

2025 LiveLaw (SC) 366

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

B.V. NAGARATHNA; J., NONGMEIKAPAM KOTISWAR SINGH; J.

March 28, 2025

CIVIL APPEAL NO. OF 2025 (@ SPECIAL LEAVE PETITION (CIVIL) NO. 6470 OF 2022)

GASTRADE INTERNATIONAL *versus* COMMISSIONER OF CUSTOMS, KANDLA

Customs Tariff Act, 1975 - Petroleum Act, 1934; Section 2 (c) - 'Flash-point' - High Speed Diesel (HSD) or Base Oil - - Confiscation Proceedings – Held, Classification of imported goods under the Act 1975, requires the Customs Authority to prove the goods are "most akin" to the specified tariff heading (e.g., HSD under CTH 27101930), as per Rule 4 of the General Rules for Interpretation, rather than relying on the "preponderance of probability" standard. Where goods declared as Base Oil (CTH 27101960) were tested for only 14 of 21 parameters under IS 1460:2005, with discrepancies (e.g., flash point exceeding 93°C), and neither test reports nor expert opinion categorically identified them as HSD, the evidence was inconclusive. The burden of proof lies on the Department, and incomplete scientific evidence cannot justify confiscation or penalties. Benefit of doubt granted to appellants due to evidentiary gaps and passage of time. Directed respondents to ensure facilities for testing all specified parameters within six months to avoid future uncertainty. High Court judgment set aside. Appeals allowed. (Para 80, 83, 84 & 88)

with CIVIL APPEAL NO. OF 2025 (@ SPECIAL LEAVE PETITION (CIVIL) NO. 6472 OF 2022) CIVIL APPEAL NO. OF 2025 (@ SPECIAL LEAVE PETITION (CIVIL) NO. OF 2025) (@ Diary No. 32623 OF 2024)

[Arising out of impugned final judgment and order dated 20-01-2022 in TA No.299/2021 passed by the High Court of Gujarat at Ahmedabad]

For Petitioner(s): Mr. Arvind P. Datar, Sr. Adv. Mr. S. Jaikumar, Adv. Mr. Kartik Jindal, Adv. Mr. M. Karthikeyan, Adv. Mr. Anant Gautam, Adv. Mr. Rohan Jain, Adv. Mr. Rajesh Kumar Gautam, AOR

For Respondent(s): Mr. N. Venkataraman, A.S.G. Mr. Gurmeet Singh Makker, AOR Mr. Rupesh Kumar, Adv. Mr. Adit Khorana, Adv. Ms. Aakanksha Kaul, Adv. Mr. Udai Khanna, Adv. Mr. Navanjay Mahapatra, Adv Mr. Gurmeet Singh Makker, AOR

J U D G M E N T

NONGMEIKAPAM KOTISWAR SINGH, J.

Delay condoned in Special Leave Petition arising out of Diary No.32623 of 2024. Leave granted in all the Special Leave Petitions.

2. The issue involved in this batch of appeals is, whether, the imported goods is to be treated as Base Oil as claimed by the appellants or High-Speed Diesel (HSD) as determined by the Customs Authorities, which is contested by the appellants. If the product is treated as HSD, it would be a prohibited item that could not have been imported by a private entity other than a State Trading Enterprise, in which event it would be liable to be confiscated and penalty be imposed on the appellant importers.

3. The Commissioner of Customs, the Adjudicating Authority held vide order dated 03.12.2019 that the said product is not Base Oil, but HSD and accordingly, ordered confiscation of the same apart from levying penalties. On the other hand, the appellate

authority, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) held the same to be Base Oil and not HSD, thus reversing the decision of the Adjudicating Authority. On being challenged before the High Court of Gujarat, by the Customs Authorities, the High Court reversed the decision of the Appellate Tribunal and affirmed the decision of the Adjudicating Authority holding the imported goods to be HSD.

4. In order to appreciate the issues in proper perspective, a brief reference of the relevant facts may be necessary.

Facts in brief

5. The three appellants, M/s Gastrade International, M/s Rajkamal Industrial Pvt Ltd and M/s Divinity Impex imported the goods from UAE by sea per vessel "Al Heera" which was docked at Kandla Port. The importers declared the goods as "Base Oil SN 50" seeking clearance of the same under Chapter Heading 27101960, which is for Base Oil. On the basis of the Intelligence Report, the Directorate of Revenue Intelligence ("DRI"), classifying the said cargo as HSD under Chapter Heading 27101930, which is prohibited from being imported except only by State Trading Enterprises, seized the said cargo. As per Import Policy ITC (HS), 2017, High Speed Diesel (HSD) and Low Diesel Oil (LDO) are covered under the EXIM Code 27101930 and 27101940 and in terms of policy as notified under Notification dated 20.05.2015 issued by the DGFT Department of Commerce, these items could be imported only by the State Trading Enterprises and thus, not by appellants. The samples of the seized goods were sent to Central Excise and Customs Laboratory at Vadodara for testing which returned the report on 11.05.2018 with the finding that the samples drawn from the seized goods had characteristics of High Speed Diesel Oil/Automotive Fuel Oil conforming to IS 1460: 2005 in respect of 8 parameters and that the samples were "other than Base Oil". The appellantimporters contested the said test report and the requested the Customs authorities for retesting the samples at the Central Revenues Control Laboratory (CRCL), New Delhi or Indian Institute of Petroleum, Dehradun. Accordingly, the samples were sent to CRCL.

6. The Central Revenues Control Laboratory to which the samples were again sent also submitted a report dated 03.07.2018 with the finding that the samples conform to the specifications of HSD Oil (Automotive Diesel Fuel) as per IS 1460: 2005 in respect of 10 parameters and each of the samples is "other than Base Oil".

7. Not satisfied with the aforesaid results, one of the appellants, M/s Rajkamal Industrial Pvt. Ltd. approached the High Court of Gujarat by filing a Special Civil Application No. 10882 of 2018 in which the High Court passed an interim order on 30.07.2018 directing the Department to send requisite quantity of samples to the Indian Oil Corporation Ltd. (IOCL), Mumbai which is one of the notified laboratories as per the Department's circular dated 16.11.2017.

8. The samples were accordingly sent to the Central Laboratory, Indian Oil Corporation Limited in Mumbai which submitted the report dated 14.08.2018 stating that the sample had been tested as per Indian Standard 1460: 2005 and the sample met 14 parameters as per the laboratory capability out of prescribed 21 parameters in terms of the specification IS: 1460: 2005.

9. The DRI, thereafter, issued show cause notices to the appellants on 24.04.2019 alleging improper classification. In the said show cause notices, it was stated that the imported goods are classifiable as HSD under CTH 27101930, that the imported goods were liable to be confiscated under Sections 111(d) and (m) of the Customs Act, 1962 (for short, "Act") and that penalties are liable to the imposed under Sections 112(a) and (b)

of the Act and the Directors of the appellant-companies were also liable to be imposed penalties under Sections 112(a) and (b), Section 114AA and the Section 117 of the Act.

The show cause notices also stated that the earlier imports were liable to be classified as Light Diesel Oil under CTH 27101940 and these were also liable to be confiscated under Sections 111(d) and (m) of the Act and penalty be imposed under Sections 112 (a) and (b) and Section 114AA of the Act.

Show cause notice was also issued to the buyer, in respect of the appellant – Gastrade International Pvt. Ltd., of the earlier imported goods stating that the earlier imports were LDO under CTH 27101940 and were liable to be confiscated under Sections 111(d) and (m) of the Act and penalties were liable to be imposed under Section 112(b). Show cause notice was also issued to the exporters of the said goods as to why penalty should not be imposed on them under Sections 112(a) and (b), 114AA and 117 of the Act.

Finding by the Adjudicating Authority

10. After considering the replies furnished by the parties and considering the evidence, both oral and documentary, relied upon, and hearing the parties, the Adjudicating Authority, the Principal Commissioner of Customs, Custom House, Kandla passed the Orders-in-Original No. KND-CUSTM-000-COM-12-2019-20 dated 05.12.2019, KND-CUSTM-000-COM-13-2019-20 dated 05.12.2019, and KND-CUSTM-000-COM-14-2019-20 dated 05.12.2019, rejecting the claim of the appellants and upholding the departmental findings. In the course of the enquiry and hearing conducted by the Adjudicating Authority, one of the experts, namely Dr. Gobind Singh, Manager (Lab), IOCL Central Laboratory, Mumbai was also examined.

11. The Adjudicating Authority concluded that as per the findings of the three independent laboratories of repute, the samples meet the parameters specified under IS 1460:2005 prescribed for High-Speed Diesel, a hydrocarbon oil and the importers could not produce any authentic or authoritative literature about what is Base Oil SN 50 and thus failed to prove that the goods imported were Base Oil falling under Chapter 27101960 of Customs Tariff Act, 1975 (for short, "Tariff Act").

12. The Adjudicating Authority also repelled the contention of the appellants that since IOCL had tested only 14 out of 22 parameters for IS 1460:2005, and thus, all the parameters had not been tested, it cannot be said that the sample is of HSD. It was also held that the appellants could not point out which of these remaining eight parameters will not be satisfied if tested.

13. Accordingly, the Adjudicating Authority held that the goods were liable to confiscation under Sections 111 (d) and (m) of the Act. The Directors of the appellants were held liable for penalty under Sections 112(a) and 114AA of the Act. However, granting permission to the appellants to redeem the confiscated goods for re-export on payment of fine.

14. Being aggrieved by the aforesaid orders in original passed by the Adjudicating Authority, the appellants preferred appeals before the Custom Excise Service Tax Appellate Tribunal (CESTAT).

Finding by the Appellate Authority (CESTAT)

15. According to the CESTAT, as per the statutory definition provided in the Tariff Act which needs to be construed strictly, only such hydrocarbon oil that conforms to the Indian Standard Specification IS1460:2005 can be classified as HSD. As per the said specification, 21/22 parameters have been mentioned and no exception has been

provided to the effect that if any or some of the parameters out of 21/22 parameters are not met, even then the product will be determined as HSD. According to CESTAT, only such product that meets all the 21/22 parameters as specified in IS 1460:2005 can be qualified as HSD. The CESTAT held that in the present case, since eight parameters were not tested, it cannot be said that the product is conforming to IS 1460:2005, and if it is not conforming to IS 1460:2005, it does not fall within the definition of HSD as provided under Supplementary Note of Chapter 27.

The CESTAT also held that the burden is on the Department to establish the classification of goods as HSD, which conforms to IS 1460:2005, and in the absence of testing of all the parameters, it can be only an assumption of the Department that on the basis of 14 parameters, a product can be classified as HSD.

16. The CESTAT also took the view that the test report of IOCL Laboratory is not conclusive. The CESTAT was of the opinion that the expert, Dr. Gobind Singh who was examined had not considered that the flash point is an important parameter for testing the goods and he could not give any firm opinion as regards the parameter of flash point. The CESTAT held that the test conducted by Dr. Gobind Singh of IOCL cannot be considered to be conclusive to determine that the product is HSD. The CESTAT was of the view that in the present case as the flash point tested was above 93°C, the goods cannot be classified as HSD. The CESTAT also held that the Department had with a predetermined mind got the goods tested for HSD, whereas the said goods should have been tested as to whether these are Base Oil or not, and only when the parameters are not met for Base Oil then the Department could have resorted to carrying out the test for classifying the goods either under HSD or any other classification.

17. The CESTAT held that even if the product is not Base oil, since it was not proved by the Department beyond doubt that the impugned goods are HSD, the case of the Department would fail.

18. Accordingly, the CESTAT held that the goods are not classifiable as HSD under CTH 27101930. Consequently, the claim of the appellants for classification of goods as Base Oil under CTH 271019160 was maintained and in view of the submission made by the appellants that irrespective of the decision of the classification, they would seek permission to re-export, the appellants were allowed to re-export the goods and the CESTAT set aside the order of confiscation, imposition of penalty and the redemption fine by the Department vide a common order dated 28.09.2021 passed in the aforesaid Customs Appeal No.10240 of 2020, Customs Appeal No.10291 of 2020 and Customs Appeal No.10298 of 2020.

19. Being aggrieved by the aforesaid decision of the CESTAT, the Department preferred three appeals before the High Court of Gujarat, which were registered as Revenue Tax Appeal No.297 of 2021, Revenue Tax Appeal No. 298 of 2021 and Revenue Tax Appeal No.299 of 2021, which were allowed by a common judgement and order dated 20.01.2022 passed by the High Court, which is the subject matter of challenge in this batch of appeals.

Finding by the High Court

20. Before the High Court, the issue of maintainability of the appeals under Section 130 of the Act was raised, which was decided in favour of the Department. However, the appellants have not pressed this issue before us and as such we make no observation about the decision, and we confine our consideration only on the issue as to whether the High Court was correct in concluding that the imported oil is not Base Oil as claimed by the appellant-importers and is HSD as classified by the Department.

21. The High Court noted that though it would appear that what had been decided by the Tribunal could be termed as a question of fact, and whether the subject goods fall within one category or the other would essentially be a question of fact, yet while deciding the same, if the Tribunal overlooks certain basic principles of law applicable to the case on hand and records findings which could be termed as perverse, then definitely such a decision of the Tribunal would give rise to a question of law and hence maintainable.

The High Court thereafter proceeded to examine the materials on record.

22. Coming to the evidence of Shri Gobind Singh, Manager (Lab), IOCL Central Laboratory, Mumbai, the High Court observed that a plain reading of the statement and cross-examination of Dr. Gobind Singh would indicate that the expert in no uncertain terms had made himself clear that all the 14 tests which were carried out revealed only one thing that the sample was of High-Speed Diesel, and not Base Oil as asserted by the assessee.

The High Court also noted that the expert was honest enough to admit that the IOC laboratory was equipped to conduct only 14 tests and it had no facility or means to conduct the remaining seven tests. The High Court then considered whether the analysis could be said to be complete or conclusive as regards the nature of the sample only if all the 21 tests were undertaken, more particularly when the expert had asserted that all the 14 tests carried out indicated only one thing that the sample analysed was that of High Speed Diesel.

23. The High Court went on to observe that it is not in dispute that the onus of establishing that the sample meets the specification IS1460:2005 lay upon the Customs Authority, and the burden of proof is on the Authority to show that the particular goods or item in question is taxable in the manner claimed by them. According to the High Court, there should be material to enter an appropriate finding in that regard and the material may be either oral or documentary, and it is for the Authority to lay evidence on that behalf even before the Adjudicating Authority.

24. The High Court went on to observe relying on the decisions of this Court in **Collector of Customs, Madras and others Vs. D Bhoormall, AIR 1974 SC 859; A.N. Guha & Co Vs. Collector [1996 (86) ELT 333]; R.V.E Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P.** [Order dated 08.10.2003 in Civil Appeal number 10585 of 1996] that the Department is not required to prove its case with mathematical precision to a demonstrable degree and legal proof is not necessarily a perfect proof.

25. It was observed by the High Court that so long as the Department has been able to establish its case with such a degree of preponderance, the existence of fact could be said to have been proved. The High Court observed that the only ground on which the Tribunal interfered with the findings recorded by the Adjudicating Authority was that the laboratories were not in a position to conduct all 21 tests. According to the High Court, the Tribunal ignored the fact that all the tests carried out in three different laboratories revealed only one thing that the sample showed the characteristics of HSD. The High Court then observed that if the Department was able to lead evidence to this extent, the onus thereafter shifted upon the assessee to establish that these tests cannot be said to be conclusive of the fact that the subject good is HSD. However, no such attempt had been made by the assessee.

26. The High Court further went on to observe that it was not at all convinced with the findings recorded by the Tribunal. The High Court held that the Tribunal could be said to have ignored the material evidence in the form of the three test reports of three different

laboratories, certifying the samples to meet the specification IS1460:2005 and assessee have not been able to show anything based on which the High Court can take the view that if all the prescribed 22 tests are not carried out, the report would remain incomplete and would not be admissible in evidence or would not be conclusive of the nature of the sample.

27. The High Court observed that if these 14 tests indicate the sample to be one of the HSD, this evidence could not have been discarded, ignored or overlooked only on the ground that seven other tests could not be undertaken by the laboratories because of lack of adequate facility to conduct these seven tests. According to the High Court, to say so would require the Department to prove its case with mathematical accuracy and beyond reasonable doubt. Accordingly, the High Court allowed the appeals preferred by the Department and set aside the order of the CESTAT.

Consideration by this Court

28. From the above three decisions of the Adjudicating Authority, the Appellate Authority (CESTAT), and the High Court, it is quite evident that their decisions primarily hinged upon the reports of the three laboratories, namely, Central Excise and Customs Laboratory at Vadodara, Central Revenues Control Laboratory (CRCL), New Delhi and Central Laboratory, Indian Oil Corporation Limited, Mumbai where the samples of the questioned goods were sent for testing as to whether these conformed to the Indian Standards Specification of Bureau of Indian Standards IS: 1460:2005. All three fora also referred to the expert evidence of Dr Gobind Singh.

29. Considering the different conclusions arrived at by the three fora on the same set of the results of the tests conducted by three different laboratories, it would be necessary to examine these tests to understand how these fora had arrived at their conclusions.

30. Since the reference point of these tests is Indian Standard Specification of the Bureau of Indian Standards, IS1460:2005, which prescribes the specifications for HSD under the Tariff Act, it would be necessary to refer to these parameters before we proceed to examine the implications of the results of the three tests and arrive at the correct conclusion.

31. Section 2 of the Tariff Act provides the rates at which duties of customs shall be levied under the Customs Act as specified in the First and Second Schedules to the Tariff Act.

Chapter 27 of the First Schedule to the Tariff Act deals with the rate of duties leviable in respect of mineral fuels, mineral oils, and products of their distillation; bituminous substances; mineral waxes.

Supplementary Note to Chapter 27 defines various kinds of oils specifying the attributes to these, including that of HSD. Accordingly, relevant portions of this Supplementary Note are reproduced hereunder for easy reference.

“SUPPLEMENTARY NOTES:

In this Chapter the following expressions have the meanings hereby assigned to them:

a) Motor Spirit means any hydrocarbon oil (excluding crude mineral oil) which has its flashpoint below 250C and which either by itself or in admixture with any other substance, is suitable for use as fuel in spark ignition engines. “Special boiling point spirits (subheadings 2710 12 11, 2710 12 12 and 2710 12 13) means light oils, as defined in Chapter Note 4, not containing any anti-knock preparations, and with a difference of not more than 600C between the temperature at which 5% and 90% by volume (including losses) distil;

- b) "Natural gasoline liquid (NGL)" is a low-boiling liquid petroleum product extracted from Natural Gas;
- c) "Superior kerosine Oil (SKO)" means any hydrocarbon oil conforming to the Indian Standards Specification of Bureau of Indian Standards IS:1459-1974 (Reaffirmed 1996);
- d) "Aviation turbine fuel (ATF)" means any hydrocarbon oil conforming to the Indian Standards Specification of Bureau of Indian Standards IS:1571:1992:2000;
- e) "High-speed diesel (HSD)" means any hydrocarbon oil conforming to the Indian Standards Specification of Bureau of Indian Standards IS: 1460:2005;
- f) "Light diesel oil (LDO)" means any hydrocarbon oil conforming to the Indian Standards Specification of Bureau of Indian Standards IS: 15770:2008;
- g) "Fuel oil means any hydrocarbon oils conforming to the Indian Standards Specification of Bureau of Indian Standards IS:1593:1982 (Reaffirmed in the year 1997);
- h) "Lubricating oil" means any oil, which is ordinarily used, for lubrication, excluding any hydrocarbon oil, which has its flash point below 93.30 Centigrade;
- i) "Jute batching oil" and "textile oil" are hydrocarbon oils which have their flash point at or above 93.30C, and is ordinarily used for the batching of jute or other textile fibres;
- j) The expression "petroleum jelly crude" (subheading 2712 10 10) by the ASTM D 1500 method
- k) For the purposes of these additional notes, the tests prescribed have the meaning hereby assigned to them
- 1) "Flash Point" shall be determined in accordance with the test prescribed in this behalf in the rules made under the Petroleum Act, 1934 (30 of 1934);
- 2)
- 5)

32. Thus, High Speed Diesel (HSD) has been defined as any hydrocarbon oil conforming to the Indian Standards Specification of Bureau of Indian Standards IS: 1460:2005.

33. As regards the Indian Standards Specification of Bureau of Indian Standards IS1460:2005 relating to High Speed Diesel, the specifications provided are as follows:

**EURO IV/BHARAT STAGE IV EMISSION NORMS COMPLAINT – SPECIFICATION
FOR AUTOMOTIVE DIESEL FUEL**

<i>Sl No.</i>	<i>Characteristics</i>	<i>Requirements</i>	<i>Test Method [P:] of IS 1448/ISO/ASTM</i>
(1)	(2)	(3)	(4)
i)	Acidity, inorganic	Nil	[P : 2]
ii)	Acidity, total, mg of KOH/g, Max	To Report	[P : 2]
iii)	Ash, percent by mass, Max	0.01	[P : 4]/ISO 6245

iv)	Carbon residue (Ramsbottom) on 10 percent residue ¹⁾ , percent by mass, Max	0.30	[P : 8]/ISO 10370
v)	Cetane number, Min	51 ²⁾	[P : 9]/ISO 5165
vi)	Cetane index, Min	46 ²⁾	D 4737/ISO 4264
vii)	Pour point ³⁾ , Max:		[P : 10]/D 5949 or D 5950 or D 5985
	a) Winter	3° C	
	b) Summer	15 C	
viii)	Copper strip corrosion for 3 h at 50°C	Not worse than No. 1	[P : 15]/ISO 2160
ix)	Distillation, percent v/v, recovered at 360°C, Min	95	[P : 18]/ISO 3405
x)	Flash point* :		
	a) Abel, °C, Min	35	[P : 20]
	b) Pensky Martens closed cup ⁴⁾ , °C, Min	66	[P : 21]
xi)	Kinematic viscosity, cSt, at 40°C	2.0 to 4.5	[P : 25]/ISO 3104
xii)	Sediment, percent by mass, Max	-	[P : 30]
xiii)	Total contamination, mg/kg, Max	24	EN 12662
xiv)	Density at 15°C ⁵⁾ , kg/m ³	820-845	[P : 16] or [P : 32] ⁶⁾ /D 4052/ISO 3675 or ISO 12185
xv)	Total sulphur ⁷⁾ , mg/kg, Max	50	ISO 20846 or ISO 20847 or ISO 20884/ [P : 83]/D 5453/ D 2622/D 4294/[P : 34] ⁸⁾
xvi)	Water content, mg/kg,	200	ISO 12937
xvii)	Cold Filter Plugging Point (CFPP) ³⁾ , Max:		[P : 110]/D 6371
	a) Winter	6°C	
	b) Summer	18°C	

xviii)	Oxidation stability ⁹⁾ , g/m ³ , Max	25	ISO 12205 or ASTM D 2274 ⁹⁾
xix)	Polycyclic Aromatic Hydrocarbon (PAH), percent by mass, Max	11	IP 391 or EN 12916
xx)	Lubricity corrected wear scar diameter (wsd 1.4) at 60°C, microns, Max	460	ISO 12156- 1/Cor 1
xxi)	Oxygen content ¹⁰⁾ , percent by mass, Max	0.6	Annex B

1) This limit is applicable prior to addition of ignition improvers, if used. In case a value exceeding the limit is obtained on finished fuels in the market, ASTM D 4046/ISO 13759 shall be used to establish the presence of nitrate containing compound. In such case the present limit for carbon residue cannot be applied. However, the use of ignition improver does not exempt the manufacturer from meeting this requirement prior to the addition of additives.

2) For Fuel processed from Assam crude, Cetane number and Cetane index is relaxed by 3 units.

3) Winter shall be the period from November to February in central and northern plains of India (both months inclusive) and rest of the months of the year shall be called as summer.

4) Applicable for Naval applications and fishing vessels requiring High Flash Automotive Diesel Fuel.

5) For fuel processed from Assam crude, the density range is relaxed to 820-855.

6) In case of dispute, IS 1448 [P : 32] shall be the referee test method.

7) For Automotive Diesel Fuel supplied to Indian Navy, the limit of sulphur shall be in agreement between the buyer and the supplier.

8) In case of dispute, IS 1448 [P : 34] shall be the referee test method.

9) This test shall be carried out only at the refinery or manufacturer's end. In case of dispute, ASTM D 2274 shall be the referee method.

10) Shall be applicable only for Automotive Diesel Fuel blended with 5 percent (v/v) Bio-diesel conforming to IS 15607 and the limit shall proportionately vary as and when the different blending percent of Bio-diesel is permitted.

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34. It may be relevant herein to mention that flash point has been defined under Section 2 (c) of the Petroleum Act, 1934 as follows:

“2 (c) ‘Flash-point’ of any petroleum means the lowest temperature at which it yields a vapour which will give a momentary flash when ignited, determined in accordance with the provisions of Chapter II and the rules made thereunder;”

35. We will now examine the results of the three tests conducted by the three laboratories, which are reproduced as follows:-

1. Central Excise and Customs Laboratory at Vadodara.

Report dated 11.05.2018.

Lab No. RCL/AH/DRI/216/07.05.2018

TANK NO. 1

Report

The sample is in the form of light pale yellow colored liquid. It is composed of mineral hydrocarbon oil having following characteristics:-

1. *Flash point (PMCC) = Above 66°*
2. *ASH Content = Nil*
3. *Acidity= NIL*
4. *Water Content= NIL*
5. *Density at 15° = 0,8301 g/ml*
6. *Distillation recovery*
 - a. *At 350° = more than 85%*
 - b. *At 360° = more than 95%*
7. *Kinetic viscosity at 40° = 3.80 CST*
8. *Sediment = N1L*

In view of the above analytical parameter the sample has characteristics of high speed diesel oil/Automotive Fuel Oil confirming to IS: 1460:2005 & amended thereafter in terms of parameters 1 to 8 mentioned above.

It is other than base oil

Sealed remnant returned

Dispatch No. 177 Sd/-

Date: 11.05.2018 .05.2018

11

Pradeep Maroo

Chemical Examiner Grade-II

Seen

Deepali

02/07/2018

2. Central Revenues Control Laboratory (CRCL), New Delhi.

Report dated 03.07.2018.

Government of India

Ministry of Finance, Department of Revenue Central Board of Indirect Taxes & Customs Central Revenues Control Laboratory Hillside Road, Pusa, New Delhi-110012 Tel.: 011-21520123/25843494, Fax: 011-25843495

Email: dir.crcl-cbec@nic.in Website: <http://crcl.gov.in>

F.No.-27-Cus/C-05 to 14/2018-19 Dated: 03.07.2018

To

The Additional Director,

Directorate of Revenue Intelligence,

Ahmedabad Zonal Unit, No. 15, Magnet Corporate Park, 100 ft Thaltej-Hebatpur Road.

Near Sola Flyover, Thaltej,

Ahmedabad-380054

Sub. : Testing of samples declared as Base Oil SN 50- reg.

Please refer to your letter F. No. DRIA/CI/ENQI/2018 dated 06.06.2018 on the subject cited above forwarding therewith 10 samples described as Base Oil SN 50 pertaining to B/E No. 6252179, 6251273, 6251276, 6251277, 6251258, 6251267, 6251268, 6252184, 6251270 and 6251278 all dated 04.05.2018 and TM No. 1A to 10A dated 06.06.2018 for retesting.

The samples u/r have been registered here under Lab Nos. CLR-05 to CLR 14 dated 14.06.2018 respectively.

The samples have been analyzed and Test reports are as under:-

Report:-

Each of the ten samples is in the form of pale yellow colored liquid. Each is composed of mineral hydrocarbon oil, having more than 70% mineral hydrocarbon oil and possesses following characteristics:- **Test Results of the samples**

Lab No.		CLR-05	CLR-06	CLR-07	CLR-08	CLR-09	CLR-10	CLR-11	CLR-12	CLR-13	CLR-14
TM Mo.		1A	2A	3A	4A	5A	6A	7A	8A	9A	10A
Characteristic	Limit as per IS 1460:2005 and amended										
Acidity, Inorganic	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil
Acidity, total mg of KOH/g	To report	0.05	0.05	0.05	0.05	0.05	0.05	0.05	0.05	0.05	0.05
Ash percent by mass	0.01 (max.)	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil
Carbon residue (Ramm bottom) on 10% residue percent by mass	0.30 (mat.)	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01
Density at 15°C	0.8200 0.8450	.8287	.8316	.8310	.8288	.8284	.8286	.8286	.8282	.8284	.8281
Flash Point (PMCC)	66° (min.)	113°C	115°C	93°C	88°C	98°C	100°C	95°C	78°C	106°C	111°C
Kinematic 40°C, cSt	2.0 to 4.5	3.7	4.4	4.4	4.4	4.0	3.9	3.5	4.1	4.0	4.0
Kinematic Viscosity 37.8°C	-	4.3	4.9	4.8	4.7	4.7	4.3	4.3	4.3	4.3	4.3
Distillation range, °C	95	238-356	234-358	234-352	238-354	240-356	238-344	240-354	240-350	240-342	238-325
Percent v/v Recovered at 360°C		356°C	358°C	352°C	354°C	356°C	344°C	354°C	350°C	342°C	325°C
95% volume recovered at											
Pour Point, Max	3°C	8°C	8°C	8°C	8°C	8°C	8°C	8°C	8°C	8°C	8°C
a) Winter	15°C										
b) Summer											
Cetane Index	46 (min.)	65.7	66.0	65.6	66.2	66.0	66.5	66.6	66.6	67.0	67.7
Water content, percent v/v mg/kg	200 (max.)	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil

On the basis of above analytical parameters, each of the ten samples conforms to the specifications of High Speed Diesel Oil/

(Automotive Diesel Fuel as per IS 1460:2005 and further amended).

Each is other than Base Oil.

Sealed remnants are returned separately.

Sd/- 03.07:2018

(K. C. Agrawal)

Joint Director

*Copy to: The Chemical Examiner Gr-I (I/e) Central Excise & Customs Laboratory,
Vadodara.*

3. Central Laboratory, Indian Oil Corporation Limited, Mumbai.

Report dated 14.08.2018

Indian Oil Corporation Limited

Central Laboratory

"K" Oil H Installation. Sewri (East), Mumbai-400 015

Telefax 0222416 3062 (D). 022 2292 4761

Marketing Division

QUALITY CONTROL TEST REPORT FOR HIGH-SPEED DIESEL

SPECIFICATION NO.	IS:1460-2005 AMENDED NO.2 MARCH 2010
Test Required	High Speed Diesel Analysis
Test Report No. & Date	LSE/3791/2018 dated 14/08/2013
Name of Customer	Directorate 01 Revenue Intelligence, Ahmedabad
Source of Sample	7S (Composite), Vessel MT. AL HEERA
Sample Drawn By	Jointly by Representative of DRI, Ahmedabad

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

REMARKS:

1. FNA: Stands for "Facility Not Available"

2. Flash point test was first done by Abel apparatus but, since it was more than 66°C, it was done by PMCC.

3. As stated in Point no. 6 of your letter No. DR1/AZU/CI/ENQ-I2(INT-02/2018)/2018 dated 08/08/2018 stating as per the order of the Hon'ble High Court of Gujarat. this sample has been tested as per Indian Standard 15: 1460:2005 as amended & under this specification there are total XXI tests covered out of which we have tested only XIV parameters as per our lab capability.

4. This sample meet the specification for only XIV parameters tested at our lab as per the specification IS:1460:2005 amended.

NOTE

1. *This test report refers only to the particular sample submitted for testing. Results relate to sample as received.*

2. *This test report shall not be reproduced except in full, without the written approval of the laboratory.*

3. *Form No: QF/OPN/07*

4. *The test results reported are valid at the time of & under stated conditions of the test.*

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

Tested by

Sd/-

Dr. Gobind Singh Manager (Lab).

Indian Oil Corporation Limited.

14.08.2018

Reviewed by

Sd/-

14.08.2018

36. Apart from the aforesaid three test results, all three forums had also referred to the evidence of the expert, namely, Dr. Gobind Singh, Manager (Lab), IOCL Central Laboratory, Mumbai, more specifically to his cross-examination, while arriving at the respective conclusions. Hence, it may be apposite to reproduce the same as below:

(i)The cross-examination of Shri Singh at the instance of M/s. Rajkamal Industrial Pvt. Ltd., is as under:

“(Before the Principal Commissioner of Customs, Custom House, Kandla)

Cross Examination of Shri Gobind Singh, Manager (Lab), IOCL, Central Laboratory, Mumbai in the matter of SCN F. No.DRI/AZU/CI/INQ-12(INT-2/2018 dated 22.04.2019 issued to M/s. Rajkamal Industrial Pvt Ltd & Others by Shri Hardik Modh, Advocate.

Q: What is your name?

A: Dr. Gobind Singh.

Q: Where have you been working and for how long?

A: I have been working in IOCL at Sewree at Mumabi since 2012.

Q: How many samples have you tested in respect of petroleum products?

A: I have tested large number of samples running into hundreds of samples.

Q: Are you aware of letter dated 04.08.2018 written by the Assistant Director of DRI whereby it was requested to Mr. Vivek W. Sawant, DGM, IOCL to test the samples as requested under test memo in accordance with the parameters prescribed under IS 1460:2005 for “High Speed Diesel”

and to categorize the identity of the goods. Had you tested these good only to ascertain whether the parameters prescribed under Indian Standard IS 1460:2005 for High Speed Diesel?

A: Yes.

Q: As per the letter dated 04.08.2018, you were requested to verify whether the samples were HSD as per IS 1460:2005. Have you followed these instructions?

A: Yes.

Q: Have you signed the test reports annexed with "Relied upon Documents" as Sr. No.25 to the Show Cause Notice dated 22.04.2019?

A: Yes.

Q: What does it mean 'reviewed by'?

A: The samples were tested by me and checked, supervised and signed by my senior at the lab.

Q: Table I of IS 1460:2005 provides total 22 parameters are to be tested for ascertaining whether the sample meets with the criteria of HSD?

A: The Sample meets with the specification IS 1460:2005 for the parameters tested at our laboratory which are 14 parameters tested as per our lab capabilities.

Q: Does it mean that the other 8 parameters are not important for ascertaining or deciding whether the sample meets with the criteria of HSD?

A: Already provided in the report that in the lab the samples were tested as per IS 1406:2005 and there is facility available only for testing of 14 parameters and for the remaining 8 parameters, the facility is not available for which I can't comment.

Q: Do you know the function/characteristics of the 8 parameters provided under IS 1406:2005 that have not been tested?

A: As the 8 parameters have not been tested, I can't comment in respect of these parameters.

Q: On perusal of report, have you concluded that it meets with the criteria of high speed diesel of IS 1460:2005?

A: Again, it is submitted in the report that the samples tested for 14 parameters as per IS 1406:2005, at the lab which itself is for high speed diesel?

Q: In respect of Flash Point, two methods are prescribed, Abel as well as PMCC. Remark No.2 of test report provides that flash point was tested by Abel apparatus method but since it was more than 66°C, sample was tested by PMCC. In which situation, sample of HSD is required to be tested at Abel method and PMCC method?

A: If the temperature is above 66°C then PMCC is required and if the temperature is below 66°C than it is required to do with Able method.

Q: Do you think so one of the ingredients for considering HSD is flashpoint?

A: Can't comment on ingredients. The minimum temperature for Flash Point 35°C as prescribed in standard. We have submitted the report. Q: What is the maximum and minimum flashpoint for considering the sample as HSD?

A: Only the minimum limit is talked about that is 35°C and there is no maximum limit prescribed in the standard.

Q: If case, the Flash Point exceeds above 100°C, 150°C, 200°C etc., then does it still pertains to HSD standard? A: Can't comment as above 35°C whatever the Flash Point is, it does not matter.

Q: Point No.1 of supplementary note of Chapter 27 of Customs Tariff Act provides that "Jute Batching Oil", "Textile Oil" are Hydrocarbon Oils, which have their flash points on and above 93°C. In case flash point exceeds 93°C, what you call it?

A: Can't comment. As flashpoint isn't the only parameter. We have tested the samples that were submitted to us as per IS 1460:2005.

Q: IOCL supplies HSD to various parties. Have you ever come across any situation in which you have found the Flash Point of all these test reports above 93°C and considered as a HSD?

A: Flash Point is not the only parameter which is used to measuring the sample as per IS 1460:2005.

Q: Can you Say it is an automotive diesel?

A: Already written in the lab report and we have tested the samples as per the parameters as per IS

1460:2005."

(ii)The cross-examination of Shri Singh at the instance of M/s. Gastrade International is as under:

“(Before the Principal Commissioner of Customs, Custom House, Kandla)

Cross Examination of Shri Gobind Singh, Manager (Lab), IOCL, Central Laboratory, Mumbai in the matter of SCN F. No. DRI/AZU/CI/ENQ-11(INT-2/2018 dated 24.04.2019 issued to M/s. Gastrade International & Others by Shri Hardik Modh, Advocate.

Q: What is your name·?

A: Dr. Gobind Singh.

Q: Where have you been working and for how long?

A: I have been working in IOCL at Sewree at Mumbai since 2012.

Q: How many samples have you tested in respect of petroleum products?

A: I have tested large number of samples running into hundreds of samples.

Q; Are you aware of letter dated 04.08.2018 written by the Assistant Director of DRI whereby it was requested to Mr Vivek W. Sawant, DGM, IOCL to test the samples as requested under test memo in accordance with the parameters prescribed under IS 1460:2005 for "High

Speed Diesel" and to categorize the identity of the goods. Had you tested these good only to ascertain whether the parameters prescribed under Indian Standard IS 1460:2005 for High Speed Diesel? A. Yes.

Q: As per the letter dated 04.08.2018, you were requested to verify whether the samples were HSD as per IS : 1460:2005. Have you followed these instructions?

A: Yes.

Q: Have you signed the test reports annexed with 'Relied upon Documents at Sr. No.14 to the Show Cause Notice dated 24.04 2019? A. Yes.

Q: What does it mean 'reviewed by'?

A: The samples were tested by me and checked, supervised and signed by my senior at the lab.

Q: Table I of IS 1480:2005 provides total 22 parameters are to be tested for ascertaining whether the sample meets with the criteria of HSD?

A: The Sample meets with the specification IS 1460:2005 for the parameters tested at our laboratory which are 14 parameters tested as per our lab capabilities.

Q: Does it mean that the other a parameters are not important for ascertaining or deciding whether the sample meets with the criteria of HSD?

A: Already provided In the report that in the lab the samples were tested as per IS 1406:2005 and there is facility available only for testing of 14 parameters and for the remaining 8 parameters, the facility is not available for which I can't comment.

Q: Do you know the function/characteristics of the 8 parameters provided under IS 1406:2005 that have not been tested?

A: As the 8 parameters have not been tested, I can't comment in respect of these Parameters.

Q: On perusal of report, have you concluded that it meets with the criteria of high speed diesel Of IS 1460:2005?

A: Again, it is submitted in the report that the samples tested for 14 parameters as per IS 1406;2005, at the lab which itself is for high speed diesel.

Q: In respect of Flash Point, two methods are prescribed, Abel as well as PMCC. Remark No. 2 of test report provides that flash point was tested by Abel apparatus method but since it was more than 66°C, sample was tested by PMCC. In which situation, sample of HSD is required to be tested at Abel method and PMCC method?

A: If the temperature is above 66°C then PMCC is required and If the temperature is below 66°C than it is required to do with Able method.

Q: Do you think so one of the Ingredients for considering HSD is flashpoint?

A: Can't comment on ingredients. The minimum temperature for Flash Point 35°C as prescribed in standard. We have submitted the report. Q: What is the maximum and minimum flashpoint for considering the sample as HSD?

A: Only the minimum limit Is talked about that is 35°C and there is no maximum limit prescribed in the standard.

Q. If case, the Flash Point exceeds above 100 •c, 150 •c, 200 •c etc., then does it still pertains 10 HSD standard?

A: Can't comment as above 35°C whatever the Flash Point is, it does not matter.

Q: Point No. 1 of supplementary note of Chapter 27 of Customs Tariff Act provides that "Jute Batching Oil, "Textile Oil" are Hydrocarbon oils, which have their flash points on and above 93°C. In case flash point exceeds 93°C, what you call It?

A: Can't comment. As flashpoint isn't the only parameter. We have tested the samples that were submitted to us as per IS 1460:2005.

Q: IOCL supplies HSD to various parties. Have you ever come across any situation in which you have found the Flash Point of all these test reports above 93°C and considered as a HSD?

A: Flash Point is not the only parameter which is used to measuring the sample as per IS 1460:2005.

Q: Can you say it is an automotive diesel? A: Already written in the lab report and we have tested the samples as per the parameters as per IS 1460:2005. (iii)The cross-examination of Shri Singh at the instance of Divinity Impex is as under:

Cross-examination of Shri Gobind Singh, Manager (Lab), IOCL, Central Laboratory, Mumbai in the matter of SCN F.No.DRI/AXU/CI/ENQ-13(INT-02/2018)/2018 dated 24.04.2019 issued to M/s. Divinity Impex & Others by Shri Kumar Pal Mehta, Practising Company Secretary and Authorized representative of M/s Divinity Impex.

Q: What is your name?

A: Shri (Dr.) Gobind Singh.

Q: What is your qualification?

A: P.hd Chemistry.

Q: How many years of experience do you have? A: 7 years.

Q: How many samples have you tested till now? A: Whatever the samples that are submitted to me, I have tested them.

Q: What are the exact numbers of samples you have tested?

A: whatever the number of samples that are submitted to me by DRI, I have tested them.

Q: Have you personally examined the samples?

A: Yes.

Q: When did you receive the samples from DRI?

A: 09.08.2018.

Q: Have you yourself prepared the report?

A: There is a procedure for that. The samples were received by concerned authority, after that I have tested and prepared the report and my senior has reviewed the report thereafter.

Q: After how many days of the seizure of the sample by the DRI, the sample was received by you?

Adjudicating Authority intervened and said that this is a matter of record and it is a sheer wastage of time of Adjudicating Authority and the person whose cross examination is being done.

Q: What is the standard specification for testing the samples of HSD?

A: IS 1460:2005.

Q: How many parameters were tested for the samples?

A: A total of 14 parameters were tested as prescribed in the standard as per the Lab capabilities.

Q: Did certain parameters were not tested due to the testing facility of other parameters not being available at the lab?

A: Yes, as the lab is a marketing lab and it is not a refining lab.

Q: Have you tested the sample as per IS 1460:2005?

A: This sample has been tested as per the standard IS 1460:2005 and under this specification there are total 22 tests covered out of which we have tested only 14 parameters as per our Lab capability."

(emphasis added)

37. Since the findings and conclusions reached by the Adjudicating Authority and Appellate Tribunal merged with the High Court's decision, we will focus our attention on the High Court's analysis and conclusion.

38. The conclusion of the High Court that the questioned imported good is HSD was based on the following premise:

(i) Though it is the settled position of law that the burden of showing the correct classification lies on the Revenue, it would suffice if the Revenue is able to establish its case with such a degree of preponderance that the existence of a fact could be said to have been proved, and it is not necessary to establish on a part of the Revenue to prove the fact with mathematical precision.

(ii) Once the Revenue has been able to prove the classification on the basis of preponderance of probabilities, the burden would then shift to the assessee to prove its claim.

(iii) In the present case, the High Court was satisfied that in respect of the sample, in the third test since 14 out of 21 parameters laid down under the Indian Standards Specification of Bureau of Indian Standards IS1460:2005 relating to HSD were satisfied the sample would be of High Speed Diesel and not Base Oil.

(iv) Though the High Court was conscious of the fact that all the tests in respect of the 21 parameters laid down under IS1460:2005 relating to High Speed Diesel were not conducted but only in respect of the 14 parameters in the third test, and since the IOCL laboratory was equipped to conduct only 14 tests as it had no facility to conduct remaining seven tests, by applying the principle of proof on preponderance of probability, the High Court took the view that the Revenue had been able to discharge its burden of the fact that the imported goods was High Speed Diesel and not Base Oil.

(v) In holding so, the High Court was impressed by the evidence of the expert Dr. Gobind Singh of the IOCL laboratory who had conducted the test and the High Court was of the view that such expert evidence could not have been ignored.

(vi) The High Court took the view that the Tribunal had ignored the fact that all the tests carried out in three different laboratories reveal only one thing that the sample showed the characteristics of HSD.

(vii) The High Court also held that the assessee has not been able to show anything on the basis of which it could be said that if all the prescribed 21/22 tests are not carried out, the report would remain incomplete and would not be admissible in evidence or would not be conclusive of the nature of the sample.

(viii) The High Court also took the view that since the 14 tests indicate the sample to be one of High Speed Diesel, merely on the ground that 7 other tests could not be undertaken by the laboratories because of lack of adequate facility to conduct these tests, such an evidence could not have been ignored in view of the legal position that the Revenue need not prove its case with mathematical accuracy and beyond reasonable doubt.

39. There cannot be any dispute to the proposition of law as noted by the High Court that the burden of proof as regards the classification of any goods of importation is upon the Revenue/Customs authority and the standard of proof in proceedings under the Tariff Act is not “beyond reasonable doubt”. However, whether “preponderance of probability” can be the appropriate test for classification under the Customs Act would be required to be examined in the light of the “General Rules for the interpretation of this Schedule” as provided in the First Schedule – Import Tariff in Part 2 of the Tariff Act (hereinafter referred to as the “Rules”)

40. The aforesaid Rules provide the principles on the basis of which the goods in the First Schedule to the Tariff Act are to be classified, which had escaped the attention of all the three forums below and each forum had adopted its own methodology to determine the proper classification of the goods/substance in issue as discussed above dehors the aforesaid rules for interpretation.

41. Rule 1 of the aforesaid Rules lays down that the classification shall be determined on the basis of the terms of the headings and relative Section or Chapter Notes.

Rule 2 is to be invoked when it relates to an incomplete or unfinished article or a mixture of substances, with which we are not concerned.

Rule 3 is attracted when for certain reasons, the goods are prima facie classifiable under two or more headings. This situation also does not arise in the present case.

Rule 4 further provides that goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are “most akin”.

For better appreciation, relevant portions of the aforesaid Rules are reproduced herein below.

General Rules for the interpretation of this Schedule

Classification of goods in this Schedule shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 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 effected as follows:

(a) The heading which provides the most specific description shall be preferred providing a more general description. However, when two or more headings each to headings refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items 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.(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

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

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold

therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provisions does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub headings and any related sub headings Notes and, mutatis mutandis, to the above rules, on the understanding that only sub headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

xxxxxxxxxx”

(emphasis added)

42. The aforesaid Rule 4 abundantly makes it clear that goods which cannot be classified in accordance with the preceding rules shall be classified under the heading appropriate to the goods to which they are “most akin.” There may be situations where, because of scientific advancements, innovations and discoveries, there may be new imported products that may not exactly fit the specifications mentioned under the Chapters, Headings, or Notes under the Tariff Act. In such events, if the attributes of these articles show close resemblance, thus, “most akin” to those articles/goods which are already specified in the First Schedule to the Tariff Act, these new products will be classified accordingly with which these imported goods are “most akin” or bear closest resemblance or similarity.

43. In the present case as discussed above, based on the three laboratory tests and evidence of the expert opinion, the High Court had concluded that the Customs Authority had been able to prove that the imported product is HSD by applying the test of preponderance of probability. The High Court had not referred to the aforesaid Rules in arriving at its conclusion by invoking the “most akin” test as contemplated under Rule 4.

44. Before we proceed further, it would be apposite to critically examine the aforesaid test reports and the evidence of the expert.

45. A careful perusal of the first report furnished by the Central Excise and Custom Laboratory at Vadodara on 11.05.2018 would show that the samples were tested in respect of only 8 parameters out of 21. Even in respect of the said 8 parameters, as regards the flash point, for which the specification is 66 (minimum) as per Pensky Martens Closed Cup (PMCC) test, the result mentions it to be above 66°C. Therefore, in respect of flash point it cannot be said that the sample conforms to this specification.

The test report mentions that in view of the analytical parameter, “*the sample has characteristics of High Speed Diesel/Automotive Fuel Oil*” conforming to IS1460:2005 and that it is not Base Oil. However, the said report does not specifically give the opinion that the sample is that of HSD or can be treated as that of HSD. The report merely says that the sample has characteristics of HSD Oil. There is a sea of difference when the opinion says that a sample *has characteristics of* High Speed Diesel in contradistinction to the other possible opinion that the sample *is or can be considered to be* High Speed Diesel Oil. If a questioned article bears only certain characteristics of a specified article, can the questioned article be treated to be or equated with the specified article? We are afraid, the answer has to be in the negative, unless the opinion clearly states that because of the

salient features in the questioned article (samples), the questioned article and the specified article (HSD in the present case) are substantially similar so as to identify the questioned article with the specified article.

46. The first report of the Central Excise and Custom Laboratory at Vadodara, however, neither says that because of the characteristics ascertained, the tested sample can be treated as that of HSD. In other words, no clear opinion has been given in the first test result by the expert that the samples are indeed that of HSD or can be treated to be that of HSD.

47. Therefore, in our opinion, the first test based on examination of 8 parameters against 21/22 prescribed cannot be considered to be a definitive opinion to take the view that the sample is indeed that of HSD. It would be speculative or assumptive to say on the basis of the aforesaid opinion that the sample is that of HSD.

48. Coming to the second test report furnished by the Central Revenues Control Laboratory, CRCL, New Delhi on 03.07.2018, the said report indicates that the sample was tested in respect of 12 out of 21/22 prescribed parameters and we find that of the aforesaid 12 parameters, at least on 2 parameters, the sample does not appear to fulfil the requirements of IS 1460:2005.

49. As per IS 1460:2005, the flash point is 66° C (minimum), whereas the test result in respect of the said sample is shown as 113°C which is far above the prescribed minimum specification.

Further, in respect of the Distillation Range of which the IS 1460:2005 has prescribed as 85 (minimum) at 350°C and 95 (minimum) at 370° C, the result of the test of the samples shows it to be 238 at 356° C, 234 at 358°C, 234 at 352°C, 238 at 354°C, 240 at 356°C, 238 at 344°C, 240 at 354°C, 240 at 350°C, 240 at 342°C and 238 at 325°C. These figures reflected in the test result are far above the prescribed figure of 85 (minimum) and 95 (minimum) as per IS 1460:2005.

Under the circumstances, though the second test was conducted in respect of 12 out of 21 parameters as per IS 1460:2005, in respect of 2 parameters, of flash point and distillation range, the samples did not match the IS 1460:2005 specifications. Thus, it can be said that the samples conform to only 10 parameters. If that is so, can it be said that the samples are of High Speed Diesel? We doubt so.

50. It has been noticed as in the case of the opinion given in the first test report, the second report also merely mentions that each of the ten samples conforms (though not so in respect of two parameters as mentioned above) to the specifications of High Speed Diesel/Automotive Diesel Fuel as per IS 1460:2005. The second test report does not specifically state that because of the characteristics ascertained, the samples can be treated as that of HSD. The second report also avoids giving any such categorical finding or opinion that the samples are of HSD except for stating that these samples conform to the IS specification (though only in respect of 10 out of 21 specifications).

51. Coming to the third test report prepared by the Indian Oil Corporation Limited dated 14.08.2018 upon which much reliance has been placed by the High Court, similar inconclusive opinion has been given.

Interestingly, we have also noted that in respect of a parameter namely, flashpoint, the third report mentions that the flash point of the sample is 112° C which is far above the minimum flashpoint mentioned under the IS specification which is 66°C. It may be noted that in the first report, the flashpoint of the sample has been shown as above 66°C, which

itself is quite vague unlike in the second and third reports, which mention very high flash points. Therefore, it cannot be said that as far as the parameter of flashpoint is concerned, the samples truly conform to the Indian Standard Bureau of Specification IS 1460:2005.

What troubles us is whether on the basis of tests conducted only in respect of 14 out of 21 parameters in the third test, can it be said that the samples are that of HSD?

52. It is noteworthy that as in the case of earlier two laboratory test reports, the third report prepared by the Central Laboratory of Indian Oil Corporation Limited also does not give a clear and categorical opinion that the samples tested indeed are of HSD.

In the REMARKS in the third report, it is mentioned under paragraph 4 that, “This sample meet the specification for only XIV parameters tested at our lab as per specification IS:1460:2005 a mended”.

No other remark or observation or opinion is given to the effect that in view of the conformity to 14 out of 21 parameters, the sample qualifies to be treated as High Speed Diesel.

53. It was left to the Adjudicating Authority/ High Court to draw the inference that the samples are of HSD in absence of such opinion by the experts.

54. One noticeable aspect in the present case is that the Adjudicating Authority/Tribunal/High Court had been called upon to decide this issue, when there are clearly laid down scientific criteria to determine whether the oil in issue is HSD or not. The fact to be proved herein is not an incident, situation, phenomenon or happening that may require a bundle of evidence to prove its existence based on the standard of preponderance of probability. The issue involved is about the proper classification of an existing material/article based on certain specified specifications. For this one only needs to refer to the specifications mentioned under IS 1460:2005 and once the sample conforms to the specifications, it would be accordingly identified/classified as HSD which would not require any analysis or appreciation of evidence. The rules do not provide that any substance that partly complies with the aforesaid parameters will be considered or deemed to be that specified substance. If tests had been done in respect of all the 21 parameters as per IS 1460:2005, and if the results conform to all these parameters, there will be no difficulty in concluding that the samples are indeed that of HSD. The problem has arisen because the tests were done only with respect of a few parameters and not all, leaving it to the discretion of the Adjudicating Authorities/Tribunal/High Court to determine whether it has been proved based on these tests that the samples are indeed that of the HSD. Thus, this exercise has introduced an element of subjective appraisal and evaluation of the pieces of evidence.

55. In the present case, the evidence/materials on which the High Court based its conclusion are the test reports and the evidence of the expert, Dr. Gobind Singh. Since the test reports are not conclusive as regards all the 21 stipulated parameters under IS 1460:2005 and the evidence of Dr. Gobind Singh is also not definitive, the test report and expert opinion would be required to be assessed properly.

56. Section 45 of the Evidence Act of 1872 deals with expert opinion, which reads as follows:

“Section 45.

Opinions of experts.

When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger-impressions are relevant facts.

Such persons are called experts.”

57. The opinion of the experts, however weighty they may be, are not binding on the court and is only relevant for the court to consider it to come to a final decision on any fact in issue. However, since courts are not experts in the discipline of science, they ordinarily accept the scientific report and act upon it. But where the expert opinion suffers from certain shortcomings or ambiguities, lack of clarity, or inadequacy, it would be subject to judicial scrutiny and it would not be safe to rely wholly on the same under such circumstances.

58. We may briefly recapitulate the views of this Court relating to expert witnesses.

59. This Court in ***State of H.P. v. Jai Lal, (1999) 7 SCC 280*** observed that the credibility of expert witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. It was thus observed as follows:

“**18.** An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions”

(emphasis added)

60. This Court in ***Dayal Singh v. State of Uttaranchal, (2012) 8 SCC 263*** reiterated the aforesaid view.

It was also observed that the essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. Thus, if the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use.

It was reiterated that the purpose of an expert opinion is primarily to assist the court in arriving at the final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record, and then form its final opinion as to whether such report is worthy of reliance or not.

It was thus observed as follows:

“**35.** This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases..... The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.....

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39. The Indian law on expert evidence does not proceed on any significantly different footing. The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned

and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the court, it has to be well authored and convincing.

.....
40. We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not.....”

61. Though these observations were made in the context of criminal trials, keeping in mind the basic principles underlying the relevance and assessment of expert opinion, in our view, would be beneficial in the present case as well.

62. In the light of the above, we will examine the test results and evidence of the expert witness, Dr. Gobind Singh, Manager (Lab) of the IOCL, Mumbai on which the High Court relied heavily to come to the conclusion that the Revenue/Department had been able to establish their case that the imported goods were HSD.

During the cross examination of the expert witness, the following questions were asked about 8 parameters on which the samples were not tested:

“Q: Does it mean that the other 8 parameters are not important for ascertaining or deciding whether the sample meets with the criteria of HSD?”

A: Already provided in the report that in the lab the samples were tested as per IS 1406:2005 and there is a facility available only for testing of 14 parameters and for the remaining 8 parameters, the facility is not available for which I can’t comment.

Q: Do you know the function/characteristics of the 8 parameters provided under IS 1460:2005 that have not been tested?

A: As the 8 parameters have not been tested, I can’t comment in respect of these parameters.

63. From the above, it is clearly noticeable that the expert who undertook the tests evaded answering the crucial question as to the importance of the 8 parameters for deciding whether the sample is of HSD or not. It is to be remembered that the Indian Specifications of Bureau of Indian Standard IS:1460:2005 specifically provides 21 parameters, which are the attributes of High Speed Oil and nothing is mentioned under the Rules as to whether compliance with only certain of the specifications would justify treating the article as HSD.

64. As regards the third test, only 13 specifications conformed to the specifications (and not 14 as mentioned in the report since in respect of the flash point, the sample did not meet the specification). In the absence of fulfilment of the remaining of specifications, can it be said authoritatively that the samples will still qualify as HSD?

Interestingly as discussed above, neither the expert nor the test results stated categorically that these samples are indeed that of HSD on fulfilment of some of the parameters.

The expert was specifically asked as to whether the sample was automotive diesel, which the expert evaded and did not give a clear answer except for saying that it is already written in the report and the sample has been tested as per the IS 1460: 2005 as evident from the following question and answer.

“Q: Can you say it is an automotive diesel?”

A: Already written in the lab report and we have tested the samples as per the parameters as per IS 1460:2005.”

65. It may be noted that in the written report, it was not mentioned that the sample is that of HSD though it mentions that it was tested as per the parameters of IS 1460:2005 and has characteristics of some of the parameters.

The Adjudicating Authority as well as the High Court, without there being any such categorical opinion in the report or by the expert, nevertheless, went on to conclude that the samples were indeed of HSD by applying the test of preponderance of probability, which we feel is problematic.

66. Apart from this lack of clarity of opinion by the expert and in the test reports to the effect that the samples are of HSD, there is one aspect which we consider is also important.

67. As noted above, all three test results show that the samples do not meet the specification relating to flash point. Unfortunately, the expert has avoided giving satisfactory answers to the searching questions put to him relating to the flash point during the cross-examination, though as an expert in the field, he was expected to know and clarify the legitimate doubts about the significance of flash point in determining the nature of the fuel as evident from the following questions and answers.

“Q: Do you think so one of the ingredients for considering HSD is flashpoint?”

A: Can't comment on ingredients. The minimum temperature for Flash Point 35°C as prescribed in standard. We have submitted the report.

Q: What is the maximum and minimum flashpoint for considering the sample as HSD?

A: Only the minimum limit is talked about that is 35°C and there is no maximum limit prescribed in the standard.

Q: If case, the Flash Point exceeds above 100°C, 150°C, 200°C etc., then does it still pertains to HSD standard? A: Can't comment as above 35°C whatever the Flash Point is, it does not matter.

Q: Point No. 1 of supplementary note of Chapter 27 of Customs Tariff Act provides that "Jute Batching Oil", "Textile Oil" are Hydrocarbon oils, which have their flash points on and above 93°C. In case flash point exceeds 93°C, what you call it?

A: Can't comment. As flashpoint isn't the only parameter. We have tested the samples that were submitted to us as per IS 1460:2005.

Q: IOCL supplies HSD to various parties. Have you ever come across any situation in which you have found the Flash Point of all these test reports above 93°C and considered as a HSD?

A: Flash Point is not the only parameter which is used to measuring the sample as per IS 1460:2005

Q: Can you say it is an automotive diesel?

A: Already written in the lab report and we have tested the samples as per the parameters as per IS 1460:2005.”

68. We are quite befuddled by the answers given by the expert about flash point, as if he was not aware of the importance of flash point in petroleum products. He was evasive as regards nonconformity on this parameter in determining whether the samples are those of HSD.

Flash point has been mentioned in the Supplementary Note to Chapter 27 in Appendix-2 to the Customs Tariff Act by stating that it shall be determined following the test prescribed in this behalf in the rules made under the Petroleum Act, 1934.

Under Section 2(c) of the Petroleum Act, 1934 flashpoint of any petroleum has been defined as the lowest temperature at which it yields a vapour which will give a momentary flash when ignited, determined in accordance with the provisions of Chapter II and the rules made thereunder.

69. The Petroleum Act classifies petroleum products under three categories, depending on the quantum of flash point, namely,

- (i) “Petroleum Class A” which means petroleum having a flash-point below twenty-three degrees Centigrade;
- (ii) “Petroleum Class B” which means petroleum having a flash-point of twenty-three degrees Centigrade and above but below sixty-five degrees Centigrade;
- (iii) “Petroleum Class C” which means petroleum having a flash-point of sixty-five degrees Centigrade and above but below ninety-three degree Centigrade.

70. Specification regarding flash point is accordingly of some significance, even if it may not be the most important parameter in determining whether a petroleum product is HSD or not. From the specification provided under IS:1460:2005, HSD will have flash point of minimum 66° C. Thus, it will be treated as Petroleum Class C in terms of the Petroleum Act. It is not anyone’s case that HSD is not a hydrocarbon and not an automotive fuel. If that is so, it will be classifiable under the Petroleum Act as a Class C Petroleum product, if not Class B or Class A product. As mentioned above, the range of the flash point of Petroleum Class C is between 65° C and 93°C whereas the test results show a higher flash point.

It has been submitted on behalf of the appellants, relying on the decision of this Court in ***Durga Oil Company Vs State of U.P., (1998) 6 SCC 299***, that HSD is petroleum Class B product. Thus, by implication, if the flash point of the sample goes above 93° C, it is questionable whether the imported oil can be considered to be HSD, even though the maximum flash point for HSD has not been specifically mentioned in the IS: 1460:2005, but only the minimum.

71. Because of the evasive and non-committal answers given by the expert Dr. Gobind Singh, the legitimate conclusion that can be drawn is that his opinion and also the test results are inconclusive, unclear and cannot be said to be fully reliable to determine the oil as HSD.

72. We would however, like to clarify that we are not stepping into the shoes of the scientific expert relating to the determination of the nature of the oil, as to whether it is HSD or Base Oil. Nevertheless, we are satisfied that there is a very germane and relevant factor on which the expert had failed to clarify, and in respect of which the test reports have also remained silent, that is, relating to flash point, making the classification of the imported oil as HSD by the Customs authority highly doubtful. If the expert or the test reports had clearly mentioned that in spite of the high degree of flash point shown by the samples, and non-examination in respect of all the parameters, these samples can still be considered to be that of HSD, we would have accorded due deference to such opinion.

But as noted above, neither the expert nor the test results categorically and in clearly terms mention that these samples are that of HSD, except for making an ambiguous remark that these samples *conform to certain* parameters of HSD as per IS 1460:2005. As discussed above, by mere conformation to certain parameters of HSD, the samples cannot be equated with HSD. The expert opinion and the test results are as vague as these can be qua classification of the oil as HSD.

73. However, as noted above, the High Court, by applying the test of preponderance of probability concluded that the substance in question is HSD.

74. At this juncture it may be apposite to dwell briefly upon the meaning of the expression “*preponderance of probability*” in contradistinction to “*proof beyond reasonable doubt*”.

75. Under Section 3 of the Evidence Act, 1872, a fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists, which clearly indicates that the Evidence Act does not insist upon absolute standard of proof. Evidence Act also nowhere defines as to the meaning of proof based on “*preponderance of probability*” and “*beyond reasonable doubt*” which are different standards of proof.

76. Different standards of proof have evolved in criminal and civil jurisdictions in course of time considering the differential stakes involved in these proceedings. In a criminal proceeding, the stakes are higher for a defendant as it involves precious rights and liberties of the person with a potential to lose the same if convicted of the offence charged. On the other hand, civil liability is less blameworthy, and penalty, if any, is less severe.

77. The expression “*preponderance of probability*” has been explained by this Court in ***M. Siddiq (Ram Janmabhumi Temple-5 J) v. Suresh Das*, (2020) 1 SCC 1**. In the aforesaid case, this Court applied the test of a prudent man who upon weighing the various probabilities finds that the preponderance is in favour of the existence of the particular fact. It was observed that even in the case of proof by preponderance of probability, there may be degrees of probability within that standard and “*the degree depends on the subject-matter.*” It was held that,

“720. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. *Phipson on Evidence formulates the standard* succinctly : If therefore, the evidence is such that the court can say “we think it more probable than not”, the burden is discharged, but if the probabilities are equal, it is not. [*Phipson on Evidence*]

In *Miller v. Minister of Pensions* [*Miller v. Minister of Pensions*, (1947) 2 All ER 372.] , Lord Denning, J. (as the Master of Rolls then was) defined the doctrine of the balance or preponderance of probabilities in the following terms : (All ER p. 373 H)

“(1) ... *It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.* If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence,

“of course it is possible, but not in the least probable” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

(emphasis supplied)

721. The law recognises that within the standard of preponderance of probabilities, there could be different degrees of probability. This was succinctly summarised by Denning, LJ in *Bater v. Bater* [*Bater v. Bater*, [1951] P. 35 (CA).] , where he formulated the principle thus : (p. 37)

“... So also, in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. *The degree depends on the subject-matter.*”

722. The definition of the expression “proved” in Section 3 of the Evidence Act is in the following terms: “3. ... “Proved”. — A fact is said to be proved when, after considering the matters before

it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.”

723. Proof of a fact depends upon the probability of its existence. The finding of the court must be based on:

723.1 The test of a prudent person, who acts under the supposition that a fact exists.

723.2 In the context and circumstances of a particular case.

724. Analysing this, Y.V. Chandrachud, J. (as the learned Chief Justice then was) in *N.G. Dastane v. S. Dastane* [*N.G. Dastane v. S. Dastane*, (1975) 2 SCC 326.] held : (SCC pp. 335-36, para 24)

“The belief regarding the existence of a fact may, thus, be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. *The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: “the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue* [Per Dixon, J, in *Wright v. Wright*, (1948) 77 CLR 191 (Aust).] , CLR at p. 210”; or as said by Lord Denning, “the degree of probability depends on the subject-matter”. In proportion as the offence is grave, so ought the proof to be clear [*Blyth v. Blyth*, [1966] A.C. 643 : [1966] 2 WLR 634 : (1966) 1 All ER 524 (HL).] , All ER at p. 536’. But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.”

(emphasis supplied)

725. The court recognised that within the standard of preponderance of probabilities, the degree of probability is based on the subject-matter involved. 726. In *State of U.P. v. Krishna Gopal* [*State of U.P. v. Krishna Gopal*, (1988) 4 SCC 302 : 1988 SCC (Cri.).] , this court observed : (SCC p. 314, para 26) “26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge.”

78. What the aforesaid decisions postulate is that there may be varying range in the degree of probabilities. Certainly, where the proceedings involve requirement of fulfilment of technical/scientific parameters with confiscatory and penal consequences, the degree of probability would be of a higher order and not mere probability.

79. In the present case, what we have observed is that the High Court, on the basis of the laboratory tests, more particularly the third test conducted by IOCL, Mumbai Laboratory and the opinion of the expert, namely Dr. Gobind Singh, and by observing that it is not necessary to establish on the part of the Revenue to prove the fact with mathematical precision, held that the Department has been able to establish its case on the basis of preponderance of probability that the imported oil was not Base Oil but HSD, which could not have been imported by the appellants and upheld the order of the Adjudicating Authority.

80. However, this analysis and conclusions arrived at by the High Court are problematic for the following reasons:

- (i) There was no expert opinion at all that the samples which were tested were indeed of HSD.
- (ii) The opinion as contained in the test results was merely mentioning about conformity of the samples with *certain* specifications of IS 1460:2005 and not about conformity with *all* the specifications.
- (iii) Once the rule making authority had clearly delineated the requisite parameters for ascertaining the nature of the goods/substance, compliance/conformity with the stated parameters would be the requirement.
- (iv) There are 21 parameters laid down under IS 1460:2005 and none of the tests have shown compliance with all these parameters. The last and third test have reported compliance with 14 parameters, though as discussed above in respect of 2 of the aforesaid 14 parameters, namely, flash point and distillation range, the same are not in conformity. Thus, it cannot be said there is substantial compliance with the parameters of IS 1460:2005.
- (v) Flash point, though may not be the most important parameter, yet, its importance in determining the nature of the Automotive oil cannot be ignored. Flash point being a very important criteria to classify petroleum products, non-compliance of the samples on this parameter would make the classification doubtful.
- (vi) Evasive answers and non-clarification on certain aspects of the flash point of the samples by the expert Dr. Gobind Singh certainly cast a serious doubt on the samples being identified as that of HSD. The expert himself also has not said that the samples are of HSD except for stating that the samples conform to certain specifications of the IS 1460:2005.
- (vii) In view of the ambiguity and lack of clarity in the expert opinion/laboratory test results, it would be unsafe to draw the inference that the Department had been able to prove their case even by applying the test of preponderance of probability merely because the samples conform to *certain* parameters.
- (viii) If the Department with all the resources at their command and access to various laboratory facilities could not get the samples tested in respect of all the 21 parameters, expecting the assesses/appellants to get the samples tested to show that these do not conform the specifications and are not HSD does not appear to be reasonable. Thus, shifting of onus to the assesses to prove otherwise appears to be unreasonable and meaningless.
- (ix) The burden was not on the assesseees to demonstrate that non-conformity with the remaining 8 parameters would vitiate the conclusion that the samples were of HSD.

81. The aforesaid difficulties in our opinion can be overcome, if we apply the test of “most akin” as contemplated under Rule 4 of the General Rules for Interpretation referred to above.

82. The real test for classification, according to us, would be as to whether any goods or substance in question is “most akin” or bears the closest resemblance or similarity to any of the specified goods mentioned under the Headings and relative Section or Chapter Notes under the Tariff Act, and *not* by applying the test of preponderance of probability.

83. By way of illustration, we may explain the position. If an importer classifies the imported goods as “X”, which is disputed by the Customs authority and classifies the same as “Y”, the test would be whether the goods imported are “most akin” to “X” or “Y” in terms of Rule 4 of the aforesaid Rules. The importer may also claim if he so wishes, that the goods are most akin to “Z”, though it may be akin to “Y” also, if such claim is more beneficial to him. Thus, it has to be shown by the Customs Authority that the imported goods bear the most affinity or resemblance or similarity to be “most akin” to the specified goods and not mere similarity or akinness. In other words, the test will be whether the imported goods bear the closest resemblance or similarity with the specified good so that these can be considered to be “most akin” to the specified good. Certainly, the principle of preponderance of probability may fall short of the more heightened test of “most akin” for proper classification. The imported goods may bear resemblance to more than one specified goods, in which event, unless the high degree in the test of preponderance of probability is applied, there may be difficulties in the proper classification. However, the said difficulty may be overcome if the test of “most akin” is applied. If the attributes of the imported goods show that the goods are “most akin” to the specified goods amongst an array of other specified goods, these imported goods have to be classified as the specified goods with which these goods bear the most resemblance or most akinness. Thus, in our view, application of the principle of preponderance of probability does not provide an accurate test. The more accurate and precise test will be whether the goods in question are “most akin” or most similar to the specified goods, as provided under Rule 4 referred to above.

84. In the present case, as noticed above, the finding of the High Court is based primarily on applying the test of preponderance of probability which may not necessarily fulfil the “most akin” test. The High Court came to the conclusion based on the incomplete test reports and noncommittal opinion of the expert Dr. Gobind Singh who in categorical terms had not stated that the imported goods are HSD. There was no opinion that the imported goods are most similar to HSD to satisfy the test of “most akin”. The definitive opinion and finding that the imported goods are “most akin” to HSD is missing in the reports and opinion for classifying the imported goods as HSD.

85. The oil in question does not fully satisfy the specifications of HSD in terms of IS 1460:2005. Hence, the correct test will be whether the oil/article in issue is most akin to HSD or not for which appropriate scientific evidence in the form of laboratory test reports and opinion of the scientific experts will be of utmost relevance.

86. For the reasons discussed above, as the results of the test are inconclusive, so being the opinion of the expert, we are unable to agree with the conclusion of the High Court. Under the circumstances, the option before this Court is, either to send the imported product again for further tests and obtain the expert opinion atleast to the effect that the imported product is ‘most akin’ to HSD even if it does not fulfil all the parameters under IS 1460:2005 or give a benefit of doubt to the appellants and close the proceedings against the appellants by quashing the impugned orders, since the Revenue/Customs Authority cannot take action against the appellants based on inconclusive evidence.

87. As far as the first option is concerned, as noted above, though the questioned product was sent for laboratory test in three premier laboratories, these laboratories did not give conclusive finding that the product is indeed HSD and the expert also could not give a definitive opinion. Further after such a long passage of time we are doubtful whether the oil in question would still retain many of the characteristics and properties which were present at the time of import for an effective testing as aforesaid. Hence, we do not

consider it appropriate to direct further testing of the imported product/oil at this point of time and such a retest may be rendered a futile exercise. In our opinion, in the facts and circumstances, it would be more appropriate to give the benefit of doubt to the appellants because of the inconclusive evidence, rather than directing for a fresh testing and seeking fresh expert opinion, as a one-time measure.

88. Before parting with these appeals, we deem it necessary to issue certain ancillary directions.

We are of the view that non-examination of any product/article/goods on all the parameters laid down by the customs authority will always lead to uncertainty and doubt, which are required to be removed when dealing with confiscatory proceedings.

The genesis of the prolonged litigation lies in the nonavailability of adequate facilities for testing all the parameters provided under Bureau of Indian Standard Specifications. Such a dispute could have been avoided had the testing facilities for all the parameters been available. Since the Authorities themselves had laid down the specific parameters for classification of goods, as in the present case by referring to classification under IS 1460:2005, it is incumbent upon the Authorities to ensure that necessary facilities are made available for testing of any disputed article on all these parameters as otherwise, laying down such parameters would be meaningless.

Hence, to avoid these difficulties, doubts and uncertainties in future, the respondents are directed to ensure that proper facilities are made available in the appropriate laboratories for undertaking tests for all these parameters or at least for those parameters which the Authorities consider are of essential character to satisfy the “most akin” test without which the article in issue cannot be properly classified. Accordingly, we direct the respondents to take necessary steps in this regard within a period of six months for proper testing in all the parameters in future.

89. For the reasons discussed above, we allow these appeals by setting aside the impugned common judgment and order dated 20.01.2022 passed in Revenue Tax Appeal No. 297 of 2021, Revenue Tax Appeal No. 298 of 2021 and Revenue Tax Appeal No. 299 of 2021.

90. Appeals are accordingly disposed of in the aforesaid terms.