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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/186 /2006 - CU[DB]

Date 10/08/2009

Assistant Registrar
C.E.S.T.A.T., New Delhi

To :
M/S. JAI GANESH TEXTILE & WOOLLEN MILLS (P)
LTD., 4121/1, HARGOBINDPURA, LUDHIANA.

M/S. JAI GANESH TEXTILE & WOOLLEN MILLS (P) LTD.

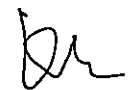
Appellant

CC AMRITSAR

Vs
Respondent

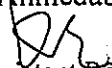
THE COMMISSIONER OF CUSTOMS

I am directed to transmit herewith a certified copy of Final order No. C/340/ 2009 CU[DB] dated 03.08.09
passed by the Tribunal under Section 129, (B) of the Customs Act, 1962 & Financial Act 1994 relating to Service Tax


Assistant Registrar
(Customs Appeal Branch)

Copy to :

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- 5 Bar association, CESTAT, New Delhi
- 6 Director Publications, Customs, Excise, I.P. Estate, New Delhi
- 7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
- 8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17
- 9 Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT. U.P.
- 10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
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Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

C/186/2006

**(Arising out of Order-in-Original No.33/Cus/05 dt.30.11.05
passed by Commissioner of Customs, Amritsar)**

M/s. Jai Ganesh Textile & Woollen Mills(P) Ltd. Appellant

Versus

Commissioner of Customs, Amritsar Respondent

Appearance
Sh. H.O.Arora, Adv. For Appellant

Sh. Vijay Kumar, SDR for Respondent

Coram: Hon'ble Mr. D.N.PANDA, JUDICIAL MEMBER
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

 Date of decision: 20.7.09
Order No. C/340/09

Per D.N.Panda:

This appellant is in second round of litigation before the Tribunal. Adjudication order was passed on 26.3.01. Being aggrieved by that order, the appellant came before the Tribunal raising the issue of classification only. Tribunal decided the matter by order dt.21.11.01 in Appeal case No.C/228/2001-D and that decision has been reported in 2002(149)ELT.352(Tri.-Del.). The operative part of the order as appearing in para 7 of the reported decision reads as under:

"7. In the light of the discussions made above, the impugned order of the Commissioner is set aside and the

matter is sent back to the adjudicating authority for getting the sample of the impugned goods tested again subject to availability of the sealed sample with either side i.e. the Customs Authority or the appellants and thereafter to decide the case afresh. However, in case the sealed sample is found to be not available, for retest, the adjudicating authority, in that event, shall allow cross-examination of the Chemical Examiner who had earlier submitted his report dt.25.2.99, to the appellants and thereafter will decide the case afresh in accordance with law".

2. Test report of both testing authorities being in dispute, Tribunal directed the appellant to make the samples available to Revenue for retest afresh. On the basis of test report, the learned adjudicating authority was directed to decide the matter afresh. Alternatively in the event, sample is not found to be available for retest, it was directed that the learned adjudicating authority shall allow cross examination of the Chemical Examiner who had earlier submitted his report dt.25.2.99. On the basis of the outcome of either of the alternatives, the matter was directed to be decided afresh in accordance with law. The appellant went back to the Ld. adjudicating authority for determination of the issue afresh before him. That authority passed an order on 29.11.05 granting opportunity of hearing to the appellant.

3. At the denovo adjudication stage, the appellant has the same grievance that 19,600 kgs. of goods imported by Bill of Entry No.0112 dt.18.1.99 for clearance were Acrylic Waste meant for home consumption and such goods deserved to be classified under sub-heading 5505.10. The second argument of the appellant was that anti-dumping duty was not leviable. Thirdly, the appellant raised the grievance that the valuation should not

be done basing on the classification under the heading 5006.30 as claimed by the Revenue.

4. Ld. Adjudicating Authority heard the matter on the basis of the order passed by the Tribunal as aforesaid. But that Authority decided the classification issue against the appellant without conducting retesting of the samples made available by the appellant. He made the finding on the basis of cross examination of Chemical Examiner. The Chemical Examiner who had examined the sample earlier, was in the meantime retired. Cross examination evidence is available in the paper book at page 12. That was done on 6.10.05. It is relevant to state that the Tribunal passed order on 21.11.01. Nearly after four years, cross examination was done. Effort was not made for retesting the goods except the remark by Revenue in para 6 of the impugned order that sample provided by the appellant was questionable being tempered and seal thereof was broken.

5. Ld. Adjudicating Authority in para 18 confirmed the anti-dumping duty leviable. So far as the valuation of the goods is concerned, that authority resorted to valuation basing on the classification under heading 5006.30.

6. Ld. Counsel Shri Hari Om Arora appearing on behalf of the appellant submitted that this appellant was all along crying that the goods imported were Acrylic Waste. But at all stages deaf ear was paid. According to him, CRCL laboratory report is available at page 28 of the appeal folder when the goods were tested by Revenue. That report categorically required following three questions to be answered:

" Whether – The sample is synthetic staple fibre and meet the following specifications:

1. Fibres are of uniform length and uniform denier and uniform diameter.
 2. Whether the fibres are carded, combed or otherwise processes for spinning of yarn.
 3. It is free from fused fibre and extraneous malber.
- The report on the question appears on the reverse of the page 28 that report reads as under:

Report : The sample is in the form of continuous stranel of white, crimpent, parallel staple fibre without twist. The fibres are of spinable length and uniform diameter. It is free from fusel mass and extraneous matter. The sample may merit consideration as Cardeol Combed or otherwise processed for spinning. It is composed wholly of acrylic"

6.1 Ld. Counsel submits that since the test report was made available as annexure to the SCN dt.6.8.99, the appellant being dissatisfied with that, immediately informed the adjudicating authority by its letter dt.6.9.99 appearing at page 31 of the paper book stating that the test report is not free from ambiguity and such report being questioned by the Appellant, the sample should meet the retest. The appellant also prayed for informing the fee payable for retest. But there was no reply at all from Revenue for a fair treatment to the appellant. The appellant, therefore, sent the goods for testing by an expert. His report is available at page 19 of the paper book and that reads as under:

"Sub: Description of the sealed sample bearing No.34, Central Excise, Chandigarh pertaining to bill of entry No.112 of 18.1.99.

TO WHOM IT MAY CONCERN

I have my self drawn and examined the sealed sample and I am of the opinion that the sample is from drawing process of a spinning plant. It is a sample of soft

waste. Some staples are from tow to top conversation system as some of the fibres are crimped. The sample is not in the form of regular silver. The sample is of variable staple length. The staples are of variables fibre diameter which is measured in deniers. So the deniers are also variable.

All the above factors point to the fact that it is soft waste without parallel staple fibres and is without twist (waste without twist is always soft waste). The soft waste can be subjected to the process of worsted system to produce yarn".

6.2 Shri Arora submits that the report of the expert was dt.21.2.01. That report was available before the learned adjudicating authority and the expert was available for further examination by Revenue. Report of the expert revealed nothing against the appellant. When order-in-original was passed on 26.3.01, the expert opinion at page 19 was available before the Authority for consideration. Failure to retest the goods by Revenue has caused injury to the appellant when the appellant was crying for retest as early as 6.9.99. This clearly shows how the authorities had made up their mind against the appellant to deny natural justice.

6.3 Shri Arora Ld. Counsel, submitted that though the appellant was dealt in the manner aforesaid, it appeared for cross examination of the Chemical Examiner who had tested the sample earlier. Such witness of the Deptt. appeared on 6.1.05. By that time she had already retired. There was a question put to her as to whether there is any standard method prescribed for testing. The reply was that testing was done as per laboratory standard provision. There was another question on the quantity of sample tested. The answer goes to say that such information is available

in the laboratory record. Similarly to a question ^{as to} what was the diner of the sample tested, the reply was that the information is available in laboratory records. Ld. Counsel further submits that another question was put to get the details furnished in respect of diner of the sample. The reply was that the witness was not aware whether the record is still available with the laboratory to indicate the manner of examination. When there was a question as to whether there was any query raised by Customs authorities regarding testing of sample for determining whether it is synthetic waste or not, the answer was that no such query was raised by the Customs authorities. Ld. Counsel points out that even the cross examination did not suggest to know whether the goods were acrylic waste or acrylic fibre. Thus Revenue failed to discharge its burden of proof.

6.4 Shri Arora throws light on the HSN classification criteria. He submits that fibre waste(soft waste) are of two types. One is long fibre obtained as waste and the other is short fibre obtained as waste. The manner of getting the waste decides the nature of waste. For this purpose he relies on the HSN classification criteria under heading 55.05 which reads as under:

"55.05 - Waste(including noils, yarn waste and garneted stock) of

Man-made fibres.

5505.10 - Of synthetic fibres

5505.20 - Of artificial fibres

This heading covers waste of man-made fibres(filaments and staple fibres - see the General Explanatory Note to Chapter 54) and includes :

- (1) Fibre wastes (soft waste), such as relatively long fibres obtained as waste during the formation and

processing of filaments; short fibres obtained as waste from the carding, combing and other processes preparatory to the spinning of staple fibres(e.g., noils, small broken pieces of laps, slivers or rovings).

- (2) Yarn wastes (hard waste), i.e., broken, knotted or tangled yarns collected as waste during the spinning, doubling, reeling, weaving, knitting, etc., operations.
- (3) Garnetted stock, i.e., fibres obtained by tearing rags or yarns into their component fibres.

Such wastes are classified in this heading whether or not they have been bleached or dyed, provided that they have not been carded, combed or otherwise processed for spinning.

The heading does not include :

- (a) Wadding (heading 30.05 or 56.01)
- (b) Waste fibres, carded, combed or otherwise processed for spinning (heading 55.06 or 55.07).
- (c) Textile flock and dust and mill neps (heading 56.01).
- (d) New or used rags (Chapter 63)".

6.5 According to Mr. Arora, Ld. Counsel, cross examination allowed was an empty formality when the witness was already retired and did not possess laboratory record. Nothing came out from the mouth of the witness against the appellant. Shri Arora submits that when the sample available with the appellant were provided to the department for retesting by letter dt.13.10.05 available at page 15 of the paper book, the department passed the denovo adjudication order on 29.11.05. The order was passed basing on the cross examination report throwing the appellant from fair retest of the sample when cross examination failed to establish stand of Revenue. The reason given by the Ld. adjudicating authority in para 16 of the order does not serve the purpose of law when the questioned sample was under seal, but that was not sent for further opinion by an authentic laboratory.

The authority merely went by the outcome of cross examination made on 6.10.05 without any evidence recorded against the appellant in such examination.

6.6 So far as the anti-dumping duty levy is concerned, Shri Arora submits that these goods are not leviable to anti-dumping duty. He relies on the judgment of the Tribunal in the case of Beeta Exports vs CC, Amritsar reported in 2003(153)ELT.632(Tri.-Del). He places para 5.2 of the said decision to submit that depending on the test, if the goods are not acrylic fibre, there should not be anti-dumping duty.

6.7 So far as the valuation is concerned, Shri Arora submits that when the Tribunal has given two options while remanding the matter, the question of valuation was still open to the appellant for challenge in denovo adjudication which is a question of law. When the appellant's claim was that its imported goods are rightly classifiable under acrylic waste category, there is no need for arbitrary valuation of the goods so imported.

7. Ld. DR Shri Vijay Kumar defends Revenue submitting that the denovo adjudication order on all counts establishes liability of the appellant. According to revenue, there was clearance of the goods under bond. When the goods were under the bond that was subject to test of applicability of the notification No.81/97-Cus dt.24.10.97 for imposition of anti-dumping duty.

7.1 Ld. DR further submits that there was no difficulty for revenue to allow a retest. But when the samples brought by the appellant was found to be tempered and its seals broken, that created doubt for revenue. Therefore, no reliance was possible

to be placed on that packet of goods. Consequently retest was not ordered. But following the second alternate suggested by Tribunal in its order reported as aforesaid, the appellant was allowed cross examination of the Chemical Examiner. That aspect was also not disputed by the appellant. The appellant put several questions to the witness and the answers go in favour of revenue. So far as the length of the sample is concerned, that has decided the case for appropriate classification claimed under the heading 5506.30. He refers to the question for getting an answer in the course of cross examination about the length of the sample. The answer to the question was that the length of the fibre was noted as 8.7, 9.5, 11.0, 12.7, 13 and 17.0 c.m. Since the length of fibre is more than 5 millimeter, it is spinable. Ld. DR also says that the diners' length was to be 3.1. This was sufficient for the revenue to proceed against the appellant even following HSN classification to hold that the goods were classifiable as claimed by revenue. So far as the valuation aspect is concerned, Ld. DR submits that the same was never being a question earlier raised by the appellant, ¹ that point should not be raised here.

8. Heard both sides in great length and perused the records.

9.1 We have noticed that the technical test was the guiding basis for determining classification of the goods in denovo adjudication. Both sides have rival submissions on the manner of conduct of the case by the learned adjudicating authority. To resolve the issue, Tribunal in its order aforesaid, granted fair opportunity to both sides to produce sample available with them for retest. Revenue failed to bring its sample for retest.

Therefore, the appellant came with the sample on 13.10.05 for such purpose. But prayer of the appellant for retest was negated in the adjudication without informing anything about right of the appellant for retest in response to the appellant's letter dt.13.10.05.

9.2 When the retest could not be conducted, second alternate suggested by Tribunal for cross examination of the Chemical Examiner was adopted. Record reveals that the Chemical Examiner who examined the sample earlier in the meantime had retired. But deposition of that witness in cross examination categorically indicates that she did not possess any document or record for answering the questions put by the appellant in the course of cross examination. There is no doubt that the denial aspect has been replied by the witness. But that also creates the doubt in view of the answer by the witness showing that this information is available in the record. When the record was not in a possession with the witness this answer cannot go in favour of the revenue in absence of any verification done by Revenue from laboratory record. The witness in respect of length of the sample, provided description thereof. But absence of the record with her, does not permit to presume that the description given by the witness is correct. When the witness was examined on 6.10.05, revenue should have taken steps to call for the records of laboratory and examined the deposition of the witness properly. When we look into the question about the nature and character of the goods, we find ^{from} the answer that question relating to this aspect was not asked to the laboratory for a reply. This

clearly throws light that Revenue had no anxiety to find out whether the acrylic imported was waste or not.

10. Shri Arora relies on page No.28 which showed dispatch of the sample for testing. We have already extracted what was the question before the laboratory. The question does not throw light to show whether revenue had any anxiety to find out that the goods were acrylic waste or fibre. Apart from this, even though there was HSN classification criteria showing that the fibre waste can be classified according to its length, there was no effort made by the revenue to bring cogent evidence to record as to classification criteria. When a question was put to the witness to find out characteristic of the good for classifying whether the same is acrylic waste, the answer provided does not throw light about the classification criteria followed in examination of sample. When the appellant had also cross examined the witness about the characteristic of classification of synthetic waste, the answer was that test guideline is available in standard books. This clearly indicates the mind of the witness that the witness had no material to support the examination report issued earlier. To a question whether the sample deserved to be classified as synthetic soft waste or not, the answer was that the finding was given in the test report. Similarly as to the query of the softwaste, the answer was that such characteristic is available in standard book. There was another question that how different types of waste are differentiated, the answer was that such answer is available in the standard books. When we notice that the cross examination had not pointed out the characteristic of

the sample nor even any cogent evidence was pointed out by the witness who had already retired, to show essential characteristics of the goods for classification, reliance on the cross examination is unsafe. So also when Sh. Arora, Ld. Counsel brought to our notice aforesaid infirmities in cross examination, *that made unreliable.*

11. Ld. DR drew our attention to page 11 submitting that Deptt. has replied to the appellant that the sample produced by it was tempered and questionable for which the same cannot be accepted for retesting. This was done by letter dt.27.10.05 in response to letter dt.13.10.05 issued by the appellant. We do not understand why the department did not make any effort to send the sample for a fair examination in the presence of both, to establish the character of the samples. When the appellant submits that the textile technologist had issued a report on 21.1.05 that has also not been contradicted by Revenue bringing any technical evidence further. Therefore, both on cross examination and on test report, revenue fails to prove its case.

12. We have also gone through the judgement in the case of Beeta Exports(Supra). There is no dispute that the Tribunal has held that the leviability of anti-dumping duty is subject to appropriate classification of goods. This order supports our view which we have taken in this case herein after.

13. We have gone through the notification submitted by the Ld. DR on the anti-dumping duty. We have no disagreement with revenue that anti-dumping duty was leviable on acrylic fibre. But to direct such levy, the goods should be proved to be acrylic fibre. In this case, Revenue failed to prove its case for *claimed* classification.

Burden of proof was not discharged. We have noticed aforesaid that test report of CRCL did not prove the impugned goods to be acrylic. Therefore, it is not possible to direct imposition of anti dumping duty when the goods itself remained in doubt for its identification and classification. Levy of anti-dumping duty is accordingly unwarranted in this case and the classification claimed by Appellant is upheld.

14. So far as the valuation is concerned when revenue could not come out with full proof and without any evidence to suggest that the goods should be classified under heading 5506.30, the appellant gets benefit of doubt.

15. In view of the aforesaid observations, all the three issues i.e. levy of anti-dumping duty, valuation and classification go in favour of Assessee for which the appellant succeeds and its appeal is allowed.

Order dictated in the open Court.

(D.N.Panda)
Judicial Member

(Rakesh Kumar)
Member Technical

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