

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

REGIONAL BENCH – COURT NO. 03

CUSTOM Appeal No. 10209 of 2019

[Arising out of OIA-MUN-CUSTM-000-APP-252-18-19 dated 13/11/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD]

Acme Micronised Minerals

Plot No 235/2, GIDC Chandisar,
Tal Palanpur, Banaskantha,
Gujarat

.....Appellant

VERSUS

C.C.-Mundra

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

.....Respondent

APPEARANCE:

Shri Dhaval K. Shah, Advocate for the Appellant
Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

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

FINAL ORDER NO.A/10044/2024

DATE OF HEARING: 22.12.2023

DATE OF DECISION: 03.01.2024

RAMESH NAIR

In the present case the dispute to be settled is that whether on the basis of test report of CRCL, Kandla the goods imported by the appellant is classifiable as natural Calcite Powder under CTH 25309030 under the notification No. 46/2011-Cus dated 01.06.2011 as claimed by the appellant or the goods is precipitated Calcium Carbonate Powder under CTH 28365000 with denial of notification No. 46/2011-CUS as contended by the revenue.

2. Shri Dhaval K Shah Learned Counsel appearing on behalf of the appellant at the outset submits that though the CRCL, Kandla has tested the goods and provided the report but admittedly the said laboratory did not have the facility for testing the goods in question as per the board circulars.

He submits that under the same set of facts involving the same circumstances of the laboratory not having the facility of testing the goods, decided the matter in the case of Asian Granito Vs. CC Mundra 2021 (375) ELT 587 (Tri. Ahmd) and in various judgments, he has relied upon the following judgments and board circulars:

- *Circular No. 43/2017 - Cus Dated 16.11.2017*
- *Circular No. 11/2018- Cus Dated 17.05.2018*
- *Circular No. 15/2019- Cus Dated 07.06.2019*
- *Asian Granito India Vs. CC, Mundra 2021 (375) ELT 587 (Tri. Ahmd.)*
- *Chem Plast Vs. Commissioner of Customs, Jamnagar Final Order No. A/11151-11152/2023 Dated 12.05.2023 (Tri. Ahmd.)*
- *Gaurav Lubricants Industries Pvt Ltd Vs. Commissioner of Cus, Ahmedabad 2023 (13) Centax 5 (Tri. Ahmd.)*
- *CC., C. Ex., & S.T., Noida Vs. Manikya Creations Pvt. Ltd 2019 (365) ELT 130 (Tri-All.)*
- *20 Microns Ltd Vs. CC (Import), Mumbai 2020 (372) ELT 403 (Tri- Mumbai)*
- *Gulshan Polyols Ltd Vs. Comm. Of C. Ex., & Service Tax, Meerut 2019 (366) ELT 728 (Tri. All)*
- *Comm. Of Cus, Noida Vs. M/s. Sachin Chemical Agencies & M/s. manikya Creations Pvt. Ltd. 2018 (10) TMI 1157 – Cestat Allahabad.*
- *M/s. Pavas Polychem Pvt Ltd Vs. Comm. Of Customs, Kanpur 2018 (2) TMI 1573 – CESTAT Allahabad*
- *M/s. Rathi Enterprises V/s. C.C.E., & C.E. & S.T. Noida 2015 SCC Online CESTAT 453*

2.1 He submits that as per the above judgments, issue is no longer res-Integra.

3. Shri Ajay Kumar Samota, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. On careful consideration of the submission made by the both the sides and perusal of record, we find that it is admitted that at the relevant time when the CRCL, Kandla has under taken the testing of imported goods in question i.e. Calcite Powder the said laboratory did not have the facilities to test such product. This Tribunal considering the very same fact came to conclusion that, when a particular laboratory does not have the testing facilities, the test report of the said laboratory without having facilities of testing the goods cannot be relied upon to decide the classification of the goods. In this regard the relevant judgment in the case of Gaurav Lubricants Industries Pvt. Ltd (supra) is reproduced below:

"4. We have carefully considered the submissions made by both the sides and perused the records. We find that the entire case of classification of the goods imported by the appellant was decided on the basis of test report of CRCL- Vadodara. We find that the testing was done in July 2017, October 2017 and February 2018. As per Circular No. 11/2018 dated 17.05.2018 as regard testing of samples of furnace oil, the certain laboratories were authorized which is given as under:

Circular No. 11/2018-Cus., dated 17-5-2018

F.No. 401/243/2016-Cus. III

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Forwarding of samples for testing to the Outside Laboratories - Regarding.

I am directed to refer to the Board Circular No. 43/2017-Customs, dated 16th November, 2017 [2017 (355) E.L.T. (T25)] on the subject above cited wherein a list of items and corresponding testing laboratories was annexed where samples could be tested from the identified list.

2. In addition to the existing list of laboratories provided in Annexure to above mentioned Circular, CRCL has identified some more entities annexed herewith as Annexure, where the samples could be tested.

3. *Principal Commissioners/Commissioners of Customs are requested to issue suitable Public Notice to bring the same to notice of all concerned.*

4. *Difficulty faced, if any, may be brought to the notice of the Board. Hindi version will follow.*

Annexure

Sl. No.	Chapter No.	Samples to be referred	Suggested Laboratories
(1)	(2)	(3)	(4)
10	27	12. Coking Coal 13. Steam Coal 14. Solvent C-9 15. C-9-C-11 Liquid Paraffins 16. C-14-C-20 N Paraffins 17. Petroleum Bitumen 60/70 18. Diesel Oil 19. Waksol 9-11 A Grade 20. Thinner Off Spec 21. Waste Oil/Sludge Oil/Sludge Water/Bilge Water/Stop Water/Furnace Oil	1. NTPC Energy Technology Research Alliance (NETRA), NTPC Ltd. Address : Plot No. E-3 Ecotech-II, Greater Noida Gautam Buddha Nagar, Pin - 201308, Uttar Pradesh 2. Central Coal Testing & Research Laboratory Western Coalfields Limited Address : Nara Nari Road, Kalpana Nagar, P.O. Uppalwadi Nagpur, Pin - 440 026, Maharashtra 3. MSME Testing Centre, 65/1 GST Road, Guindy, Chennai, Pin - 600032 Tamil Nadu

From the above circular, it can be seen that the CRCL- Vadodara or CRCL Delhi were not equipped laboratory with the facilities to test the furnace oil. Even prior to the above circular as per Circular No. 43/2017-Cus dated 16.11.2017, the facilities to test the goods in question that is waste oil/furnace oil was not available with the CRCL- Vadodara or Delhi, the said Circular is also reproduced below:

Circular No. 43/2017-Cus., dated 16-11-2017

F. No. 401/243/2016-Cus. III

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Forwarding of samples for testing to the Outside Laboratories - Regarding.

It has come to the notice of the Board that due to lack of testing facilities of certain goods in Revenue Laboratories, there is delay in clearance of the consignments of these goods due to avoidable movement of samples between Customs field formations and Revenue Laboratories.

2. In this regard, CRCL has shortlisted the items whose samples cannot be tested in their Laboratories at present and also identified the Laboratories functioning under the other Ministries/Departments/Organizations where such samples could be tested. The list of such items and corresponding testing Laboratories are annexed herewith.

3. The Revenue Laboratories are, presently, in the process of up-gradation. However, until Revenue Laboratories are upgraded, as a measure of trade facilitation, the Board has decided that field formations may directly forward samples of goods mentioned in column (3) of the Annexure I of this circular, to the laboratories mentioned in column (4) of the said Annexure or any other accredited laboratories empanelled by the concerned Commissionerate. The procedure for forwarding the samples to the laboratories shall be as follows :

a. Customs formations should follow the respective standard sampling technique prescribed by the concerned laboratory for the items under question. The Commissionerate should ascertain sampling requirement with the laboratory concerned before drawing samples from the consignment. The sampling requirements may clearly be specified on the website of the Commissionerate.

b. In cases of live consignments which cannot be cleared without getting the test reports due to its hazardous nature or for any other reason, the samples shall be forwarded to the concerned laboratory at the earliest. Further, the Commissionerates should develop a mechanism in consultation with the laboratories so as to get the test report expeditiously and preferably online.

c. In cases where the time taken by laboratory exceeds three days, the importer should invariably be given an option to warehouse goods under section 49 of the Customs Act.

d. Testing fee, if any, shall be paid by the importer or the exporter.

4. It is further clarified that aforementioned procedure shall not be applicable in cases where Partner Government Agencies themselves draw the sample.

5. In view of above, the Commissioners of Customs are requested to issue suitable Public Notice based on aforementioned guidelines, prescribing detailed procedures for empanelment of laboratories, techniques for drawing & dispatching of samples, mechanism to receive online reports etc., for guidance of all concerned.

6. Difficulty faced, if any, may be brought to the notice of the Board.

ANNEXURE I

Sl. No.	Chapter No.	Samples to be referred	Suggested Laboratories
(1)	(2)	(3)	(4)
10	27	19. Coking Coal	Central Institute of Mining and Fuel Research (CIMFR), Nagpur (Under Ministry of Science & Technology) CSIR-CIMFR, Barwa Road, Dhanbad 826015, Jharkhand, INDIA Tel : 91-326-2296004/5/6, Email : director@cimfr.nic.in/ drpksingh@cimfr.nic.in/dcmrips@yahoo.co.in
		20. Steam Coal	Central Mine Planning & Design Institute Limited, Ranchi (Under Ministry of Coal) (A Subsidiary of Coal India Limited/a Public Sector Undertaking of the Government of India Under the Ministry of Coal), Gondwana Place, Kanke Road, Ranchi - 834 031, Jharkhand, India Phone : (+91) 651 2231850/51/52/53, Fax : (+91) 651 2231447/223082
		21. Solvent C-9	Indian Institute of Petroleum (IIP), Dehradun (Under Ministry of Science & Technology) CSIR - IIP, Dehradun 248005 Email : headrpbdd@iip.res.in, Phone : 0135 2525743, 2660124, Fax : 0135 2660202
		22. C-9-C-11 Liquid Paraffins	IOCL (R&D Centre), Faridabad (Under Ministry of Petroleum) GM (Technology Promotion, Forecasting & Pipeline Research), Indian Oil Corporation Limited, R&D Centre, Sector 13, Faridabad 121007. Email :

	23. C-14-C-20 N Paraffins	acharyagk@indianoil.in IOCL/HPCL/BPCL, Mumbai, Chennai, Kochi, Vizag., Kolkata, Kandla (Under Ministry of Petroleum)
	24. Petroleum Bitumen 60/70	same as above
	25. Diesel Oil	same as above
	26. Waksol 9-11 A Grade	same as above
	27. Thinner Off Spec	Central Pollution Control Laboratories (CPCB) (Under Ministry of Environment) Ministry of Environment, Forest & Climate Change, Government of India, Parivesh Bhawan, CBD-cum-Office Complex East Arjun Nagar, DELHI 110032, INDIA Tel : 91-11-22303655, Fax : 91-11-22307078, Email : psms.cpcb@nic.in, adaba.cpcb@nic.in
	28. Waste Oil/ Sludge Oil/ Sludge Water/ Bilge Water/ Stop Water/ Furnace Oil	

From the above circular, it can be seen that against waste oil/furnace oil, the Laboratories mentioned in column 4 do not include the CRCL Vadodara and CRCL Delhi. The facilities to test the goods namely waste oil and furnace oil was made available which is prescribed under Circular No. 15/2009-Cus dated 07.06.2019, the same is reproduced below:

M.F. (D.R.) Circular No. 15/2019-Cus., dated 7-6-2019

F. No. 401/243/2016-Cus. IV

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Indirect Taxes & Customs, New Delhi

Subject : Forwarding of samples for testing to the Outside Laboratories - Regarding.

I am directed to refer to the Board Circular No. 43/2017-Cus., dated 16th November, 2017 [2017 (355) E.L.T. (T25)] on the subject above cited. In the said Circular, a list of items, the samples of which could not be tested in the revenue laboratories was provided in the Annexure.

2. The Revenue Laboratories have now acquired testing facilities for some of the samples listed in the said Annexure following the up-gradation and induction of more sophisticated equipment. These items are listed in Annexure I annexed with this Circular.

3. Additionally, Revenue Laboratories have also acquired the facilities for testing items provided in Annexure II of this Circular.

4. Field formations may therefore first ensure with their respective jurisdictional laboratories that the testing facilities for any particular items listed in the said Circulars are not available with them before forwarding such samples to outside Laboratory(s) listed therein.

5. Principal Commissioners/Commissioners of Customs are requested to issue suitable Public notice to bring the same to notice of all concerned.

5. Difficulty faced, if any, may be brought to the notice of the Board.

Sl. No.	Chapter No.	Name of the Samples
5	27	Steam Coal Solvent C-9 C-9-C-11 Liquid Paraffins C-14-C-20 N Paraffins Petroleum Bitumen 60/70 Diesel Oil Waksol 9-11 A Grade Thinner Off Spec Waste Oil/Sludge Oil/Sludge Water/Bilge Water/Stop Water/Furnace Oil

From the perusal of all the 3 Circulars as reproduced above, it is found that the facilities to test waste oil or furnace oil was made available only as per the circular dated 07.06.2009 prior to that the CRCL Vadodara or as the case may be CRCL Delhi, did not have the facilities to test the waste oil/furnace oil. Admittedly in the present case, the tests of goods in question were done prior to the issue of Circular No. 15/2009-Cus. Accordingly, the testing done by CRCL Vadodara/Delhi cannot be said to be the correct test as these Laboratories did not have the facilities for testing waste oil/furnace oil. It is a settled law that the Board Circulars are binding on the departmental officer as held by the Hon'ble Supreme Court in the case of M/s. Commr of C.Ex., Bolpur Vs. Ratan Melting & Wire Industries-2008 (231) ELT 22 (S.C). We find that this Tribunal also dealing with the issue that whether the test report of laboratory which is not having the facilities for testing product can be accepted or otherwise. In

case of M/s. Asian Granito India (supra), this Tribunal dealing with the identical issue observed as under:

"7. We also find merit in the submissions made by the Ld. Counsel for the Appellant that even otherwise, the test reports of Kandla Customs Lab do not test all parameters as required under IS: 8767-1978, i.e. the Specification for Precipitated and activated Calcium Carbonate for Paints, and the range of Oil Absorption and other parameters (including particle size) are not found in the present case at all. This IS: 8767-1978 was referred to in the cases of 20 Microns (supra), Gulshan Polyols(supra) as well as in the case of Sakshi Makfin (supra) before concluding that identical product in question was classifiable under Chapter 25 and not under Chapter 28."

Similar view was expressed by this Tribunal in the case of M/s. Chem Plast vide order No. A/11151-11152/2023 dated 12.05.2023, wherein it was observed as under:

"4. We find from the factual matrix that at the relevant time Kandla port CRCL laboratory, was not having requisite test facilities, even as per the case laws cited as well as the CBEC Circular. Further, once a report was received by the party and it sought re-test within reasonable time and simultaneously or even before the test report did test at the private lab same should have been accepted. We also find that the impugned order of the Commissioner (Appeals) gives no reasons as to why the department could not agree with the request of re-test.

5. In view of the facts, we find that the test report as submitted by the party is required to be accepted. Accordingly, we accept the same and classification as claimed by the party on that basis. The appeal is therefore allowed. The appeal filed by the CHA is also accordingly allowed."

This Tribunal in the case of M/s. Manikya Creations Pvt Ltd-2019 (365) ELT 130 (Tri-All.) on the identical issue passed the following order:

"6. Being aggrieved, Revenue has filed the appeal on the ground that CRCL is fully equipped to test the goods. On the other hand, the appellant has referred to Circular No. 43/2017-Customs, dated 16-11-2017, clarifying - that CRCL has shortlisted the items whose samples cannot be tested in their Laboratories at present and also identified the Lab, where such samples could be tested. Natural Calcite Powder is one of the specified product which CRCL Lab is unable to test.

7. The above fact demolishes the Revenue's case. As such, we find no merits in the Revenue's stand. Their appeal is accordingly rejected."

Following the above decision of M/s. Manikya Creations Pvt Ltd, the Mumbai Bench of the CESTAT in the case of 20 Microns Ltd also expressed the same view as under:

"5. The contention of the appellant that 'oil absorption value' and 'particle size' are both critical in determining classification cannot be lost sight of. The test report does not refer to 'particle size' and it has been officially admitted that the chemical facilities of the department is deficient in capacity to carry out that test. As the test result is faulty, we apply the principle laid down in re Gulshan Polyols Ltd. and re Shakshi Makfin Pvt. Ltd. and the decision of the Tribunal in Commissioner of Customs, Central Excise and Service Tax v. Manikya Creations Pvt. Ltd. [[2019 \(365\) E.L.T. 130](#) (Tri.-All.)] that :

'6. Being aggrieved, Revenue has filed the appeal on the ground that CRCL is fully equipped to test the goods. On the other hand, the appellant has referred to Circular No. 43/2017-Customs, dated 16-11-2017, clarifying - that CRCL has shortlisted the items whose samples cannot be tested in their Laboratories at present and also identified the Lab, where such samples could be tested. Natural Calcite Powder is one of the specified product which CRCL Lab is unable to test.'

In view of above undisputed fact that during the relevant time as per Board Circular and also on the basis of the judgment cited above the CRCL Vadodara or as the case may be CRCL Delhi being not equipped with the facilities to test waste oil/furnace oil the test report of the said laboratories cannot be accepted.

As regard the submission of the learned Counsel that the department violating the direction of the Hon'ble High Court did not release the goods despite specific direction by the Hon'ble Court, we prima facie find force in the submission, in this regard the relevant order of High Court is reproduced below:

"Heard learned Counsels for the parties.

The direction contained in para 5 of the order dated 17.09.2018 passed in Special civil Application No. 13267 of 2018 is not complied with and a categorical statement is made by the learned Counsel for the petitioners that the petitioners have furnished full bank guarantee towards security amount of Rs. 9 lakhs for releasing the goods provisionally and the very paragraph further directs that upon fulfillment of the above condition, the respondents shall release the seized goods upon furnishing bank guarantee within 7 days from the date of order and that direction was not complied with and ultimately the above directions were

subject to adjudication of notice dated 13.04.2018 also subject to outcome of the sample testing report by CRCL, New Delhi.

Report received from CRCL, New Delhi by the authority cannot be a ground for not releasing the goods provisionally and same is subject matter of the petition.

If the goods are not released, as directed in order dated 17.09.2018, the Assistant Commissioner, custom House, Hazira, Surat shall remain personally present in the court on the next date of hearing."

As per above order of the Hon'ble High Court, the department vide letter dated 31.10.2018 requested the appellant to take charge of their goods the said letter is reproduced below:

OFFICE OF THE ASSISTANT COMMISSIONER OF CUSTOMS,
ADANI HAZIRA PORT PVT. LTD. HAZIRA BY-PASS ROAD, CHORVADIA,
AT & POST HAZIRA - 394210.
PHONE: 0261-2207665 hazira@adaniport.com/fax: 0261-2207694

F.No. CHAZIRA/BE 3668483/17-18 P.II Hazira, Dated: 31.10.2018

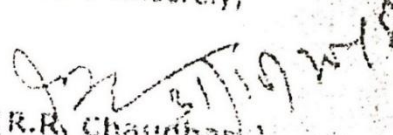
To,
M/s Gaurav Lubricants Industries Pvt. Ltd.
FLAT NO 615, 6TH FLOOR, BABUKHAN ESTATE
BASHEERSAID, HYDRABAD,
ANDHRA PRADESH.

Sub: Import of "Furnance Oil" in 3x20 Ft Flexi Bag Containers
and 9x20 Ft Flexi Bag Containers by M/s. Gaurav Lubricants
Industries Pvt. Ltd. -regarding.

.....

In compliance to the Hon'ble High Court of Gujarat's Order in Misc Civil
Application No. 1/2008 in respect of SCA No. 13267/2018, this office has
done the provisional assessment in respect of Bill of Entry No. 3612218 dated
13.10.2017 and B.E. No. 3668483 dated 18.10.2017 for the above said
goods on 29.10.2018.

You are therefore requested to take the charge of your goods at an
early date.

Yours sincerely,

(R.R. Chaudhary)
Superintendent
Custom House, Hazira, Surat

From the above, it is a submission of the counsel that despite accepting the High Court order, the department has not released the goods so far, therefore he also request direction to department for release of the goods immediately. We find that

since the goods were supposed to be released as per the High Court order, the act of department is clearly the non-compliance with the High Court order for which if any action to be taken it is by the High Court. Therefore, even after prima facie finding that the goods were supposed to be released this Tribunal can not give any direction in this regard with reference to the Hon'ble High Court order dated 26.10.2018. However, since in the present case we are deciding the matter on merit, the appellant is otherwise entitled for release of the goods.

As per our above discussion and finding, we are of the view that since the test report of CRCL Vadodara/Delhi cannot be accepted the declaration made by the appellant in respect of nature of goods, classification and also valuation are found to be absolutely correct.

5. Accordingly the impugned orders are set aside. Appeals are allowed with consequential relief."

4.1 In view of the above decision, the similar issue has been considered by this Tribunal. In the case of Asian Granito India Ltd, the following order was passed:

"We have carefully considered the submissions made by both the sides and perused the records. We find that the appellant had claimed at the threshold that the Kandla Customs Lab is not equipped to conduct test on Calcite Powder and even drawl of sample was also disputed as being importer. While in general, it is true that report of CRCL cannot be brushed aside lightly, however, when CBEC itself categorically admits that for calcite powder, their Labs were not equipped to test the same till 2019, as evident from Circular No.43/2017-Cus., dated 16-11-2017 as also Circular No. 15/2019-Cus., dated 7-6-2019, the Kandla Customs Chemical Lab reports as relied upon in the impugned order have to be discarded. The various case laws as relied upon by the Appellant, duly based on the said Board Circular dated 16-11-2017, in the context of classification of calcite powder and precipitated calcite carbonate, are well founded and apply to the present case on all fours. The present case is identical to that in the case of 20 Microns (supra) as also Manikya Creations and Pavas Polychem (supra). It therefore must be held that in absence of any independent cogent evidence to reject the classification under CTH 2503 90 30 as

claimed by the Appellant, the claim of the revenue to classify the very goods under CTH 2836 50 00 has no support and must fail."

In view of the above decision, it can be seen that it was consistently held by this Tribunal that if a particular laboratory did not have the facility to test a product and if such laboratory tests the same product the test report of such product cannot be relied upon for deciding the classification. Accordingly in the present case also being the same fact involved that the Kandla, CRCL did not have the facility to test calcite powder, the entire case based on the test report of CRCL, Kandla will not sustain.

5. Hence, following the above decision, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 03.01.2024)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Dharmi