

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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.77796 of 2018

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/26/2018 dated 20.03.2018 passed by Commissioner of Customs (Port), Kolkata.)

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

...Appellant

VERSUS

M/s. Sagar Vyapar Private Limited

.....Respondent

(236, N.S.C. Bose Road, Narendrapur, Kodalia, South 24 Parganas, West Bengal.)

WITH

Customs Appeal No.76677 of 2018

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/26/2018 dated 20.03.2018 passed by Commissioner of Customs (Port), Kolkata.)

M/s. Sagar Vyapar Private Limited
(236, N.S.C. Bose Road, Narendrapur, Kodalia, South 24 Parganas, West Bengal.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

.....Respondent

(15/1, Strand Road, Custom House, Kolkata-700001.)

AND

Customs Appeal No.76678 of 2018

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/26/2018 dated 20.03.2018 passed by Commissioner of Customs (Port), Kolkata.)

**Shri Sanjay Kumar Kothari, Director
M/s. Sagar Vyapar Private Limited**

(236, N.S.C. Bose Road, Narendrapur, Kodalía, South 24 Parganas, West Bengal.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

(15/1, Strand Road, Custom House, Kolkata-700001.)

.....Respondent

APPEARANCE

Shri S. Debnath, Authorized Representative for the Revenue

Shri Sudhir Mehta, Advocate for the Respondent/Party

**CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

FINAL ORDER NO. 75946-75948/2024

DATE OF HEARING : 16.05.2024

DATE OF DECISION : 16.05.2024

Per : R. MURALIDHAR :

The Appellant has imported 182 consignments. In case of 181 consignments, they had classified the product under CTH 5903. In respect of 1 consignment they had classified the consignment under 54.07. The Revenue was under the impression that all the 182 consignments were to be ultimately used for the manufacture of umbrella and were not impregnated fabrics. Accordingly, Show Cause Notice was issued in respect of 182 consignments seeking to classify the same under CTH 54.07. The samples were collected and sent for testing through various institutions. After due process, the Commissioner has held that the 181 consignments were coated/impregnated fabrics and hence he upheld the classification of 5903 adopted by the Appellant. Accordingly, he dropped the demand in respect of 181 consignments. In respect of 1 consignment, the Appellant had themselves adopted the CTH of 5407 and they had paid

the applicable Customs duty under this Tariff. However, in the Show Cause Notice the entire 182 consignments were taken as if the Appellant had claimed the CTH to be 5903. In respect of dropping of demand towards 181 consignments, the Revenue is in appeal. Being aggrieved with the confirmation of demand in respect of 1 consignment, the Appellant is before the Tribunal. The Adjudicating authority has also imposed penalty on the Director of the firm. Being aggrieved, two Appeals have been filed by the importer and one Appeal has been filed by the Revenue. All the Appeals have been taken up together for disposal with the consent of both the sides.

2. The Ld. AR for the Department submits that Revenue viewed that all the 182 consignments were classified by the Appellant under 5903 and sought to re-classify the same under 5407. For this purpose, samples were drawn and also sent to various institutions. He submits that the very issue was before this Tribunal in the case of another Appellant wherein on identical set of facts, this Bench has held that the goods are not classifiable under CTH 5907 and are classifiable under 5903 only. Taking this view, this Bench has dismissed the earlier Appeal filed by the Revenue. In respect of the confirmation of demand in case of one consignment, he submits that though the Appellant himself has classified the goods under 5407, the Show Cause Notice was issued treating the same as 5903 and taking the stand that it should be classified under 54.07.

3. The Ld. Advocate for the importer submits that the issue is fairly covered by this Bench's decision in the case of **Commissioner of Customs (Port), Kolkata vs. Umbar Marketing Private Limited decided vide Final Order No.75547/2023 dated 06.06.2023**. He submits that in that case also the samples were drawn and sent for testing and after testing reports are received and Adjudicating authority had dropped the demands. Being aggrieved, the Revenue had filed their Appeal before the Tribunal which came to be dismissed by this Bench. He further submits that in that case, the Respondent was also granted the consequential relief by way of refund.

4. He further submits that no further Appeal has been filed against the order of the Bench before the High Court/Supreme Court and hence the issue has reached finality. Therefore, he submits that in case of 181 consignments he is fully covered by the decision of this Bench. Hence, he prays that the Revenue's Appeal may be dismissed.

5. In respect of 1 consignment he submits that the Adjudicating authority is in error in initially treating the consignment as classified under CTH 5903. Admittedly, the Appellant had never claimed this CTH 5903 for this 1 consignment. The Appellant was maintaining that the consignment was covered under CTH 5407 only and they had paid the Customs duty applicable for this CTH. Therefore, he submits that the Adjudicating authority is in error in confirming the demand.

6. Heard both sides and perused the documents and the cited case law.

7. In respect of 181 consignments we find that the issue was before this Bench in the case of **Commissioner of Customs (Port), Kolkata vs. M/s. Umbar Marketing Private Limited**, cited (supra). This Bench has held as under:-

"18. The Department has sought the classification of the impugned goods under the Chapter Heading 5407. The Department's classification of the goods under 5407 is on the ground that the fabrics are utilized mainly as 'Umbrella Cloth' and there is a specific sub-heading under Chapter 5407 for Umbrella Clothes. In this regard, the Counsel for the Respondent argued that end use of a product cannot be the criteria for deciding classification of the goods. We agree with the argument of the Respondent that end use of a product cannot necessarily be the determining factor for classification of the goods as held by the Hon'ble Supreme Court in the case of Indian Aluminium Cables vs UOI . For classification of the goods the nature of material used is a very relevant factor.

19. We find that Chapter 54 covers various types of fabrics. The details available in the Test Report received from RLTC or IIT, Delhi does not contain various other parameters required for classification of Customs the product under a specific sub-heading in Chapter 54. The Department has proposed the classification of the goods under the

Chapter Heading 54071014 as umbrella cloth cotton fabrics. The relevant sub-heading is reproduced below:-

5407-Woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404 540710-Woven fabrics obtained from high tenacity yarn of nylon or other polyamides or of polyesters.

From the description of the sub heading mentioned above, we find that the woven fabrics obtained from the High tenacity yarn of nylon or other polyamides or of polyesters are classified under this heading. Thus, for classification of the goods under Chapter 5407, it is required to know whether the woven fabrics are made from high tenacity yarn or not. We find that the Test Report received from RLTC does not contain these details. In fact, the RLTC Report says it cannot be ascertained whether the fabrics are made from high tenacity yarn or not. Without having this basic requirement whether the fabrics are made up of high tenacity yarn or not, it is not possible to classify the goods under CTH 5407. We also find from Chapter Note 2(a)(1) of Heading 5903 that textile fabrics in which the impregnation cannot be seen with the naked eye or can be seen only by reason of a resulting change in colour usually fall in Chapters 50 to 55. The obvious corollary is that if the coating in the textile fabrics are visible to naked eye, then they will not fall under the Chapters 50 to 55.

20. We observe that the Department proposed to classify the goods under the CTH 5407 only on the basis of end use. End use of a product cannot be a criteria for classification. However, as held by the Hon'ble Supreme court in the case of Indian Aluminium Cables vs UOI, end use alone cannot determine the classification. The other parameters such as the nature of cloth, nature of coating etc are required to be ascertained to classify the fabrics. Further when the fabrics are coated and the coating is visible to naked eye, the fabrics are classifiable only under Chapter 59 of the Customs Tarriiff Act. Thus, we observe that coated fabrics visible to naked eye would fall under Chapter 59 only. But, the specific sub heading under which it is to be classified will depend on the nature of the material coated.

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22. We also find that the above judgement of the Hon'ble Supreme Court has been relied by the Co-ordinate Bench of the Tribunal in the

case of Pepsico Holdings Pvt.Ltd. v. Commissioner of C.Ex., Pune-III [2019 (25) G.S.T.L. 271 (Tri.-Mumbai)], wherein the Tribunal observed as under:-

"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."

23. In view of the above discussion, we hold that the goods are not classifiable under CTH 54071094 as proposed by the Appellant. Accordingly, we reject the Appeal filed by the Appellant (Department)."

8. By respectfully following this decision, we dismiss the Appeal filed by the Revenue.

9. In respect of the Appeals filed by the importer, we find that there is no mis-classification or mis-declaration on the part of the Appellant. They have claimed the consignment to be under CTH 5707 and they have paid the applicable Customs duty. The Show Cause Notice was in error by taking the view that all the 182 consignments were classified by the appellant under CTH 5903. Since the duty has already been correctly discharged by the Appellant under the heading 5407, we hold that the impugned order is required to be set aside. Accordingly, we set aside the impugned order to the extent that it confirms the duty and interest and penalty thereon in respect of this one consignment. The Appeal filed by the importer is allowed with consequential relief, if any towards this one consignment.

10. So far as the penalty imposed on the Director is concerned, as we have already held that there is no mis-declaration or mis-classification

in respect of 1 consignment, we set aside the penalty imposed on the Director.

11. To summarize –

(A) The Appeal filed by the Revenue is dismissed.

(B) The Appeals filed by the importer and the Director are allowed.

(Dictated and pronounced in the open Court.)

Sd/

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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