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

REGIONAL BENCH-COURT NO.1

Customs Appeal No. 241 of 2011-DB

(Arising out of OIA-KDL/COMMR/25/2010-11 dated 11/03/2011 passed by the Commissioner of Customs (Appeals), Kandla)

BHARAT ENTERPRISE **.....Appellant**
92, KRISHAN PURI,
BAGPAT GATE,
MEERUT, UTTAR PRADESH

VERSUS

COMMISSIONER OF CUSTOMS- KANDLA **.....Respondent**
CUSTOM HOUSE,
NEAR BALAJI TEMPLE,
KANDLA, GUJARAT

With

(i) Customs Appeal No. 242 of 2011 (JAGDAMBA PETROLEUM INDIA PVT LTD).
(ii) Customs Appeal No. 243 of 2011 (RELIABLE INDUSTRIES).
(iii) Customs Appeal No. 244 of 2011 (BAJRANG PETRO CHEMICALS PVT LTD).
(iv) Customs Appeal No. 247 of 2011 (DINESH NAURATMAL GUPTA).
(v) Customs Appeal No. 251 of 2011 (SHREE GANESH OLEOCHEM PVT LTD).

APPEARANCE:
Shri Rajesh Chhibber, Advocate & Shri Vikas Mehta, Consultant appeared for the Appellant
Shri R Kumar, Superintendent (AR) appeared for the Respondent

CORAM:
HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. SATENDRA VIKRAM SINGH, MEMBER (TECHNICAL)

FINAL ORDER NO. 10267-10272/2026

DATE OF HEARING: 27.01.2026
DATE OF DECISION: 15.04.2026

SOMESH ARORA

M/s. Teej Impex Pvt. Ltd., (hereinafter referred as Teej) imported 3265.233 MT of bulk liquid cargo as "condensate" at Kandla Port. They sold 1500 MT to Bajrang Petro, 1000 MT to Jagdamba, 100 MT to Shree Ganesh Oleochem on high sea sale basis and balance of 665.233 MT was kept with them for which they filed warehouse BE. The goods were accompanied with

certificate of quality issued by INTERTEK as condensate. Jagdamba Petro filed BE dated 21.04.2009 under heading no. 27101990 for 1000 MT and took delivery of said stock except 6.209 MT. Shree Ganesh filed BE dated 01.04.2009 under heading no. 27101990 for 100 MT and took delivery of stock except 4.100 MT. Bajrang Petro purchased 1500 MT on high sea sale and filed warehouse BE dated 09.06.2009 for 1500 MT under heading 27101990, which was sold to three parties who filed respective ex bond BE on 12/6/2009 (Bharat Enterprises), 18/06/2009 (Jagdamba Petroleum) and 22/06/2009 (Reliable Industries) respectively and took delivery of goods.

1.1 Out of the remaining quantity of 665.233, Teej sold 100 MT to Shree Ganesh Oleochem for which ex bond BE was filed by them on 26.06.2009, but the same was not physically cleared and was lying in tank no.113. On 28.05.2009, DRI initiated investigation about classification of goods stated to be "condensate" by the Appellant-Importers in these bunch matters. It was found that the Vessel MT Rising had discharged 1783.431 MT at Kandla out of which 659.545 MT was discharged in tank no.113 and balance was discharged at other storage terminal. Therefore, on 02.06.2009 they detained the stock in tank no.113 which was co-mingled with the stock already lying in tank no.113. Samples were earlier drawn for which test report dated 23.06.2009 and 24.06.2009 were issued, which revealed the item to be "light oil" falling under heading No. 27101190. On the basis of test reports, DRI seized the stock in tank no. 113 on 24.06.2009. It was an admitted fact that independent samples of the seized balance quantity of cargo, discharged from vessel MT Chemical Progress, could not be drawn as it was found comingled with cargo imported by Vessel MT Rising. However, it was observed that samples were already drawn at the time of import of 3256.233 MT which were tested to be composing of mixture of mineral hydro carbon oil flashing below 25 degree centigrade and having density of 0.7307 g/ml at 15degrees centigrade, API Gravity at 15 degrees as 62 and distillation range of 45 degrees centigrade to 225 degrees centigrade. In the said test report, the temperature reading for

90% distillation was not mentioned and, therefore, chemical examiner was asked to clarify the same. The chemical examiner informed that temperature reading at 90% distillation of subject sample was recorded as 208 degrees centigrade and though available with them was not communicated by them as the local customs had not asked this detail. It was on such basis, the department concluded that the goods were light oil.

1.2 Statements were recorded during investigation. Shri Praesh Jhabarmal Khandelwal, Commercial Manager of TEEJ stated that on being asked by Bajrang Petro for purchase of condensate for distillation in their plant, he arranged for import of condensate. Statement of Shri Rakesh of Jagdamba Petroleum was recorded on 30.11.2009 when he also stated having placed order for purchase of condensate for distillation in their factory. He stated that he was given certificate issued by Iran Petrochemical Co. and therefore, they did not doubt the nature of goods. He also explained the process carried out by them at their factory. Similar was the statement dated 01.12.2009 of Shri Mangal Kumar Garg of Bajrang Petro, Shri Manish Gupta of Bharat Enterprises.

1.3 It is admitted in the SCN that said certificate at sl. no.9, mentioned that 90% recovery was at 216 degrees. The notice also alleged that said report was analogous to test report of Kandla CRCL. However, as per the department, the test report dated 31.03.2009 issued by CRCL Kandla, 90% distillation was at 208 degrees and therefore, at 2 degrees higher i.e. at 210 degrees, the distillation was naturally a little higher than 90% and, therefore, the same confirms to note 4 of chapter 27. It was on such basis, the department issued SCN dated 18.12.2009 that when such goods fulfil the condition of 90% or more distillation (including losses) at 210 degrees centigrade, the same was covered under light oils and its preparations. The notice also alleged that the certificate of quality issued by Intertek at load port shows 90% at 216 degrees. It was categorically admitted in the notice that in the absence of reading of distillation at 210 degree, exact inference could not be drawn.

1.4 The SCN proposed demand of differential duty of Rs.5,88,887.00 jointly and severally from the importers/buyers. Proposal was made for confiscation of seized goods of 668.476 MT. Charge of wilful misstatement and suppression of facts was alleged. Differential duty amounting to Rs.3,39,74,357.00 was demanded jointly and severally from TEEJ, Bajrang Petro and other parties. Differential duty of Rs.2,26,49,574.00 was demanded from Jagdamba Petro. Differential duty of Rs.22,64,956.00 was demanded from Shree Ganesh. Proposal for confiscation of goods already cleared was also made. Penal provisions were also invoked. The notice was adjudicated upon and the original authority ordered classification of the goods under light oils, confiscation of goods available with department and imposed penalties. The duty has been demanded from respective importers individually and not jointly and severally as alleged in the notice. The appellant filed appeal and stay application before CESTAT which while granting stay vide order No. S/779-805/WZB/AHD/08 dated 19.08.2008 on a prima facie ground of limitation, also observed that even otherwise, the appellant had a good case on merits.

2. Appellant submitted as follows:-

- Entire case of department is on the basis that the chemical examiner reported 90% distillation at 208 degrees centigrade and, therefore, the same were light oil.
- The SCN dated 18.12.2009 alleges that when such goods fulfil the condition of 90% or more distillation (including losses) at 210 degree centigrade, the same was covered under light oils and its preparations as per note 4 of Chapter 27. The notice also alleged that the certificate of quality issued by Intertek at load port shows 90% at 216 degrees. It was categorically admitted in the notice that in the absence of reading of distillation at 210 degree, exact inference could not be drawn.
- The chemical examiner informed that temperature reading at 90% distillation of subject sample was recorded as 208 degree centigrade. It

was solely on such basis the department concluded that the goods were light oil. Similar has been the finding of lower authority. In other words, the SCN and the OIO admit that there was no testing at 210 degrees. The OIO held that as per the test report dated 31.03.2009, the FBP was mentioned as 225 degrees, the importer could not be expected to be ignorant of the fact that the boiling point 90% distillation could be somewhere near 210 degrees.

- The issue of classification of light oil on the basis of definition of note under chapter 27 has been settled by Apex court in the case of CC Kolkata vs. Krishna Technochem P. Ltd. reported in 2022 (379) ELT 273 (SC) wherein it has been held that 90% or more should be at 210 degree and not upto 210 degree. Said judgment has been relied upon by CESTAT Ahmedabad in the case of Kunjal Synergies P. Ltd. vs. CC, Mundra as reported in 2024 (387) ELT 116 (Tri.Ahmd).
- Even otherwise, this Bench while deciding stay application, had observed that the appellant had a strong case on merits. Though the observations in the stay order are not binding, but the same definitely have persuasive value, so long as the same are not rebutted by the department at the time of final hearing.
- The panchnama drawn during investigation admitted that the cargo discharged from the vessels MT rising OM declared as condensate was comingled with other cargo declared as condensate and pertaining to M/s. Teej Impex and the samples were not drawn thereafter. Once that was so, no reliance could otherwise be placed on sample test reports as the very method of drawing the sample was not proper, nor indicated to the appellants.
- That on one hand the lower authority has held that there was mis-declaration on the part of appellant in classifying the goods as condensate whereas on the other hand the lower authorities in para 35 of the OIO admitted that there was no specific entry in the tariff for classification of

condensate and the fact that the importer sought classification under 27101990 (other) and that the chemical analysis report did not indicate anything to the contrary, the assessment of bill of entry and clearance of goods allowed by the proper officer was in order. Once that was so, there could be no case for invocation of extended period at all.

- In the instant case, the SCN proposed demand jointly and severally from more than one party whereas the lower authority has confirmed the demand against respective importer, which is beyond the scope of show cause notice and, therefore also, the impugned order is not sustainable.
- As regard mala fide on the part of respective appellant, the lower authority has observed that condensate being a crude oil was to be classified under Tariff heading no.2709.00, which was in accordance with load port analytical report, yet the appellant classified the same under 2710 which was sufficient to show mala fide intention on the part of appellant. It was submitted that crude falling under heading 2709 was subjected to nil rate of duty and, therefore, by filing classification under some other heading having some rate of duty could not be considered as mala fide on the part of importer. The findings of lower authority are self-contradictory.
- As regard limitation, the SCN was served upon the appellant on 27.12.2009 for the bill of entry which was beyond six months from the date of bill of entry. When Hon'ble Bench has already granted stay primarily on the issue of limitation, there is no scope for invocation of extended period. In fact, the lower authority in para 35 of the OIO has admittedly held that when there was no specific entry for condensate and the chemical analysis report did not indicate anything contrary, the assessment was in order. Once that was so, he was supposed to drop the notice on limitation as well.
- As regard role of importers who purchased goods from TEEJ or from parties who purchased goods from TEEJ for imposition of penalty, there has been nothing on record to show that they were aware of the so- called

misclassification or suppression on the part of TEEJ especially when the load port classified the goods under 2709 which was not subjected to any custom duty.

- There was no difference of custom duty, CVD and the only differential duty was primarily on account of specific CVD. For example, in BE no.293917 of Reliable Industries the Custom duty is mentioned as Rs.2,65,804.00 and CVD at advalorem rate was Rs.7,81,465.00 which was the same duty as mentioned in calculation of differential duty chart at page 131 of S.C.N. by the department where the custom duty and CVD at advalorem rate assessed under light oil was also the same. The difference was primarily on account of CVD at specific rate, which was otherwise eligible for credit to the appellant. It is otherwise a settled law that when the exercise is revenue neutral, the demand, especially by invoking extended period, is not sustainable. The appellant relies upon the decision of CESTAT in the case of Indus Valley Partners wherein following earlier decisions, the demand was set aside on the issue of revenue neutrality.

2.1 Learned Advocate for Dinesh Nauratmal Gupta submitted as follows:-

- Penalty was proposed on his party, being Custom Broker, under Section 112 (a) of Customs Act, 1962.
- Ld. Adjudicating Authority has imposed penalty on appellant by observing that *"he consciously and deliberately dealt with the goods which he knew or had reasons to believe were liable to confiscation under the Customs Act, 1962."*
- The impugned order has travelled beyond the scope of notice inasmuch as reasoning advanced by Ld. Adjudicating Authority for imposition of penalty is covered by scope of Section 112 (b) that was not proposed in the show cause notice.
- As per Section 112 (b), any person who acquires possession of or is in any way concerned carrying, removing, depositing, harbouring, keeping,

concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111 is liable to penalty. Thus, the pre-requisite of Section 112 (b) is prior knowledge about liability of goods to confiscation. As against this, Section 112 (a) prescribes penalty on any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act.

- Thus, sub-section (a) and (b) of Section 112 operate in completely different fields and are not inter-changeable.
- Department has proposed classification of goods under CTH 2710 1190 as light oil (and not as condensate oil) after testing by CRCL., Vadodara. The appellant is a partner of Custom House Agent firm, who is neither an expert in chemistry nor equipped with any facility of testing to make out distinction between condensate and light oil. Goods were described in the bills of entry as Condensate on the basis of description mentioned in the invoice, bills of lading, etc, placed in the hands of CHA firm by importers and were accordingly classified under CTH 2710 1190. It is not the case of department that correct classification of Condensate is not CTH 2710 1990.
- No action was ever proposed against CHA firm i.e., M/s. Rishi Kiran Roadlines, under CHALR, 2004, of which appellant is one amongst 05 partners. Hence, imposition of penalty on appellant under Section 112 (a) of Customs Act, 1962 on a reasoning that there was a breach of Regulation 13 (d) of CHALR, 2004 by CHA firm is not justified.
- Reliance is placed on the decision of Hon'ble Ahmedabad Tribunal in the case of Prime Forwarders v/s Commr. of Customs, Kandla, 2008 (222) ELT 137, wherein, it is inter alia held that CHA is not liable to penalty under Section 112 of Customs Act, 1962 when he acted on the basis of

the documents given to them and there is nothing to show that he was aware of the contents of goods in question.

3. Department contested the challenge of the appellant on the following grounds, apart from reiterating findings of the lower authority. The appellants have taken the following grounds:-

- **Limitation:**

(i) None of the appellants contested the invocation of extended period before adjudicating authority. It has been clearly recorded in para 42.3 of the OIO. The principle of exhausting lower forum before approaching higher forum is a settled legal principle. It means that all the arguments and grounds should be raised before lower authority so that it may consider them all. In M/s. Bharat Sanchar Nigam Limited Versus The Commissioner of GST & Central Excise, Chennai-2024(12) TMI 1242-CESTAT, Chennai remanded the matter on the basis that the grounds raised before tribunal were not raised before lower authority and hence, the adjudicating authority could not record its findings on them. The Tribunal held that natural justice is equally applicable for the department also. Relevant para is reproduced as under:

> *"6. All the above referred submissions which are now being sought to be made in the miscellaneous application were not raised before the authorities below and hence there is no finding on them. The Ld. Counsel accepts that they are certainly in the nature of new grounds, however since they are purely questions of law, there is no bar in considering the same. However, I am of the considered opinion that though the issue now being raised are purely on legal grounds yet the department should get enough opportunity to place on record the submissions in support thereof and contest the same."*

(ii) Factual position on limitation:- This factual position is being submitted without agreeing with the contention that there was no willful misstatement. The submission on willful misstatement will be made separately. This factual submission is limited to those Bills of Entry for which the Out of Charge order was issued after 18.06.2009.

(iii) The SCN was issued on 18.12.2009. The normal period of limitation at the relevant time was 6 months from the relevant date. The relevant date is the Out of Charge date in case the duty is short levied or paid. It means that the Bills of Entry for which the OOC was granted after 18.06.2009 are within the normal period. Though there is no tabulation in respect of all the Bills of Entry as to when the Out of Charge was granted, many Ex-bond BEs are filed after 18.06.2009, which will certainly fall under the normal period of limitation.

(iv) A report regarding the factual position of the dates was called for from Kandla Customs. The reply was received vide a letter dated 03.08.2012. The SCN was dispatched by Speed Post on 19.12.2009. Proof of dispatch dated 19.12.2009 has also been attached with the reply. Hon'ble Madras High Court in Lalchand Bhimraj Vs CESTAT, Chennai (2022) 1 Centax 77 (Mad.) has held that it is a settled law that the date of despatch of notice alone, will be taken into account for limitation. Relevant para is reproduced as under:

> ***"13.*** *Though the learned counsel for the petitioner cited several case laws, to substantiate his stand that the date of delivery of notice to the petitioner is taken into consideration for the purpose of calculating the limitation period, this court is not inclined to accept the same, it is now settled that the date of despatch of notice alone, will be taken into account for limitation."*

Therefore, when the notice is issued on 18.12.2009, all the Bills of Entry for which Out of Charge is given after 18.06.2009 are covered under normal period of limitation.

(v)It cannot also be contended by the appellant that the SCN has been issued invoking the extended period of limitation and therefore, the demand should be dropped completely. It is a settled law that the demand for normal period sustains when it is found that extended period has been

invoked wrongly. Therefore, in any case, the demands sustain for the Bills of Entry for which Out of Charge was given after 18.06.2009.

(vi) On a possible contention that the SCN has quoted wrong provisions (invoking extended period) and hence, is illegal, Hon'ble Supreme Court in COMMISSIONER OF C. EX. & S.T., ROHTAK VS MERINO PANEL PRODUCT LTD.-2023 (383) E.L.T. 129 (8.C.)/(2022) 1 Centax 59 (5.C.) has held that citation of incorrect source of power does not vitiate the proceedings provided power vests in the authority to begin with. Relevant para is reproduced as under:

> *"16. It is clear that the latter question goes to the heart of the matter, rather than the issue of whether the show cause notice becomes legally untenable for failure to expressly mention that the valuation of the goods is to be done under Rule 11 read with Rule 9 of the CEVR. On the legal proposition advanced by Learned ASG, we readily affirm that citation of an incorrect source of power does not vitiate the exercise of the power itself provided the power vests in the authority to begin with."*

In view of the above factual position and the judgments, the demand within the normal period sustains in any case.

- **Whether wilful misstatement was there or not:**

(i) The background of the case is that some other vessel (MT Rising Om) was intercepted by the DRI, and it was found that the goods were misdeclared in that case. Since it was found that some quantity of goods in present case was still present but was comingled with the goods imported vide vessel MT Rising Om, an investigation was started by the DRI.

(ii) During investigation, it was found that all the high-sea buyers were actual manufacturers and did not obtain any sample of the goods to be supplied by M/s TIL, and they merely relied on a copy of the certificate provided to them by TIL, which was issued by M/s Iran Petroleum Commercial Company. Directors of M/s Jagdamba Petroleum India Pvt Ltd, M/s Bajrang

Petro-chemicals Pvt Ltd., and Bharat Enterprises have stated this in their statements. None from the M/s Reliable Industries even appeared for the statement and thus, did not cooperate in the investigation. This certificate, which was purported to be issued by the foreign supplier of the goods, mentioned the classification to be 2709.

(iii) However, all the appellants chose to change classification despite having a purported document classifying the goods under 2709. All have stated that they possessed this document issued by Iran Petroleum Commercial Company. Negotiations for oil purchase started few months back and after due deliberations among themselves, they changed the classification. It means that change of classification was a conscious decision. Also, all have stated that they did so after consultation with each other, especially the CHA, Kiran Road Lines and none of the statements were either retracted or denied later. It is a settled position of law that what is admitted need not be proven.

(iv) All high sea buyers were major manufacturers having plants, and they had with them a so-called certificate issued by the foreign supplier, which mentioned classification of goods to be 2709 and still, they chose to change the classification. Above facts prove conclusively that change of classification was done willfully.

(v)This fact of changing the classification itself proves the intention of the appellants. In STATE OF MAHARASHTRA VS NATWARLAL DAMODARDAS SONI - 1983 (13) E.L.T. 1620 (S.C.), Hon'ble Supreme Court held that mens rea can be proved on the basis of circumstantial evidences. Relevant para is reproduced:

> ***"17.*** *The requisite guilty knowledge or mens rea under Clauses(a) and (b) of Section 135(1) can be established by circumstantial evidence also. In order to substantiate the charge under Clause(b) against the respondent, the prosecution had to prove: (i) that he had acquired possession of or was in any way concerned in keeping or concealing the gold bars; (u) that he knew*

or had reason to believe that these gold bars were smuggled goods, and thus liable to confiscation under Section 111 of the Customs Act."

(vi) In this case also, the requisite information (so-called load port documents classifying the goods under 2709) was available with all the appellants and still they chose to change the classification is a clear proof that the change of classification was done intentionally. All the high-sea buyers, being big manufacturers of industrial solvents, cannot claim that they did not know the difference between light oil and condensate.

(vii) Secondly, all have stated that they decided the classification in consultation with their CHA i.e. Kiran Roadlines, despite having a contrary load port document. Interestingly, DRI booked another case in 2004 involving the same CHA i.e. Kiran Roadlines in which importers (Vibhuti Shipping is common in the vessel Rising Om case in 2009 and in the case booked in 2004) tried to smuggle Naphtha while declaring the goods as condensate under 2709. This may be the only reason that this time, they tried the classification 27101990 to escape the import restriction under 27101190. The case booked in 2004 has been decided by Hon'ble CESTAT, Ahmedabad, in favour of revenue.

(viii) A repeat offender trying a different modus every time certainly tilts the case in favour of revenue, keeping in mind the Preponderance of Probability. Even from the point of view of intention, antecedents of an offender need to be considered to determine at least the intention. It also means that the CHA was well aware of repercussions of classifying the goods under 2709 (fear of getting caught) and 27101190 (import restrictions) and therefore, he suggested a middle path i.e. classifying the goods under 27101990.

(ix) The intention also becomes clear from the fact that duty is NIL in CTH 2709 while they had to pay duty when they classified the goods under CTH 2710. When on testing it is found that the correct classification is 27101190 and the item is restricted for import, the balance of probability

tilts in favor of revenue that they misstated description/classification of goods willfully with an intention of circumventing the import restriction.

- **Ground:**

(i) It is not the contention of the appellant that any of their submission is not taken on record or that PH was not given. Hence, natural justice has been followed by the adjudicating authority.

- **Merits:**

(i) Background of inclusion of a specific chapter note for determining the goods to be Light Oil is the WCO report of the scientific subcommittee. Condensate and the products falling under chapter 2710 have overlapping physical and chemical properties. Multiple deliberations happened in WCO in the year 1999 as a result, a new subheading 2709 was created for condensate subsequent to which DGFT issued Policy Circular dated 18.08.1999 prescribing subheading 2709 for condensates.

(ii) In this backdrop, chapter note providing the condition that if 90% or more distillation happens at 210° C, the product will be classified as Light Oil was incorporated vide Finance Act, 2000.

(iii) In view of the above background, it is clear that there is a huge overlapping in chemical and physical properties of "Condensate" and "Light Oil" (or any product of subheading 2710). Therefore, 90% or more distillation at 210° C is a clear distinguishing feature between "Condensate" and "Light Oil".

(iv) In the present case, when chemical examiner was cross examined, he clarified that the prescribed method was used for testing and the opinion that 90% distillation happened at 208°C was based on the data of original testing (dated 31.03.2009). There is no dispute about these facts.

- **Distillation:**

(i) Distillation is a process that exploits the different boiling points of components of a mixture. The basic idea is that lower boiling point materials are evaporated first and when the vapor is passed through a

condenser, they get condensed. The temperature is increased continuously and different ingredients having different boiling points are condensed in a progressive manner.

(ii) There are various indicators in American Standard for Testing Material (ASTM). The most important and most widely used data points are T10, T50 and T90. These are the temperatures at which corresponding percentage of evaporation happens and likewise, T10 indicates the temperature at which 10% liquid evaporates and likewise, T90 is the temperature at which 90% of the liquid evaporates. Reference is invited to the book "Fundamental of Petroleum and Petrochemical Engineering" by Uttam Roy Chaudhari. It is a reference book for petroleum engineering students. Page 32-34 of the book define T90 and page 25-26 explain the process of distillation.

(iii) As per chapter note 4, if 90% or more of the material distils at 210°C, including losses (losses occur due to various factors such as heat losses, vapor leaks, design flaws, etc), the product is "Light Oil". In the present case, 90% of the material was distilled at 208°C. If losses are taken into account, the percentage will only increase and on the other hand if temperature is increased to 210°C to be precise, this percentage of distillation would increase. Therefore, in any case, more than 90% of the material is distilled at 210°C which makes the product classifiable as Light Oil. This factor is clearly in favour of Revenue. Hon'ble Supreme Court in GASTRADE INTERNATIONAL VS COMMISSIONER OF CUSTOMS, KANDLA-2025 (392) E.L.T. 529 (S.C.) has held that most akin test should be made applicable when the goods of complex nature are to be classified.

(iv) Further, the importers were asked for distillation data from their plants which is discussed in para 40.1 of the OIO which indicates that 94-96% distillation occurred at 235°C. This also indicates that 90% or more distillation occurred at 210°C (i.e. at a temperature lower than 235°C). Report from Intertek also mentioned 90% distillation at 216°C which

included losses + residue of 2.5%. It means that 90% distillation, including losses, should be at a temperature less than 216°C. Thus, all the evidences tilt the balance of evidence in favor of revenue.

(v) It is misrepresentation of facts that the adjudicating authority has not discussed Intertek report which in fact, has been discussed in para 41. Actually, the report of Intertek strengthens the case of revenue.

(vi) When the chapter note is clear and there is a clear report of CRCL that 90% distillation occurred at 208°C, the report is conclusive and the department has thus discharged the burden to prove the classification of imported goods.

(vii) The first test report (31.03.2009) or the later clarifications have not been disputed. First test report was not conclusive in the sense that neither it defined the goods nor was the distinguishing test i.e. distillation of 90% material was done. No inference could be drawn from this report. It is the temperature at which 90% or more material is distillated will decide whether the goods will fall under 2709 or 271011. Chemical Examiner was also cross examined in which he repeated that in earlier report he did not specify the goods to be "Condensate". He categorically stated that further clarification about distillation of 90% material was given on the basis of records and no re-testing was done. He also stated during cross examination that the samples had been tested as per procedure laid down in ASTM. He also clarified during cross examination that the parameters reported by them in the test report were general parameters tested for all hydrocarbons.

(viii) The appellant have asserted that during cross examination, chemical examiner stated that he would provide record of testing done for the test report dated 31.03.2009 which was not provided. This assertion is wrong as it has been clearly recorded in para 31 of the OIO that the records asked for during cross examination were supplied to Jagdamba Petroleum India Pvt Ltd vide letter dated 10.12.2010, sent by a registered post. When they

again requested for the records vide letter dated 10.01.2011, the adjudicating authority has held that it was merely an attempt to subvert finalization of adjudication proceedings.

(ix) Another contention of the appellant is that the officers gave out of charge on the basis of earlier CRCL report and hence no *mala fide* intention can be attributed to them. This contention is misplaced since the custom officers gave NOC on the basis of a report which was inconclusive and could not distinguish between "Condensate Oil" and "Light Oil". As has been discussed earlier, it is almost impossible to distinguish "Condensate" from "Light Oil" on the basis of physical and chemical properties, except for the chapter note regarding 90% distillation at 210°C. At best, it can be said that the officers acted in a *bona fide* manner for an inconclusive report and accepted the self-assessment done by the importers. It has been recorded in para 35 of the order-in-original also.

(x)Out of charge does not give blanket protection to the appellants. Classification is a part of assessment. Section 2(2) of the Customs Act,1962 defines assessment and classification is its part. Out of Charge is issued under Section 47 of the Act. The question is whether assessment can be changed if OOC has been granted under Section 47.

(xi) It has been held in many judicial pronouncements that a demand under Section 28 can be made to change the assessment after Out of Charge/Final assessment of the Bill of Entry.

1) UOI Vs. Jain Shudh Vanaspati Ltd.-1996 (86) E.L.T. 460 (SC):-

> *"5. It is pertinent that a show cause notice under the provisions of Section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under Section 47 of the concerned goods. Further, Section 28 provides time limits for the issuance of the show cause notice thereunder commencing from the "relevant date"; "relevant date" is defined by sub-section (3) of Section 28 for the purpose of Section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order*

under Section 47. The High Court was, therefore, in error in coming to the conclusion that no show cause notice under Section 28 could have been issued until and unless the order under Section 47 had been first revised under Section 130."

2) Midas Fertchem Impex Pvt Ltd Vs Principal Commissioner of Customs ACC (Import), New Delhi -2023(4)Centax 73 (Tri-Delhi). Relevant paras are as under:

"9. It needs to be noted that in Priya Blue Industries the Supreme Court had reaffirmed the law laid down in Flock India. This decision in Priya Blue Industries was again referred to the Supreme Court in ITC Ltd. Thus, the law laid down by the Supreme Court in all three judgments is that once an assessment is made it stands unless it is reviewed under Section 28 or modified in an appeal. Thus, any assessment can be modified in two ways the first is through an appeal and other is through a process of review under Section 28."

10. There is a distinction between the provision for refund under Section 27 (or Section 11B of the Central Excise Act) and the provision for raising a demand under Section 28 (or Section 11A of the Central Excise Act). Refund provisions are not quasi-judicial proceedings. The officer can sanction refund only if excess duty is paid over what is to be paid as per the assessment. He cannot modify the assessment. Self-assessment is done under Section 17(1) and re-assessment is done under Section 17(5). The process of assessment (self-assessment and re assessment) under Section 17 comes to an end once an order permitting clearance of goods for home consumption under Section 47 is issued by the proper officer. Thereafter, the goods cease to be imported goods and no assessment of duty is possible under Section 17. The only exception is where the duty is provisionally assessed for want of documents, test reports, etc. and goods are cleared for home consumption in which case the process of assessment gets completed when the assessment is finalized.

11. Once an order under Section 47 permitting clearance of goods for home consumption is issued, the assessment can be modified either through an appeal by either side before the Commissioner (Appeals) or through an SCN under Section 28. While the option of appeal is open to both sides to assail the assessment on any ground, the scope of an SCN under Section 28 is limited by WHO, WHEN and WHY. Only the proper officer can issue the SCN, within the normal period of limitation or the extended period of limitation of five years (as the case may be), and 'only to collect the duties not levied, short levied, not paid, short paid or erroneously refunded'. It has been made clear by Supreme Court in Priya Blue, Flock India and further in ITC Ltd. that the assessments can be modified by either of these two methods. It was also clarified by the Supreme Court in Jain Shuddh Vanaspati that a notice under

Section 28 can be issued without modifying the order permitting clearance of goods for home consumption under Section 47."

3) De-Diamond Electric India Pvt. Ltd. Va Principal Commissioner of Customs (Import), New Delhi- (2023) 3 Centax 11 (Tri.-Del):

"12. There would be occasions, where duty is paid in excess of what was due or short of what was due. If duty is paid in excess, a claim for refund of the duty so paid in excess can be made under section 27 by the person who paid the duty or who has borne the duty. The question before the Supreme Court in the case of Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive) 2004 (172) ELT. 145 (S.C.) and Collector Vs. Flock (India) Pvt. Ltd. 2000 (120) ELT. 285 (SC) was whether refund could be claimed in a manner so as to modify the assessment under section 17. The Supreme Court held that refund claim is not an appeal proceeding and the officer sanctioning the refund claim cannot sit in judgment over an assessment made by the assessing officer. In other words, refund under section 27 is a mechanical process of sanctioning refund if the claimant is entitled to it as per the assessment already made. The officer sanctioning the refund cannot modify the assessment done by a competent proper officer. Thereafter, in some decisions, such as, Micromax Informatics Ltd. v. Union of India (2016) 67 taxmann.com 217/2016 (37) GSTR 309/54 GST 669/2016 (335) ELT. 446 (Del), Aman Medical Products Ltd. v. Commissioner of Customs, Delhi (2010) 2 taxmann.com 874/2010 (250) B.LT. 30 (Delhi), it has been decided by High Court of Delhi that where there is no assessment by the officer, i.e., goods are cleared through self-assessment, there is nothing to be appealed against. Therefore, the refund can be sanctioned without appealing against the self-assessment. The matter was examined by a Constitution Bench of the Supreme Court in ITC Ltd. Vs. Commissioner of Central Excise, Kolkata IV 2019 (368) ELT. 216 (SC) in a batch of Civil Appeals pertaining to Customs, Central Excise as well as Service Tax. It has been held that once an assessment is made, even if it is a self-assessment, no refund can be sanctioned unless such self-assessment is appealed against and modified. Thus, insofar as the refunds are concerned, the settled law is that once an assessment is complete, even if it is self-assessment, such assessment must be appealed against before claiming the refund

13. As far as the cases where duty was short levied or short paid or not levied or not paid or erroneously refunded is concerned, unlike the provisions of refund under section 27 (which is a mere mechanical process), a quasi-judicial process has been laid down in Section 28 of the Act. The question which arises is if the assessment is complete and there is a procedure for appeal against all assessments, including self-assessment, what is the nature of this power under section 28. This has been clarified by the Supreme Court in Commissioner of

Customs Vs. Sayed Ali (2011) 10 taxmann.com 416/2011 (265) ELT. 17 (SC) and Canon India Pvt. Ltd. v. Commissioner of Customs (2021) 125 taxmann.com 188/2021 (376) E.L.T. 3 (SC) as a power to reopen an assessment already made. Such a power is not inherent in any officer and is available only when it is specifically conferred by law. It is for this reason that Section 28 has a system of issuing notice and passing of adjudication orders. This power under section 28 is subject to three limitations: (i) WHO only the proper officer can issue a notice under section 28; (i) WHEN within the normal period of limitation or extended, (iii) WHY-to recover the duty short paid, short levied, not paid and not levied or erroneously refunded.

14. In view of the above, there is no force in the argument of the learned Consultant of the appellant that the demand under section 28 cannot be issued without challenging the self-assessment by the appellant before Commissioner (Appeals). Reliance on the judgment of Supreme Court in ITC Ltd. by the appellant is completely mis-conceived as this is not a case of refund, but is a case of demand of duty under section 28, which is fully permissible.

15. Learned Consultant of the appellant submitted that no demand for duty can be made by the Revenue without getting the classification under the self-assessment by the appellant modified by filing an appeal before Commissioner (Appeals). This submission cannot be accepted in view of the fact that Section 28 itself gives a power of reopening of assessment to the proper officer as has been held by the Hon'ble Supreme Court in Canon India."

In all the above judgments, Hon'ble Courts have held that Section 28 confers power on department to review the assessment after out of charge order has been granted without challenging the assessment order. The instant case is squarely covered by the above case laws.

- **Quantification:**

(i) Being a new ground, this should not be permitted. This ground was not taken before the adjudicating authority and hence, no findings are there.

(ii) One of the sub grounds is that CVD is available as Credit to the appellants and hence, case of revenue neutrality. This is a misplaced contention for simple fact that it would lose the purpose of imposing the CVD. Credit of CVD is available in every case but it does not mean that once somebody is caught misstating the facts, they are given relief on the basis of revenue neutrality. A statutory liability cannot be done away with on the basis of

revenue neutrality as clearly held by the Hon'ble Supreme Court in Star Industries Commissioner of Customs (Import) Raigad -2015 (324) E.L.T. 656 (8.C.) [07-10-2015]. Relevant para is reproduced as under:

> *"35. It was submitted by the learned counsel for the assessee that the entire exercise is Revenue neutral because of the reason that the assessee would, in any case, get Cenvat credit of the duty paid. If that is so, this argument in the instant case rather goes against the assessee. Since the assessee is in appeal and if the exercise is Revenue neutral, then there was no need even to file the appeal. Be that as it may, if that is so, it is always open to the assessee to claim such a credit."*

(iii) Only revenue neutrality is not involved here. Importability is the main reason why the goods were mis-declared.

- **Mens rea:**

(i) As has been discussed in detail that mens rea is proven and hence, the penalty should be upheld.

4. The appellant/Advocate vide his submission dated 02.02.2026 made following further points:-

a) The issue relates to classification of imported condensate oil classified by the appellants under heading no. 27101990 vide bill of entry dated 21.04.2009. The certificate of origin given by Iran Petrochemicals described the goods as condensate falling under heading 27.09. The same were kept in storage terminal of FOCT, Kandla in Tank No.113. The goods were cleared as per bill of entry filed by respective parties. The customs sought analysis report with regard to description and composition, which was provided by CRCL Kandla vide its report dated 31.03.2009. On such basis, goods were allowed to be released as condensate oil falling under heading 27101990 on payment of custom duty, CVD @14% and cess. Similar was the case of other imports by Ganesh Oleochem and Bajrang Petro Chemicals P. Ltd, who in turn sold the same to Bharat Enterprises, Jagdamba Enterprises and Reliable Industries. The bills of entry were filed

during the period from 12.6.2009 to 22.06.2009. All said goods were imported by M/s Teej Impex through vessel MT Chemical Progress.

b) DRI on the basis of information, initiated investigation on 28.05.2009 and drew samples from comingled oils consisting of part parcel discharged from vessel MT Rising Om and vessel MT Chemical progress. Samples were sent for testing to Vadodara Lab, which vide its report dated 23.06.2009 declared the same to be light oil. The DRI also sought clarification regarding temperature at which distillation of 90% occurs which was replied by CRCL as 208 degree C. On such basis, statements were recorded and ultimately SCN dated 18.12.2009 was issued proposing classification of goods under 27101190 subjected to custom duty @5%, CVD @ 14% and CVD at fixed rate of Rs.15/Ltr.. Hence, only difference is on account of CVD at fixed rate @15/Ltr and corresponding cess.

c) The show cause notice observed that though Iran Petro declared the goods as condensate falling under 27.09, which was subjected to NIL duty, still the importers classified the same under chapter 2710, which is strongly relied upon in the adjudication order. The lower authority supported the stand of importers that the chemical examiner had correctly answered the requirement indicated in test memo, no specific entry for condensate, analysis report did not indicate anything contrary – the assessment of bill of entry was proper.

d) The certificate of quality given by Intertek had shown recovery of 90% at 216 degree C. The CRCL Kandla did not give any adverse report, therefore the goods were allowed to be cleared. Entire case was made out by DRI after release of goods. The chemical examiner was asked to provide records for which time was sought but were not provided.

e) The SCN in para 9 admittedly alleged that the facts and circumstances of import of cargo per vessel MT Rising Om were different than per vessel MT Rising Om. Samples were drawn by DRI from vessel MT Rising Om on their own and the show cause notice does not mention as to when, how and in

what manner the samples were drawn and sent for testing as the testing was shown to the importers during investigation as mentioned at page no.153. There is nothing on record to show that the samples drawn by DRI were in the presence of importers as the same were drawn much after clearance of goods and that too, from left over material comingled with other material. Even otherwise, there was no mention as to whether drawl of sample and even testing by CRCL was in accordance with prescribed manner. The test report of CRCL Kandla did not specify full method of testing and all the parameters. The chemical examiner promised but did not provide the records. Reliance is placed upon the judgment of Hon'ble Supreme Court in the case of Tata Chemicals reported in 2015(320)ELT45(SC) which held that sampling and testing is to be done in prescribed manner. The DRI sent samples to Vadodara which stated the FBP ranging from 261 to 292 degree celsius for samples drawn from same material, which was otherwise not possible. In any case, Intertek had stated the FBP as 273°c.

f) The show cause notice did not dispute certificate of quality issued by Intertek which showed distillation of 90% at 216 degree C. The notice admitted that there was no reading of distillation including losses at 210 degree, which was in fact the only criteria for classification of goods as light oil as settled by Apex court in the case of Krishna Technochem reported in 2022 (279) ELT 273 (SC) that the testing is to be at 210°c. Further, reliance is again placed on para 14 of the judgment of Tata Chemicals wherein it is held that without doubting the certificate of quality, the department cannot go against it. In the instant case, the department has admitted report of Intertek about distillation of 90% at 216 degree and hence, the same was qualified to be light oil in terms of chapter note. Even in para 18.1, the notice admitted that Ganesh Oleochem after testing the parameters in their factory stated the recovery of 89.36% at 240 degree.

g) Iran Petrochemical classified the goods as condensate under 27.09 but in order to avoid difficulties at the place of import, they classified it under 27101990 subjected to levy of duties. In fact, the lower authority in para 40.2 also observed that in the case of Oil India Ltd. reported in 2002(148)ELT802(Tri. Del.) it was held that condensate is classifiable under heading no.27.09.

h) In the instant case, duty was paid and credit of CVD was claimed by respective importers, which was not objected to by the jurisdictional authorities. The only difference between the duties paid and demanded is primarily on account of CVD at fixed rate, which was also eligible for cenvat credit. Hence, entire exercise was revenue neutral. They rely on Final Order No.70155/2024 dated 02.04.2024 of CESTAT Allahabad in the case of Indus Valley Partners wherein it was held that demand is not sustainable on account of revenue neutrality.

i) The department itself admit that the condensate was classifiable under heading 27.09 subjected to NIL duty and hence, payment of duty by the appellants could not lead to evasion of duty, which is otherwise not the case of department as CVD at fixed rate was eligible for credit.

j) Extended period could not be invoked, as already observed in stay order passed by Hon'ble Bench in these appeals. Though the show cause notice was issued on 18.12.2009, it was served upon the appellants on dated shown below:

Name of appellant.	B/E Date	Date of receipt of SCN
Bharat Enterprises	12.06.2009	26.12.2009
Reliable industries	12/22.06.2009	27.12.2009
Jagdamba Petro	12/18/22.6.09	27.06.2009
Bajrang Petro	-	SCN for penalty only
Ganesh Oleochem	01.04.2009 26.06.2009 (not got released bill of entry)	26.06.2009

It is a settled legal position that date of service of show cause notice is to be considered as relevant date for computing limitation. The department's stand is that the date of dispatch is to be considered as relevant date, by placing reliance upon judgment of Hon'ble Madras High Court which was given in peculiar facts of that case. They rely on final Order No.70318/2025 dated 22.05.2025 of Hon'ble Allahabad CESTAT in the case of Ashwani Kumar Raja wherein reliance was placed on para 6 of CBEC instructions dated 16.03.2023. Hence, demand is otherwise time barred. It is a settled law that the department cannot argue against the circular/instructions issued by CBEC.

k) Even otherwise, the lower authority in para 35 of the impugned order has categorically admitted that clearance of goods by the proper officer was prima facie in order. The show cause notice in para 30 demanded duty jointly and severally which is not provided under the law, whereas the Commissioner confirmed duty demand from respective importers contrary to the allegation in SCN.

l) The Commissioner in para 12 of his order has imposed redemption fine of Rs.8 lakhs on M/s. Ganesh Oleochem. The demand of fixed CVD otherwise could not be subjected to levy of penalty and imposition of fine.

APPELLANT'S SUBMISSIONS ON REVENUE SUBMISSIONS:

- ON LIMITATION:

(i) Revenue states that limitation was not urged before the lower authority and hence, could not be raised before CESTAT. This being a question of law, can be raised at any stage. Further, CESTAT had granted stay primarily on the issue of limitation which was not challenged by the department at higher forum. It is also contended that no new fresh material was unearthed as the demand was issued only on the basis of interpretation of test report and the findings of Commissioner in page

73 that the assessment of bill of entry was prima facie in order, are sufficient to show that no extended period could be invoked.

(ii) Regarding time bar, Hon'ble Gujrat High Court in the case of Ambalal Morarji Soni vs. UOI reported at AIR 1972 Guj 126 held that mere dispatching the notice does not complete the service of notice. CBIC has already issued clarification that service of notice on the assessee is to be considered as relevant date. They also rely on CESTAT Delhi Bench decision in Shree Cement Ltd. case.

- SUPPRESSION

(i) It is the contended that change of classification was done wilfully but it is on record that the department cleared the goods after following due procedure. The goods falling under heading 27.09 were eligible for full exemption. The CVD at fixed rate was otherwise eligible for Cenvat credit. It is also admitted that in the plant of one of the importer, 90% recovery was at 235 degree C. It is contended that the report of Intertek was supporting the case of revenue. Payment of duty by them cannot be a wilful intent. Hon'ble Apex Court in the case of Krisha Technochem has categorically held that the test of 90% is to be at 210 degree C, which has not been done in the instant case at any stage.

- REVENUE NEUTRAL:

(i) Reliance has been placed by the Revenue upon the judgment of Apex court in the case of Star Industries but a perusal of the same shows that the issue before the Apex Court was not the issue of revenue neutrality. Even it was observed that it was open to the assessee to claim credit. In the instant case, they have already claimed credit of CVD paid at advalorem rate and if at all CVD at fixed rate was to be paid, the same was also eligible for credit.

(ii) Hon'ble Tribunal in the case of Jet Airways- 2016 (44) STR 465 (Tri.-Mumbai) has categorically dealt with the issue of revenue neutrality and

the same has been upheld by the Apex Court reported in 2017 (7) GSTL J35.

(iii) In any case, once the department admitted that the appellants were eligible for credit, extended period could not be invoked, which is also a settled legal position. Reliance is place upon Nirlon Ltd. vs. CCE, reported in 2015 (320) ELT 22 (SC). Reliance is also placed upon the decision of CESTAT, Allahabad in the case of Indus Valley Partners.

Hence, it is prayed that the appeals be allowed with consequential relief.

5. The Department filed its final written submissions dated 30th January, 2026, wherein it addressed and rebutted various contentions raised by the appellant and also relied upon several judicial precedents in support of its case on different grounds.

6. The appellants have taken the following grounds:

(i) Limitation: SCN issued on 18.12.2009 was served on 26.12.2009. Duty in respect of BE No 293925 dated 12.06.2009 was paid on 15.06.2009. Hence, demand issued beyond 6 months under Section 28(1) is time-barred. No new material/fresh revelation was unearthed after the Test Reports dated 31.03.2009, and the demand is issued only on the basis of interpretation of Test Reports, on the basis of which initial clearance was granted. Hence, invocation of extended period is unlawful.

(ii) Natural Justice: Para 29 of the OIO mentions that the appellant did not file reply and the Adjudicating Authority proceeded in the case as if no reply had been filed by appellant whereas Para 27 of the OIO clearly records that appellant filed a reply dated 03.01.2011. Similarly, it is recorded that opportunity of PH was not availed by appellant but every time PH was fixed, they sent response, though PH was not attended to physically.

(iii) **Merits:**

a) Clearance was allowed by Customs officers on the basis of Test Reports/certificate given by Intertek and no malafide intention can be attributed to appellant. Goods were purchased on high sea sale basis and appellant had no role in deciding the classification.

b) The manner in which classification has been decided is not proper. Para 14 of the SCN and para 33.1 of the Commissioner's adjudication order observed that condensate oil is classifiable under 2709 attracting NIL rate of duty. The appellant could have claimed classification under 2709 with no duty liability. It has been held that since the goods have been classified under 2710, it is sufficient to show that the goods are not condensate oil. The department has not discharged the burden to prove the classification.

c) Chemical Examiner gave a reply dated 20.08.2009 to DRI in which he informed that 90% distillation recovery is at 208 degree centigrade. Chapter Note says that it should happen at 210°C. Aspect of losses, as mentioned in chapter note, is missing from the Test Reports dated 31.03.2009 & reply dated 20.08.2009. The Certifying agency Intertek has given 90% recovery of material at 216 degree centigrade which neither SCN nor OIO contradicted. A clarification issued by the Chemical Examiner, after a long gap, cannot be the basis of classification.

(iv) **Quantification of duty and Penalty**

a) Notification No. 4/2006 provides for CVD @ 32% while the Adjudicating Authority has quantified the CVD as 14% + Rs. 15 per litre.

b) Despite appellant's contesting penalty vide reply dated 03.01.2011, (mentioned in para 27), it has been recorded in the OIO that none except Teej contested the penalty. This is factually incorrect. (Separate facts for all the parties have been taken as grounds).

c) There is no evidence in the SCN that appellant was aware of the fact that classification was declared incorrectly to evade payment of duty. Malafide intention is not there. Penalty under Section 114A can be imposed only when there is some malafide intention. They rely upon decision in case of M/s RBS Home Appliances Pvt. Ltd. Vs. Commr. of Cus. (Import), Mumbai is 2009 (244) ELT 225 (Tri.- Mumbai).

d) There is no evidence that appellant connived with CHA firm. The statement of the person from CHA firm was recorded on 06.11.2009 when the department knew all the facts, and still no mention has been made with regard to this in the statement. Further, penalty amount is very high and not in proportion to the offence committed.

7. Revenue further submitted on following points:-

(i) "Limitation":

- None of the appellants have contested invocation of extended period before the Adjudicating Authority as recorded in para 42.3 of the OIO. The principle of, exhausting lower forum before approaching Hon'ble Tribunal is a settled legal principle and therefore, all the arguments and grounds should be raised before lower authority for consideration. In M/s. Bharat Sanchar Nigam Limited Vs. The Commissioner of GST & Central Excise, Chennai-2024(12) TMI 1242- CESTAT, Chennai remanded the matter on the basis that grounds raised before Tribunal were not raised before lower authority and hence, the Adjudicating Authority could not record its findings on them. It held that natural justice is equally applicable for the department also. Relevant para is reproduced as under:

> *"6. All the above referred submissions which are now being sought to be made in the miscellaneous application were not raised before the authorities below and hence there is no finding on them. The Ld. Counsel accepts that they are certainly in the nature of new grounds, however since they are purely questions of law, there is no bar in considering the same. However, I am of the considered opinion that though the issue now being raised are purely on legal grounds yet the department should get enough opportunity to place on record the submissions in support thereof and contest the same."*

- Factual position on limitation: This factual submission is being made without agreeing with the contention that there was no wilful misstatement. It is limited to those Bills of Entry for which Out of Charge order was issued after 18.06.2009.
- The SCN was issued on 18.12.2009. The normal period of limitation at the relevant time was 6 months from the relevant date which is the Out of Charge date in case duty is short levied or paid. It means that Bills of Entry for which OOC was granted after 18.06.2009 are within the normal period. Though there is no tabulation in respect of all the Bills of Entry as to when Out of Charge was granted, many Ex-bond BEs are filed after 18.06.2009, which will certainly fall within normal period. On the basis of factual position of the dates as reported by Kandla Customs vide letter dated 03.08.2012, SCN was dispatched by Speed Post on 19.12.2009 (proof of dispatch attached with the reply). Hon'ble Madras High Court in Lalchand Bhimraj Vs CESTAT, Chennai reported at (2022) 1 Centax 77 (Mad.) held that it is a settled law that the date of despatch of notice alone will be considered for limitation. Relevant para is reproduced as under:

> *"13. Though the learned counsel for the petitioner cited several case laws, to substantiate his stand that the date of delivery of notice to the petitioner is taken into consideration for the purpose of calculating the limitation period, this court is not inclined to accept the same, as it is now settled that the date of despatch notice alone, will be taken into account for limitation."*

Therefore, when the notice is issued on 18.12.2009, all the Bills of Entry for which Out of Charge is given after 18.06.2009 are covered under normal period of limitation. Further, the SCN has been issued invoking extended period of limitation. Therefore, demand should not be dropped completely as it is a settled law that the demand for normal period sustains when it is found that extended period has been invoked wrongly.

- Further, On a possible contention that SCN has quoted wrong provisions (invoking extended period) and hence, is illegal, Hon'ble Supreme Court in

Commissioner of C.Ex. & ST. Rohtak Vs Merino Panel Product Ltd 2023 (383) E.L.T. 129 (S.C.) / (2022) 1 Centax 59 (S.C.) has held that citation of incorrect source of power does not vitiate the proceedings provided power vests in the authority to begin with. Relevant para is reproduced as under:

> *"16. It is clear that the latter question goes to the heart of the matter, rather than the issue of whether the show cause notice becomes legally untenable for failure to expressly mention that the valuation of the goods is to be done under Rule 11 read with Rule 9 of the CEVR. On the legal proposition advanced by Learned ASG, we readily affirm that citation of an incorrect source of power does not vitiate the exercise of the power itself provided the power vests in the authority to begin with."*

In view of the above factual position and the judgments, the demand within the normal period has to sustain in any case.

(ii) Whether wilful misstatement was there or not:

- During investigation, DRI officers found that all the high-sea buyers were actual manufacturers but they did not obtain any sample of the goods to be supplied by Teej, and merely relied on certificate purported to be issued by M/s. Iran Petroleum Commercial Company as provided to them by Teej indicating classification of goods under CTH 2709. Directors of Jagdamba, Bajrang, and Bharat Enterprises have stated this in their respective statements and none appeared from Reliable Industries. However, all the appellants chose to change the classification despite having above document in their possession classifying the goods under 2709. Negotiations for oil purchase started few months back and after due deliberations among themselves, they changed the classification which means it was a conscious decision. Also, all have stated that they did so after consultation with each other, especially CHA, Kiran Road Lines. None of the statements were either retracted nor denied later. It is a settled position of law that what is admitted need not be proven.

- Above facts prove conclusively that change of classification was done wilfully which proves the intention of the appellants. In State of Maharashtra Vs. Natwarlal Damodardas Soni 1983 (13) E.L.T. 1620 (S.C.) (Pages 40-44)**,** Hon'ble Supreme Court held that *mens rea* can be proved on the basis of circumstantial evidences. Relevant para is reproduced:

> *"17. The requisite guilty knowledge or mens rea under Clauses(a) and (b) of Section 135(1) can be established by circumstantial evidence also. In order to substantiate the charge under Clause(b) against the respondent, the prosecution had to prove:*
> *(i) that he had acquired possession of or was in any way concerned in keeping or concealing the gold bars;*
> *(ii) that he knew or had reason to believe that these gold bars were smuggled goods, and thus liable to confiscation under Section 111 of the Customs Act."*

- In this case also, the requisite information (the so-called load port documents classified the goods under 2709 was available with every person), still they chose to change the classification is proof of "the change done intentionally". All the high-sea buyers, being big manufacturers of industrial solvents, cannot claim that they did not know the difference between light oil and condensate. Secondly, all have stated that they decided the classification in consultation with their CHA, i.e. Kiran Roadlines, despite having a contrary load port document. Interestingly, another case was booked by DRI in the year 2004 involving the same CHA i.e. Kiran Roadlines. In that case [Pushpal Exports Pvt. Ltd. Vs. Commissioner of Customs, Kandla – 2013 (295) ELT 424 (Tri – Ahmd)], the importers (Vibhuti Shipping is common in the vessel Rising Om case in 2009 and in the case booked in 2004) tried to smuggle Naphtha while declaring the goods as condensate under 2709. This may be the only reason that this time, they tried the classification under CTH 27101990 to escape import restriction under 27101190. The case booked in 2004 has been decided by Hon'ble CESTAT, Ahmedabad, in favour of revenue.
- A repeat offender trying different modus every time certainly tilts the case in favour of revenue, keeping in mind the Preponderance of Probability

even from the point of view of intention. Antecedents of an offender need to be considered to determine at least the intention. Also, it means that the CHA was well aware of repercussions of classifying the goods under 2709 (fear of getting caught) and 27101190 (import restrictions). That is why CHA suggested a middle path i.e. classifying the goods under 27101990. The intention also becomes clear from the fact that duty is NIL in CTH 2709 while they had to pay duty when they classified the goods under CTH 2710. When on testing, it is found that correct classification is 27101190 and the item is restricted for import, the balance of probability tilts in favour of revenue. That they misstated the description/classification of the goods wilfully with an intention of circumventing the import restriction.

(iii) Following natural justice:

- Natural justice has been followed by the Adjudicating Authority as it is not the contention of the appellant that any of their submission is not taken on record or that PH was not given.

(iv) Merits:

- Background of the inclusion of a specific chapter note for determining the goods to be Light Oil is the WCO reports of the Scientific Subcommittee. Condensate and the products falling under chapter 2710 have overlapping physical and chemical properties. Multiple deliberations happened at the WCO in the year 1999. As a result, a new sub-heading 2709 was created for condensate subsequent to which, DGFT issued Policy Circular dated 18.08.1999 prescribing sub-heading 2709 for condensates. A chapter note providing the condition that if 90% or more distillation happens at 210 C, the product will be classified as **"Light Oil"** was incorporated vide Finance Act, 2000.
- In view of the above, it is clear that there is a huge overlapping in chemical and physical properties of "Condensate" and "Light Oil" (or any product of sub-heading 2710). Therefore, 90% or more distillation at 210°C is the

distinguishing feature between "Condensate" and "Light Oil". In the present case, when Chemical Examiner was cross-examined, he clarified that prescribed method was used for testing and the opinion that 90% distillation happened at 208°C was based on the data of original testing (dated 31.03.2009), nothing remains inconclusive. There is no dispute about these facts.

- Distillation is a process that exploits different boiling points of components of a mixture. The lower boiling point materials are evaporated first and when the vapor is passed through a condenser, it gets condensed. The temperature is increased continuously and different ingredients having different boiling points are condensed in a progressive manner.
- There are various indicators in the American Standard for Testing Material (ASTM). The most important and most widely used data points are T10, T50 and T90. These are the temperatures at which corresponding percentage of evaporation happens. **T10** indicates the temperature at which 10% liquid evaporates and likewise, T90 is the temperature at which 90% of the liquid evaporates. Reference is invited to the book "Fundamental of Petroleum and Petrochemical Engineering" by Uttam Ray Chaudhuri used for petroleum engineering students. Page 32-34 of the book define T90 and page 25-26 explain the process of distillation.
- As per chapter note, if 90% or more of the material distils at 210C, including losses (losses occur due to various factors such as heat losses, vapor leaks, design flaws, etc), the product emerges is "Light Oil". *In the present case, 90% of the material was distilled at 208 degree Centigrade and if losses are taken into account, percentage will only increase and if temperature is increased to 210 degree Centigrade, percentage of distillation,* in any case, would be more than 90% which makes the product classifiable as “Light Oil”.
- Hon'ble Supreme Court in Gastrade International Vs. Commissioner of Customs, Kandla - 2025 (392) E.L.T. 529 (S.C.) has held that most akin

test should be made applicable when the goods of complex nature are to be classified.

- The importers were asked for distillation data from their plants which has been discussed in para 40.1 of the OIO. It also indicates that 94-96% distillation occurred at 235 degree Centigrade. This also indicates that 90% or more distillation occurred at 210 degree Centigrade (i.e. at a temperature lower than 235 degree Centigrade). Report from Intertek also mentioned 90% distillation at 216 degree Centigrade and it included losses + residue of 2.5%. It means that 90% distillation, including losses, should be at a temperature less than 216-degree Centigrade. It is misrepresentation of facts that the Adjudicating Authority has not discussed **Intertek report** which has been discussed in para 41. **Actually, the report of Intertek strengthens the case of Revenue.** Thus, all the evidences corroborate the opinion of Kandla CRCL. This tilts the balance of evidence in favour of Revenue.
- The first Test Report (31.03.2009) or the later clarifications have not been disputed. First Test Reports was not conclusive in the sense that neither it defined the goods nor was the distinguishing test i.e. distillation of 90% material was done. No inference could be drawn from this report. It is the temperature at which 90% or more material distillated will decide whether the goods will fall under CTH 2709 or 271011. Chemical Examiner was also cross-examined in which he that the samples had been tested as per procedure laid down in ASTM. He also clarified in this cross examination that the parameters reported by them in the Test Reports were general parameters tested for all hydrocarbons. That in earlier report, he did not specify the goods to be "Condensate". He categorically stated that further clarification about distillation of 90% material was given on the basis of records and no re-testing was done. He also stated during cross examination

- Another assertion is that during the cross examination, Chemical Examiner stated that he would provide the record of testing done for the Test Reports dated 31.03.2009 which was not provided. This assertion is wrong as para 31 of the OIO mentions that the records asked for during cross-examination were supplied to Jagdamda vide registered post letter dated 10.12.2010. When they again requested for the records vide letter dated 10.01.2011, the Adjudicating Authority has held that it was merely an attempt to subvert finalization of adjudication proceedings.
- Another contention of the appellant that the officers gave out of charge on the basis of the earlier CRCL report and hence, no *mala fide* intention can be attributed to them. This contention is misplaced since the custom officers gave OOC on the basis of a report which was inconclusive and could not distinguish between "Condensate Oil" and "Light Oil". It is almost impossible to distinguish "Condensate" from "Light Oil" on the basis of physical and chemical properties except for the chapter note regarding more than 90% distillation at 210 degree Centigrade. At best, it can be said that the officers acted in a bonafide manner on an inconclusive report and accepted the self-assessment done by importers. Out of charge issued under Section 47 of the Act does not give blanket protection to appellants. Classification is a part of assessment. The question whether assessment can be changed if OOC has been granted under Section 47 has been decided affirmative. It has been held by many judicial pronouncements that a demand under Section 28 can be made to change the assessment after Out of Charge/Final assessment of the Bill of Entry.

(i) Union of India Vs. Jain Shudh Vanaspati Ltd. - 1996 (86) E.L.T. 460 (S.C.):-

> *"5. It is patent that a show cause notice under the provisions of Section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under Section 47 of the concerned goods. Further, Section 28 provides time limits for the*

issuance of the show cause notice thereunder commencing from the "relevant date"; "relevant date" is defined by sub-section (3) of Section 28 for the purpose of Section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under Section 47. The High Court was, therefore, in error in coming to the conclusion that no show cause notice under Section 28 could have been issued until and unless the order under Section 47 had been first revised under Section 130."

(ii) In Midas Fertchem Impex Pvt Ltd Vs Principal Commissioner of Customs ACC (Import), New Delhi -2023(4) Centax 73 (Tri-Delhi), CESTAT discussed proceedings of assessment/re-assessment under Section 17 and those of demand Section 28 at length. Relevant paras are as under:-

"9. It needs to be noted that in Priya Blue Industries, the Supreme Court had reaffirmed the law laid down in Flock India. This decision in Priya Blue Industries was again referred to the Supreme Court in ITC Ltd. Thus, the law laid down by the Supreme Court in all three judgments is that once an assessment is made, it stands unless it is reviewed under Section 28 or modified in an appeal. Thus, any assessment can be modified in two ways; the first is through an appeal and other is through a process of review under Section 28.

10. There is a distinction between the provision for refund under Section 27 (or Section 118 of the Central Excise Act) and the provision for raising a demand under Section 28 for Section 11A of the Central Excise Act. Refund provisions are not quasi-judicial proceedings. The officer can sanction refund only if excess duty is paid over what is to be paid as per the assessment. He cannot modify the assessment. Self-assessment is done under Section 17(1) and re-assessment is done under Section 17(5). The process of assessment (self-assessment and re-assessment) under Section 17 comes to an end once an order permitting clearance of goods for home consumption under Section 47 is issued by the proper officer. Thereafter, the goods cease to be imported goods and no assessment of duty is possible under Section 17. The only exception is where the duty is provisionally assessed for want of documents, Test Reportss, etc. and goods are cleared for home consumption in which case the process of assessment gets completed when the assessment is finalized.

11. Once an order under Section 47 permitting clearance of goods for home consumption is issued, the assessment can be modified either through an appeal by either side before the Commissioner (Appeals) or through an SCN

under Section 28. While the option of appeal is open to both sides to assail the assessment on any ground, the scope of an SCN under Section 28 is limited by WHO, WHEN and WHY. Only 'the proper officer' can issue the SCN, within the normal period of limitation or the extended period of limitation of five years (as the case may bej, and 'only to collect the duties not levied, short levied, not paid, short paid or erroneously refunded'. It has been made clear by Supreme Court in Priya Blue, Flock India and further in ITC Ltd. that the assessments can be modified by either of these two methods. It was also clarified by the Supreme Court in Jain Shuddh Vanaspati that a notice under Section 28 can be issued without modifying the order permitting clearance of goods for home consumption under Section 47."

(iii) De-Diamond Electric India Pvt. Ltd. Vs Principal Commissioner of Customs (Import), New Delhi- (2023) 3 Centax 11 (Tri.-Del)

"12. There would be occasions, where duty is paid in excess of what was due or short of what was due. If duty is paid in excess, a claim for refund of the duty so paid in excess can be made under section 27 by the person who paid the duty or who has borne the duty. The question before the Supreme Court in the case of Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) 2004 (172) ELT. 145 (S.C.) and Collector u. Flock (India) Pvt. Ltd. 2000 taxmann.com 701/2000 (120) E.LT. 285 (SC) was whether refund could be claimed in a manner so as to modify the assessment under section 17. The Supreme Court held that refund claim is not an appeal proceeding and the officer sanctioning the refund claim cannot sit in judgment over an assessment made by the assessing officer. In other words, refund under section 27 is a mechanical process of sanctioning refund if the claimant is entitled to it as per the assessment already made. The officer sanctioning the refund cannot modify the assessment done by a competent proper officer. Thereafter, in some decisions, such as, Micromax Informatics Ltd. v. Union of India (2016) 67 taxmann.com 217/2016 (37) GSTR 309/54 GST 669/2016 (335) E.LT. 446 (Del), Aman Medical Products Ltd. v. Commissioner of Customs, Delhi (2010) 2 taxmann.com 874/2010 (250) ELT. 30 (Delhi), it has been decided by High Court of Delhi that where there is no assessment by the officer, i.e. goods are cleared through self-assessment there is nothing to be appealed against. Therefore, the refund can be sanctioned without appealing against the self-assessment. The matter was examined by a Constitution Bench of the Supreme Court in ITC Ltd. v. Commissioner of Central Excise, Kolkata IV 2019 (368) E.LT. 216 (SC) in a batch of Civil Appeals pertaining to Customs, Central Excise as well as Service Tax. It has been held that once an assessment is made, even if it is a self-assessment no refund can be

sanctioned unless such self-assessment is appealed against and modified. Thus, insofar as the refunds are concerned, the settled law is that once an assessment is complete, even if it is self-assessment, such assessment must be appealed against before claiming the refund

13. As far as the cases where duty was short levied or short paid or not levied or not paid or erroneously refunded is concerned, unlike the provisions of refund under section 27 (which is a mere mechanical process), a quasi-judicial process has been laid down in Section 28 of the Act. The question which arises is if the assessment is complete and there is a procedure for appeal against all assessments, including self-assessment, what is the nature of this power under section 28. This has been clarified by the Supreme Court in Commissioner of Customs v. Sayed Ali (2011) 10 taxmann.com 416/2011 (265) ELT. 17 (SC) and Canon India Pvt. Ltd. v. Commissioner of Customs [2021] 125 taxmann.com 188/2021 (376) E.LT. 3 (SC) as a power to reopen an assessment already made. Such a power is not inherent in any officer and is available only when it is specifically conferred by law. It is for this reason that Section 28 has a system of issuing notice and passing of adjudication orders. This power under section 28 is subject to three limitations: (i) WHO only the proper officer can issue a notice under section 28; (ii) WHEN within the normal period of limitation normal or extended; (ii) WHY to recover the duty so paid, short levied, not paid and levied or erroneously refunded.

14. In view of the above, there is no force in the argument of the learned Consultant of the appellant that the demand under section 28 cannot be issued without challenging the self-assessment by the appellant before Commissioner (Appeals). Reliance on the judgment of Supreme Court in ITC Ltd. by the appellant is completely mis-conceived as this is not a case of refund, but is a case of demand of duty under section 28, which is fully permissible.

15. Learned Consultant of the appellant submitted that no demand for duty can be made by the Revenue without getting the classification under the self-assessment by the appellant modified by filing an appeal before Commissioner (Appeals). This submission cannot be accepted in view of the fact that Section 28 itself gives a power of reopening of assessment to the Proper Officer as has been held by the Hon'ble Supreme Court in Canon India."

In all the above judgments, Hon'ble Courts have held that Section 28 confers power on the department to review the assessment after the out

of charge order has been granted without challenging the assessment order. The instant case is squarely covered by the above case laws.

- This ground was not taken before the Adjudicating Authority and hence, no findings are there. A new ground should not be permitted.
- Another sub grounds that CVD is available as credit to the appellants and hence, revenue neutrality is there. This is a misplaced contention for the simple fact that it would lose the purpose of imposing CVD. Credit of CVD is available in every case but it does not mean that once somebody is caught misstating the facts, he is given relief on the basis of revenue neutrality. Here, importability is the main reason why the goods were mis-declared.
- Hon'ble Supreme Court in Star Industries Commissioner of Customs (Import) Raigad -2015 (324) E.L.T. 656 (S.C.) [07-10-2015) held that a statutory liability cannot be done away with on the basis of revenue neutrality. Relevant para is reproduced as under:

> *"35. It was submitted by the learned counsel for the assessee that the entire exercise is Revenue neutral because of the reason that the assessee would, in any case, get Cenvat credit of the duty paid. If that is so, this argument in the instant case rather goes against the assessee. Since the assessee is in appeal and if the exercise is Revenue neutral, then there was no need even to file appeal. Be that as it may, if that is so, it is always open to the assessee to claim such a credit."*

- As has been discussed in detail that *mens-rea* is proven and hence, the penalty should be upheld.

8. The following issues have been brought up for discussion:

a. Whether sampling process of the goods claimed as condensate by the party to 'light oil' by the department was in accordance with case law (cited) or not?

b. What is likely classification of the goods claimed as condensate by the parties falling under Tariff heading 27101990 under which goods were

initially cleared by customs or was "Light Oil" under CTH 27101190 as is now being claimed by the department after investigation by DRI?

c. Whether extended period of limitation is applicable or the demands are partly or wholly, barred by limitation? And whether in the facts of the case, revenue neutrality is involved.

8.1 We have gone through various case laws, materials and submissions made by either side in support of these points including the one's relied upon by the department. The facts are identical in all the matters including of the lead appellant and also of the appellant who are against the penalty, and this position is admitted by both sides. We find that initially the Customs Officers on the basis of test reports/certificate given by Intertek i.e. exporter of the impugned products in case of Jagdamba Petroleum Pvt Ltd, Teej Impex etc. and also of the result sought on analysis by assessing officers from CRCL of the goods, after duly satisfying themselves cleared the goods. Later on, DRI started investigation and came to the conclusion that condensate oil imported by the appellants was actually "light oil" and was classifiable under 27101190 which attracted BCD + CVD @ 14% and CVD at fix rate of Rs. 15 per litter and cess but the goods were classified by the parties under tariff heading 27101990 which added same BCD, CVD @ 14% and cess.

8.2 The AR has opposed appellant's plea to take ground of limitation before Tribunal on the ground that this issue was not taken up by them earlier. We find that the ground of limitation being a legal ground can be taken up at any stage if it does not involve further factual probe. The learned AR has stated that even if issue of limitation is considered, the same shall still allow a portion of the demand to be sustained as the same is not hit by limitation. It has been pointed out, *inter alia*, by the AR that the appellant chose to change the classification despite having the purported documents issued by Iran Petroleum Commercial Company classifying the goods under chapter 2709. That change of classification was sought by the appellants despite having a

document from foreign supplier, indicating it to be classifiable under heading 27101190. The statements recorded indicate that the change of classification was done at the behest and guidance of the CHA i.e. Kiran Roadlines, which incidentally is not a party before us in this matter nor has been show caused in the impugned proceedings, despite the statement indicating that he was the one who had guided the parties. The learned AR has also taken up the background of issuance of DGFT policy circular dated 18.08.1999 prescribing sub-heading 2709 for condensate in the chapter 27 which provides the condition that if 90% of more distillation happens at 210 degrees centigrade then the product will be classified as light oil and this chapter note was incorporated vide Finance Act, 2000. He laid emphasis that 90% or more distillation is the distinguishing feature between condensate and light oil. He also pointed out that the chemical examiner was cross-examined who clarified that the prescribed method was used for testing and opinion that 90% distillation has happened at 208 degrees centigrade was available from the data of original testing. There is a silence on the point that if temperature is raised at 210 degrees centigrade as is prescribed, whether more than 90% distillation could have happened at this point centigrade or not? It is however obvious, that if more than 90% distillation would have happened at 210 degrees centigrade, the product will be "light oil" as per the chapter note. The expression "or more" has obviously not been considered by the parties while coming to their conclusion. That is to say if the distillation at 210 degrees centigrade had been 93%, the same being more than 90% or more the product will still be a light oil.

8.3 He also pointed out that the Adjudicating authority has in para 41 discussed on Intertek report which strengthens the case of Revenue. He pointed out that the need for second test report arose as first test report was not conclusive and never defined the goods nor was it pointing out anything regarding distillation of 90% material and therefore, the report as per him was

inconclusive, even though found sufficient by the competent assessing officers. The Chemical Examiner during cross-examination, had also repeated that he did not specify the goods to be condensate. He also pointed that the test reports dated 31.03.2009, was already sent to Jagdamba by registered post vide letter dated 10.12.2010 before their request vide letter dated 10.01.2011. He also justified that the demand under Section 28 can be made to change assessment even after clearance on final assessment of the bill of entry. The judgments relied upon are UOI Vs. Jain Shudh Vanaspati Ltd reported in 1996 (86) ELT 460 (SC) and also the decision of CESTAT Delhi in case of Midas Fertchem Impex Pvt Ltd Vs Principal Commissioner of Customs ACC (Import), New Delhi reported at 2023(4) Centax 73 (Tri-Delhi) and De-Diamond Electric India Pvt. Ltd. Vs Principal Commissioner of Customs (Import), New Delhi- (2023) 3 Centax 11 (Tri.-Del)**.**

8.4 He also pointed out that the ground of quantification was not taken before the adjudicating authority and therefore, there is no finding on that. On the ground that CVD is available as credit and there is a Revenue neutrality, he pointed out that if allowed, it will lose the purpose of imposing CVD. Credit of CVD is available in every case but that does not mean that once somebody is caught, he is given relief on the basis of Revenue neutrality. He relies on the decision of Apex Court in Star Industries Vs. Commissioner of Customs (Import), Raigad reported 2015 (324) E.L.T. 656 (S.C.) which in para 35 held that if Cenvat credit was available in any case to the assessee then he should not have litigated into the matter and appeal should not have been filed to claim that. Revenue neutrality if available can lead to the situation whereby appellant can by itself change the credit of duty paid.

8.5 We have also considered various submissions and case laws submitted by the Advocate in this case. We find that in the decision of CC Kolkata vs. Krishna Technochem P. Ltd. reported in 2022 (379) ELT 273 (SC), the Hon’ble

Supreme Court in para 3 has interpreted expression "at" as not been "up to" para 3 is reproduced below:-

> ***"3.*** *In the present case, even as per the Chemical Examiner's Report, the range of distillation of the product in question was between 35 degree to 58 degree Celsius which is much below 210 degree Celsius and the word used in sub-heading notes referred to herein above is "at" and not "up to". Therefore, we see no reason to interfere with the impugned order(s) passed by the Tribunal."*

8.6 Therefore, it is clear that it is at 210 degrees centigrade that the indicated level of distillation should happen. As per the report of Intertak which is report at the load port (Sr. No. 19 of the relied upon documents) indicates that the reading of 90% distillation including losses should be at 216°. The report procured by DRI indicates that 90% distillation happens at 208 degrees centigrade. It is thus clear that both the reports are not meeting the criteria laid down by the Hon'ble Supreme court in Krishna Technochem P. Ltd. (cited supra), which has interpreted that 90% or more should get distilled at 210° degrees centigrade. Hon'ble Supreme Court, had held that the expression "at" cannot be treated as "upto". Therefore, distillation happening at 208 degree Celsius or 216 degree Celsius will not come exactly within the preview of 210 degrees for 90% distillation or more as both the ranges of Intertak as well as Kandla CRCL though close to 210 degree, are not exactly "at" 210 degree. We also find that the department in this case is seeking re-classification of the product in tariff heading 27101190 as "light oil" whereas the party has sought the classification of the same as condensate under heading 27101990 as others. The goods were initially allowed to be released as "condensate" as claimed by the party under heading 27101990 which was subjected to duty as per the basic customs duty + CVD @ 14% and cess. Whereas the heading sought now by the department under 27101190 was having same basic customs duty, CVD @ 14% and CVD at fixed rate of Rs.15 per litter. Therefore, the difference is on account of fixed CVD at Rs.15 Per litter and corresponding cess. Since the goods were already cleared by the customs and that too, after

chemical testing, burden of proof for correct classification on reclassifying the same is on the department. The learned Advocate, *inter alia*, has raised serious objections on the way the samples were drawn for retesting/testing of the impugned goods and for this purpose he cited decision of Tata Chemicals reported in 2015 (320) ELT 45 (SC), in which the samples were not drawn according to the expressed provisions of Indian Standard 436 and it was mentioned that test reports cannot be looked into. It was also laid down that if method of drawing of samples were not mentioned anywhere, then ISI Methods need to be applied. Para 16 and 17 of the cited orders are relevant and are reproduced below:-

"16. *The admitted position on record is that the samples drawn were not drawn in accordance with law and were drawn with no regard whatsoever to IS 436. That IS 436 would apply to the facts of the present case is made clear by our judgment reported in Bombay Oil Industries (P) Ltd. v. Union of India, 1995 (77) E.L.T. 32 (S.C.), where this Court held following Union of India v. Delhi Cloth & General Mills Co. Ltd., 1963 Suppl. (1) SCR 586 = 1977 (1) E.L.T. (J 199) (S.C.), that if the method of testing of any item of Central Excise tariff is not mentioned, then the Indian Standard Institution's method should be applied. That this would apply to the Customs Act as well. IS 436 lays down :-*

""5. SAMPLING FROM SHIPS DURING LOADING OR UNLOADING

5.1 Sub-lots - For the purpose of sampling, the entire quantity of coal in a ship shall be divided into a suitable number of sub-lots of approximately equal weight as specified in Table 1.

5.1.1 A gross sample shall be drawn from each of the sub-lots and shall be kept separately so that there will be as many gross samples as the number of sub-lots into which the lot has been divided.

5.2. Sampling of coal from ships shall be carried out, as far as practicable, when coal is in motion. If it is taken on a conveyer, the gross sample shall be collected as per the procedure laid down in Table 3. If not, the gross samples may be drawn during loading or unloading of the ship. For this purpose, the number of increments to be taken shall be governed by the weight of the gross sample and the weight of increment as specified in Table 3 for various size groups of coal."

TABLE 1 NUMBER OF SUB-LOTS/GROSS SAMPLES
(Clauses 0.3.4.1 and 3.1)

Weight of the Lot (MT)	***No. of sub-Lots/Gross Samples***

Upto 500	*2*
501 to 1000	*3*
1001 to 2000	*4*
2001 to 3000	*5*
Over 3000	*6."*

Then the IS 436 goes on to describe the procedure to reduce a gross sample into a sample for a lab test etc. in great detail, and speaks about the minimum weight of a gross sample being 75 Kg so far as "Coal, small" is concerned.

17. *Clearly the samples drawn by the Inspector in the present case, have been drawn contrary to the express provisions of IS 436. On this count also, the samples being drawn not in accordance with law, test reports based on the same cannot be looked at."*

8.7 It is thus clear that even if samples are drawn and representative of appellant was present, there is no estoppel against law and if the law requires something to be done in a particular manner, it has to be so done. Further, it is also incumbent upon Revenue as per the above decision to indicate that certificate at load port of any inspection was not proper in any manner and deserved to be rejected. Now let's examine how the sampling was done in this case with reference to para 5 of the show cause notice as reproduced below :-

"5. *On the basis of specific intelligence, on 28.5.2009, officers of DRI boarded vessel MT Rising Om, berthed at Kandla Oil Jetty No. 3. The said vessel MT Rising Om had discharged 1783 431 MT bulk liquid cargo at Kandia. Out of the said 1783 431 MT cargo, part quantity of 659.545 MT was discharged in the tank No. 113 of the liquid storage terminal of M/s. FOCT and balance 1123.886 MT was discharged at other storage terminal M/s. Friends Salt Works & Allied Industries Ltd., Kandla. M/s Vibhuti Shipping Pvt. Ltd., shipping agent of the vessel MT Rising Om, filed an IGM before Custom House, Kandla declaring the said bulk liquid cargo as "Condensate" loaded from Karachi. On being questioned, the master of the vessel and all crew members admitted that vessel MT Rising Om had not arrived from Karachi. They admitted that the cargo was loaded from Mumbai for Iran but was diverted to Kandla from High Seas. The said consignment was originally imported and warehoused at Mumbai and then re-exported declaring its description as "Condensate" and wrongly showing CTH of Methanol because "Condensate" is a canalized item for export. Intelligence suggested that the said bulk liquid cargo was not "Condensate but a distilled petroleum product. On 02/06/2009, the*

officers of DRI visited storage terminal of M/s. FOCT for quantification and sampling of the cargo and detained the goods stored in tank No. 113 of the said storage terminal under Panchanama dated 02/06/2009 (Placed at Sl. No. 2 of the relied upon documents). The detained goods were consisting of part parcel discharged from vessel MT Rising Om, comingled with a part parcel of cargo discharged from vessel MT Chemical Progress."

8.8 M/s Teej Impex Pvt Ltd had imported goods on Vessel MT chemical progress and the same was discharged at the storage terminal of M/s FOCT, Kandla. The DRI found that the cargo discharged from the vessel MT chemical progress was not worthy of drawing samples as it was comingled with cargo import as per vessel Rising Om, therefore, they decided to seek further clarification on the samples that were taken from the cargo earlier at the time of clearance. As cargo discharged from vessel MT Rising Om and MT Chemical Progress were comingled, it is stated by appellant that the cargo samples were not properly drawn for Lab testing in fact samples were drawn earlier at the time of clearance and sent for testing to Kandla Customs House Lab. It is thus clear the sampling done was not of comingled goods, or affected as claimed by the appellants. In fact, samples were of the imported goods drawn at the time of importation and on the basis of which goods of importer were cleared as "condensate" by Kandla Customs. There is nothing on record however to show as to whether the DRI even at the later stage rejected the INTERTAK report and on what basis as is the requirement of TATA Chemicals case (cited supra) decided by the Hon'ble Apex Court. Revenue also failed to discharge the burden which was heavily on them specially when the goods were already got cleared after due verification by the authorities at Customs House Kandla. The distillation points of 90% though in both case of INTERTAK report as well as Kandla report are close to 210 degrees but are not exactly at 210 degrees as has been held by the Apex Court in Krishna Technochem P. Ltd. (Supra) while interpreting the expression "at". Following para regarding samples and observation at para 35 of the impugned order are relevant to indicate as to the process of initial clearance by Customs, testing initially without

communicating distillation point of 208°c by Customs and later same appearing when DRI intervened on the same report:-

> *"**35.** As per the requirements of section 17 of the Customs Act, 1962, samples of Imported goods are drawn and sent to the Custom House Laboratory, Kandia along with a Test Memo wherein description of goods as declared in the bills of lading is indicated and the nature of analysis is normally required, to confirm the description and composition. To this extent, the report dated 31.03.2009 given by the Chemical Examiner, Custom House Laboratory, Kandia, as above, can be said to have answered the requirements indicated in the Test Memo. When the test report does not indicate anything contrary to the declared description of the goods, the assessing officer accepts the same for completion of assessment. In the instant case, when there is no specific entry in the Tariff for Condensate and the fact that the importer sought classification of the goods under sub-heading 2710 1990 (other) and that the chemical analysis report did not indicate anything to the contrary, the assessment of bills of entry and clearance of goods allowed by the proper officer was prima facie in order."*

It is thus clear that the Adjudicating authority itself has accepted the position that initial classification as "condensate" under Tariff heading 27101990 was found correct by the Assessing Officer and also nothing to the contrary was found in the Chemical analysis report, provided for the purpose. The burden of proof reclassification of goods after investigation was therefore totally on the department. Para 35.1 and 36 reproduced are also relevant to show that there was no sample drawn as goods were comingled. Therefore, the assertion of the party that sample was drawn from the comingled goods is not borne out from the records. Now only thing from which appellants can draw succour and support from the decision of TATA Chemicals (cited supra) is that nowhere till date, the reason was given for rejection of the report of M/s Intertak at the Load port. Rest we find that only the earlier sample which stated to be having the details of distillation of 90°c at 208 but was not communicated by CRCL Kandla for whatever reasons to Kandla port authorities and Assessing officers was the reason why DRI took up Investigation:-

> *"**35.1** However, facts in the instant case are that there was specific intelligence to the effect that the goods imported per vessel MT Rising Om were not "Condensate"*

but a distilled petroleum product and, therefore, the officers of DRI boarded the vessel MT Rising Om and drew samples of goods from a part quantity of 659.545 metric tons of goods discharged from the said vessel at the storage terminal which was found co-mingled with the remaining quantity of 668.476 metric tons of goods discharged from vessel MT Chemical Progress, in tank No.113 at the said storage terminal. The test reports dated 23.06.2009 and 24.06.2009 issued by the CRCL Laboratory, Vadodara revealed that the said bulk liquid cargo was other than Crude Mineral Oil, Gas Condensate and Natural Gasoline and was mainly composed of "Light Oils" classifiable under CTH No.27101190 which was a canalised item for Import. It is as a sequel to the said test report that the goods cleared on assessment of the respective bill of entry in the case on hand that the classification is sought to be revised in the Impugned show cause notice. It is a settled position in law that classification of goods can be revised subsequently if evidence gathered during Investigation reveals that the goods escaped proper classification and assessment Initially.

36. *As already stated above, the intelligence gathered by the investigating officers was to the effect that the goods imported per vessel MT Rising Om, as also a part quantity of the goods landed per vessel MT Chemical Progress lying co-mingled and stored in tank No.113 in the storage terminal were Light Oils and not Condensate as declared. Therefore, the distilled quantity, including losses, at 210°C of the temperature reading at 90% distillation of the product is the crucial determinant factor to decide whether the impugned goods are Light Oils or otherwise. It is in this context that the investigating officers specifically requested the Chemical Examiner, Custom House Laboratory, Kandla who had originally tested the samples drawn from the consignment landed per vessel MT Chemical Progress, to report the temperature reading for 90% distillation and the latter vide letter No. KCL/20/T0/2009-10 dated 20.08.2009 informed that the temperature reading at 90% distillation of subject sample was recorded as 208 degree Centigrade. In the light of Chapter Note 4 of Chapter 27 of the Customs Tariff, if 90% or more by volume of the goods classified under Chapter Heading 2710, distills at 210 degree Centigrade, the same is considered as Light Oils. This clearly indicated that the subject cargo was "Light Oil" and not Condensate, as declared."*

It is thus clear that the results were already available while checking the initial test memo but were neither asked for by the assessing officers nor provided by Dr. G P Sharma Chemical Examiner of CRCL Kandla despite the same being available and it was from the report already available and information contained therein that the DRI made the case.

8.9 We have already observed on the basis of decision of Krishna Technochem P. Ltd. (supra) that neither 90% distillation at 208°c (Kandla

CRCL report) nor the same being at 216°c (Intertak report) helps the cause of either party as the same has to be at 210°c (and nothing more or less). Burden for reclassification thus has not been discharged by the DRI/ Department and the classification done by the proper officer at the time of assessment is required to be upheld, based as it was on the report of Kandla CRCL and same has not been rebutted by evidence of 90% or more distillation at exact 210°c. Case of Gastrade International (cited supra) by the learned AR does not help the case of the department, as in that case Hon'ble Supreme Court was interpreting expression "akin to" whereas in the case of M/s Krishna Technochem (cited supra), Hon'ble Supreme Court was concerned with exact expression of "at 210°c" and in view of the expression being exact, no akinness of 208°c or 216°c to 210°c is involved. The argument is thus rejected.

8.10 In view of the foregoing, we are unable to say that the product was "light oil" and the party's contention that the same was "condensate" and therefore cleared as such was incorrect. We also find on the basis of case law quoted by both sides, on the point of availment of Cenvat credit, that there was actually a revenue neutrality, as the appellant parties were actual manufacturer and user of the material and payment of any extra CVD would have been eligible to claim the credit of the same. Such revenue neutrality also indicates that there cannot be any intention to suppress or mis-declare to draw any benefit from the alleged conjured up operation. Since, we are in agreement with the appellant on the burden to prove for classification, which was upon the department and has not been discharged, we are not going into the question of limitation and whether the same was within limitation partly or outside the limitation totally. Accordingly, we hold that the department has not been able to discharge the burden that initial classification done by its officers as "condensate" was incorrect. And the burden not having been discharged for reclassifying the product, the classification proposed by the

department in the peculiar facts of this case, fails. Also, revenue neutrality exists, as the parties if had discharged higher duty (CVD) at the time of clearance would have been entitled to higher credit even as per Jet Airways case (cited supra) of the Apex Court. Appeals are therefore allowed with consequential relief to all the parties.

9. Appeals allowed.

(*Order Pronounced in the open court on 15.04.2026*)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(SATENDRA VIKRAM SINGH)
MEMBER (TECHNICAL)

Raksha