

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**
REGIONAL BENCH – COURT NO.2

Customs Appeal No.76022 of 2016

(Arising out of Order-in-Original No. KOL/CUS/Port/14/2016/Gr.3/Apprg. dated: 03.03.2016 passed by Commissioner of Customs (Port), Kolkata)

Commissioner of Customs (Port), Kolkata
(15/1, Strand Road, Customs House, Kolkata-700001)

...Appellant(S)

VERSUS

M/s. Rabbi Traders & Others
(92, first floor, LD Block, Pitampura, Delhi-110088.)

...Respondent(S)

Appearance:

Mr. Subrata Debnath, Authorized Representative for the Appellant
Mr. None

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

Final ORDER No.....76535/2023

Date of Hearing :22.08.2023

Date of Decision :22.08.2023

PER RAJEEV TANDON :

The Department is in appeal against the Order-in-Original No. KOL/CUS/Port/14/2016/Gr.3/Apprg. dated. 03.03.2016 passed by Commissioner of Customs (Port), Kolkata.

2. At the outset, it is observed that the Department has filed only one appeal bearing No. C/76022/2016, as indicated supra. However, in the Review Order No. KOL/CUS/COMMITTEE/REVIEW/12/2016 dated. 24.05.2016, the Review Committee has stated as under:

“Thus, on perusal of the impugned order in original, the Committee is of the view that the issue of segregating and determining the old and used articles showing signs of appreciable as raised by the Adjudicating Authority was not

warranted. However, the committee is of the view that the order in respect of the CHA and members of the Examination Committee appears to be legal and proper. The appeal is being proposed against the rest of the notices." There are no separate appeals filed as required in terms of Rule 6A of the CESTAT (Procedure) Rules, 1982 in respect of the other noticees, against whom the department had any misgivings about the legality and propriety of the impugned order in appeal. The CESTAT registry vide Defect Memo No. SP/75400/16-C/76022/16- dated 04.07.2016 had also pointed out the same. The said defect memo at Sr. 17 reads:

"Joint appeals are not admissible. This appeal treated M/s Rabbi Traders to file separate appeal for others respondent."

In view thereof the present appeal filed by the department is being considered as to have been filed against the principal party alone.

3. The facts of the case are that the respondent Rabbi Traders, Delhi imported old and used worn clothing, completely fumigated which were allowed to be cleared upon re-determined values, imposition of redemption fine and penalty. The proceeding arise out of show cause notices (A) DRI F.No. 127/KOL/APP/2008 Rabbi dated 26/27.11.09 for bill of entry no. 422965 dated 29.07.08; and (B) DRI F.No. 127/KOL/APP2008/Rabbi dated 26.07.2010 for bill of entry no. 421013 dated 18.07.08 issued by the Directorate of Revenue Intelligence.

4. The primary issue involved in the appeal is the challenge to the methodology of examination undertaken by the DRI. They however have subsequently added a whole list of grievances to the impugned order as under:

- ❖ *Whether the Commissioner has erred in observing that a scientific method of examination was not adopted by DRI while trying to arrive at a conclusion regarding the actual type of goods and in rejecting the examination findings in entirety;*
- ❖ *Whether the Commissioner has erred in appreciating that it is not at all feasible to burst open all the bales to fulfil the criteria of 100% examination, considering the huge space required for storage of such burst opened goods nowhere in the country all bales in a consignment are burst opened;*
- ❖ *Whether the Commissioner has erred in appreciating that application of any sort of non-scientific method and, for that matter, any incomprehensiveness of the examination leaving possibility for variation from the actual contents of the consignments, appears to be misplaced without taking into consideration the trade practice, which has adverse revenue implications;*
- ❖ *Whether the Commissioner has erred in determining the classification of the goods, which was done keeping in view of the provision contained under Section 19 of the Customs Act, 1962;*
- ❖ *Whether the Commissioner has erred in determining the valuation, which was proposed in show cause notices using reasonable means under rule 9 of the Customs Valuation (Determination of Value of Imported Goods Rules) 2007, as preferable for valuation of subject goods of no uniform standard;*

- ❖ *Whether the Commissioner has erred in determining the interest under Section 28AB of the Customs Act, 1962;*
- ❖ *Whether the Commissioner has erred in determining the quantum of the fine and penalties under Section 125 and 112(a)/112(b) respectively of the Customs Act, 1962;*
- ❖ *Whether the Commissioner has erred in not imposing the mandatory penalty under Section 114A of the Customs Act, 1962;*
- ❖ *Whether the Hon'ble tribunal should pass any other order as deemed fit.*

5. On the issue of determination of the actual nature of the contents of the impugned consignments, we find that the case made out by Directorate of Revenue Intelligence, Kolkata in brief, is that six consignments covered under Bill of Entry No. (A) 422965 dt. 29.07.08; and (B) 421013 dt. 18.07.08 declared to contain 'old and worn clothing and worn articles' and reported by the 'Examination Committee', initially examining the goods, as 'old and used garments' had been found on re-examination by the investigating agency to contain 'garments' having 'no signs of appreciable wear', therefore, did not merit classification under Tariff Item 63090000 of the 1st Schedule of the Customs Tariff Act, 1975, as declared by the importer. Further, these consignments under impugned two Bills of Entry were found to contain quilts as well which the investigating agency had sought to classify the said goods on merit under respective headings of the CTH as detailed in the show cause notice. It is alleged that the importer had resorted to incomplete description in respect of the subject goods, which amounted to mis-declaration.

5.1. We thus find that the case revolves around the primary contention that the impugned goods are other than 'Old and Used garments'. The key issue for determination here is, therefore, whether the imported goods are indeed "Old & Worn Clothing Completely Fumigated" as had been claimed by the importer at the time of importation or otherwise. Determination of Classification and valuation as well as the culpability of the noticee, if any, can follow only after determination of this key issue.

6. The consignments were initially examined by the Examination Committee by strip opening without bursting open the bales as per existing practice and had been reported as old and used garments. As a part of the investigations, the impugned consignments were re-examined, when as per records, about 9%-10% consignments were burst open, and a visual examination of the rest of the goods undertaken to draw the conclusion that the goods were other than old and used goods falling under Chapter 6309 and were also undervalued. Also, certain code words on the bales helped them in identifying the description of the clothing item contained in that particular bale. However, since the examination report essentially suggested that a major part of the consignments consisted of items that had little or no sign of appreciable wear, we are of the view that it is imperative that the examination of the consignment should have been carried out in a manner as would have enabled true and correct assessment of the quality and quantity of items imported i.e. to split up the imported cargo as consisting of garments that had sufficient signs of wear and tear-weight wise, and that which had little sign of wear and tear piece wise. Similarly quantity of items which had absolutely no signs of wear

and tear also needed quantification, piece wise. Also specific reasons for so assessed need to be stated. This was a minimum mandatory requirement for assessment of the goods on merit under the respective headings, since duty is to be calculated piece wise on most of the goods. We also note from Table – V given in the SCN that several of the articles did not have a unique code word or numbers, likewise there are articles which have more than one code word. Thus relying on the purported Code Words/Code Nos found on the hydraulically pressed bales is of no consequence for purpose of assessment.

7. The Tribunal in a similar context in the case of **M/s. A.N Impex Vs. Commissioner of Customs (Port) Kokata**¹ had held as under:

"7.4. Article having little sign of appreciable wear, would not automatically fall in the category of article having no sign of appreciable wear, assigning any reason or in absence of any evidence. We also find that in the show cause notice in para 53 at page 9 it is recorded that "Moreover, most of the articles of consignment having no sign of appreciable wear". Similarly, Id. Commissioner has found that in most of the articles of the consignment. Admittedly, 'most' does not denote 'all'. Thus the findings are based on presumptions and assumptions."

"7.5 Further, from the panchnama, SCN and finding of the Ld. Commr., nothing specific is revealed as to how many articles have no sign of appreciable were. The DRI proceeded on the basis that the particular type of Code No. carries similar

1. 2013 (287) ELT 197 T

goods, since the bales carried consignment of cloth of various kinds only, merely on presumption, it cannot be held to carry same type of articles. It is cardinal principle that while fixing the liabilities the same should be specific and not based on mere estimation or guess work. Undisputedly, the consignment was not subjected to 100% examination and no scientific method of sampling was followed. We are of the opinion that the sample test by DRI could not be appropriate in the present case while challenging the earlier report of the Examination Committee, especially when re-examination of the consignment was resorted to by shunning the report of examination carried out earlier by the Examination Committee.”

(Emphasis Supplied)

8. Identical, is the situation in the present case. As per chapter Note 3(b)(1), in order to classify the goods under Chapter 6309, the article must (a) show signs of appreciable wear and (b) they must be presented in bulk or in bales, sacks or similar packing. It is not in dispute that the imported goods were in hydraulically compressed bales. The only question remaining, here is whether the goods were indeed having signs of wear and tear or not. The Chapter note has no discussion on “sufficiency” of wear and tear. Thus in other words, a garment which shows signs of wear and tear, sufficient or otherwise, will be classifiable under CTH 6309 and a garment having no signs of wear and tear will be classified on merit under its respective heading. It

may be pertinent to point out here that it is only the "reasonable belief" of the seizing officers that is the basis for concluding that the goods were not having sufficient wear and tear and as such could not be treated as old and used garments classifiable under CTH 6309. There is no expert opinion rendered by any technical person, nor is there a report from the testing agency onto the actual state and nature of goods.

9. In the given situation, the re-examination of the goods not having been done completely, determination of the actual nature of the impugned goods have to be based on the basis of available records. On record, is the specific finding of the Examination Committee pointing out the old and used nature of the goods. This in the given context cannot be given a go by and has to form the basis of assessment and has been so done by the department. A very minor percent of the cargo stated to be of bags, quilts, etc., without specifying numbers and other relevant details/composition etc., is meaningless for purpose of assessment of the goods. Thus for reasons aforesaid, we are of the view that a very small percentage of bales which on re-examination by DRI, had been found to contain quilts, bags, curtains, etc. would also have to go alongwith old and used worn clothing as for their valuation and classifiable under CTH 6309 or the appropriate heading under the Customs Tariff. This is more so as CTH 6309 heading is with a caveat and reads as under:

"HEADING 63.09 – WORN CLOTHING AND OTHER WORN ARTICLES.

In order to be classified in this heading the articles of which a **limitative** list is given in paragraphs (1) and (2) of this Explanatory

Note must comply with both of the following requirements. If they do not meet these requirements they are classified in their appropriate headings.

(A) They must show signs of appreciable wear whether or not they require cleaning or repair before use.

New articles with faults in weaving dyeing etc. and shop-soiled articles are **excluded** from this heading.

(B) **They must be presented in bulk (e.g. in railway goods wagons) or in bales, sacks or similar bulk packings** or in bundles tied together without external wrapping or packed roughly in crates.

These articles are normally traded in large consignments usually for resale and are less carefully packed than is generally the case with new articles.

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* *

Subject to compliance with the above requirements this heading covers the goods in the following **limitative** list only:

(1) The following articles of textile materials of Section XI: clothing and clothing accessories (e.g. garments shawls scarves stockings and socks gloves and collars) blankets and travelling rugs household linen (e.g. bed sheets and table linen) and furnishing articles (e.g. curtains and table covers). The heading also includes parts of such clothing or clothing accessories.

However, the heading **excludes** furnishing articles specified in CHAPTER 57 or heading 58.05 (carpets and other textile floor coverings including "Kelem" Schumacks Karamanie and similar hand woven rugs

and tapestries) even when showing signs of appreciable wear and irrespective of their packing. The articles falling in CHAPTER 94 and in particular those specified in **heading 94.04** (mattress supports; articles of bedding and similar furnishing articles fitted with springs or stuffed or internally fitted for example, mattresses, quilts, eiderdowns, cushions, pouffes, pillows) are also **excluded** from this heading irrespective of their degree of wear or their packing.

(2) Footwear and headgear of all kinds and of any material **other than** of asbestos (e.g. leather rubber textile materials straw or plastics).

All other articles (e.g. sacks and bags, tarpaulins tents and camping goods) showing signs of wear are excluded from this heading and are to be classified with the corresponding new articles."

10. As to the valuation of the goods the DRI had sought to enhance the value of the articles treating them other than 'Old and used article'. We note that in the case of **M/s. S.S. Impex Vs. Commissioner of Customs (Port) Kolkata**² this Tribunal had inter alia observed as under:

"7.8 Once the goods are held to be old and used, their value cannot be enhanced by treating the goods as other than old and used goods. There is no findings that the invoices issued by the overseas suppliers are fake or fabricated and that the importer had paid any amount more than that mentioned in invoices either in kind or any other

manner. Thus, the Id. Commissioner's order on valuation is not sustainable in law. In these circumstances the Id. Commissioner's order is set aside and appeal of importer and other noticees allowed to that extent....."

11. For valuation of imported goods – the mechanism flows from Section 14 of the Customs Act, 1962 and the Customs Valuation (Determination of Value of Imported Goods) Rules 2007, The rules clearly lay down the sequences to be followed for determining the value of imported consignment, only after rejection of the declared value on proper grounds. If the proper officer finds that the declared value is liable to rejection under Rule 12 read with Rule 3(1), then in terms of Rule 3(4), the value is to be determined under Rules 4 to 9 sequentially. Following the ratio of law laid down in M/s. S.S Impex case supra, we find that no plausible reason is made out by the revenue in this appeal, for the revaluation of the assessed goods. Nonetheless, a look at the legal stipulations may be set out for greater clarity. The DRI, sought to reject the declared value by resorting to Rule 12 of Customs Valuation Rules, 2007 (CVR), quoted below:

Rule 12 -Rejection of declared value.-

(1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable

doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of Sub-Rule (1) of Rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation:- (1) For the removal of doubts, it is hereby declared that:

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with Rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the Importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include-

(a) the Significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price,

(c) the sale involves special discounts limited to exclusive agents;

(d) the mis-declaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non-declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents.

12. Thus the declared assessable value of old and used garments imported was rejected, in terms of Explanation 1(iii)(a) to Rule 12, wherever the declared value was less than USD 0.60 per Kg CIF. It is a well settled principle that in case of old and used goods, if the value is liable for rejection, the same cannot be determined under Rules 4 to 8 as these goods do not have uniform standards and can only be re-determined under Rule 9 of CVR, 2007. Similar view has been taken by the Tribunal in the matter of **M/s B.K. Spinning Mills (P) Ltd. – vs- Collector of Customs, Cochin**³ wherein it was held that the

(erstwhile) Rule 8 of the Customs Valuation Rules was correctly applicable in case of subject goods for which there was no uniform standard. Therefore, based on market enquiries undertaken, the assessing officer re-determined the value of such goods. We find no qualms with such valuation arrived at. We also note that this methodology has been upheld and approved of in a series of cases, by this Tribunal viz.:

- i. **Commissioner of Customs (Port), Kolkata vs. M/s Devraj Trading Company, Customs Appeal No.75359 of 2019.**
- ii. **Commissioner of Customs (Port), Kolkata vs. M/s. N.N. Traders, Customs Appeal No.75363 & 75366 of 2019.**
- iii. **Commissioner of Customs (Port), Kolkata vs. M/s Durga Enterprises, Customs Appeal No.78014 of 2018.**
- iv. **Commissioner of Customs (Port), Kolkata vs. M/s Prakash Overseas, Customs Appeal No.75171-72 of 2015.**
- v. **Commissioner of Customs (Port), Kolkata vs. M/s R.D. Impex, M/s Krishna Enterprises and M/s Prince International, Customs Appeal Nos.75830 & 75849-55 of 2016.**
- vi. **Commissioner of Customs (Port), Kolkata vs. M/s R.K. International, Customs Appeal No.76294 of 2016.**
- vii. **Commissioner of Customs (Port), Kolkata vs. M/s Swaraj Woolens, Customs Appeal No.75789 & 75793 of 2016.**
- viii. **Commissioner of Customs (Port), Kolkata vs. M/s Tube Traders, Customs Appeal No.76297 of 2016.**
- ix. **Commissioner of Customs (Port), Kolkata vs. M/s Allied Export Corporation, Customs Appeal No.76280 of 2016.**

x. Commissioner of Customs (Port), Kolkata vs. M/s Laxmi Woolen Mills, Customs Appeal No.76021 of 2016.

amongst several others.

13. We also note that the adjudicating authority in the impugned order has systematically demolished the pleas of the DRI, for adopting the values as indicated in the 'purchase register' recovered from the premises of M/s. Ma Vabatarini Enterprises, Kolkata. Also DRI, while relying on the said "purchase register" of Ma Vabatarini Enterprises to decide the values of individual items had taken the higher side of the range of values mentioned therein, contending that the goods were other than old and used. This is not factually correct and the department has not placed any evidence to substantiate its contentions. Also limiting market enquiry to a single entity Ma Vabatarini Enterprises cannot be deemed to be a satisfactory conduct of the same, at best it is a one-vendor enquiry. The learned Commissioner has given cogent reasons in para 22.4.7 of his order to negate the valuation basis as to be the register values of M/s. Ma Vabatarini Enterprises. We find no reasons to disagree with the same. As regards assessment of old and used garments, the observation recorded by the Commissions is as under:

"22.4.9 As has already been discussed above, I find that at the material time of import, such goods were being allowed clearance through the different ports in the country at USD 0.60 per Kg CIF. In view of the discussions above, I am inclined to accept that the goods should be assessed as per the norms of assessment of such similar goods that had been

prevalent during the material time of import. I accordingly hold that the value of the goods found to be "old and used garments" should be assessed at USD 0.60 per Kg CIF. As for the bales of quilts found in the consignment, while the same would be classifiable on merit under tariff item 94049019 attracting duty @ 10% Basic+14.42% CV Duty + 3% Education Cess on Customs Duty + 4% Special Additional Duty), the value in absence of any reliable and relevant evidence of value for the material period for such items, I hold that the value of these goods should be assessed @ 0.60 USD per Kg."

The Commissioner has thus, based on the above findings, calculated the duty as required to be further worked out in Table (XIV) of the order.

14. On the aspect of imposition of penalty and charging of interest we note that the goods have been determined to be old and used garments. These are restricted for the purpose of import and require an import licence for import and clearance. For the purpose and related aspects like lack of a valid licence for import and the excess weight, the adjudicating authority has subjected the importer to appropriate action in law. Thus, he has rightly confiscated the said goods under Section 111(m) of Customs Act, 1962 and also imposed penal liabilities.

15. In fact, on the methodology of examination of the cargo the Tribunal in the case of A. N. Impex referred to earlier in para 7 has observed as:

"7.5.....from the Panchnama, SCN and finding of the Ld. Commissioner, nothing specific is revealed as to

how many articles have no sign of appreciable wear and how many article have little sign of appreciable wear. The DRI proceeded on the basis that the particular of Code No. carries similar goods, since the bales carried consignment of cloth of various kinds only, merely on presumption, it cannot be held to carry same type of articles. It is a cardinal principle that while fixing the liabilities the same should be specific and not based on mere estimation or guess work. Undisputedly, the consignment was not subjected to 100% examination and no scientific method of sampling was followed. We are of the opinion that the sample test by DRI could not be appropriate in the present case while challenging the earlier report of the Examination Committee, especially when re-examination of the consignment was resorted to by shunning the report of examination carried out earlier by the Examination Committee.”

Unfortunately, there is no variation in the factual scenario in the present appeal as well.

16. Admitting their own handicap at subjecting the goods to a comprehensive examination on account of infrastructural constraints, it is deeply distressing that the Revenue prefers to subject the importers to the implication of a frivolous appeal.

17. In view of the foregoing discussions and our finding supra, we are firmly of the view that the impugned order calls for no interference. The order passed by the learned Commissioner is upheld and the appeal filed by the revenue is dismissed.

(Operative part of the order was pronounced in the open court)

**Sd/-
(R. Muralidhar)
Member (Judicial)**

**Sd/-
(Rajeev Tandon)
Member (Technical)**

K.M

