IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: C/240 to 242/2011

[Arising out of Order-in-Appeal No.07 to 09/MCH/AC/GR-III/2011 dated 27/02/2011 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

Smart Designer … ***Appellant***

versus

Commissioner of Customs (Import)
Mumbai …***Respondent***

Appearance:

Ms Shamita Patel, Advocate for appellant

Shri Bhushan Kamble, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 14/03/2019
Date of decision: 14/03/2019

ORDER NO: A/ 85803-85805 / 2019

Per: C J Mathew

These three appeals of M/s Smart Designer pertain to the controversy arising from import of goods declared as 'polyester texturised fabric' which, upon detailed examination, was found to be incompatible with the description in the heading no. 5407 6190 of the First Schedule to the Customs Tariff Act, 1975 and coverage sought under notification no. 36/2003-Cus dated 1st March 2003.

2. Narrating the background, Learned Counsel informs that goods declared in bills of entry no. 439/11.08.2003, 435/11.08.2003 and 432/10.08.2003 had been subject to the test for conformity with the description 'fabric manufactured out of non-texturised polyester yarn' by the Textile Committee but proceedings were initiated very much later after the remnant samples were tested by the Deputy Chief Chemist at the Customs House. Both the original authority and the first appellate authority have confirmed the ineligibility for classification under the claimed heading consequent denial of benefit in notification no. 36/2003-Cus dated 1st March 2003.

3. Learned Counsel for the appellant draws attention to the decision of the Tribunal in *Commissioner of Customs, Mumbai v. Atlas Mercantile Pvt Ltd [2018 (4) TMI 490 – CESTAT MUMBAI]* and *Shri Lakshmi Cotsyn Ltd v. Commissioner of Customs & Central Excise, Kanpur [2011 (263) ELT 299 (Tri.-Del.)]* to contend that the second test conducted with the Deputy Chief Chemist should not be accepted being contrary to the directions of Central Board of Excise & Customs in such matters.

4. We have heard Learned Authorised Representative .

5. We find that the benefit of the exemption notification claimed by the appellant is available to goods classifiable under sub-heading 5407 61 whereas the classification adopted by the lower authorities is that of 5407 69 of the First Schedule to the Customs Tariff Act, 1975. At the instance of Learned Counsel, we have perused the original records and find that the show cause notice, although dated 12th August 2003, is based upon a test report that, admittedly, pertains to 2004-05, which is inconceivable. Learned Authorised Representative submits that the date in the show cause notice appears to be erroneous and such discrepancy does not make any difference to the proceedings. We do find some merit in the submission as it would have been impossible to issue a show cause notice just a day after the bill of entry was filed; it would appear that the show cause notice was authored on some other date.

6. Appellant had, as we find, claimed classification as fabric containing 85% or more by weight of textured polyester filaments. It is seen that the Textile Committee did not find any contrary reason to suggest discrediting this contention. The customs authorities chose to revise the classification based on a test report generated through the Deputy Chief Chemist after testing of the remnant samples. We do not find any evidence of that test report in the records. Furthermore, as made amply clear in the decisions of the Tribunal in *re Atlas Mercantile Pvt Ltd* and in *re Shri Lakshmi Cotsyn Ltd,* that as per circular no. 23/2004-Cus dated 15th March 2004, the expertise of the Textile Committee should be relied upon for a single test instead of test being carried out by both authorities. In the face of these decisions, the reliance placed on the results of testing by Deputy Chief Chemist is not acceptable. If at all, the proper procedure would have been for the remnant samples, after due notice to the importer, to be subject to re-test by the Textile Committee. Thus, report of the Deputy Chief Chemist cannot overrule the earlier test results. In view of these circumstances, the re-classification, with consequent disallowance of the benefit of notification, is not proper in law.

7. Accordingly, we set aside the impugned orders and allow the appeals.

(Pronounced in Court)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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