

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

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10145 of 2021

(Arising out of OIO-MUN-CUSTM-000-COM-12-20-21 dated 29/10/2020 passed by Commissioner of CUSTOMS-AHMEDABAD)

MS SUNRISE TRADERS

House No. C-6/9 Sector 4 Eldecp Gt Road
Panipat
Panipat, Haryana

.....Appellant

VERSUS

C.C.-MUNDRA

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

.....Respondent

WITH

- (i) **Customs Appeal No. 10632 of 2021- JAI DURGA IMPEX**
- (ii) **Customs Appeal No. 10633 of 2021- ALISHAN IMPEX**
- (iii) **Customs Appeal No. 10634 of 2021- SATISH JINDAL**
- (iv) **Customs Appeal No. 10635 of 2021- ADITYA LOOMTEX**
- (v) **Customs Appeal No. 10636 of 2021- TUSHAR TILAK**
- (vi) **Customs Appeal No. 10637 of 2021- JMD TRADING CO**
- (vii) **Customs Appeal No. 10638 of 2021- MOHIT SOIN**
- (viii) **Customs Appeal No. 10639 of 2021- AJAY HIRALAL VIJ**
- (ix) **Customs Appeal No. 10640 of 2021- JAI HANUMAN OVERSEAS**
- (x) **Customs Appeal No. 10643 of 2021- PANKAJ KUMAR KATARIA**
- (xi) **Customs Appeal No. 10644 of 2021- PANKAJ KUMAR**
- (xii) **Customs Appeal No.10645 of 2021- SHREE SHYAM INTERNATIONAL**
- (xiii) **Customs Appeal No. 10646 of 2021- TUSHAR GUPTA**

(Arising out of OIO-MUN-CUSTM-000-COM-13-20-21 dated 29/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-13-20-21 dated 29/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-13-20-21 dated 29/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-06-20-21 dated 12/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-06-20-21 dated 12/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-08-20-21 dated 19/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-08-20-21 dated 19/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-11-20-21 dated 29/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-11-20-21 dated 29/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-10-20-21 dated 29/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-10-20-21 dated 29/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-07-20-21 dated 29/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

(Arising out of OIO-MUN-CUSTM-000-COM-07-20-21 dated 19/10/2020 passed by Commissioner of CUSTOMS-MUNDRA)

APPEARANCE:

Shri Jatin Mahajan, Advocate for the Appellant

Shri J. A Patel, Superintendent (Authorized Representative) for the Respondent

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

Final Order No . A/ 10013-10026 /2022

DATE OF HEARING: 29.09.2021

DATE OF DECISION: 11.01.2022

RAMESH NAIR

The common issue in all the above appeals involved is that the goods imported by the Appellants declaring the same as Polyester Bed Cover are Polyester Bed Cover or Polyester Fabric and whether the same is classifiable under Custom Tariff Heading 63041930 as declared by the Appellant or under Custom Tariff Heading 54075490 as claimed by revenue.

1.1 Brief Facts of the case are that the Appellants are engaged in business of made up articles of textiles and importing 100 % Polyester Bed Cover. The Appellants filed bills of entry declaring the goods as 100% polyester bed cover under CTH 63041930, the goods imported were examined by Directorate of Revenue Intelligence (DRI) where it was observed that the clothes material were of 3 pieces of clothes sheets roughly and unsymmetrically stitched on two sides, one side fold and one side open. The samples were drawn and examined by Expert Committee on Textiles, Surat. DRI sent a letter to Textile Committee, Mumbai along with samples for testing and classification purpose; along with the remarks and conclusions of Expert Committee that these are not made ups. Meanwhile a sample was

drawn by the Customs and sent to the Textile Committee and the report received by post where it stated that the sample is to be classified as "made up" as declared by the Appellant in bills of entry. The said report is contrary to report procured by DRI. A letter to Textile Committee on 29.03.2017 was sent stating since two different reports have been received, so the office copy be sent to their office to which Director of Textile Committee informed the test report received at your end "at DRI end has been found to be tempered with".

1.2 The Textile Committee's report reflects that item is 100 % polyester and warp is texturised yarn but the weft cannot be ascertained and expressed opinion that 34.3 % is texturised yarn and remaining 65.7% cannot be ascertained, therefore CTH cannot be decided. After that DRI sent the sample to Ahmedabad Textile Industries Research Association (ATIRA) to find out about the composition of goods and percentage of filament and staple yarn. ATIRA again could not confirm the actual strength of the warp and weft yarn.

1.3 A Show Cause Notice dated 04.05.2017 issued to the Appellants relying upon the expert committee's opinion & the report of textile committee was adjudicated vide order dated 26.03.2018.

1.4 Aggrieved by the order dated 26.03.2018, Appellants filed appeals before CESTAT which vide order dated. 11.07.2019 remanded the matter directing that the case be decided by the adjudicating authority on the basis of statutory definition and Chapter Notes of Section XI of Custom Tariff as well as on HSN Notes not on the general meaning of made ups. The Adjudicating authority vide order dated 29.10.2020 has again confirmed the demands on the same grounds. Therefore, the present appeals.

2. Heard both sides and perused the records. The department to classify the goods as "polyester woven fabric" under CTH 54075490 and to prove that

the goods are polyester woven fabric has relied on three textile committee reports reproduced in the impugned order. By perusing the reports dated 28.02.2017 it is clearly mentioned in the column of correct description & Classification of the sample that appropriate HS Code could not be provided due to rupture of yarn in weft while untwisting.

2.1 On the other hand in report dated 21.03.2017 in correct description & classification column it is mentioned, sample is classified as polyester woven printed quilt case under HS code 630222 as classified by the appellants. Another reliance of the department is on the report of ATIRA (Ahmedabad Textile Industry Research Association) dated 27.03.2017 states that the actual strength of the warp and weft used in making fabric cannot be ascertained. If we go by all the above reports mentioned except for the report dated 21.03.2017 which classifies the goods as quilt cover all the other reports are inconclusive. If at all any report to be relied upon it is report dated 21.03.2017 which was brushed aside as tampered by the department without giving any details who tempered with the report and what action was taken.

2.2 Even if we accept the corrected report and all other reports they are all inconclusive and instead of relying upon them they should have been sent for retesting which the commissioner categorically denied stating that he does not find any cogent reason to grant resampling and retesting at this stage as samples were tested at two different recognised institutions and expert committee.

2.3 The department has relied upon M/s Rudra Vyaparchem vs Commissioner of Customs, Kolkata 2019 (370) E.L.T. 412 (Tri. - Kolkata) as similar goods to Appellant. The above case cannot be relied upon as it is based on the conclusive textile committee reports while in the present case undisputedly inconclusive as to the composition of samples, therefore the order of CESTAT in Rudra Vyaparchen case is distinguishable.

2.4 Secondly to decide the correct classification of goods the commissioner held the Subheading 540751 to 540754 cover "other woven fabric, containing 85% or more weight of textured polyester filaments. For that the authority has relied upon report of ATIRA stating the fabric is made entirely of texturised yarn to be covered under the above heading the fabric should contain 85% or more weight of texturised polyester filaments, now as per the report of ATIRA as well as report of Textile committee, that could not be ascertained as the weft ruptured, therefore the basic condition of 85 % percent could not be fulfilled and could not be ascertained whether weft is texturised yarn or not. There is no possible reason to cover the product under this subheading when basic criteria not fulfilled and in all the reports relied upon by the department it is clearly mentioned that they could only ascertain the warp which ranges from 34% to 47% of texturised yarn and to be classified as textured yarn the warp and weft should be more than 85% which is not the case in all the test reports. Therefore, the only conclusion that could be drawn from the above facts is department has not discharged their burden of proof and the classification of the department should be rejected as held by Hon'ble Supreme Court and CESTAT in various decisions; In case of UIO vs Garware Nylons Ltd. 1996 (87) E.L.T. 12 (S.C.) held:

"The burden of proof is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the authority first adjudicating."

In HINDUSTAN FERODO LTD. Vs COLLECTOR OF CENTRAL EXCISE, BOMBAY 1997 (89) E.L.T. 16 (S.C.) :

"It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed."

Also in recent order Cestat held in the matter of ALPHA FOAM PVT. LTD. Vs COMMISSIONER OF CENTRAL EXCISE, PUNE-I 2019 (365) E.L.T. 636 (Tri. - Mumbai):

"The impugned order clearly recognises that the test report is not final. However, he continues to rely on the said report. He has relied on the fact that the original adjudicating authority has evaluated the product in terms of the technical literature available. We find that the office of the chemical laboratory is not sure of exact classification and has raised some doubts about classification, it is not open to original adjudicating authority to decide the issue suo motu without going back with the said clarification to the office of the Chemical Examiner. The Commissioner (Appeals) has in his order observed that the technical basis of the Dy. Chief Chemist is quite clear whereas the report itself shows that the office of Chemical Examiner is not clear about the classification and needs further clarification before arriving at final decision. It is seen that the onus of establishing the change of classification is on Revenue and from the records it is apparent that Revenue has been unable to produce sufficient evidence to substantiate the claim."

The facts in the above judgment of Cestat is similar to the Appellant's case as in the above case also there is an inconclusive report which has been relied upon as in the appellant's case and the Cestat was pleased to allow the Assessee's appeal.

2.5 Without prejudice to above findings, it is a settled legal position that if the goods are not classifiable under the chapter heading proposed by the revenue thereafter even the goods is classified under the chapter heading claimed by the assessee is correct or not, the case of the department will fail. This gets support from the following judgments:

- **PEPSICO HOLDINGS PVT.LTD.- 2019(25) GSTL 271 (Tri.-Mum)**

"8. In the light of the above, we cannot decide on a classification that has not been pleaded before us. Once the classification proposed by Revenue is found to be inappropriate, that claimed, while clearing the goods, will sustain even if it may appear to be inappropriate. We cannot also, in our appellate capacity, direct or accord the latitude for invoking Section 11A of Central Excise Act, 1944 by obliteration of the proceedings leading to the impugned order. The mandate of the law pertaining to recovery of duties not paid or short-paid will have to be followed to the letter."

The above decision of the tribunal is based on the view taken by the Hon'ble Supreme Court in the case of WARNER HINDUSTAN LIMITED –(1999) 6 SCC 762 wherein the Hon'ble Supreme Court has held as under:

"In our opinion, the tribunal was quite wrong in these circumstances in allowing the appeal of the Excise Authorities and classifying the mint tablets as items of confectionary under Heading 17.04. The correct course for the tribunal to have followed was to have dismissed the appeal of the Excise Authorities making it clear that it was open to the Excise Authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionary. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before authorities below."

In view of the above settled law, irrespective whether the classification claimed by the appellant is correct or not since the classification proposed by the Revenue is absolutely incorrect, the entire case of the Revenue will not sustain.

3. Since the revenue has not been able to discharge their burden of proof. Hence the classification of goods declared by the appellants cannot be disturbed.

4. As per our above discussions and findings, the impugned orders are not sustainable. Hence, the same are set aside.

5. The appeals are allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court 11.01.2022)

(RAMESH NAIR)
(MEMBER JUDICIAL)

(RAJU)
(MEMBER TECHNICAL)