

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

REGIONAL BENCH- COURT NO.3

Customs Appeal No.11499 of 2018

(Arising out of OIO-MUN-CUSTM-000-COM-16-17-18 dated 12/02/2018 passed by Commissioner of CUSTOMS-MUNDRA)

Diamond Creations

.....Appellant

112, 1st Floor, Eight Marla, Model Town ,
SONIPAT, HARYANA

VERSUS

C.C.-Mundra

.....Respondent

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

WITH

- i. Customs Appeal No. 11750 of 2018 (Shri Pradeep Narang)**
- ii. Customs Appeal No. 11969 of 2018 (Shri Amit S Momaya)**
- iii. Customs Appeal No. 12072 of 2018 (Bajrang Lal Sharma)**
- iv. Customs Appeal No. 10400 of 2020 (S S Impex)**
- v. Customs Appeal No. 10401 of 2020 (Shri Suryakant Baldervaj Gupta)**
- vi. Customs Appeal No. 10402 of 2020 (Shri Amit Momaya)**
- vii. Customs Appeal No. 10549 of 2020 (Bajrang Lal Sharma)**

APPEARANCE:

Shri Jatin Mahajan, Advocate for the Appellant

Shri G. Kirupanandan, Superintendent (AR) for the Respondent

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

Final Order No. A/ 10739-10746 /2022

DATE OF HEARING: 12.05.2022
DATE OF DECISION: 27.06.2022

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 the business of importing 100% polyester bed covers, polyester quilt covers and polyester blankets. The appellants had filed bills of entry declaring the goods as 100% Polyester Bed Cover under CTH 63041930. The said consignment was examined by SIIB, Mundra and it was found there were pieces of rectangular shape of printed fabrics, folded and loosely stitched from two sides. Representative Samples were drawn and forwarded to the textile Committee, Mumbai to ascertain whether the said samples fall under the category of "made ups" as defined under HSN. Test Report of Textile Committee, Mumbai was submitted by Custom Broker at Mundra Custom House, wherein Textile committee opined stating that the sample is to be classified as "made up" in Correct description & Classification of the sample as declared by the Appellant in bills of entry whereas, a copy of Test Report obtained by officer of SIIB, Custom House, Mundra in person revealed a different remark as "could not be ascertained". When clarification was sought from the Committee, they confirmed that the report obtained by SIIB officer is the genuine report and the report submitted by Custom Broker is the fake report. 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 38.4 % is texturised yarn and remaining 61.5% cannot be ascertained, therefore CTH cannot be decided. Since actual composition of texturised and Non texturised yarn was not forthcoming hence, vide letter sample was drawn and sent to Ahmedabad Textile Research Association (ATIRA) for ascertaining the nature and composition of goods, ATIRA confirmed that the samples are made up of 100% polyester and contains all texturised filament yarn. As the fabric has been peach finished the filament yarn are damaged, hence actual strength of warp and weft yarns used in making the fabric cannot be determined. Show Cause Notices were issued to the Appellants relying upon the Textile Committee Reports and statements of various persons. Later on Show Cause Notices were adjudicated confirming the custom duties and penalty on the importers and personal penalties were imposed on authorised persons of the importer and CHA and other person involved under Section 28(4), Section 24AA, Section 112(a), Section 114A, Section 114AA of Customs Act, 1962. Therefore the present appeals.

02. Heard both sides and perused the records. The Appellants' main contention is that department has not discharged the burden of proof of classifying the impugned goods under chapter 54 for which they have relied upon this CESTAT's order in case of SUN RISE TRADERS VS CCE Final Order No. A/10013-10026/2022 dated 11.01.2022. Regarding the personal penalties on CHA (Bajrang Sharma & Amit Momaya) the charge of forging of the textile committee reports, it is Appellants submission that the basis of imposing penalty are only either retracted statements of Bajrang Sharma & Amit Momamya or statement of Mahesh Bhanushali of which the Appellants never got the chance of cross examination even after requesting repeatedly.

03. On the other hand Revenue's contention is that Hon'ble Tribunal's order in case of Sunrise Traders vs CCE is not applicable in present appeals and clearly distinguishable. In case of Sunrise Traders appellants challenged the test reports of Textile Committee and requested for retesting also whereas facts in the present appeals are different as the textile reports have conclusively proved the impugned goods are polyester fabric and there was no request of retesting from appellants because Test reports of textile committee and ATIRA are conclusive and decisive. Also the forgery of textile committee report by the appellants has been proved which discharges the burden on part of revenue.

3.1 Now before moving further we proceed to examine whether the facts of the Sunrise traders order supra can be applied in the present set of appeals or it is distinguishable for the reasons stated by the revenue. In the above relied upon order in the Textile Committee report, it was mentioned in the column of correct description and Classification of the sample that appropriate HS Code could not be provided due to rupture of yarn in weft while untwisting, the condition of having 85% texturised polyester yarn to classify under CTH 54075490 which is similar in the present set of appeals where warp is 38.4% texturised yarn and weft cannot be ascertained. The report of ATIRA has also been relied upon to prove that the goods are 100% texturised filament yarn in both warp and weft this was also dealt by the bench in detail in the SUNRISE ORDER (supra) relevant portion is reproduced below:

"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 quiet 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."

Since we have already dealt the above reports of Textile Committee and ATIRA which are truly identical in nature, we find no reason to change our findings on the basis of the above reports as no new facts have been brought to our attention which warrants such a change. 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.

3.2 Now coming to the contention of revenue regarding forgery of the textile committee report, we do not find any reason to go into the detail as the fact that reports were forged does not impact the classification assuming the reports relied upon by the department are the original one as was held in Sunrise Trader case (supra). Lastly personal penalty on the charge of forgery of Textile Committee report, Mumbai on Bajrang Sharma, Amit Momamya and Mahesh Bhanushali, have been imposed mainly on the basis of confessional statements of all three persons involved. We find that forgery is a very serious charge which should be proved by clear and cogent evidence which seems to be missing in the present case as two of them have retracted their statement and the statement of Mahesh Bhansuhali is the one

left for which both the appellants have asked for cross examination which was denied by the lower authorities, which in our view should have been given since other confessional statements were retracted. In our view imposition of penalty only on the basis of Mahesh Bhanushali is not tenable, hence set aside.

3.3 Moreover, when department's claim of change of classification failed as discussed above the personal penalties being consequential to the main case of classification would also not sustain.

4. As per our above discussions and findings, the impugned orders are not sustainable. Hence, the same are set aside. The appeals are allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 27.06.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul