

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 77797 of 2018

(Arising out of Order-in-Original No.KOL/CUS/COMM/30/SIB/2018 dated 23.03.2018 passed by Commissioner of Customs (Port), Kolkata.)

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

Appellant

VERSUS

M/s. Umbar Marketing Private Limited
(2, Raja Woodmound Street, 1st Floor,
Kolkata-700001)

Respondent

APPEARANCE :

Mr. Manish Mohan, Authorized Representative for the Appellant
Mr. Sudhir Mehta, Advocate for the Respondent

CORAM:

HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75547/2023

Date of Hearing : 31 March 2023

Date of Decision : 06 June 2023

PER K. ANPAZHAKAN

The facts of the case in brief are that the Respondent has imported Non-Texturised Polyester Lining Fabric and filed the Bill of Entry No 4760255 dated 27/02/2014, by classifying the same under the Chapter Heading No.5903. The SIB wing of Customs, Kolkata intercepted the impugned goods filed under the above said Bill of Entry and on examination found that the imported goods were 'Umbrella Panel Fabrics' classifiable under Chapter Heading 5407. Accordingly, the goods were seized and later provisionally released on execution of bond and Bank Guarantee.

2. The samples of the goods were drawn and sent for testing to IIT, Delhi. From the Test Report received on 05/12/2014, it was revealed that

(i) Goods are coated and that coating is visible with naked eye.

Customs Appeal No. 77797 of 2018

- (ii) Goods are coated with water repellant/waterproof substances as well as ultra violet proof substances.
- (iii) Goods are to be used in manufacturing umbrella.
- (iv) Goods are not "Woven Non-Texturised Polyester Lining Fabric" as declared in the B/E.

Based on this test report, the Department alleged that the Respondent has mis-declared their goods and wrongly classified them under the CTH 5903.

3. A Show Cause Notice was issued proposing to classify the above goods as 'Non-Texturised Polyester Lining Fabric' under the Chapter Heading 54071094 with specific Basic Customs Duty of Rs.115 per Kg. The Show Cause Notice demanded differential duty of Rs.3,69,17,393.00/- under Section 28(4) of Customs Act, 1962. The Notice also proposed penalties under Sections 112(a), 112(1), 114A and 114AA of Customs Act, 1962.

4. The importer filed a Writ Petition at Kolkata High Court, seeking orders to send the samples of the fabric for retest by the Textile Committee (RLTC) or Customs Research Laboratory (CRCL), Delhi or any other authorized laboratory. The Hon'ble High Court of Calcutta disposed the Writ Petition by Order dated 10.02.2016 wherein the Hon'ble High Court has passed the following order:-

"W. P. was disposed of by directing the goods, or samples drawn there from, to be tested by the Textiles Committee Laboratory. All expenses for such repeat test will be borne by the petitioner by a substantial pre-deposit equivalent."

5. The order was accepted by the Department and samples were drawn and sent for re-test to the Textiles Committee Laboratory (RLTC) on 18/4/2016. The report of the Textile Committee was received on 27/04/2016. The Report of RLTC confirmed that :-

- (a) The fabric is woven and coated
- (b) Coating can be seen with naked eye, without taking into consideration of any colour change. But, the nature of the coating cannot be ascertained.
- (c) The end use cannot be ascertained, as it is customer's choice.

Customs Appeal No. 77797 of 2018

(d) It cannot be ascertained whether the coating is meant for water proofing or anti UV radiation.

6. After going through the records of the case, the submissions made by the Noticee and the two Test Reports from IIT Delhi as well as the Regional Laboratory Textiles Committee, the Adjudicating Authority found that, both the Test Reports have confirmed that ;

(a) the fabric is coated

(b) Coating can be seen with naked eyes, and

(c) Coating can be seen with naked eyes without taking into consideration any colour change.

7. Therefore, the Ld Adjudicating Authority, Commissioner of Customs, passed an order holding that the subject goods have fulfilled the criteria as mentioned in Chapter Note 2 (a) to Chapter 59.03 and also they do not fall under the exception clauses (1) to (6) in general. He further observed that the test report of IIT, Delhi have not been substantiated by the Second test report of RLTC. He concluded that the impugned goods have fulfilled the criteria for classification under CTH5903 on the basis of the General Rules of interpretation. Accordingly, he classified the goods under CTH 5903.

8. The Commissioner has relied upon the decision of the Hon'ble Supreme Court in the case of Ugham Chand Bhandari vs Commissioner wherein the Hon'ble Supreme Court had upheld the Tribunal's decision holding that the waterproofed fabrics to be classifiable under CTH 5906. He has also referred to the Hon'ble Supreme Court's decision in the case of Indian Aluminium Cables vs UOI where the court has held that end use of a product cannot necessarily be the determining factor for classification of the goods. Accordingly, he passed the following order:-

"I find that the allegations in the Show Cause Notice NO.S2-04/2015 SIB bearing File No.S121-20/2014 SIB dated 19.03.2015 against the importer M/s Umbar Marketing Pvt. Ltd. and Customs House Agents/Customs Brokers M/s Pagoda Shipping Corporation, M/s Perfect Logicare Pvt. Ltd. as not sustainable. Hence, I drop the charges."

Customs Appeal No. 77797 of 2018

9. Aggrieved against the order passed by Commissioner, the Revenue is in Appeal before us. In their Grounds of Appeal, the Revenue has made the following submissions:-

(i) In the impugned Order, the Commissioner classified the fabrics under CTH 5903 on the ground that they were found to be woven fabrics, coated and the coating can be seen with naked eye without taking into consideration of any colour change. Accordingly, he concluded that the fabric fulfilled the criteria as mentioned in Chapter Note 2 (a) of Chapter 5903 and also they do not fall under the exception clause (1) to (6) in general.

(ii) The impugned goods imported by the Respondent are used in making umbrella panel and thereafter a Complete Umbrella in finished form. Thus, the imported goods, namely the non-texturised polyester lining fabric coated is nothing but the fabric usable in umbrella panel.

(iii) 'Umbrella Cloth Panel Fabrics' are specifically classified under CTH No. 54071014, 54071024, 54071034 or 54071044 based on different parameters.

(iv) The HSN explanatory notes to Tariff heading 5903 under which the importer classified the goods explains that:

This heading covers textile fabrics which have been impregnated, coated, covered or laminated with plastics (e.g. poly vinyl chloride). Such products are classified here whatever their weight per square meter and whatever the nature of the plastic component (compact or cellular).

(i) That, in case of impregnated, coated or covered fabrics, the impregnation, coating or covering can be seen with the naked eye otherwise than by a resulting change in colour. 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, 58 or 60. Examples of such fabrics are those impregnated with substances designed solely to render them crease-proof, moth-proof, unshrinkable or water-proof ex. water-proof gabardines and poplins.

Customs Appeal No. 77797 of 2018

(v) Fairchild's dictionary of textiles define waterproof as possessing the ability to prevent penetration by water. Waterproof fabrics are generally tightly woven and coated with rubber, plastic (usually vinyl), linseed oil, cellulose esters, etc. Similar explanations have been put up by Prof. Shenai and Dr. Naresh M. Saraf in their papers. It therefore appears that even if these fabrics are accepted as coated then it is relevant to note that coating has been made with some Polyvinyl Chloride etc. which as per worldwide trade circles/dictionaries are for waterproofing only and hence, the goods in question will fall under Chapter 5407.

(vi) Further, the Notes of Chapter 59 in respect of Heading 5903 specifies as under,

“Heading 5903 applies to:

(a) textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (Compact or cellular), other than.....”

10. Thus, the Department contended that the Principal condition for the goods to be classified under Heading 5903 is that the goods have to be impregnated, coated, covered or laminated with plastics.

The test report of IIT, Delhi mentions that four of the samples (other than Sample E) were coated with “Aluminium Paste”. The test report of RLTC states that the “-Silver colour coating is applied on basic fabric as visible to naked eyes. However, it cannot be ascertained that this type coating is used for waterproofing or anti UV purpose. These qualities of the impugned goods are not in dispute. Consequently, the impugned goods cannot be classified under Heading 5903.

It is established from the test reports that the impugned goods do not fulfill this condition of ‘Coating with Plastics’ for bringing it within the purview of Chapter Note 2 (a) (1) of Chapter Heading 5903. Hence, the Department contended that the Commissioner has erred in ignoring this primary condition and erroneously classified the impugned goods under the Heading 5903.

11. In the Grounds of Appeal, the Revenue also contended that the Commissioner has ignored the ultimate use of these fabrics. In trade

Customs Appeal No. 77797 of 2018

circles, it is common knowledge that these goods are used for manufacturing of "Umbrella Cloth Panel", which also gets corroborated by the statement of the CHA/CB and therefore the goods should be treated as such. Moreover, as per Explanatory notes to Chapter 59, it has been clarified that goods "crease proof, moth proof, unshrinkable and water proof" has to be classified under CTH 50 to 55. Umbrella cloth fabrics having all these conditions are appropriately classifiable under CTH 5407.

12. In view of the above, the Department filed the present Appeal with a request to set aside the Order-in-Original passed by the Commissioner and classify the goods under CTH54071094 chargeable to specific rate of Customs duty of 115 Per kg

13. Heard both sides and perused the documents available on record.

14. We find that the Commissioner has classified the goods under the CTH 5903 on the basis of Chapter Note 2 (a)(1) of Chapter 5903.

For the sake of ready reference the Chapter Note is reproduced below:

2. Heading 5903 applies to:

(a) textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular), other than:

(1) fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually Chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of colour'

15. We observe that the Commissioner has arrived at the conclusion on the basis of the two Test Reports received from IIT Delhi and Textile Committee. The Report received from RLTC indicate that the fabrics are coated and the coating can be seen with naked eye other than change in colour. The contention of the Department is that as per Chapter Note 2(a)(1) fabrics coated with 'plastics' only are covered under the Chapter heading 5903 and in the instant case, the Test Reports of RLTC and IIT Delhi clearly indicates that the impugned fabrics are not coated with plastics. The Test report of IIT Delhi clearly indicates that the fabrics are coated with Aluminium paste. The RLTC report also indicate

Customs Appeal No. 77797 of 2018

that the fabric are coated with silver. Accordingly, the Department contended that once the fabric are not coated with plastics, whether it can be seen with naked eyes are not, is immaterial, and the goods cannot be classified under the Chapter Heading 5903.

16. We find merit in the argument of the Department. Chapter Note 2(a) of Heading 5903 applies to textile fabrics, impregnated, coated, covered or laminated with plastics. According to the Principle of *Ejusdem generis*, when a general word follows some specified words, then the general words will have the same meaning as that of the specified words. By applying this Principle of *ejusm generis*, the interpretation of the above Chapter Note is that the textile fabrics impregnated with plastic, coated with plastic, covered with plastic and laminated with plastic are covered under the Chapter Heading 5903. Coating with plastic is the primary requirement for classification of any fabric under the chapter heading 5903. Visibility to naked eye is also a relevant condition, but, that will come only after satisfaction of the primary condition of covering with plastics.

17. We also agree with the argument of the Learned Counsel for the Respondent that Chapter 59 covers coated fabric, where the coating is visible to naked eye other than the change in colour.

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 Appeal No. 77797 of 2018

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 Tarriff Act. Thus, we observe that coated fabrics visible to naked eye would fall under Chapter 59 only. But, the

Customs Appeal No. 77797 of 2018

specific sub heading under which it is to be classified will depend on the nature of the material coated.

21. During the course of the hearing, the Respondents made a written submission wherein they stated that if the said goods are not falling under CTH 5903, then the goods would fall under CTH 5907 of the Customs Tarriff, where the rate of duty is same as that of 5903. We find that the Hon'ble Supreme Court in the case of Warner Hindustan Ltd. v. Collector of Central Excise, Hyderabad reported as 1999 (113) E.L.T. 24 (S.C.), held that

"2. In our opinion, the Tribunal was quite wrong in these circumstances in allowing the Appeal of the Excise authorities and classifying the mint tablets as items of confectionery under Head 17.04. The correct course for the Tribunal to have followed was to have dismissed the appeal of the Excise authorities making it clear that it was open to the Excise authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionery. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before the authorities below."

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."

Customs Appeal No. 77797 of 2018

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).

(Pronounced in the open court on 06 June 2023)

Sd/-

(P. K. CHOUDHURY)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Pooja