

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

REGIONAL BENCH – COURT NO. 03

CUSTOM Appeal No. 10977 of 2013
Customs/Cross/11706 of 2013

[Arising Out Of OIA-12/COMMR-A-JMN/2013 Dated- 23/01/2013 Passed By Commissioner of CUSTOMS(PREVENTIVE)-JAMNAGAR(PREV)]

C.C.-Jamnagar(prev)

.....Appellant

Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

VERSUS

Shankar Packaging Ltd

.....Respondent

2-6, Gidc Estate, Waghodiya
Vadodara, Gujarat

APPEARANCE:

Shri. Himanshu P Shrimali, Superintendent (AR) for the Appellant
Shri. P.M. Dave and Shri. Mrugesh Pandya, Advocates for the Respondent

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

FINAL ORDER NO. A / 11488 / 2023

DATE OF HEARING:12.06.2023

DATE OF DECISION:12.07.2023

SOMESH ARORA

M/s. Shankar Packaging Limited, 2-6, GIDC Estate, Waghodiya, Vadodara (here-in-after referred to as "the respondent") a registered company under the provisions of the Company Laws also registered with Central Excise department was engaged in the manufacture and export of goods inter alia declared as Flexible Intermediate Bulk Container (FIBC). The respondent had filed six shipping bills under Advance Authorization License scheme for export of FIBC and had classified the goods under CTH 63053200 in the said shipping bills. The entire consignments intended for export under

the said 06 shipping bills were stuffed at factory premises of the Respondent under supervision of jurisdictional Central Excise Officers. On going through the various export documents furnished by the Respondent, it was noticed that the respondent had declared HS code of the export goods as 63053200 in their Invoices & Packing lists whereas in the ARE-1s they mentioned "Flexible Intermediate Bulk Containers -HSN code 63053200 ...C.Ex. Tariff 39231090. Hence, it was observed that for central Excise purpose the respondent had declared HS code of the subject goods under Chapter 39 and for the Customs purpose they declared HS Code under Chapter 63. Since the goods appeared to be classifiable under Chapter 39 of Customs Tariff Act, 1975 a query was raised in the EDI system and the same was conveyed to the respondent. The samples of the goods were also drawn for visual inspection as well as for laboratory testing. The respondent had requested for provisional assessment of the shipping bills, hence the said 06 shipping bills were assessed provisionally and shipment of the consignments were allowed. The Assistant Commissioner of Customs, Custom House. Pipavav (here-in-after referred to as "the Adjudicating Authority") after considering the oral/written submission made by the Respondent, vide Order-in-Original No. 46/AC/GPPL/11-12 dated 02.02.2012 ordered that the goods exported by the Respondent declared as Flexible Intermediate Bulk Containers be classified under Tariff Heading 39232990.

2. Being aggrieved, the Respondent filed an appeal before the Commissioner of Customs (Appeals), Jamnagar against the above Order-in-Original.

3. The Appellate Authority while deciding the appeal observed that for classification of goods a specific heading of classification was to be preferred to the general heading: that the goods exported by the Respondent were specifically mentioned under chapter 63 of the First Schedule to the CTA, 1975 as "63053200- Flexible Intermediate Bulk Containers"; that this sub-heading was discarded by the Adjudicating Authority in favour of tariff

heading (other) 39232990 which covered Sacks and Bags (including Cones) of other plastics with exception of polyvinyl Chloride; that Sacks and bags made of polyvinyl chloride is separately classifiable under CTSN 39232910; that this was nothing but a residuary heading. That the ratio of Hon'ble Supreme Court's judgment in the case of CCE, Bhubaneswar vs. Champdany Industries Ltd (2009(241)ELT 481(SC) was relevant;

4. The appellate authority on the basis of general explanatory chapter note to Chapter 63 given under HSN, found that flexible intermediate bulk container were usually made of polypropylene or polyethylene woven fabrics and generally had a capacity ranging from 250 kgs to 3000 kgs; that the impugned goods were made of polypropylene material and the export was under Advance Authorisation Licence under which they were allowed duty free imports of various items; that there was nothing to controvert that the goods were flexible intermediate bulk container of polypropylene;

5. That Adjudicating Authority heavily relied upon the 37-B order issued by Board in respect of HDPE sacks issued in the year 1992; that the matter pertained to FIBC which was covered under specific entry 63053200; that the stand taken by the Adjudicating was not correct; that the ratios of Hon'ble Supreme Court's judgments in the case of CC. Goa Vs. Phil Corporation Ltd and Tribunal's judgment in the case of M/s. T.P.I. India Ltd Vs. CCE, Mumbai-II (2005(189)ELT (296) (Tri. Mumbai) were squarely applicable:

5.1 In view of above observations the Appellate Authority vide Order-in-Appeal No. 12/Commr(A)/JMN/2013 dated 23.01.2013 (here-in-after referred to as "the Appellate Order") has upheld the classification of flexible intermediate bulk containers under chapter 63053200. Accordingly, the Appellate Authority set aside the order passed by the Adjudicating Authority and allowed the appeal filed by the respondent.

6. The department feeling aggrieved by the order of appellate authority has filed the present appeal on the basis of following grounds of appeal:-

6.1 That the Appellate Authority has decided the matter in favour of the respondent mainly on the grounds that Customs Tariff Act is having specific sub-heading No. 6305320 for the goods Flexible Intermediate Bulk Container. However, the Appellate Order has failed to take into consideration the fact that the respondent showed different classification for the same goods declared as Flexible Intermediate Bulk Container i.c.. for Central Excise purpose he showed Central Excise Tariff Sub-heading No. 39231090 whereas for customs purpose and for availing export benefits they showed under Customs Tariff Sub-Heading No. 6305320. Central Excise Tariff as well as Customs Tariff has been modeled on Harmonized System of Nomenclature (HSN) and First Schedule to Central Excise Tariff Act, 1985 also contains specific entry "63053200 for the goods namely Flexible Intermediate Bulk Container. But, the Appellate Authority has not made any effort to ascertain the reason for the two separate classifications in respect of the same goods. Though, from facts on record it can be deduced that the Respondent changed classification of the said goods exported for the customs purpose because the Advance Licenses was issued to them for Chapter heading 63 only.

6.2. That the Appellate Authority erred in appreciating the fact that the Adjudicating Authority had decided the classification of the impugned goods after considering the Test Report as well as definitions, descriptions given under various Statutes of Government of India Customs Tariff.

6.3 That the Appellate Authority did not consider the fact that Flexible Intermediate Bulk Container (FIBC) is a generic name and its classification would depend upon the materials out of which the same has been manufactured. If the FIBC is made out of plastic it would fall under Chapter 39(Plastics and articles thereof) whereas, if it is made out of Textiles then it

would fall under Chapter 63 (other made up textile articles, sets; worn clothing and worn textile articles; rags). In this regard, the Respondent himself has stated before the Adjudicating Authority that their product was a large sized woven sack manufactured by weaving of Poly Propylene Strips. The Adjudicating Authority on the basis of Section Notes, Chapter notes and on the basis of definition given under different statutes has clearly demonstrated that such strips made out of Polypropylene and subsequently such strips woven into fabrics and then bags/sacks made out of these fabrics cannot be termed as "Textile" or "Textile Articles" so as to cover under section XI (Textiles and Textile Articles (covers Chapter 50 to Chapter 63) of the First Schedule to the Customs Tariff Act, 1985. On the other hand the Adjudicating Authority with the help of various chapter headings/sub-headings of Chapter 39 has explicitly justified as to how the impugned goods declared as FIBC (big bags or sacks) is classifiable under Customs Tariff Item 39269099. Also, the test report of Chemical Examiner, Gr-1. Custom House Laboratory, Kandla certified that the goods exported by the respondent was plastic articles and accordingly confirmed the view of the Adjudicating Authority. However, the Appellate Authority has not considered any of such elaborate findings of the Adjudicating Authority and decided the matter in favour of the Respondent.

6.4 That the Adjudicating Authority has also relied upon Board's circular No. 42/2011-Cus dated 22.09.2011, wherein, it has been clarified that FIBC which are big or bulk bags or super sacks made of polymers of ethylene and other plastic material would be classifiable under Chapter 39 of the drawback schedule. Since tariff items and descriptions of goods in the drawback schedule have been aligned with the tariff and descriptions of goods in the First Schedule to the Customs tariff Act. 1975 at four digit level the clarification though issued in connection with the drawback matter, is quite relevant from the facts and circumstances of the present case. The

Appellate Authority has not given any findings as to how the spirit of above clarification by Board is not applicable to the instant case,

6.5 That the Adjudicating Authority has relied upon Hon'ble High Court's judgment in the case of Raj Pack Well Ltd Vs. UOI (1990(50) (201) (MP) and Tribunal 's judgment in the case of Gujarat Raffia Industries Ltd Vs. CCE, Ahmedabad. The ratio of both these judgments appears to be squarely applicable in the present case. However, the Appellate Authority has not given any findings regarding applicability of above judgments in the present case. The Appellate Authority has relied upon Tribunal's judgment in the case of M/s. T.P.I. India Ltd. Vs. CCE, Mumbai-II (2005(189)ELT 311(Tri.Mumbai). However, the Appellate Authority failed to observe that the above judgment was delivered in the Central Excise matter and it is on record that respondent has been classifying the impugned goods under Chapter Heading 39 of the Central Excise Tariff Act, 1985.

6.6 That the Appellate Authority also wrongly ended in not observing the fact that that many other exporters were exporting similar products viz., FIBC or P.P.Woven Bags/ Sacks & PP Woven Fabrics through the same port under Chapter 39 under Advance Authorization issued by DGFT.

6.7 It is clear from the above discussions that the Appellate Order has been passed without appreciating the crucial findings of the Adjudicating Authority. The Appellate Order is erroneous, invalid, bad in law and contrary to the materials on record. The Order of the Commissioner of Customs (Appeals) Jamnagar is prima facie as well as factually incorrect and, therefore, is legally not sustainable and, therefore, deserves to be set aside.

7. As against this, the respondent stated that the matter is covered. The matter is identical to what was decided by the jurisdictional High Court of Gujarat as reported in 2020 (12)-TMI-1100 in the matter of M/s CTM Technical Textiles Ltd Vs. UOI that the order cited had clearly distinguished the case law relied upon by original adjudicating authority in the matter of

Raj Pack Well Ltd Vs. UOI-1990 (50) ELT (201) (M.P.) wherein in para 19-20

it was held as follows:-

"19. *Now, textile material has not been defined in the Tariff Act. However, in the Textiles Committee Act, 1963 (Act 41 of 63) the word 'fibre' has been defined in S. 2(a) as under :*

"fibre" means man-made fibre including regenerated cellulose rayon, nylon and the like."

"Textiles" has been defined in S .2(g) as under:

"textiles" means any fabric or cloth or yarn or garment or any other article made wholly or in part of -

(i) cotton; or

(ii) wool; or

(iii) silk; or

(iv) artificial silk or other fibre, and includes fibre;"

Therefore, according to the above definition, any fabric or cloth or yarn or garment if made wholly or in part of cotton, wool, silk, artificial silk or other fibre shall be called textiles. The definition of 'fibre' includes the regenerated cellulose, rayon, nylon and the like. Nowhere in the aforesaid definition of 'fibre' or 'textiles' plastic has been mentioned as a commodity to be included in the definition of 'fibre' or 'textiles'. Now in the Shree Radhe Industries case (supra) and the Shellya Industries case (supra) irrespective of the entries in the tariff as prevailing then, it has been held that the HDPE sacks are articles made of plastic; they are made of high density polyethylene which is a plastic raw material and it has further been held that they are not man-made filament yarn but are articles of plastic. The Circular of the Central Board of Direct Taxes dated 20-11-1985 also clearly says that the Board has decided that so long as the finished articles of plastic is made out of plastic material falling under Tariff Item No. 15A(i), even if at the intermediate stage articles classifiable under Item No. 15A(ii) if any tariff item emerges, the said product would be considered to have been produced out of the plastic material falling under Tariff Item No. 15A(i) and, therefore, the HDPE woven sacks should be considered as articles of plastic and that the Tribunal's decision be accepted. In common parlance also the HDPE woven sacks are known as plastic woven sacks industry as is apparent from the annexures filed with the petition and the authenticity of which has not been disputed. The Dy. Director of the Ministry of Textile, Office of Textile Commissioner has, vide letter dated 2-3-1989 informed one of the petitioners that the HDPE/PP weaving activity on regular looms as well as circular looms manufacturing fall under the purview of DGTD and no installation permission or registration of circular looms is required under Textile (Control) Order, 1986. Therefore, the petitioner was advised to approach DGTD. The D.G.T.D. certificate is Annexure P-18 which has registered the Company of one of the petitioners for weaving HDPE woven sacks. As such the woven sacks are not treated as an item of textile by the Commissioner of Textiles and the DGTD (Plastic and Polymer Directorates) has registered it as an Industry producing HDPE woven sacks. The raw material used for the production of the HDPE strips is covered under Chapter 39 and in absence of anything on the record to show that the HDPE strips are synthetic textile material the only fact that their width is less than 5 mm would not automatically put that item under entry No. 54.06 of Chapter 54 of the Central Excise Tariff of India. What the learned Asst. Collector, C. Excise and the Collector Appeals, Central Excise have done is that they have considered only the width of the strip and have come to the conclusion that since the strip is of less than 5 mm, therefore, it falls within 54.06 ignoring the fact that in addition to this there should be something to arrive at a conclusion that the aforesaid strip is of synthetic

textile material. If the strip is a strip of plastic only and not a synthetic textile material and is also known in the common parlance as a commodity of plastic, and the finished goods i.e. the HDPE woven sacks are also known in the common parlance as plastic woven sacks, then it cannot be held that the strips with which such bags are woven are the strips of synthetic textile material.

20. *Thus, the view of the Textile Commissioner as discussed above, the registration by the DGTD of the factory of the petitioner, the definition of 'textile' and 'fibre' as discussed above, the process of the manufacture of the HDPE tapes, the earlier judgments of the CEGAT approved by the Supreme Court and accepted by the Department, all clearly go to show that the HDPE bags are the bags woven by the plastic strips and they, therefore, are goods of plastic and the material used for weaving those bags being the strips of plastic made from plastic granules, the strips of plastic used for weaving the aforesaid HDPE woven sacks has to be classified as an Item under entry 39.20 of Chapter 39 and not under entry 54.06 of Chapter 54. Accordingly the entries of the finished goods have also to be made under the proper Chapter of the Tariff Act treating them as the finished goods made of plastic strips."*

8. The learned Advocate took us through that the decision of Hon'ble High Court of Gujarat relied upon by him specially para 52-58 and the direction of the Hon'ble High Court of Gujarat contained in para 64. He also relied upon the decision in the matter of Porritts & Spencer (Asia) Ltd Vs. State of Haryana as reported in 1983 (13) ELT 1607 (S.C) which was decided delivered under item 30 pertaining to textiles of schedule 'B' to Punjab General Sales Tax Act, 1948 where the terms 'textile' was interpreted according to the popular sense and whereby Nylon Textile, Rayon Textile or any other kinds of textile depend upon the same being knit weaver as woven into fabric was considered as textile in the popular sense of the world. He also sought support from Gujarat Advance Ruling Authority Under GST which has under GST Tariff whereas Agro Textile was held item of Chapter 5911 despite being who one from HDPE through extrusion in Advance Ruling No. GUJ/GAAR/R/2022/11 dated 07.03.2022. Further, writtern submissions were filed by the Learned Advocate on 20.06.2023 relying *inter alia* on the decisions of COMMISSIONER OF CENTRAL EXCISE, TIRUNELVELI Vs. SUNPAK as reported in 2016 (343) E.L.T. 201 (Tri.-Chennai) and also in decision of M/S SOFEFLEX INTERNATIONAL LTD Vs. CCE&ST, INDORE as

reported in 2018 (6) TMI-CESTAT NEW DELHI, to buttress his point that only articles made from strips of high than 5mm can merit classification under chapter 39 and not of those made from less than 5mm material.

9. Learned AR while reiterating the ground of appeal emphasised that the law laid down in *Raj Pack Well Ltd Vs. UOI-1990 (50) ELT (201) (M.P.)* was proper law and to be reckoned as 'textile' not the process of weave or knitting but the fibbers used is the decisive factor. *Raj Pack Well Ltd Vs. UOI* therefore while dealing with sacks made of HDPE classified the item to fall under chapter 39 and not to be treated as synthetic textile material as stated. While pronouncing the decision the Hon'ble High Court of M.P had duly considered the relevant Chapter notes and section notes of Chapter 39 as well as Chapter 54 which bring out through statutory provisions as to what is textile material and what is article of plastic falling under chapter 39. He drew attention to para 18 to 21 of aforesaid decision to his point. He further submitted that in the decision of the Hon'ble Gujarat High Court in the matter of *CTM Technical Textiles Ltd Vs. UOI* though the decision of Hon'ble Supreme Court has been referred in the case of *Porritts & Spencer (Asia) Ltd Vs. State of Haryana* as reported in 1983 (13) ELT 1607 (S.C) but the same was in context of the Punjab General Sales Tax Act, 1948 wherein the terms 'textile' was not defined and therefore the same was interpreted by the Supreme Court in the popular sense of the meaning, which definition has been adopted by the Hon'ble Gujarat High Court in the case of *M/s CTM Technical Textiles Ltd Vs. UOI* in 2020 (12) TMI 1100- Gujarat High Court. That the decision in the matter of *Raj Pack Well Ltd Vs. UOI-1990 (50) ELT (201) (M.P.)* was delivered, considering, various Statutory Chapter Notes and Section Notes applicable to Chapter 39 as well as various Chapters relating to textile material including Chapter 54 of the Central Excise Tariff Act, 1985. He further emphasise that during the impugned period the party itself was clearly classifying item under Chapter 39 and therefore was taking the convenience based stand on the Customs side. He also pointed out that

even the Hon'ble Supreme Court has nowhere held in the matter of Porritts & Spencer (Asia) Ltd Vs. State of Haryana, that the statutory definition if available, the same could be ignored in favour of the general meaning of terms 'textile'. Further he pointed out that even the Hon'ble Gujarat High Court had only remitted the matter back with certain directions to Union of India to have a relook at the Ahmedabad Collectorate Trade Notice No. 78/94 dated 09.05.1994 and various other issues including that of discrimination to the assessee.

10. Considered, We find that the decision in the matter of M/s CTM Technical Textiles Ltd Vs. UOI in 2020 (12) TMI 1100- Hon'ble Gujarat High Court, dealt with the issue and distinguished the matter from Raj Pack Well Ltd Vs. UOI (supra) as item was made from HDPE Strips/Taps and not from the HDPE fabric. We also find that the Hon'ble Gujarat High Court found that item will be textile fabric if woven out of any material and same was not an issue before the Court in Raj Pack Well Ltd Vs. UOI case. The Hon'ble Court accordingly held that woven fabric will be textile, irrespective of the method of weaving through any technique or material used in weaving, which may also be cotton, silk, rayon, nylon or of other description or made out of any other material. When such material is woven into fabric, what comes into existence is textile. As such, we hold that while in the matter of Raj Pack Well Ltd Vs. UOI the input material for HDPE sacks was derived from HDPE strips/tapes/sacks. In the present matter, it is a factum of same being woven which, *inter alia* qualifies to make it textile. We therefore, like in the matter of M/s CTM Technical Textiles Ltd Vs. UOI inclined to remit the matter back to have a relook into the CBEC Circular No. 8/92 dated 24.09.1992 and CBEC and Trade Notice No. 78/94 dated 09.05.1994. While doing so the appellate authority shall consider the parameters laid down by the Hon'ble Gujarat High Court in the aforesaid decision and also the relevant section notes and Chapter Notes relating to Chapter 39 as well as Section XI of

schedule 1 of the Customs Tariff Act, 1975 as also the Chapter Notes relating to Chapter 54, 59, 60 and 63 to arrive at its decision, it shall also properly identify the product under dispute and whether the same is made from strips of up to 15mm or more. Specially, the following Section and Chapter notes should be considered.

Notes to the section-XI

"1. This section does not cover:

(g) monofilament of which any cross-sectional dimension exceeds 1 mm or strip or the like (for example, artificial straw) of an apparent width exceeding 5 mm, of plastics (Chapter 39), or plaits or fabrics or other basketware or wickerwork of such monofilament or strip (Chapter 46);

(h) woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39;

(ij) woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, or articles thereof, of Chapter 40;"

Chapter 59

"2. Heading 5903 applies to:

(a) textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square metre and whatever the nature of the plastic material (compact or cellular), other than:

(1) fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually, Chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of colour;

(2) products which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15 and 30 °C (usually, Chapter 39);

(3) products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour (Chapter 39);

(4) fabrics partially coated or partially covered with plastics and bearing designs resulting from these treatments (usually, Chapters 50 to 55, 58 or 60);

(5) plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 39); or

(6) textile products of heading 5811;"

Further, as we find that the EDI System indicates that both Flexible Intermediate Bulk Containers un-coated, as well as without mention of coating were imported during the relevant time, differential treatment may be required to be considered, if goods are different.. Further while considering party's classification relating to Central Excise Tariff, the existence of analogous provision under the Customs Act shall also be considered. The observation relating to 'textile' of Hon'ble High Court of Gujarat in general, wherever relevant Chapter Notes and section notes are not available shall be duly followed.

11. The matter is accordingly remanded for reconsideration of all these points. Appeal is allowed by way of remand in the above terms. Cross is also accordingly disposed of.

(Pronounced in the open Court on 12.07.2023)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

PRACHI