (d) and 111 (m) of the Customs Act, 1962 and gave an option to the appellant to redeem the same on payment of redemption fine in lieu of confiscation under section 125 of the said act for re-export purpose. The respondent imposed penalties upon the appellant' under section 112 (a) of the Customs Act on the premises that they mis-declared description of the goods and imported restricted goods which is not otherwise permissible under the provision of Customs Act.

4.1 We find that entire case was decided on the basis of test conducted initially by the Central excise and Customs Laboratory at Vadodara and CRCL New Delhi. Subsequently on the intervention of Hon'ble Gujarat High Court in the petition filed by the appellant and as per direction of Hon'ble High Court the test was conducted at IOCL, Mumbai. As per IS 1460:2005 there are 21 Parameters and as per amended IS 1460:2017 it is 22 parameters. However, IOCL Lab tested 21 parameters as per IS 1460:2005. The

adjudicating authority decided the confiscation on the basis of test report given by IOCL laboratory. Therefore, relevant test report of IOCL Laboratory is scanned below:-

इंडियन ऑयल कॉर्पोरेशन लिमिटेड
सेन्ट्रल लेबोरेटरी
"K" ऑफिस इन्स्टालेशन, सिवरी (पूर्व), मुंबई - 400 015
Indian Oil Corporation Limited
Central Laboratory
"K" Office Installation, Seewri (East), Mumbai - 400 015
Telephone : 022 2416 3082 (D), 022 2292 4761


IndianOil
A Maharatna Company

विपणन प्रभाग
Marketing Division
SPECIFICATION NO: **QUALITY CONTROL TEST REPORT FOR HIGH SPEED DIESEL**
IS: 1460-2005 AMENDMENT NO. 2 March 2010

Test Required High Speed Diesel Analysis
Test Report No. & Date ICF/ 4791 /2018 dated 14/08/2018
Name of Customer Directorate Of Revenue Intelligence, Ahmedabad
Source Of Sample 75 (Composite), Vessel MT. AL HEERA
Sample Drawn By Jointly by Representative of DRI, Ahmedabad
Seal No. Glass bottle sealed with Lead Seal (Yellow tag with Panchas signature)
Date Of Sampling 05/05/2018
Date Of Sample Received 09/08/2018
Reason For Testing As per letter ref. DRI/AZU/CI/ENQ-12(INT-02/2018)/2018 dated 08/08/2018, Goods declared as "Base Oil 5W 50-IN Bulk" to be tested as per High Speed Diesel Specification IS 1460:2005 amended.

Sl. No.	CHARACTERISTICS	REQUIREMENTS	TEST METHOD- (P) of IS : 1448/ISO/ASTM	RESULTS
I	Acidity, inorganic	Nil	P : 2	Nil
II	Acidity, total; mg of KOH/g, Max	To report	P : 2	0.06
III	Ash, percent by mass, Max	0.01	P : 4	0.002
IV	Carbon residue (Ramsbottom) on 10 percent residue, percent by mass, Max	0.30	P : 8	0.03
V	Cetane Number, Min.	51	P : 9	FNA
VI	Cetane index, Min	46	D - 4737	66.9
VII	Pour point, Max: (a) Winter / (b) Summer	3°C / 15°C	P : 10	-3
VIII	Copper strip corrosion for 3 hrs at 50°C	Not worse than No.1	P : 15	1a
IX	Distillation, % v/v, recovered at 360°C, Min	95	P : 18	95
X	Flash Point: a) Abel°C Min b) Pensky martens closed cup, °C, Min	35 66	P: 20 P : 21	— 112
XI	Kinematic viscosity, cSt, at 40°C	2.0 to 4.5	P : 25	3.997
XII	Sediment, percent by mass, Max	—	P : 30	0.02
XIII	Total Contamination, mg/Kg, Max	24	EN 12662	FNA
XIV	Density at 15°C, kg/m³	820 - 845	P : 16	829.5
XV	Total Sulphur, mg/kg, Max	50	D - 4294	37
XVI	Water content, mg/kg, Max	200	ISO-12937	75
XVII	Cold Filter Plugging Point*°C(CFPP), Max, (a) Winter/ (b) Summer	6°C/18°C	P : 110	FNA
XVIII	Oxidation Stability, g/m³, Max	25	ISO : 12205	FNA
XIX	Polycyclic Aromatic Hydrocarbon(PAH), % m, Max	11	IP - 391	FNA
XX	Lubricity Corrected Wear Scar Dia. @ 60°C, microns, Max	460	ISO : 12156-1	FNA
XXI	Oxygen Content, %m, Max	0.6	Annex B	FNA

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पंजीकृत कार्यालय : 'इंडियन ऑयल भवन', जी-9, जली यारव जुंग मार्ग, बंदरा (पूर्व), मुंबई- 400 051, (भारत)
Regd. Office : 'Indian Oil Bhavan', G-9, Ali Yavar Jung Marg, Bandra (E), Mumbai - 400 051 (INDIA)

विपणन प्रभाग
Marketing Division

इंडियन ऑयल कॉर्पोरेशन लिमिटेड
सेन्ट्रल लेबोरेटरी
"के" ऑयल इन्स्टालेशन, सिवरी टर्मिनल,
सिवरी (पूर्व), मुंबई - 400 015.
Indian Oil Corporation Limited
Central Laboratory
"K" Oil Installation, Sevre Terminal - II,
Sevre (East), Mumbai - 400 015.
Telfax : 022 2415 3002, (D), Phone : 022 2292 4761 / 2414 8741



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REMARKS:

1. FNA: Stands for "Facility Not Available"
2. Flash point test was first done by Abel apparatus but, since it was more than 66°C, it was done by PMCC.
3. As stated in Point no. 6, of your letter No. DRI/AZU/CI/ENQ-12(INT-02/2018)/2018 dated 08/08/2018 stating as per the order of the Hon'ble High Court of Gujarat, this sample has been tested as per Indian Standard IS:1460:2005 as amended & under this specification there are total XXI tests covered out of which we have tested only XIV parameters as per our lab capability.
4. This sample meet the specification for only XIV parameters tested at our lab as per the specification IS:1460:2005 amended.

NOTE:

1. This test report refers only to the particular sample submitted for testing. Results relate to sample as received.
2. This test report shall not be reproduced except in full, without the written approval of the laboratory.
3. Form No: QF/OPN/07
4. The test results reported are valid at the time of & under stated conditions of the test.

-----End of test report-----

Tested by:

डॉ. गोबिंद सिंह / Dr. Gobind Singh
प्रबन्धक (लेब) / Manager (Lab),
इंडियन ऑयल कॉर्पोरेशन लिमिटेड
Indian Oil Corporation Limited
सेन्ट्रल लेबोरेटरी, "के" ऑयल इन्स्टालेशन,
Central Laboratory "K" Oil Installation,
सिवरी (पूर्व), सेवरे (East), मुंबई - 400 015.

Reviewed By: 14/08/2018

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पंजीकृत कार्यालय : 'इंडियन ऑयल भवन', जी 9, अली यावर जंग मार्ग, बंडरा (पूर्व), मुंबई - 400 051. (भारत)
Regd. Office : 'Indian Oil Bhavan', G-9, Ali Yavar Jung Marg, Bandra (E), Mumbai - 400 051. (INDIA)

From the above report it is observed that the test was conducted as per specification of IS: 1460:2005 as amended by IS: 1460:2017. There are total 21/22 parameters which are the requirement for testing of the goods to determine that the goods are HSD. However, out of 21/22 parameters only 14 parameters were tested and for the remaining parameters it is clearly stated in the report that the IOCL has no facility for testing the remaining parameters. For classification, HSD is defined as per supplementary note of chapter 27 under section V which is reproduced below:-

(e) "High Speed Diesel (HSD)" means any Hydrocarbon Oil Conforming to the Indian Standard Specification of Bureau of Indian Standard IS: 1460:2005.

4.2 As per the above statutory definition provided in the Customs Tariff Act which needs to be construed strictly and according to the definition only that hydrocarbon oil which conforming to the Indian Standard Specification IS1460; 2005 can be classified as HSD. As per said specification there is a requirement of 21/22 parameters, there is no exception provided that out of 21/22 parameters if any or some of the parameters are met the product will be determined at HSD even though the remaining parameters are not meeting as specified in IS. Therefore in our view any product which meets all the 21/22 parameters as specified in IS 1460:2005 are tested can only be qualified as HSD. In our view, as per facts of the present case since 7 parameters as per IS: 1460:2005 and 8 parameters as per IS: 1460:2017 were not tested it cannot be said that the product is conforming to IS 1460:2005 and if it is not conforming to IS 1460:2005 it does not fall in the definition of HSD as provided under supplementary note of chapter 27. The Learned Authorized Representative submitted that the appellant did not give any explanation about the 14 parameters. In this regard, we find that the burden is on the revenue when the classification claimed by the appellant is challenged to prove that the product is other than base oil or in other words it up to the department to establish the classification of the goods as HSD which is to be conforming to the IS 1460;2005. In absence of test of all the parameters it is only the assumption of the revenue that on the basis of 14 parameters the product is HSD.

4.3 This is the settled legal position in terms of Hon'ble Supreme Court judgment in case of HPL CHEMICALS LTD 2006 (197) ELT 3 (SC). The relevant Para 29 of the judgment is reproduced below:

29. *This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is quite clear that the goods are classifiable as "Denatured Salt" falling under Chapter Heading No. 25.01. The Department has not shown that the subject product is not bought or sold or is not known or is dealt with in the market as Denatured Salt. Department's own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject matter is to be treated as Sodium Chloride.*

From the above judgment of the Apex court it is the settled position that the burden of proving the classification is on the department and not on the assessee. Similar view was taken by the Hon'ble Supreme Court in the case of PUMA AYURVEDIC HERBAL PVT LTD 2006 (196) ELT 3(SC) wherein para 8 the Hon'ble Supreme Court opined as under :

"8. *On the other hand the revenue led no evidence of any sort to rebut the evidence led by the assessee. It is settled law that burden of showing correct classification lies on the revenue. The revenue has done precious little in this case to discharge this burden. The Collector (Appeals) further relied on the following evidence in support of his finding that the products in question fall in the category of medicaments :*

(i) Licence No. A40 888 granted by the Drug Controllers, Maharashtra.

(ii) The inscription of the words on the wrapper "Ayurvedic Proprietary medicines or and Ayurvedic licence No. A 888 on the wrapper mentioning of percentage of ingredients as approved by the Drug Controller.

(iii) Circulation of Therapeutic Index of the products for the use of Doctors Vaidyas.

(iv) Certificate issued by Dr. Narendra Agashe, M.D. Medical Superintendent Dr. Dalvi Memorial Hospital, Nagpur, the relevant extract of which is reproduced below :

"This is to certify that we in this hospital have extensively tried the following Ayurvedic Medicinal Products from Puma Ayurvedic & Herbal Cosmetics Co., Nagpur. We have found them to be of good therapeutic value and prescribe them regularly whenever the need arises."

In view of the above judgments it is settled legal position that it is the department who has to discharge the burden in classifying the goods correctly.

4.4 Apart from the above decision the Hon’ble Supreme Court has been repeatedly held that the onus is on the department to prove that the goods are classifiable under a particular tariff entry. Following are some of the citations in this regard:

- Hindustan Ferodo Limited- 1997 (89) ELT 16 (SC)
- Garware Nylons Ltd- 1996 (87) ELT 12 (SC)
- Calcutta Steel Industries- 1989 (39) ELT 175 (SC)

4.5 The larger bench of this tribunal in the case of Brindavan Beverages 2019 (29) GSTL 418 LB has also held similarly following the above ratio. The relevant para 56 of the said decision reads as follows:

"56. The revenue, However, contends that the products are "Leamonades" falling undrr Traiff Item No 22021020. The Burden is clearly on the revenue to support its contention with evidence.This is what was observed by the Supreme nCourt in Hindustan Ferodo Ltd Vs Collector of Central Excise, Bombay, reported in 1997 (89) ELT 16(S.C) and Union of India vs Garware Nylons Ltd, reported in 1996 (87) ELT 12 (SC)"

4.6 Since the test report of IOCL Laboratory is not conclusive the appellant have cross-examined. Shri Gobind Singh, DGM (Lab), who tested these goods at the time of adjudication. He stated that this 8/7 parameters were not tested in the laboratory of IOCL because IOCL did not have such facility to examine this goods. He didn’t even know the Function/ importance of 8/7 parameters provided under IS- 1460:2005. Relevant extracts of the question placed before Shri Gobind Singh and his answered are as under:

Questions	Answers
Table 1 of IS: 1460:2005 provides	The samples meets with the

total 21 parameters are to be tested for ascertaining whether the samples meet with the criteria of HSD?	specification of IS; 1460:2005 for the parameters tested at our laboratory which are 14 parameters tested as per our lab capabilities.
Does it mean that the other parameters are not important for ascertaining or deciding whether the samples meet with the criteria of HSD?	Already provided in the report that in the lab the samples were tested as per IS :1460:2005 and there is facility available only for testing 14 parameters and for the remaining 8 parameters the facilities is not available for which I can't comment.
Do you know the function/importance of the 8 parameters provided under IS: 1460:2005 that they have not tested?	As the 8 parameters have not been tested, I cannot comment on these parameters.

From the above question and answer it is clear that Shri Gobind Singh has not confirmed that out of 21/22 parameters on testing of only 14 parameters, whether it can be ascertained that the samples meet the criteria of HSD .He repeatedly stated that 14 parameters were tested as per IS 1460:2005. He also stated that since 8/7 parameters have not been tested the Function / Importance of 8/7 parameters cannot be commented on. We find that the test report if read with the explanation given by the Shri Gobind Singh, who tested the samples, it is clear that though 14 parameters were tested as per IS 1460:2005 but in absence of testing of remaining 8/7 parameters it cannot be concluded that the goods is HSD.

4.7 As regard the crucial aspect of Flash Point of the goods tested at IOCL it shows that the flash point is above 112°C IS 1460:2005 provides that the minimum flash point for Abel method Requires 35 °C where as Pensky Martens Closed cup method requires minimum 66 °C. Since the product in dispute exceeds threshold limit of Flash Point as prescribed under IS 1460:2005, IOCL certified that the product as HSD. The appellant referred to the Petroleum Act, according to which the petroleum products are classified into 3 different classes. As per the Act Petroleum has been defined under section 2 of the Petroleum Act which means any liquid hydrocarbon or mixture of hydrocarbon and any inflammable mixture (liquid, solid) containing in any liquid Hydrocarbon Section 2(b) defines the meaning of petroleum class A which means petroleum having a flash point below 23 °C. Petroleum class B has been defined under section 2(bb) which means petroleum having flash point of 23 °C and above but below 65 °C, petroleum class 3 has been defined under section 2(bbb) which means product having flash point of 65 °C and above but below 93 °C. In view of the above definition of petroleum classes A, B and C any petroleum product exceeds the threshold limit of 93 °C would not be called as petroleum item. The appellant also refer to work order under the petroleum act explosive safety organization (PASO- Ministry of Commerce And Industry) provided types of petroleum products which fall under petroleum class A, B and C. By the PASO HSD has been specified under petroleum class b it means flash point of 23°C and above but below 65°C would be considered as HSD if 21/22 parameters provided under IS 1460:2005 are complied. In the present case the flash point of the disputed goods is above 93 °C for this reason also the goods cannot be classified as HSD. The learned AR countering the above submission argued that classification of the goods for purpose of the

customs has to be strictly made on the basis of definition provided in Customs Tariff Act and no resort can be made of any other Act such as Petroleum Act. We find that since the test report by IOCL is incomplete and inconclusive, in such case it is just and proper in the interest of justice to refer to other statutory authority to determine the nature of goods as HSD. Therefore, the aforesaid submission of the learned AR is not tenable in the given facts of the present case.

4.8 In the cross examination when Shri Gobind Singh, DGM (Lab) of IOCL was asked the question related to flash point he answered in the following manner:

Questions	Answers
Do you think one of the ingredients for considering HSD is flash point?	Can't comment on the ingredients. The minimum temperature flash point is 35° C as prescribed in standard. We have submitted report.
What is the maximum and minimum flash point for considering the samples as HSD?	Only the minimum limit is talked about that is 35° C and there is no maximum limit prescribed in the standard.
If case, flash point exceeds above 100° C, 150° C, 200° C and does it still it pertains to HSD?	Can't comment as above 35° C whatever the flash point is, it does not matter.
Point No.1 of Supplementary not of Chapter 27 of Customs Tariff Act provides that "Jute batching Oil" and "textile oil" are hydrocarbon oils, which have their flash point on and above 93°C. In case, flash point exceeds 93°C, what you call it?	Can't Comment. As flash point isn't the only the parameter. We have tested the samples that were submitted to us as per IS:1460:2005

From the above answers of Shri Gobind Singh, it reveals that he has not considered the flash point as important parameter for testing the goods. According to him irrespective to Flash point of the product it remains HSD. From his answer given above he could not gave the firm opinion as regard parameter of flash point. This is also one of the reason that the test conducted by Shri Gobind Singh of IOCL is not conclusive to determine the goods is HSD.

4.9 As regard the upper limit of flash point, the appellant submitted that the appellant and several other importers imported consignments of base oil in the past and in the same head always been cleared by the customs after test report in which the samples were found to be complied with specifications of base oil. He referred to the enclosed various such test report wherein the samples were clearly found to have flash point of more than 93 °C. It clearly shows that even if the flash point is above the limit of 35 °C prescribed under IS 1460:2005 i.e. more than 93°C. The goods were admittedly classified as base oil by the department. Therefore, in the present case even though the Flash point tested was above 93°C on that basis the goods cannot be classified as HSD. We also observed that the department with the pre- determined mind got the goods tested for HSD. Whereas in the first attempt since the goods was declared as base oil the sample should have been tested with parameters of base oil also and if the parameters are not meeting for the base oil than only the department should have resorted to carry out the test for classifying the goods either under HSD or any other classification.

4.10 We have gone through the judgment of Gulf First Petro Product Pvt Ltd 2014 (310) ELT 393. In this case the dispute was whether the goods are base oil or lubricating oil on the chemical test by the customs laboratory. The flash point of the imported product was found to be above 94°C as per

chapter note 27 lubricating oil means any oil which is ordinarily used for lubrication excluding hydrocarbon oil which has its flash point below 93.3°C. It was held by this tribunal that product having flash point above 94 °C cannot be classified as lubricating oil and the classification as base oil has been maintained. In the present case also the flash point is 112 °C applying the ratio of the aforesaid judgment the goods having flash point above 94 °C will merit classification as base oil only. In this position goods cannot be classified as HSD. The identical issue has been considered by the CESTAT Hyderabad in the case of Deep Water Pacific Inc reported in 2019 (4) TMI 1704 wherein the question under consideration was whether the importer imported consignment is MGO or HSD. The revenue alleged that the goods in dispute are HSD. The tribunal held that it is an accepted principal that "he who asserts must prove" and the department asserts in that case that the product is HSD not MGO and failed to prove so. The tribunal held that since the chemical examiner has not examined all the parameter which are required to classify the same as HSD, the impugned order classifying it HSD was quashed and set aside. Relevant portion of order is as under:

"8 We have considered the arguments on both sides and perused the records. The short point to be decided is whether the claim of the appellant that the imported goods were MGO can be rebutted by the department based on the test report which indicates only four parameters and states that it has the characteristics of HSD but does not deny that it is MGO when these 4 parameters are common to both. This issue is no longer res integra and in the assessee's own case, the matter was decided in their favour. It is an accepted principle that "he who asserts must prove" and the department asserts in this case that the product is HSD and not MGO but has failed to prove so. We therefore find that the imported fuel deserves to be classified as MGO as claimed by the appellant and duty charged appropriately as the test report by the chemical examiner has not tested all the parameters which are required to classify the same as HSD and has also not indicated that the material is not MGO. Accordingly, the impugned orders need to be set aside and we do so."

From the reading of the above judgment we find that the identical situation prevails in the present case also. Since all the parameters as specified under

IS 1460:2005 has not been tested it is not proved that product imported by the appellant are HSD. Since Supplementary note to chapter 27 defines the meaning of HSD that means hydrocarbon oil conforming to the Indian standard subsequently by IS 1460:2005 as amended from time to time. All the conditions, parameters prescribed in IS1460:2005 unless followed the product cannot be classified as HSD. IS 1460:2005 clearly prescribes the requirements, sampling procedure and test method of Automotive Diesel Fuel. It is applicable for automotive diesel fuel for use of Diesel engine vehicles designed to run on Automotive Diesel fuel. The standard prescribes 21/22 parameters for coming to conclusion that whether the product is HSD or not. In the present case admittedly all the 21/22 parameters were not tested therefore product cannot be called as conforming to IS 1460:2005 and consequently cannot be classified as HSD.

4.10 As regard the contention of the revenue that even if remaining 8/7 parameters are not tested the other parameters which were tested are sufficient to hold the classification as HSD. We find that in this tribunal judgment in the case of Petroplus International Marketing 2006 (205) ELT 1041 CESTAT Bangalore, while dealing with the issue as to whether the imported product is "super kerosene oil (SKO)" or "Aviation turbine Fuel (ATF)". It was held that all the 28 parameters prescribed for testing ATF have to be met with before concluding that the same is ATF and since ATF and SKO have several common parameters the benefit of doubt should go to the appellant. The present case, applying the ratio of the above judgment, is on better footing that out of 21/22 parameters, 8/7 parameters are not tested due to which goods cannot be classified as HSD. This tribunal in the case of Jagadamba petroleum 2003 10 (TMI) 123 CESTAT new Delhi also decided the similar issue of classification of petroleum product and held as follows:

"5. We have examined the records and the submissions. The assessee has classified 'special solvent' and 'other residue' under sub-headings 2710.90 and 2713.30 respectively, both attracting basic excise duty at the rate of 16% ad valorem and no special excise duty (SED). On the other hand, the Revenue wants both the items to be classified under sub-heading 2710.13 which attracts SED also. Heading 27.10 is extracted below :-

27.10	Petroleum oils and oils obtained from bituminous Minerals, other than crude; Preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations
	Motor spirit, that is to say, any hydrocarbon oil (excluding crude mineral oil) which has its flash point below 25°C, and which either by itself or in admixture with any other substance, is suitable for use as fuel in spark ignition engines :
2710.11	-- Special boiling point spirits (other than Benzene-Toluol) with nominal boiling point range 55-115°C
2710.12	-- Special boiling point spirits (other than Benzene, Benzol, Toluene and Toluol) with nominal boiling Point range 63-70°C
2710.13	-- Other special boiling point spirits (other than Benzene, Benzol, Toluene and Toluol)
2710.14	-- Naphtha
2710.15	-- Natural Gasoline Liquid
2710.19	-- Other
2710.90	-- Other"

The reasons stated by the adjudicating authority for classifying the goods under sub-heading 2710.13 are that the flash points of the liquids are below 25°C and that the goods are suitable for use as fuel either by themselves or in admixture with any other substance in spark ignition engine. The Chemical Examiner's report also shows the flash points of the samples below 25°C. But this report also states thus :- "However, at present, it is not possible for this lab to say whether each of the products under reference by itself or in admixture with any other substance is suitable for use as fuel in spark ignition engine or otherwise." The report, therefore, is no basis for the finding recorded by the Commissioner that admixture of the subject goods with any other substance may be suitable for use as fuel in spark ignition engine. We find no other evidence, whether in the form of technical literature or otherwise, on record to support this finding of the Commissioner. In this context, we must mention the decision cited by the Counsel. In that case, the question considered by the Tribunal was whether certain fractions from naphtha



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were to be classified as special boiling point spirit under sub-heading 2710.13. The flash points of the liquids were below 25°C. The Tribunal held that, apart from fulfilling this criterion, the goods should also meet the requirement of being suitable for use as fuel in spark ignition engine for the purpose of being classified under sub-heading 2710.13. There was no evidence to show that the naphtha fractions were suitable for use as fuel in spark ignition engine. The instant case is, factually, no different as there is no evidence on record to show that the goods under consideration are suitable for use as fuel either by themselves or in admixture with any other substance, in spark ignition engine. The Chemical Examiner's report is of no use insofar as this suitability condition is concerned. Hence the decision of the adjudicating authority classifying the goods under sub-heading 2710.13 is not sustainable. The impugned order does not contain anything in rebuttal of the classification claimed by the assessee, either. We, therefore, approve the classification claimed by the assessee. As we have held the substantial issue in favour of the appellants, it goes without saying that the penalty imposed on them cannot be sustained. In the result, the impugned order is set aside and the appeal is allowed."



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4.11 In the present case also we find that the commissioner has merely relied on the 3 test report to conclude that the imported product is HSD even though none of the laboratories were able to test the samples for all 21/22 parameters prescribed in IS 1460:2005 and no test was conducted to decide whether product is a base oil. The department has not adduced any document to support or substantiate their claim that the imported products are HSD. As held by this tribunal in the aforesaid case , in this case also though it is claimed that the imported product is HSD and not the base oil but the laboratories were not able to test the sample of all the 21/22 parameters under IS 1460;2005 as they did not have the requisite facility for testing. In our view the custom department ought to have established that the imported base oil can be used as HSD/ Automotive fuel in internal combustion engines but the adjudicating authority could not establish that the imported product can be used as HSD or automotive fuel and he kept silence on this aspect. We find that the ratio of the above case is squarely applicable to this also and in absence of any conclusive evidence to hold that the imported product is only HSD and it can be used as Automotive Fuel, the imported base oil in question cannot be reclassified as HSD. The aforesaid decision has been upheld by the Apex Court reported in 2007 (4) TMI 672 (SC) by dismissing the department's appeal.

4.12 The learned counsel for the appellant also raised the valid point that when the value prescribed for flash point is same for both HSD and fuel oil and almost all the parameters prescribed for fuels oil is commonly prescribed for HSD also while the DRI has not considered the testing the samples of the imported product for the parameters prescribed for the fuel oil under IS 1593 and why they have pre supposed that the imported product s only HSD and not the fuel oil. Since fuel oil is freely importable into India, it appears that DRI has not reckoned with the BIS Standard for fuel oil and the parameters prescribed for it. We have also observed in our above discussion

why the DRI only opted to test the product for HSD and not first got the product tested as base oil. However, in our above discussion we opined that in absence of testing of all the 21/22 parameter the product cannot be classified as HSD as the same is not in confirmation to IS 1460:2005.

5. Without prejudice to our above finding, we are of the views that even if the product is base oil or otherwise but since it was not proved by the department beyond doubt that the impugned goods are HSD; the case of department got failed. This view has been taken by this tribunal in the case of P.K Exim wherein vide order No A/12326/2021 dated 31.08.2021 passed the following order.

"It is a settled position that if the goods are not classifiable under the chapter heading proposed by the revenue thereafter whether the goods is classified under the chapter heading claimed by the assessee is correct or not, the case of the department will fail. This gets support from the following judgments:

- PEPSICO HOLDINGS PVT.LTD.- 2019(25) GSTL 271 (Tri.-Mum)

"8. In the light of the above, we cannot decide on a classification that has not been pleaded before us. Once the classification proposed by Revenue is found to be inappropriate, that claimed, while clearing the goods, will sustain even if it may appear to be inappropriate. We

cannot also, in our appellate capacity, direct or accord the latitude for invoking Section 11A of Central Excise Act, 1944 by obliteration of the proceedings leading to the impugned order. The mandate of the law pertaining to recovery of duties not paid or short-paid will have to be followed to the letter."

The above decision of the tribunal is based on the view taken by the Hon'ble Supreme Court in the case of WARNER HINDUSTAN LIMITED –(1999) 6 SCC 762 wherein the Hon'ble Supreme Court has held as under:

"In our opinion, the tribunal was quite wrong in these circumstances in allowing the appeal of the Excise Authorities and classifying the mint tablets as items of confectionary under Heading 17.04. The correct course for the tribunal to have followed was to have dismissed the appeal of the Excise Authorities making it clear that it was open to the Excise Authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionary. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before authorities below."

In view of the above settled law, irrespective whether the classification claimed by the appellant is correct or not since the classification proposed by the Revenue is absolutely incorrect, the entire case of the Revenue will not sustain.

5.1 In view of the above settled legal position in the present case also irrespective of whether the base oil was correctly declared by the appellant or otherwise but since the proposed classification by the department does not sustain the case of department clearly fails, for this reason also the impugned order is not sustainable.

5.2 As per our above discussion and finding we hold that the goods are not classifiable as HSD under CTH 271031930. Consequently the claim of the appellant for classification of goods as base oil under CTH 271019160 is maintained. The appellant have submitted that irrespective decision of classification they seek permission to re- export of goods. Though we have decided the classification as claimed by the appellant in their favour but as per the concession made by the appellant we allow the appellant to re-export the goods.

5.3 The appellant also argued that in the facts of the case the demurrage and detention charges needs to be waived. In this regard we find that as per above finding since the case of the department is not sustained the appellant's claim is Prima facie correct for waiver of demurrage and detention charges. However, the appellant is at liberty to raise this issue before the appropriate authority who, in the light of this decision may consider this aspect leniently.

5.4 Since we have decided this case on merit, we are not addressing the issue of the jurisdiction for issuance of Show Cause Notice as pointed by the Learned Authorized Representative.

5.5 As per our above discussion since we hold that goods is not classifiable as HSD as claimed by the revenue, the redemption fine and penalties imposed on the appellants are set aside.

6. Accordingly, the impugned order is modified to the above extent. The appeal is allowed in the above terms.

7. Since the appeals are disposed of, the MAs also became infructuous and disposed accordingly.

(Pronounced in the open court on 28.09.2021)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Geeta