

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Customs Appeal No. 76079 of 2015

(Arising out of the Order-in-Original No. CCP/NER/11/2015 dated 28.08.2015 passed by Commissioner of Customs (Prev.), Shillong.)

M/s S. K. Enterprises,

Proprietor: Kamal Chand Surana, babu Bazar Building,
3rd Floor, Fancy Bazar, S.S. Road, Guwahati-781001.

...Appellant (s)

VERSUS

Commissioner of Customs (Prev.), Shillong.

North Eastern Region, Customs House, 110, M.G. road, Shillong-793001.

...Respondent(s)

APPEARANCE :

Shri Sudhir Mehta, Advocate for the Appellant

Shri S. Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No. 77366/2023

DATE OF HEARING : 11.10.2023

DATE OF PRONOUNCEMENT: 19.10.2023

PER K. ANPAZHAKAN :

The present appeal has been filed against the impugned order dated 28 August 2015, passed by the Commissioner of Customs, Shillong, wherein he ordered for confiscation of the goods imported vide Bills of Entry No. 10/ICD/05 dated 12.08.2005, 12/ICD/05 dated 26.08.2005 in 15/ICD/05 dated 15.12.2005 and 17/ICD/05 dated 28.12.2005 under Section 111(m) of the Customs Act, 1962. However, he gave an option to redeem the goods on payment of redemption fine of Rs.25,00,000/-. Customs duty of Rs.1,28,82,505/- in total has been confirmed in respect of the goods imported vide the said four Bills of

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Entry. Penalty of Rs.1,28,82,505/- has also been imposed under Section 114A of the Customs Act. This order has been passed pursuant to a remand order passed by CESTAT, Kolkata vide Final Order No.FO/A/75390/2014 dated 26.04.2014.

2. While passing the Final Order No.FO/A/75390/2014 dated 26.04.2014, this Tribunal has ordered for retesting of the remnant samples at CRCL, New Delhi, after following proper procedure and a copy of the Report is to be supplied to the Appellant before deciding this case. As directed by this Tribunal, the remnant samples were retested at CRCL, New Delhi and a copy of the Report was given to the Appellant.

3. Briefly stated facts of the case are that the Appellant imported the goods vide the said four Bills of Entry declaring the same as Cotton Polyester Fabrics classifiable under Customs Tariff Heading (CTH) 52113190. On examination, the department observed that the goods imported were Blue Coloured fabrics of 'Denim' classifiable under CTH 52114200. Samples were drawn in the presence of DRI officers and sent for testing to Customs Laboratory, Kolkata and Textile Committee Laboratory, Mumbai. The Reports received from the Laboratories indicated that the samples had the characteristics of Denim fabrics and the fabrics were three thread twill weave woven fabric and in the construction of the fabric, blue coloured (dyed) yarns entirely made of cotton in one direction and white textured polyester multifilament yarn reinforced with other material in the other direction has been used. Based on the Test Report, DRI concluded that the imported goods are 'Denim fabrics' and merits classification under CTH 52114200.

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Accordingly, Show cause Notices dated 31.10.2005 and 07.02.2006 were issued proposing for confiscation of the goods. In the Notices, the classifications of the goods were proposed to be changed from 52113190 to 52114200. Both the Notices were adjudicated and demands were confirmed. On appeal, this Tribunal has passed the Final Order No. FO/A/75390/2014 dated 24.06.2014. The impugned order has been passed in pursuance of the Tribunal's remand order.

4. In their grounds of appeal, the Appellant made the following submissions:

(i) In the remand order passed by the Tribunal, it directed the adjudicating authority to deal with all the contentions raised by the Appellant and also as to whether the show cause notice could be issued under section 28 of the customs act, 1962. But, the adjudicating authority has not discussed this issue raised by them.

(ii) The Chapter Notes of Chapter 52 defines Denim fabrics. As per the Chapter Notes, Denim" is a fabric of yarns of different colours, three thread or four thread twill, including broken twill , warp faced, warp yarn of which are of one and the same colour, and weft yarn of which are unbleached , dyed of lighter shade of the colour of the warp yarn. From the definition given above, it would appear that Denim is a weaving pattern where the fabric is warp faced and weft yarn is also of the same color of a lighter shade or grey colour. "Warp faced" means where warp is predominant. Fabric is made of one colour where warp yarn are of darker shade and weft Yarn is of lighter shade of same colour where as in the subject samples warp yarn is blue and weft yarn

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is white. Hence, the fabrics does not satisfy the definition of 'Denim' as per the Chapter Notes of Chapter 52.

(iii) The Respondent has sent the goods for retest without due process of law. The Appellant's representatives were not called to see the samples which were sent to the CRCL Delhi laboratory which was necessary for compliance with the order passed by the Tribunal.

(iv) The fabric cannot be treated as 'Denim' because in the Test Report there is no finding that warp yarn is pre-dominant and the fabric is warp faced. The Test report says that the fabric is of two colours, blue and white, which cannot be treated as 'Denim' because Denim is made of one colour fabric where darker side is used in warp and lighter side in weft or weft should be of grey color.

(v) The samples sent to CRCL Delhi were not representative samples of all the four Bills of entry. Hence, adjudication of all consignments cannot be done based on these test reports.

(vi) Therefore, the Appellant contended that the fabrics cannot be treated as Denim and it needs to be classified under Customs Tariff Heading 5211 3190, as declared by them.

(vii) There is no material in the show cause notice to show that there was an assessment done in respect of all the four Bills of Entry. In the absence of any assessment so made, the question of short levy under section 28 would not arise. In support of this contention, the Appellant relied on the decision of this Tribunal in the case of Jaju Petrochemicals.

5. The Ld. A.R submitted that the CRCL Test Report clearly states that the goods imported has the characteristics of Denim fabrics. The Test Report confirms with the definition of Denim as given in the Chapter

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Notes to chapter 52. Accordingly, he prayed for rejecting the appeal filed by the Appellant.

6. Heard both sides and perused the appeal records.

7. Before going into the merits of the issue, we would like to discuss the preliminary objections raised by the Appellant.

7.1. The Appellant contented that the samples sent to CRCL Delhi were not representative samples of all the four Bills of Entry. Hence, adjudication of all consignments cannot be done on the basis of these Test Reports. Also, they contended that the Appellant's representatives were not called to see the samples which were sent to the CRCL Delhi laboratory which was necessary for compliance with the order passed by the Tribunal. We observe that the adjudicating authority has given a findings on this issue when it was raised before him before passing the order, which is reproduced as under:

" I have examined the Test Memo and observed that the samples were drawn in the presence of the proprietor of M/s. S.K. Enterprises and the representative of M/s. Technovite Eastern(P) Ltd, Guwahati, the CHA and none of the said persons/representative have raised any objection regarding the procedure of drawing samples or otherwise. It is therefore not correct to state that the importers were not knowing as to how the samples were drawn. Hence, it is my considered opinion that proper procedures have been followed while drawing as well as sending the remnant samples of the imported goods to retest."

7.2. We agree with the findings of the adjudicating authority. There is no procedural error in the drawal of the samples and sending the

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remnant samples for retest as directed by this Tribunal. Accordingly, we hold that this objection raised by the Appellant is not sustainable.

7.3. The next objection raised by the Appellant is that there is no material in the show cause notice to show that there was an assessment done in respect of all the four Bills of Entry. In the absence of any assessment so made, the question of short levy under section 28 would not arise. We observe that Notice has been issued by the department proposing reclassification of the goods imported under the said four Bills of Entry. On adjudication, the Commissioner has reclassified the fabrics under the CTH 52114200. The classification dispute is further on appeal before this tribunal. When the classification dispute attains its finality, the original bills assessed provisionally will be assessed finally by the proper officer. Thus, we observe that the process of finalization will be done by the proper officer as and when the classification dispute attains its finality. During the course of this process, Notice can be issued for reclassification demanding duty as per the proposed new classification. The demand will be finally confirmed only when the classification dispute attains its finality. Thus, we find there is no infirmity in the demand issued under Section 28 of the Customs Act, 1962 . Accordingly, we hold that the objection raised by the Appellant on this count is not sustainable.

8. We observe that the issue involved in the present appeal is classification of the imported fabrics. The Appellant has declared the imported goods as Cotton Polyester Fabrics classifiable under Customs Tariff Heading (CTH) 52113190. On examination, the department observed that the goods imported were Blue Colored fabrics of 'Denim'

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classifiable under CTH 52114200. Samples were drawn in the presence of DRI officers and sent for testing to Customs Laboratory, Kolkata and Textile Committee Laboratory, Mumbai. It was reported that the samples had the characteristics of Denim fabrics and the fabrics were three thread twill weave woven fabric. It composed of dyed blue coloured cotton yarns in one direction and undyed (white) polyester staple fiber spun yarns along with elastomeric yarns in other direction . The composition is as under:

Cotton yarn : 79.2% Polyester Yarns - 16,8%

Rest being elastomeric yarns.

Based on the Test Report DRI concluded that the imported goods are 'Denim fabrics' and merits classification under CTH 52114200.

9. We observe that the classification of the goods is to be determined based on the Test Report and the Chapter Notes. Chapter Notes to Chapter 52 defines Denim as under:

"Denim means fabrics of yarns of different colours, of 3- thread or 4- thread twill including broken twill, warp faced, the warp yarn of which are of one and the same colour and the weft yarns of which are unbleached, bleached or dyed, grey or coloured a lighter shade of the colour of the warp yarns".

10. As per the Test Report, the samples had the characteristics of Denim fabrics and the fabrics were three thread twill weave woven fabric. It composed of dyed blue coloured cotton yarns in one direction and undyed (white) polyester staple fibre spun yarns along with elastomeric yarns in other direction . The composition is as under:

Cotton yarn : 79.2% Polyester Yarns - 16,8%

Rest being elastomeric yarns.

11. A comparative study of the Test Report along with the Chapter Note 52, indicate the following:

(i) As per Chapter Note to Chapter 52, fabrics will be considered as Denim fabrics, if the weaving pattern of the yarn should be of 3 thread or 4 thread twill. The Test Report indicate that fabric is of 3 thread twill. Hence, it satisfies the definition on this count.

(ii) Warp faced yarns should be of same colour in a Denim fabric. The Test report indicates that the warp yarn is made of cotton in blue colour. Hence, it satisfies the definition on this count also.

(iii) As per the chapter Note, in a Denim fabric, the weft yarns should be of unbleached, bleached or dyed, grey or coloured a lighter shade of the colour of the warp yarns". The Test reports indicate that the weft yarn of the sample fabric is of white colour, undyed polyester staple fibre yarn.

(iv) The Test Report also indicates that the weft yarns contain elastomeric yarns. As per the Chapter Note, there cannot be any other combination of yarns in the weft yarn. Hence, the condition regarding the weft yarn available in the Chapter Note 52 is not satisfied.

(v) Regarding combination of material in the fabric, 79.2% is cotton yarn in the warp and 16.8% polyester yarn in the weft. Other than these 96% yarns, the remaining 4% of the composition constitute elastomeric yarns in the weft.

12. From the above comparison of the Note to Chapter 52 and Test Report, we observe that the colour of the weft yarn does not satisfy the definition of Denim as mentioned in the Chapter Note 52. The

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composition of elastomeric material in the weft yarn indicates that the Test Report does not fully satisfy all the conditions required to classify the fabrics as a Denim fabrics. The Test Report only indicates that the fabric has the characteristics of Denim fabrics. The Test Report did not categorically say that the fabric is a Denim Fabric. Fabrics having the characteristics of Denim fabric cannot be equated with the Denim fabric itself, if it does not otherwise satisfy the requirements of Chapter Note 52. In the present case, we observe that the sample fabric satisfy the requirements of Denim fabrics in the warp yarn, but does not satisfy the requirement in the weft yarn as its composition contains 4% of elastomeric material. Also, the weft yarn does not satisfy the requirement in the chapter note "unbleached, bleached or dyed, grey or coloured a lighter shade of the colour of the warp yarns". Thus, we hold that the fabric cannot be called 'Denim' fabric as per the Chapter Note 52, as it does not fulfill all the requirements of the chapter Note 52.

13. For classifying the fabrics, we find from the Test Report that the sample fabrics contains Cotton yarn: 79.2% Polyester Yarns - 16.8% and rest 4% being elastomeric material. The CTH 52113190 deals with Cotton Polyester Fabric. As per the Test Report, The fabric contains both Cotton and polyester in the ratio of 79.% and 16.8% respectively. Thus, we hold that, the fabric is rightly classifiable under the CTH 52113190 as Cotton Polyester fabric. Accordingly, we uphold the classification declared by the Appellant in the Bills of entry and reject the department's reclassification of the fabric.

14. Since, the fabric is classifiable under the CTH 52113190, we hold that the demand of differential duty of customs in the impugned order,

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is not sustainable. Since there is no misclassification of the goods imported, the confiscation of the goods is not warranted. Accordingly, we hold that the redemption fine imposed is not sustainable. For the same reason, the penalty imposed on the Appellant is also not sustainable.

15. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant.

(Pronounced in the open court on...19.10.2023...)

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

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar