

IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application ("SCRA") No. 1490 of 2023

Date

Order with signature of Judge

**Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Mohammad Abdur Rahman**

APPLICANT : **The Collector of Customs
Through Ms. Tania Alam, Advocate.**

RESPONDENT : **M/s. Dua International & Co.
Through Mr. Ghulam Nabi Shar, Advocate.**

Date of Hearing : **03.09.2024**

Date of Judgment : **26.09.2024**

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this Reference Application the Applicant department has impugned judgment dated 22.05.2023 passed in Customs Appeal No.K-671 of 2023 by the Customs Appellate Tribunal, Bench-III at Karachi; proposing the following questions of law: -

- 1. Whether keeping in view the facts and circumstances of the case, the learned Appellate Tribunal has erred in law to hold that the respondent importer's consignment may be allowed release as per his declaration and applicable PCT Heading of 2710.1991?*
- 2. Whether keeping in view the facts/circumstances of the case and the law as contained in the Pakistan Customs Tariff for classification of the goods, in the light of World Customs Organization (W.C.O)'s Explanatory Notes, the learned Appellate Tribunal erred in law to accept statement of the respondent importer as a "gospel truth", without any findings at its own, to classify the found goods "White Mineral Oil (Technical Grade)", under PCT Heading 2710.1991 instead of correct classification under PCT Heading 2710.19969?*
- 3. Whether, under the facts / circumstances of the case, the imported goods. "White Mineral Oil" instead of declared description of "Mineral Oil", as found through the physical examination / Laboratory testing, during checking of GD under Section 80 of the Act, are correctly classifiable under PCT Heading 2710.1996 as white oil?*

2. Learned counsel appearing on behalf of the Applicant has contended that the Tribunal was not justified in allowing the Appeal by setting aside the orders of the forums below since the correct classification of the goods in question is under HS Code 2710.1996 and not under 2710.1991. She has further contended that the imported oil is white oil, which is specified in HS Code 2710.1996, whereas the test report also supports the stance of the Applicant department. In view of such position, she has prayed for answering the questions in favour of the Applicant department by setting aside the order of the Tribunal.

3. On the other hand, learned counsel for the Respondent has contended that that the goods in question are more appropriately classifiable under HS Code 2710.1991, as it is a “white mineral oil” having a Flash Point at or above 200 °F and is also used for batching of jute and fibre, therefore, the impugned judgment is correct in law. He has also referred to the reply furnished by the Respondent before the Adjudicating Authority.

4. We have heard learned counsel for the parties and perused the record. The record reflects that Respondent imported a consignment of “mineral oil” and claimed classification of the goods under HS Code “2710.1991” chargeable to customs duty at 3%, whereas, on the basis of test report issued by the Customs Laboratory as well as M/s. H.E.J. Research Institute of Chemistry International Centre, the correct classification as per the Applicant department was under HS Code 2710.1996 chargeable to customs duty at 11% along with regulatory duty at the rate of 5%. Based on such report, a Show Cause Notice was issued, and the Adjudicating Authority passed Order-in-Original dated 03.03.2023 (“**ONO**”) by determining the classification of the goods under HS Code 2710.1996. The operative part of the Order-in-Original reads as under: -

“12. I have gone through the record of the case, heard at length both parties and also taken into consideration the written submissions made by them. At the outset it is clear from the description covered under Tariff Heading / H.S. Code 27.10 is mainly “Mineral Oil, having different varieties. The H.S Code 27.10 covers the following description:-

.....

The PCT Heading 2710.1990 has been further divided by the Federal Government into four dash (- - -) local headings, which are as under:-

- 2710.1991:** - - - - Mineral oil which has flash point at or above 200°F and is ordinarily used for the batching of jute or other fibre
- 2710.1992:** - - - - Mineral Greases
- 2710.1993:** - - - - Base Oil for lubricating oils of sub headings 2710.1951, 2710.1952 and 2710.1953.
- 2710.1994:** - - - - Brake Fluid
- 2710.1995:** - - - - Liquid Paraffin
- 2710.1996:** - - - - White Oil
- 2710.1997:** - - - - Transformer Oil
- 2710.1998:** - - - - Spin Finish Oil
- 2710.1999:** - - - - Other

From the above, in the presence of Lab reports it is clear that the importer goods are White Mineral Oil, correctly classifiable under PCT Heading 2710.1996. The aforementioned bifurcation of the descriptions of PCT Heading 2710.1990 (- - -) “Other” confirms that all products are made of “Mineral Base Oil”, however, the Government of Pakistan, as per local financial policies have bifurcated / distinguish the description / specifications as per their usage in order to facilitate the certain industries / sectors. Thus, for classification of the impugned goods under PCT Heading 2710.1991, the importer has failed to substantiate the Tariff description and its usage through any corroborative documents. The aforesaid discussion, facts and circumstances of the case are proving that the imported oil is not of a kind mentioned in the PCT Heading 2710.1991 for specific use of batching of jute and other fibre processing, thus, cannot be classified under PCT Heading 2710.1991. Without prejudice, even otherwise keeping in view the provisions of rule 3(c) of the General Rule of Interpretation (GRI), if any description is equally falls in that case too the goods have to be classified under the PCT Heading occurs later in time. Thus, the impugned goods i.e. White Mineral Oil were correctly classifiable under PCT Heading 2710.1996 and the charge of mis- declaration of physical description, specification, classification and value thereof stands established against the importers and the customs agent. As such considering the prevailing practice of penal actions in similar cases and the provisions of law mentioned in the show cause notice, I hereby order for imposition of personal penalty of Rs. 300,000/- (Rupees Three Hundred Thousand) on the importers under Section 156(1)(14) of the Customs Act, 1969 and the demand for recovery of the evaded amount of duties / taxes Rs.

2,520,607/- is hereby enforced. The reporting Collectorate is directed to recover the aforesaid adjudicated amounts of duties, taxes and penalty from the importers under Section 202 of the Customs Act, 1969. The case is disposed off accordingly.”

5. Respondent being aggrieved preferred an Appeal before the Customs Appellate Tribunal and through impugned judgment the Appeal has been allowed. The relevant findings read as under: -

“8. I have heard both the parties at length and also examined the relevant case record. The appellant has argued that the goods are technical grade mineral oil (as determined by HEJ laboratory). The Appellant has maintained that goods imported are mineral oil. The viscosity and flash point of the sample on test by HEJ laboratory was found at 14.7% and 338 °F (170 °C) respectively. The PCT classification in eight digits (2710.1991) prescribes flash point at or above 200 °F. It would be pertinent to examine attributes of the imported goods. The Appellant has contended that mineral oil is MES used for jute batching, softness of fabric and lubrication of machines, as against white oil which is used in medicine, pharmaceutical and cosmetic application etc. The Appellant has submitted Pakistan ATE TRIB Standards Specification for jute batching oil. It prescribes viscosity at 38°C to be between range of 12-25 (in the instant case it is 14.7%) and Flash point of a 250 °F (in the instant case it is 338 °F). This unrebuttal characteristics of the oil leads to logical conclusion that it is used in jute batching and is correctly classified under PCT heading 2710.1991.

9. For the foregoing reasons and facts, the Order-in-Original No. 912/2022-23 dated 03.03.2023 is hereby set-aside with the direction to the Respondents to release the Appellant's goods as per his declaration and applicable PCT and duties and taxes thereon. The penalty imposed is therefore remitted as not warranted under the facts and circumstances of this case.”

6. From perusal of the aforesaid findings of the forums below it reflects that there were two HS Codes under consideration for classification of the imported oil, i.e. “2710.1991” and “2710.1996”, and on the basis of report issued by M/s. H.E.J. Research Institute/Laboratory, the Applicant department has come to the conclusion that it is white oil, whereas, its composition appropriately classifies it under HS Code 2710.1996. The Adjudicating Authority in addition to its findings has also

observed that in view of Rule 3(c) of the General Rules of Interpretation, if any description of goods falls in two headings, then the goods are to be classified under the heading, which occurs later in time.

7. Before proceeding further, it would be advantageous to refer to the Laboratory Report of M/s. H.E.J. Research Institute. The relevant portion of the report of M/s. H.E.J. Research Institute of Chemistry dated 26.12.2022 reads as under: -

“2. Measurement Result:

The given sample was analyzed by Analytical technique and methods. The results are as follows: -

| Tests | Results |
|----------------------------------|---|
| Appearance | Colorless Bright and Clear Oily Liquid |
| Solubility | Insoluble in water and soluble in hydrocarbon |
| Color | +30 |
| Kinematic Viscosity at 40°C | 14.7cSt |
| Flash point (COC) | 170°C (338°F) |
| Pour Point | -26°C |
| Relative Density @ 20°C | 0.8752 g/mL |
| Ash | Nil |
| Additives | Nil |
| Acidity or Alkalinity | Nil |
| Readily Carbonisable Substance | Nil |
| Polycyclic Aromatic Hydrocarbons | Not according to USP standard |
| Nature | Paraffinic (Aliphatic) |
| Carbon chain distribution | > C ₂₀ |

3. Results:

*The given sample entitled “Mineral Oil” has been tested against USP and ASTM methods and found to be as **technical grade white mineral oil** due to the presence of polynuclear aromatic hydrocarbon, having flash point 338 °F (170°C).”*

8. Insofar as the goods in question are concerned, as per the Laboratory Report of M/s. H.E.J. Research Institute the description of goods is found to be **“technical grade white mineral oil”** and not simply **“white oil”** as understood and determined by the Applicant. So, the question which remains to be addressed is whether the product is simply a *white oil* as provided in HS code 2710.1996 or is *mineral oil (white)* which can be classified in HS code 2710.1991. It will not be out of place to state that for a

product to be classified under HS code 2710, notwithstanding additions of various substances to render them suitable for specific uses, the product still must contain by weight 70% or more of petroleum oils or of oils obtained from bituminous mineral as a basis and further that they are not covered by a more specific heading in the Nomenclature¹. Therefore, at least to that extent there is no dispute that the product in question is minimum 70% mineral based and is covered by the main heading i.e. 2710. The undecided issue is in respect of its correct sub-heading. Insofar as the Laboratory report is concerned it has come to a definite conclusion that the given sample has been tested against USP and ASTM methods and found to be as “**technical grade white mineral oil**” due to presence of polynuclear aromatic hydrocarbon, having flash point 338 °F (170°C). HS Code 2710.1991 requires that firstly the oil should be a mineral oil and secondly, it must have a flash point at or above 200°F. Admittedly, both these conditions are fulfilled as the product is a “mineral oil” (white in color) and has a flash point at 338°F. The third requirement is that “it may ordinarily be used for batching of jute and fibre”. To this effect the report is silent, whereas the Applicant department has also failed to investigate this aspect of the matter. However, Respondent No.2 had submitted before the Adjudicating Authority that the goods in question, as per Pakistan Standard Specification (“**PSS**”) is for jute batching due to presence of ingredients as shown in the laboratory report. The relevant objection taken by the respondent before the Adjudicating Authority as available in the Order-in-Original reads as under: -

“4. The test report shows the Flash Point as 170°C which is equal to 338°F. According to Customs Tariff HS Code 2710.1991 Mineral Oil which has Flash Point at or above 200°F then it will be classifiable under the HS Code 2710.1991.

¹ See Explanatory Notes to Chapter 2710 Para [C] of the Harmonized Commodity Description and Coding System notified by the World Custom Organization

5. That the test Report also shows that the Kinematic Viscosity at 40°C 14.7cSt which is the Viscosity of the Mineral Oil as per standard Test Method for Carbonizable Substance in Mineral Oil (ASTM) Reapproved 2019 (Chapter 16 Table 16.1) as per Pakistan Standard Specification for Jute Batching Oil where the limits of Kinematic Viscosity given at 38°C were in range of 12 and 25.

6. According to V/R there is three category of White Oil (i) Light White Oil (ii) Medium White Oil & (iii) Heavy White Oil but there is no technical grade White Oil. This fact shows that Oil imported by the Applicant is "Mineral Oil".

7. That our imported goods i-e Mineral Oil are used for softness of Fabrics, lubrications of Machines and Jute Batching and not for Pharmaceutical purpose whereas the White Oil is used in Pharmaceutical products etc.

8. That as per Hand Book of Petroleum products analysis, 2nd Edition, U.S.A. published in 2002 & 2015 the White Oil is totally different product from Mineral Oil as White Oil is used in Medicines, Pharmaceutical Applications, Food Contact Application and Food Batching whereas Mineral Oil is used for Softness of Fabrics and Lubrications of Machines.

9. That the test report clearly shows that imported oil is not White Oil and there is no single indication which could suggest that imported consignment is of White Oil."

9. From perusal of the aforesaid submissions it reflects that Respondent No.2 had provided enough material to the Adjudicating Authority as to the usage of mineral oil in question, including Pakistan Standard Specification which according to the Respondent was to be specifically used in batching of jute and fibre. This apparently has not been attended to in a proper manner by the Adjudicating Authority. At the same time the Tribunal also did not bother to examine this aspect while passing the impugned order. It is also pertinent to note that in the ONO, alternatively, the Adjudicating Authority has placed reliance on the General Rules of Interpretation notified by the World Custom Organisation ("WCO") and adopted locally in our Customs Tariff (1st Schedule to the Customs Act, 1969) as an authentic source for determination of classification of imported goods, however, it needs to be finally determined that whether it is applicable only when the classification is being determined on the basis of international heading(s) / sub-heading(s) of 6 digits (or 6 (dash) ---

--- heading) issued by the World Custom Organisation or it also applies when the classification is being determined or considered on the basis of a local 8-digit sub-heading in the Pakistan Customs Tariff. Such interpretation of single dash (-) and double dash (--) headings issued by WCO and their bifurcation into sub-headings locally for variance in customs duties have been dealt with and interpreted keeping in view the General Rules of Interpretation notified by WCO in the case of **Collector v SG Enterprises**² by this Court. Therefore, even if Rule 3(c)³ of GIR is applicable, then before that, Rule 3(b)⁴ of GIR will come into application as the goods in question are more akin to the description of HS Code 2710.1991, except that its final use for batching of jute and fibre is yet to be determined. However, all these aspects have not been touched upon by both the forums below.

10. Lastly, as to final determination of correct classification of the subject goods and the appropriate forum or authority, there are several cases wherein, this Court as well the Supreme Court has finally determined the classification of goods in *S.M. Ahmad & Company (Pvt.) Limited*⁵, followed in *Shahnawaz Enterprises*⁶; *Iqbal Hussain*⁷; *Shakeel Brothers*⁸; *Asian Food Industries Ltd*⁹; *Pak Noble Enterprises*¹⁰ and *Askari Cement (Pvt) Limited*¹¹.

² 2021 PTD 815

³ 3. When by application of Rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be affected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the times in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

⁴ (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

⁵ Collector of Customs v S.M. Ahmad & Company (Pvt.) Limited (1999 SCMR 138)

⁶ Collector of Customs v Shahnawaz Enterprises (2007 PTD 1213-upholding a judgment of this Court reported as Shahnawaz Enterprises v Collector of Customs-2005 PTD 1172)

⁷ Iqbal Hussain v Federation of Pakistan (2010 PTD 2338-maintained by Supreme Court vide order dated 11.02.2020 in Civil Appeal No.381 of 2011)

⁸ Central Board of Revenue v Shakeel Brothers (1998 SCMR 237)

⁹ Asian Food Industries Ltd v Pakistan (1985 SCMR 1753)

¹⁰ Pak Noble Enterprises v CBR & Others (PLD 1989 Karachi 617)

¹¹ Collector of Customs v Askari Cement (Pvt) Limited (2020 SCMR 649)

However, very recently, the Hon'ble Supreme Court in the case of ***K. S. Sulemanji Esmailji***¹² has been pleased to deprecate exercise of such authority by the Tribunal as well the High Court. The Supreme Court has been pleased to hold that the First Schedule of the Customs Act, 1969, provides that for the purposes of classification the Board shall be the final authority to determine the classification of any item meant to be imported or exported, as in order to fulfil the commitments under the 'International Convention on the Harmonized Commodity Description and Coding System' the Board has established the *Classification Centre* which is run and managed by the *Classification Committee*, and pursuant to Customs General Order No. 10/2001, dated 04-09-2001, has prescribed a procedure in order to streamline the issuance of classification rulings to implement the recommendations of the World Customs Organization. The Supreme Court has further observed that classification of goods is one of the most basic functions of the procedure in the context of import or export of goods and is a specialized job and technical in nature as it essentially requires expertise and taking of multiple factors into consideration e.g. examining the goods, all the relevant documents, understanding the classification aids and technical literature etc. It has been further observed that the Classification Committee includes experts who possess the skills, knowledge and experience in respect of classification of goods in conformity with the Harmonized System and therefore, the Classification Committee and its classification rulings have crucial importance. The Court has further held that the First Schedule also declares that the determination of classification by the Board shall be final which is also in the light of the scheme of the Harmonized System which has been adopted and followed by Pakistan pursuant to its commitments under the Convention, and the Tribunal nor the High

¹² (SC Citation- 2024 SCP 312) vide judgment dated 1.1.2024 in Civil Appeal Nos. 799 to 824 of 2015

Court can substitute the findings of the Classification Committee. In essence it has been held that The Tribunal or the High Court could not bypass the competent forum i.e. the *Classification Committee* nor give a different finding unless it could be clearly shown that the determination was arbitrary, fanciful and in violation of the rules and principles relating to classification of goods under the Harmonized System.

11. In view of hereinabove facts and circumstances of the case and the law now settled by the Supreme Court as above, since in this matter the Applicant department and the Tribunal have both failed to refer or seek opinion of the *Classification Committee*, we do not see any reason to sustain the order(s) passed by both the forums below. They are hereby set-aside accordingly. The matter stands remanded to the *Classification Centre* for finally deciding the issue of classification of the subject goods, which opinion shall be a final opinion; however, subject to the exceptions as provided in the above order of Supreme Court. The proposed questions are answered accordingly, and the Reference Application is *disposed* of in these terms. Let copy of this order be issued to the Customs Appellate Tribunal as required under subsection (5) of Section 196 of the Customs Act, 1969.

Dated: 26.09.2024

J U D G E

J U D G E

Farhan/PS