

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 01

**CUSTOMS Appeal No. 10800 of 2019-DB**

[Arising Out Of Order-In-Original/Appeal No MUN-CUSTM-000-APP-308-18-19 Dated 19.03.2019 Passed By Commissioner ( Appeals ) Commissioner Of Central Excise, Customs And Service Tax-AHMEDABAD]

**M M Trading Company**

Opp. Hanuman Mandir, Mama Khania Road,  
Bhavnagar,  
Gujarat

**...Appellant**

VERSUS

**C.C.-Mundra**

Office Of The Principal Commissionerate Of Customs, Port User  
Buld. Custom House Mundra, Mundra  
Kutch  
Gujarat-370421

**...Respondent**

**APPEARANCE:**

Shri N D George, Advocate for the Appellant  
Shri. Anand Kumar, Superintendent (Authorized Representative) for the Respondent

**CORAM: HON'BLE MEMBER (TECHNICAL), RAJU  
HON'BLE MEMBER (JUDICIAL), SOMESH ARORA**

**FINAL ORDER NO.A / 11695 /2023**

DATE OF HEARING: 31.07.2023

DATE OF DECISION: 14.08.2023

**SOMESH ARORA**

Facts of the matter in brief are that the appellant filed Bill of Entry No.7032841 dated 02.07.2018 for clearance of 198.32 Mts of "Industrial Composite Mixture" classifying the goods under CTH 27101990, assessable value of which was declared as Rs.82,57,556/- involving duty of Rs.20,22,276/- The goods were given first check with order to draw sample and forward the same to CRCL, Kandla for testing. As per the test report of the Customs Laboratory, Kandla, is concerned, the imported goods were found "Light Oil, and not "Industrial Composite Mixture". The adjudicating authority found that the imported goods are classifiable under tariff heading 27101290 i.e. 'Other of sub heading Light Oils and Preparations'. The

adjudicating authority also found that goods falling under tariff heading 27101290 are allowed to be imported through State Trading Enterprises (STE) only as per Policy condition-5 of Chaptr-27 of ITC (HS), Schedule-1. However, the appellant is neither STE nor they have submitted any documents showing grant of such rights by the DGFT to import or export any of the goods notified for exclusive trading through STEs, therefore, they have violated the policy conditions of Foreign Trade Policy. The appellant had waived show cause notice and personal hearing. The adjudicating authority vide impugned order rejected the classification of the goods under CTH read with ITC (HS) Schedule-1's heading 27101990 and ordered to classify the same under CTH 27101290 and ordered to charge appropriate duty; confiscated the goods valued at Rs.82,57,557/- under Section 111(d) and 111(m) of the Customs Act, 1962 and gave an opportunity to the appellant to redeem the confiscated goods on payment of redemption fine of Rs.13,00,000/- under Section 125 of the Customs Act, 1962; imposed penalty of Rs.2,00,000/- on the appellant under Section 112(a)(i) of the Customs Act, 1962; also ordered that the goods to be released on payment of appropriate duty, redemption fine and penalty. The order of the adjudicating authority was upheld by the Commissioner (Appeals) as well in totality. Being aggrieved, appellant has filed the appeal contending, inter alia, that:

2 The department failed to appreciate that on examination it was found that the goods were declared as "Industrial Composite Mixture", however, on the basis of test report, the goods was found to be light oil. There is no change in rate of duty in case the goods are light oil. Therefore, there is no case for confiscation under Section 111 (d) and 111(m) of the Customs Act, 1962 as the goods are freely importable under CTH 27101290.

2.1 The department erred in holding that the goods merited classification under CTH 27101290 as light oil, which is without any basis and/or evidence as the density at 15 degree Celsius \* 0.783g/ml. flash point-41 degree Celsius, aniline point-44 degree Celsius, initial boiling point

M/s.M.M. Trading Company

2.2 (IBP) 158 degree Celsius, and final boiling point (FBP) = 212 degree Celsius can vary due to climate conditions prevailing at the relevant time. Therefore, there is no case for confiscation under Section 111 (d) and 111(m) of the Customs Act, 1962, nor for any penalties.

2.3 The findings of the department are unsustainable and unjustifiable in law and on facts especially as regards claim of classification not been approved resulting in mis-declaration and a false declaration to call for confiscation under the provisions of Section 111(d) and (m) of the Act. Relied on the judgment in case of Northern Plastic Ltd. Vs Collector of Customs & Central Excise reported in 1998 (101) ELR 549 (S.C.)

2.4 The department failed to appreciate that the test report of the supplier clearly shows the goods as "Industrial Composite Mixture" and it has been rightly classified under CTH 27101990 in international trade. Therefore, there was no intent or knowledge on the part of the appellant to mis-declare and claim incorrect classification.

2.5 It is also settled law that fine and penalty cannot be imposed in case of classification of goods even when there is no duty difference.

3. The Learned, advocate for the appellant submitted that the Respondent-Department, as per note 4 of Chapter 27 seeks to classify the

impugned goods under Customs Tariff Heading 27101290, as against Heading claimed by them under CTH 27101990. For the sake of convenience Sub-heading Note - 4 is reproduced here in below:

*"4. For the purpose of sub heading 2710 12," light oils and preparations" are those of which 90% or more by volume (including losses) distil at 210 C according to the ISO 3405 method (equivalent to the ASTM D 86 method)."*

As per the test report the distillation has not been done in the present case. Therefore, the goods cannot be classified under CTH 2710 1290 as the goods do not confirm to the light oil.

3.1 The samples drawn have been tested for only 4 parameters on the basis of which it cannot be determined as light oil. The appellant has furnished a Certificate of Analysis along with the Bill of Entry which clearly goes to show that the goods are "Industrial Composite Mixture". The goods as per test report of the department bearing No. 1671 dated 12.07.2018, are composed of Mixture of Mineral Hydrocarbon oil having the following compositions:

- i. Initial boiling 158°C
- ii. Final boiling point 212°C
- iii. Flash Point 41°C
- iv. Density at 15°C 0.7830 gm/ml  
and is therefore light oil/SBPS

3.2 The appellant further say and submit that the order in original clearly records as follows: [para 05.]

**'From the test report it is seen that the goods in question do not confirm the parameters of Motor Spirit.'**

Further, the goods have not been tested for having anti-knock preparations, hence the respondent seeks to classify the goods under CTH

2710 1290 i.e **'Other'**. However, there is no duty difference even if the goods had confirmed the test of anti-knock preparations.

3.3 The appellant say and submit that the said goods are used in paint and similar industries. To qualify as light oil the product needs to be tested in ad mixture with anything other than 'Mineral oil'. The respondent has not produced any evidence to classify the product as 'light oil falling under CTH 2710 1290. However, due to paucity of time and the detention charges the appellant waived the SCN and personal hearing and did not get the goods re-tested.

3.4 Further, the appellant had submitted the certificate of analysis at the time of filling of the Bill of Entry. Further, to classify the goods as light oil the following ingredients were required to be satisfied i.e.

- i. Distillation range
- ii. Density @ 15°C
- iii. Copper strip, 3hrs 100 C
- iv. Flash point tag (min)
- v. Color, saybolt
- vi. Gum existent
- vii. Aromatic Content
- viii. Doctor test
- ix. Sulphur total

3.5 In the instant case only four test were done out of the total nine test as per the certificate of analsis. Therefore, it is out of purview of light oils and preparation. In this Context we rely on the judgment of the Hon'ble Supreme Court of India in the case of Commissioner of C. Ex. & S.T., Vadodara-II versus Gail (India) Ltd reported in 2023 (383) EL.T. 257 (S.C). Further the Hon'ble Tribunal in the case of Swarna Oil Services, SM Trading Company v/s Commissioner of Customs, Mundra reported in 2020(6) TMI 70-CESTAT Ahmedabad and in the case of Oil Energy verses Commissioner of Customs Jamnagar in Customs Appeal No. 01619 of 2020.

3.6 The policy condition -5 of chapter 27 does not apply in the present case as the said goods is not transportation fuel. It goods are used in paint and varnish industry. Therefore, the Foreign Trade Policy has not been violated. That being so the goods are liable to confiscation under Section 111(d) & (m) of the Customs Act, 1962 nor the appellant liable to redemption fine or penalty under Section 112(a)(i) of the Customs Act, 1962. Further, the appellants made added submissions vide their letter received on 11.08.2023 emphasizing, *inter alia* that only 4 test out of nine were done by the department.

3.7 The appellant therefore submits that the order imposing redemption fine and penalty be set aside with consequential reliefs.

4. As against this, Learned AR relied upon the order of both the lower authorities and the findings to justify the reasoning and the classification upheld by the Department as well as the confiscation and violations has analysed.

5. Considered. We find that the Learned Commissioner (Appeals) has in detail dealt with various submissions of the party as reproduced below:

*"6. In the instant case, the appellant has declared the imported goods as "Industrial Composite Mixture" and classified the same under CTH 27101990. As mentioned in the impugned order, sample was drawn and forwarded to CRCL, Kandla for testing. The test report No.1671 dated 12.07.2018 states that the imported goods is composed of mixture of mineral Hydrocarbon having initial boiling point 158 C. Final Boiling Point 212° C, Flash Point 41° C, Density at 15° C - 0.7830 gm/ml; it is light oil. Thus as per the said test report, the imported cargo was other than the declaration and they are other than Industrial Composite Mixture and it is Light Oil. After it is confirmed from the test report that the imported goods are Light Oil, the adjudicating*

authority has correctly observed at para 05 and 06 of the impugned order that the imported goods are appropriately classifiable under tariff heading 27101290 i.e. 'Other' of sub-heading 'Light Oils and Preparations'. The appellant has contended that even the goods imported are freely importable under CTH 27101290. However, being the goods falling under tariff heading 27101290, the same are allowed to be imported through State Trading Enterprises(STE) as per Policy condition-5 of Chapter-27. The policy condition-5 of chapter 27 is as under:

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*"5 Import allowed through 10C subject to Para 2.20 of Foreign Trade Policy, except for the companies who have been granted rights for marketing of transportation fuels in terms of Ministry of P&NG's Resolution No. P-23015/1/2001-MKT dated 8.3.2002 including HPCL BPCL & IBP who have been marketing transportation fuels before this date."*

*As mentioned in para 13 of the impugned order, the appellant is neither an STE nor has submitted any documents showing grant of such rights by the DGFT to import or export any of the goods notified for exclusive trading through STES therefore the appellant has violated the policy conditions of the Foreign Trade Policy.*

*7. Regarding confiscation, I find that as per Section 111(m) of the Customs Act, 1962, if any goods which do not correspond in respect of value or any other particular with the entry made under this Act, are liable to confiscation. In the present case, the appellant has declared the goods as "Industrial Composite Mixture" and classified the same under CTH 27101990 which are "Light Oil" as per test report of CRCI. Kandla. Also as per Section 111(d) of the Customs Act, 1962, any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force, are liable for confiscation. In this case, the goods being "Light Oil" falling under tariff heading 27101290, the same are allowed to be imported through State Trading Enterprises(STE) as per Policy condition-5 of Chapter-27. However, the adjudicating authority has found that the appellant is neither an STE nor has submitted any documents showing grant of such rights by the DGFT to import or export any of the goods notified for exclusive trading through STES thus the appellant has*

*violated the policy conditions of the Foreign Trade Policy. The adjudicating authority has discussed in detail the confiscation, fine and penalty in the impugned order and I agree with the same"*

5.1 Further in this matter, we find that the party had brought a test report with 9 parameters, which it asserts are relevant and decisive for determination of the nature of product and which was drawn purportedly in the country of exportation i.e Bandar Abbas. Same on analyses of 9 parameters including one Doctor test (which has been stated as negative), is reproduced below:

| <b>ANALYSIS</b>             |         |
|-----------------------------|---------|
| Distillation range          | 145-230 |
| Desity@ 15°C                | 780-790 |
| Copper strip, 3hrs<br>100°C | 1a      |
| Flash point, tag(min)       | 45      |
| Color, saybolt              | 25      |
| Doctor test                 | Neg     |
| Sulphut total(max)          | 0.1     |
| Gum existent (max)          | 5       |
| Aromatic content            | 20(max) |

The report at R/P 18 of the appeal memo is undated and bears no name of testing agency and its purpose nor does it correlate with impugned consignment.

5.2 As against this, Department relied upon the test report Bearing No. 1671 dated 12.07.2018, from CRCL Kandla, which indicated the imported goods is composed of mixture of Mineral Hydrocarbon which is reproduced below:

- Initial Boiling Point = 158°C
- Final Boiling Point = 212°C
- Flash Point = 41°C
- Destity at 15 C = 0.7830 gm/ml

5.3 On the basis of above and a clear finding that the product was light oil has been arrived at, by the department. The learned Commissioner (Appeals), after detailed discussion upheld the classification proposed by the Department. As can be seen the report sought to be relied upon by the appellant was drawn behind the back of the department and in another country and therefore cannot be given precedence over the report relied upon by the Department, which has much higher credence, in the factual matrix of the matter, as the party's report does not even match on the parameters tested by the department. Further even by relying upon this report, the appellants despite advice of suppliers for second opinion and the sample re-test did not opt for same foregoing their right of SCN or personal hearing or even re-test in the matter and just pleading for minimum fine and penalty.

5.4 After having got the goods cleared by waiving Show Cause Notice or personal hearing and requesting for imposition of minimum fine, which were clearly brought in violation of EXIM policy relating to light oil at the relevant time as the same was a canalised item and was allowed to be imported only through State Trading Enterprises, as per the policy condition 5 of chapter 27. An after thought of the appellants cannot be allowed to help their cause. Reliance in this regard is placed on 1992 (9) T.M.I 111 (S.C) in Fine Chemical Suppliers to emphasize that when violation in relation to goods are accepted, penalties get attracted. Party had all the opportunity to seek re-test or even cross examination of Chemical analyst, if it found it to be erroneous, but it chose not to do the same. Having acquiesced with so termed erroneous report, it cannot now be allowed to resist it. Error, qui non resistitur. (An error not resisted is approved) will therefore, in any case apply in the facts and circumstances of the matter.

5.5 In view of the foregoing, and party having accepted the classification and the nature of goods without seeking any re-test of the sample, we find that the present appeal is devoid of merits both on classification issue as well as violation of ITC policy and penalties imposed. We therefore find no merits in the present appeal and uphold the order of Commissioner (Appeals).

6. Appeal is accordingly dismissed.

*(Pronounced in the open Court on 14.08.2023 )*

**(RAJU)**  
**MEMBER (TECHNICAL)**

**(SOMESH ARORA)**  
**MEMBER (JUDICIAL)**

PALAK