CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 614 OF 2009

[Arising out of Order-in-Appeal No: 116/2009/MCH/ADC/Gr III/2009 dated 6th May 2009 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai - 400001 … ***Appellant***

versus

Suri Exports (P) Ltd
9, Industry House, Plot No. 4, Marwah Estate
Off: Saki Vihar Road, Mumbai - 400072 ***…Respondent***

APPEARANCE:

Shri Manoj Das, Assistant Commissioner (AR) for the appellant

Shri Viraj Y Bhate, Advocate for the respondent

WITH

CUSTOMS APPEAL NO: 419 OF 2010

[Arising out of Order-in-Appeal No: 49/2010/MCH/AC/Gr III/2010 dated 30th December 2008 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Janata Trading Co
LBS Marg, Janata Barrel Compound,
Next to Maharashtra Weigh Bridge and
Mahadevi Tea House, Kurla, Mumbai - 400070 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri Viraj Y Bhate, Advocate for the appellant

Shri Manoj Das, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85321-85322 /2023

DATE OF HEARING:	30/08/2022
DATE OF DECISION:	23/02/2023

PER: C J MATHEW

It is not commonplace, though not unusual, for peripheral, and especially procedural, rights and wrongs to distract tax controversies from the fundamental scheme of taxing statutes enabling the mandate of the charging provision in conjunction with the valuation provision for powering the assessment provision. Impugning the discard of test reports of Central Revenue Chemical Laboratory (CRCL) and of the Textile Committee respectively by Commissioner of Customs (Appeals), Mumbai-I in appellate proceedings arising from two separate disputes, that converge on congruity of facts and circumstances and within the same window of test, assessment and re-test, are the jurisdictional Commissioner of Customs (Import) and M/s Janta Trading Co. Inevitably, the submissions have been all about the primacy of one over the other and, not unreasonably, motivated by self-interest. The victim of this jousting is the law which has been relegated to the spectator lists. The context is, therefore, of vital concern necessitating elaboration, albeit briefly.

2. M/s Suri Exports (P) Ltd and M/s Janta Trading Co imported three consignments[1] and one consignment[2] respectively of goods declared as 'non-texturized polyester fabric' and sought classification against tariff item 5407 6190 of First Schedule to Customs Tariff Act, 1975 claiming duty liability of 25% from notification no. 36/2003-Cus dated 1st March 2003 (at serial no. 51) in bills of entry filed in July and August 2003 which were cleared upon report of the Textile Committee on the representative samples drawn and sent to them. Subsequently, on report of 12th December 2003 and 19th December 2003 respectively of test carried out by Central Revenue Chemical Laboratory (CRCL), notice was issued to the importers before confirming differential duty of ₹ 29,64,186 and of ₹ 9,72,606 respectively to be recovered, under section 28 of Customs Act, 1962, along with applicable interest under section 28AB of Customs Act, 1962, from M/s Suri Exports (P) Ltd[3] and M/s Janta Trading Co[4] by charging rate of duty to that corresponding to tariff item 5407 7200 of First Schedule to Customs Tariff Act, 1975, for which notification no. 27/2003-Cus dated 1st March 2003 (at serial no. 93) was applicable, in

[1] [bill of entry no. 903/21.07.03, 1198/21.07.03 and 1199/29.07.03]
[2] [bill of entry no. 384604/26.08.03]
[3] [order-in-appeal no. 116/2009/MCH/ADC/Gr.III/2009 dated 6th May 2009]
[4] [order-in-appeal no. 49/2010/MCH/AC/GR-III/2010 dated 25th February 2010]

order of 21st December 2006 and 29th March 2007 after report dated 27th December 2004 and 27th December 2004 of Textile Committee on re-test of the remnant sample confirmed that the fabric was woven almost entirely of ‘texturized yarn’ in contrast with the earlier reports.

3. The confirming of the proposed recovery, having been upheld by first appellate authority, was carried by M/s Suri Exports (P) Ltd to the Tribunal which, by order[5], remanded the matter back to the original authority for determination of notice afresh after furnishing copy of test report of Central Revenue Control Laboratory (CRCL), opinion of Joint Director, Central Revenue Control Laboratory (CRCL) relied upon in its order and letter of Textile Committee of 19th July 2005. Further adjudication thereto was impeded by protracted correspondence on material yet to be furnished in pursuance of the remand order and by denial of request for cross-examination of the authors of the test reports. The *de novo* proceedings were concluded *ex parte* by order dated 25th November 2008 confirming the demand. In appeal, the demand was set aside, by placing reliance on the first test report after discarding the testing parameters applied in the second test and on the lack of chemical tests for determination of composition of the product, leading to the present appeal.

[5][A/551/07/CII/CSTB dated 25th September 2007]

4. The confirming of the proposed recovery, having been upheld by first appellate authority, and carried to the Tribunal by M/s Janta Trading Co was, by order[6], remanded back to the original authority for fresh determination of proposals in the notice after furnishing copy of test report of Central Revenue Control Laboratory (CRCL), opinion of Joint Director, Central Revenue Control Laboratory (CRCL) relied upon in its order and letter of Textile Committee of 19th July 2005. Further adjudication thereto was hindered by lingering correspondence on material yet to be furnished in pursuance of the remand order. The proceedings concluded with order of 30th December 2008 confirming the demand once again which, having been upheld by the impugned order, is now before us.

5. Thus, the dispute, remanded to the original authority by the Tribunal for remedying the deficiency in relied upon evidence furnished to the importers, is back with the contention of Revenue on the primacy of test reports returned by Central Revenue Control Laboratory (CRCL) and of the other side insisting upon the inappropriateness of later testing that, in their contention, lacks validity. The proceedings before the lower authorities were disposed off on that solitary aspect even though, in the order of the Tribunal on the earlier occasion, such constrained disposition had not been directed; more so, as the Tribunal had merely taken note of the

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[6] [A/646/CSTM/2007 dated 30th November 2007]

preliminary objection on non-adherence to principles of natural justice to issue directions at the threshold.

6. Between the submissions made by, and on behalf of, the jurisdictional Commissioner - as appellant in the matter of M/s Suri Exports (P) Ltd and as respondent in the appeal of M/s Janta Trading Co - and of the two importers - as respondent in appeal of Revenue and as appellant respectively - the arguments on the above aspect have been gone over repeatedly. Hence, rather than engage in the tedium of chronological narration, we propose to deal with the analysis of the issues warranting resolution. It suffices, for the nonce, to bear in mind that the goods impugned in both the disputes had been cleared initially on confirmatory report from the Textile Committee and was taken for re-determination of classification only after the remnant samples, subjected to testing by the local facility of Central Revenue Control Laboratory (CRCL) at the instance of investigative agency, was reported to be otherwise. A second round of testing by the Textile Committee which confirmed the later report was considered sufficient by the customs authorities to proceed with the show cause notice. Not surprisingly, the chain of custody of representative samples drawn initially at the time of examination has been called into question by the importers along with the validity of the re-test reports that, to them, appear to have been customized for initiating the proceedings under Customs Act, 1962.

7. It was the assailing of this allegedly opaque arrangement that persuaded the Tribunal, on the former occasion, to remit the proceedings back to the original authority for appropriate remedies as noted *supra*. The original authority proceeded with the re-adjudication on its own satisfaction that available, and sufficient, documentation had been furnished and that the first report of the Textile Committee could be, justifiably, discarded to conclude that the imported fabric was composed of ‘texturised yarn’ for re-assertion of the classification adopted in the earlier round of litigation. The divergent views, revolving entirely around the validity of the respective tests supported by either side, on the classification is also the outcome of the consequent finding on the nature of the yarn used in production of the imported fabric.

8. Professedly, the controversy is about the description corresponding to the tariff item in First Schedule to Customs Tariff Act, 1975 that is most proximate to the impugned goods. The reality, however, does not give the impression of such punctiliousness: the genesis of the dispute, the course of the proceedings and the leap in the conclusions manifests the obsession with – understandable enough in business but not among administrators of tax law - the rates on the ‘right hand side’ which is all about the alternatives of duty at 25% ad valorem rate or at specific rate of ₹ 24 per square metre – a dispute that, conceivably, ceases to be, assuming standard width of fabric, when assessable value is ₹ 105 per metre. That sums up the contour of the controversy: tax policy determining fitment in

the tariff schedule instead of being fitted around the tariff schedule with law relegated to dismissible irrelevance. The malady needs, not palliative care but, putative cure lest the damage overwhelms the whole.

9. On behalf of the importers, Learned Counsel argued that clearances were effected on the finding of conformity of declaration of composition of the fabric as ‘textured polyester yarn’ with tests of the Textile Committee and that it was the remit of the Textile Committee, in accord with practice prevailing then, to determine the type of yarn in the product which was, by later instruction of the following year, assigned to the Central Revenue Control Laboratory (CRCL). It was contended by him that the subsequent testing, with varying result, by the Central Revenue Control Laboratory (CRCL) lacked credibility on their own admission of absence of standards that were, only subsequently, crafted by certain ‘experts’ and whose professional competence to do so was glossed over by steadfast refusal to permit their cross-examination. The manner in which it was held out that the samples tested subsequently were the same as the one drawn in the presence of representatives of importers, according to him, lacked acceptability as the entire process was carried out without notice to them. He argued that such ‘guided’ revisit of assessment is not consistent with Customs Act, 1962 that accords finality, subject to certain exceptional exceptions, to goods cleared for home consumption as per section 48 of Customs Act, 1962.

10. Learned Authorized Representative insisted that the correct method of ascertainment of the composition of the fabric has been documented by the Joint Director, Central Revenue Control Laboratory (CRCL), and in conjunction with two members of the Textile Committees whose authority in the field is espoused by Learned Counsel, which is beyond question and, having been applied by its progenitor at the first, and second, re-test, must prevail. He further argued that it was improper on the part of the first appellate authority, in disposing off the appeal of M/s Suri Exports (P) Ltd, to subordinate the views of scientists to his clear lack of technical expertise. Reliance was placed upon the decision of the Hon'ble Supreme Court in *Kanungo & Co v. Commissioner of Customs, Calcutta [1983 (13) ELT 1486 (SC)]* and of the Tribunal in *Fortune Impex v. Commissioner of Customs, Calcutta [2001 (138) ELT 556 (Tri-Kol)]* and in *Jagdish S Trivedi v. Commissioner of Customs, Kanpur [2006 (194) ELT 290 (Tri-Del)]* in support of denial of cross-examination and on section 45 of Indian Evidence Act, 1872 to establish the primacy of scientific experts.

11. There is a history of sorts in this clash over test reports that is at the core of this dispute. It would appear that, for some reason, imported 'textile fabrics' was being cleared after testing by Textile Committee but, owing to intelligence reports of 'polyester fabric' being imported by misdeclration, past clearances of imports effected between January 2003 and August 2003 were subjected to scrutiny by testing of remnant sample

in the New Custom House laboratory of Central Revenue Chemical Laboratory (CRCL). The consequent controversy came to a head when, after Directorate General of Foreign Trade (DGFT) issued notification no. 29/(RE-2004)/2002-2007 dated 28th January 2004 requiring imported textiles / textile articles not accompanied by pre-shipment certificate from notified agencies to be subjected to test by notified agencies in India, complaints of delay owing to multiple testing prompted Central Board of Excise & Customs (CBEC) to direct, by circular no.23/2004-Cus dated 15th March 2004, that such consignments as were to be tested for 'azo dyes' for which Directorate General of Foreign Trade (DGFT) had nominated Textiles Committee as the notified agency for the purpose of their notification *supra* would also be tested for composition there and only other consignments to be tested for composition would be exclusively referred to the inhouse laboratory of the respective customs formation. The controversy of contrary outcomes of test of the impugned consignments, initially reported by Textiles Committee as conforming to declaration but found by customs laboratory to be of different composition, being, thus, incongruent with the subsequent instructions, continued to plague disposal of the demand notices and as the controversy raged, a committee, comprising Joint Director, Central Revenue Chemical Laboratory (CRCL) and two others of Textile Committee constituted for the purpose, reported upon the methodology and modality of testing wherein it was admitted that no standard test was, otherwise, available for distinguishment of 'texturized' and 'non-texturized' yarn in fabric and in package. The re-test by Textile Committee, in accordance with the new methodology, produced another outcome but, which nonetheless, was not in favour of the importer. In explanation of the discrepancy with the earlier report, Textile Committee, *vide* letter dated 19th July 2005, admitted that ascertainment of presence of 'texturized yarn' had not been undertaken then.

12. The noticees had sought cross-examination of the authors of the subsequent test reports and denial thereof had been considered by the first appellate authority to have compromised the case of customs authorities against M/s Suri Exports (P) Ltd; M/s Janta Trading is also aggrieved about denial of cross-examination of these technical experts. To dispose off the argument of Learned Authorized Representative that the first appellate authority had erred in not deferring to scientific knowledge, there is much to be said for authentic and authoritative source being employed in judicial decision-making but, nonetheless, the judicial organ erected by the Constitution would be in jeopardy if that proposition is accepted in absolute terms. We cannot subscribe to such a position as all judgements may, if not stemming from such expertise, be said to be lacking in credibility. That is clearly overreach on the part of Learned Authorized Representative. Reliance placed on the decision of the Tribunal in *re Fortune Impex* may not be assistance as there is no record of section 138B of Customs Act, 1962 having been brought to the notice

of the Tribunal which followed the decision of the Hon'ble High Court of Calcutta in *Tapan Kumar Biswas v. Union of India [1996 (63) ECR 546]* and in *Debu Saha v. Collector of Customs [1990 (48) ELT 302 (T)]*. In *re Tapan Kumar Biswas*, the issue was limited to the scope of section 124 of Customs Act, 1962 and in *re Debu Saha*, the issue pertained to cross-examination of co-noticee. In *re Jagdish Shanker Trivedi*, the Tribunal was not only considering statements recorded under section 108 of Customs Act, 1962 and the non-availment of several opportunities afforded for cross-examination but also relied upon the decision of the Hon'ble Supreme Court in *re Kanungo & Co* which dealt with proceedings under Sea Customs Act, 1872 in a seizure of October 1959 that did not provide for cross-examination; indeed, even Customs Act, 1962 incorporated 'relevancy of statements' subject to examination in section 138B only from September 1973. Hence, the decisions rendered without referring to this provision offer no assistance in the dispute before us. *Per contra*, reliance placed by Learned Counsel upon the decisions of the Hon'ble High Court of Bombay in *Kellog India Pvt Ltd v. Union of India [2007 (8) STR 84 (Bom)]* and of the Hon'ble High Court of Gujarat in *Manek Chemicals Pvt Ltd v. Union of India [2016 (334) ELT 302 (Guj)]*, even though not referring to the incorporation in Customs Act, 1962, does, nonetheless, drive the point home that section 138B of Customs Act, 1962 cannot be overlooked. And, more particularly, in the context of the test undertaken subsequently.

13. It is common ground that no test method existed, as standard, for ascertainment of 'textured yarn' in fabric and that a methodology had been devised by Joint Director, Central Revenue Control Laboratory (CRCL) along with two members of the Textile Committee. In these circumstances, cross-examination would appear to have been intended for placing on record the technical competence of the progenitors of the new testing parameters as expertise in one or, even several branches of science, does not necessarily imply expertise in ascertainment of composition of fabric. Moreover, it was only in the following year that Central Board of Excise & Customs (CBEC) formulated the system for assigning responsibility to test composition of fabric; in so doing, it did not derecognize the competence of the Textile Committee either. Therefore, the first report of the Textile Committee is not easily disregarded especially without subjecting the authors of subsequent test report to cross-examination that may have elicited cause of change of stand. It must also be borne in mind that the subsequent test, in accordance with new testing parameters, does not necessarily emerge as the more superior process merely from later evolved consensus of Central Revenue Control Laboratory (CRCL) and Textile Committee.

14. Even assuming the later test report, based on which the claim for effective rate of duty[7] of 25% on the impugned goods was denied

[7] [notification no. 36/2003-Cus dated 1st March 2003 at sl no. 51]

and substituted by the effective rate of duty[8] of Rs 24 per sq m, to be acceptable, neither of the descriptions corresponding to the entries in the two notifications make any reference to 'texturised yarn' over which the controversy over the validity of the reports of the two testing authorities turns. The notification claimed by the importers rests upon coverage within sub-heading 5407 61 of First Schedule to Customs Tarif Act, 1975 and, owing to goods not being 'upholstery fabric', saddled with the higher rate in the tariff. The notification sought to be applied by customs authorities covers all goods conforming to the description corresponding to tariff item 5407 7200. Hence, though the lower authorities have decided on fitment for the one or the other of the effective rates of duty and from the contents of the contested test reports, it can be seen that the presence of 'texturised yarn' in the imported fabric may, if at all, be relevant only to the primary classification for determination of 'rate of duty' mandated by section 12 of Customs Act, 1962.

15. More to the point, therefore, is the implicit, as it turns out, resolution of disputed classification within chapter 54 of First Schedule to Customs Tariff Act, 1975, intended for 'man-made filaments; strip and the like of man-made textile materials', by reliance on the test report. Surprisingly, the adjudicating authority had, not two but, three possible tariff items to choose from and that is

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[8] [notification no. 27/2003-Cus dated 1st March 2003 at sl no. 93]

in breach of the General Rules for the Interpretation of Import Tariff which permits alternative to claimed classification subject to compliance with stipulations therein. Accordingly, it was held by the Hon'ble Supreme Court in *HPL Chemicals Ltd v. Commissioner of Central Excise, Chandigarh [2006 (197) ELT 324 (SC)]* that

> *'29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub- heading different from that claim by the assessee, the Department has to produce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue……'*

and in *Hindustan Ferodo Ltd v. Commissioner of Central Excise, Bombay [(1997) 2 SCC 677]* that

> *'It is not in dispute before us as it cannot be, that owners of establishing that the said drinks fell within Item No. 22 lay on the Revenue. Revenue has led no evidence. The onus was not discharged, therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellant, the appeal should nevertheless have been allowed.'*

which applies, doubtlessly, to proposals for substitution at the heading or sub-heading level in the First Schedule to Customs Tariff Act, 1975 and that is the threshold scrutiny that the present disputes must pass.

16. There is no dispute at the heading level as both sides did not seek to foray beyond 'WOVEN FABRICS OF SYNTHETIC

FILAMENT YARN, INCLUDING WOVEN FABRICS OBTAINED FROM MATERIALS OF HEADING 5404' corresponding to heading 5407 in First Schedule to Customs Tariff Act, 1975. It is at the next subordinate level that the divergence occurs between sub-heading 5407 61 and sub-heading 5407 72 of First Schedule to Customs Tariff Act, 1975 and which, in accordance with the decisions of the Hon'ble Supreme Court, places onus on customs authorities to defend the appropriateness of the latter before evaluating comparative precedence between the two. At this stage and in view of the primary qualification for coverage within the impugned heading, we may gainfully observe that

> *'The terms "man-made", "synthetic" and "artificial" shall have the same meaning when used in relation to "textile materials".*
>
> *The terms "synthetic" and "artificial", used in relation to fibres, mean: synthetic: fibres as defined it (b); artificial: fibres as defined it (b)….*
>
> *and*
>
> *… the term 'man-made fibres' means staple fibres and filaments of organic polymers produced by manufacturing processes either*
>
> *(a) by polymerisation of organic monomers to produce polymers such as polyamides, polyesters, polyolefins or polyurethane, or by chemical modification of polymers produced by this process…; or*
>
> *(b) by dissolution or chemical treatment of natural organic polymers (for example, cellulose) to produce polymers such*

> *as cuprammonium rayon (cupro) or viscose rayon, or by chemical modification of natural organic polymers (for example, cellulose, casein and other proteins, or alginic acid), to produce polymers such as cellulose acetate or alginates.'*

in note 1 in chapter 54 of First Schedule to Customs Tariff Act, 1975 enables us to deduce that 'man-made fabric' are either 'synthetic' or 'artificial', depending upon origin, from 'organic monomers' or from 'natural organic polymers' and process of 'polymerisation' or of 'dissolution/chemical treatment' respectively. The scheme of the chapter, after enumerating yarns - synthetic and artificial - till heading 5406, moves on to woven fabric - from synthetic and from artificial - in the remaining two headings. Within the heading for woven fabric made from synthetic yarn, those *'obtained from high tenacity yarn of nylon or other polyamides or of polyesters'*, *'obtained from strip or the like'*, *'specified fabrics'* and *'other woven fabric'* make up the headings; the last is further segregated as those *'containing 85% of more by weight of filaments of nylon and other polyamides'*, *'containing 85% or more by weight of textured polyester filaments'*, *'containing 85% of more by weight of polyester filaments'*, *containing 85% more by weight of synthetic filaments'*, *'containing less than 85% by weight of synthetic filaments, mixed mainly solely with cotton'* and *'other woven fabrics'* of which we need not concern ourselves with the last two as the dispute is about the two subheadings preceding these. It is thus clear that other woven fabrics are, by composition, distinguished according to the specificity of composition, not only by weight but also of source material such as nylon or other polyamides, textured polyester filament, other polyester filaments including non-textured, or synthetic filaments etc. It is apparent from the classification adopted by the customs authorities that preference been accorded to the generality of fabric woven from synthetic filaments over the more specific composition of textured polyester filaments even though the reference to the testing authorities was ascertainment of the presence of texturised yarn in the impugned fabric. The declaration of goods as polyester fabric has not been controverted. Woven fabrics containing less than 85% by weight of textured polyester yarn and woven fabrics containing more than, as well as less than, 85% by weight of non-textured polyester yarn are covered with sub-heading 5407 61 of First Schedule to Customs Tariff Act, 1975; by no stretch can a later sub-heading be adopted for 'woven fabrics from polyester', except on composition less than 85%, without compromising the General Rules for the Interpretation of Import Tariff in Customs Tariff Act, 1975.

17. In the absence of finding, or even proposal, that samples of impugned goods contained less than 85% by weight of polyester yarn, the sub-heading adopted for re-classification does not meet the test of decisions of the Hon'ble Supreme Court *supra*. The classification declared in the bills of entry, along with claim for effective rate

according to the relevant notification, of both importers, stands unchallenged.

18. Consequently, the appeal of Revenue fails with the order impugned in their appeal sustained and the appeal of M/s Janta Trading is allowed by setting aside the order impugned in their appeal.

(Order pronounced in the open court on 23/02/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*