

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH, MUMBAI

Customs Appeal No. C/517/2009

(Arising out of Order-in-Appeal No. 842/09 CC(I) JNCH dated 25-2-2009/26-2-2009
passed by the Commissioner of Customs (Import)).

M/s. Kapila Knit Fabrics Pvt. Ltd.,
8th Floor, New Harileela House,
134-E, Mint Road, Opp. G.P.O. Fort
Mumbai-400 001

.....Appellant

VERSUS

Commissioner of Customs (Import)
J.N. Custom House,
Nhava Sheva, Dist. Uran,
Raigad, Maharashtra-400 707.

.....Respondent

WITH

Customs Appeal No. C/518/2009

(Arising out of Order-in-Appeal No. 842/09 CC(I) JNCH dated 25-2-2009/26-2-2009
passed by the Commissioner of Customs (Import)).

Mr. Ashish Rajinder Kapila, Director,
M/s. Kapila Knit Fabrics Pvt. Ltd
5, Slater Road, 1st Floor, Office,
Mumbai 400007.

.....Appellant

VERSUS

Commissioner of Customs (Import)
J.N. Custom House,
Nhava Sheva, Dist. Uran,
Raigad, Maharashtra-400 707.

.....Respondent

APPERANCE:

Shri Anil Balani, Advocate for the Appellant
Shri C. Singh, Asst. Commissioner, and Shri Manoj Kumar, Asst.
Commissioner - Authorised Representatives for the Respondent

CORAM: HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86062-86063/2019

Date of Hearing: 24-01-2019

Date of Decision: 03-06-2019

PER: DR. SUVENDU KUMAR PATI

1. Confirmation of duty demand along with confiscation of goods valued Rs. 14,91,845/- under section 111 (e) & 111 (m) of Customs Act 1962 with option for redemption on payment of fine of Rs. 7,00,000/- for alleged mis-declaration of woven fabric is assailed in this appeal.

2. Factual backdrop of the case is that Appellant purchased four consignments of mixed stock lot of fabrics from M/s. MEIYO BOEKI SOKHAI, Japan and filed 4 Bill of Entry seeking clearance of the same through their CHA as the original importer M/s. S.D. International, Surat failed to honour the import documents in time and offered the goods to appellant. The goods covered under Bill Of Entry No. 653738 dt. 22-12-2005 stated to have contained 104851.10 yards of mixed lot fabrics which is the subject matter of the present dispute. Further case of the appellant is that there was no Packing List containing detail description of the fabric imported for which, on Appellant's request vide letter dt. 22-12-2005 addressed to the Dy. Commissioner of Customs,

first check examination and drawing of samples for Textile Committee for the purpose of testing and ascertaining the classification was done and after such examination goods were found to be knitted fabrics, classified under chapter 60053100 and cleared on payment of duty of Rs. 3,71,939/-. On 8-2-2006. Officers of DRI detained 11,745 sq mts. of fabrics which was lying at godown No. A17 of the appellant and drew various samples, recorded various statements of Director of appellant's company and other persons, show cause notice no. DRI/MZU/G/INV-15/2004-05/5072 dt. 28-7-2006 was issued to the applicant proposing reclassification of the goods in terms of subsequent Test Report and for payment of differential duty with proposal for confiscation and penalty on the various provisions of Customs Act 1962. Appellant vide its letter dated 21-2-2008 replied to the show cause notice and the matter was thereafter adjudicated by the Commissioner of Customs (Import), JNCH, confirming differential duty liability with order for confiscation, redemption fine and penalty as stated above as well as penalty of Rs. 10,00,000/- on the Director Ashish Kapila. Hence the appeal.

3. In the memo of appeal and during the course of hearing the appeal, Learned Counsel for the appellant Shri Anil Balani submitted that the Commissioner of Customs (Appeals) ignored appellant's defence in not taking evidence of the Customs officers, who collected representative samples and appellant was not permitted to cross examine the Customs Officer as well as examiners of goods and other person namely Shri Rajbir Singh, on whose statement reliance was placed by the adjudicating authority. He further submitted that para 7 of the show cause notice confirmed that goods were examined under

first check procedure so as to accept and complete acceptance of goods and on the basis of said Examination Report, duty liability was discharged but DRI subsequently collected some samples from appellant's godown on the strength of identification of those samples by the said Rajbir Singh that they were remaining part of the consignment imported under Bill of Entry No. 653738. The entire procedure was initiated despite the fact that in the other three consignments lying at the Dock, DRI officers found those have been same as declared by the appellant. He also claimed that in respect of those Bills of entry, goods were found as declared to the extent of 95% whereas in the present case, goods were same to the extent of 98% and discrepancy of 2% being minimal and negligible, should have been ignored by the Department. Further contention of Learned Counsel for the appellant is that goods were already imported by another importer and supplier had assured the appellant that the goods were mixed with knitted fabrics but in order to reconfirm the same, appellant had asked specifically for the first check examination after which assessment was made by proper officer of the Customs for which no suppression of facts can be attributed to the appellant for invoking extended period but DRI Officers calculated duty on pro rata basis with reference to seized quantity. An amount of Rs. 15,00,000/-, also was deposited by the appellant to prove it's bonafide and to buy peace with the DRI but ultimately it was burden further with duty liability, penalty etc. Learned Counsel for the appellant submitted that as goods were correctly assessed after examination and testing of samples under chapter 60, the same cannot be reclassified under chapter 54 on the basis of

assumption and presumption for which order passed by Learned Counsel for Commissioner of Customs is required to be set aside.

4. In response to such submissions, Learned Authorised Representative for the respondent Department reiterated the reasoning and rationality of the order passed by the Commissioner of Customs and take us through his finding as to how mis-declaration of the description of the goods as knitted fabrics was made in respect of woven fabrics that was confirmed by subsequent test report dt. 14-2-2006 and 24-2-2006 after testing of 4 samples collected and sought no interference by the Tribunal in the order passed by the Commissioner of Customs.

5. We have heard both the sides at length and perused the case record. It is an admitted fact on record that goods were originally imported by another concern and the description of goods were mixed fabrics and it is at the instance of the appellant that goods were put to test for ascertainment of its description and classification, that was done before the goods were cleared for own consumption. The entire case of the respondent Department is based on collection of samples from the appellant's Warehouse on the basis of identification made by one employee Shri Rajbir Singh, who was not subjected to cross examination by the appellant despite its request for such cross examination. No other relationship was established by the respondent Department to substantiate that the goods seized by the DRI was in fact related to the goods cleared to the appellant through the disputed Bill of Entry. Show cause notice reveals that DRI Officials made visual

examination of goods and ascertained that they comprised of 7 different varieties/types of fabrics. It is not understood as to why after such discovery, Customs Officials who drew the samples for first check examination were not examined and why reliance is placed on only examination if the appellant's staff to find out the error in the First Examination Report. It is a settled principle of law that even in such situation, when two different opinions can be formed from contradictory evidence, the opinion that is favourable to the offender is to be accepted. There is nothing available on record to substantiate that the samples drawn by DRI Officials were the representative samples of the consignment cleared in the disputed Bill of entry except the statement of that Shri Rajbir Singh whose veracity is not tested through cross-examination nor any opportunity was provided to the appellant to falsify such statement. Under the circumstances, no credence can be attributed to such a statement to penalise the appellant with additional burden of duty liability penalty etc. Hence the order.

6. The appeals are allowed and the order passed by the Commissioner of Customs in order no. 842/09 CC(I) JNCH dated 25-2-2009/26-2-2009 is hereby set aside.

(Order pronounced in the Court on 03-06-2019)

(DR. SUVENDU KUMAR PATI)
MEMBER (JUDICIAL)

(C J MATHEW)
MEMBER (TECHNICAL)

John