

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

Customs Appeal No. 42100 of 2013

(Arising out of Order-in-Appeal C.Cus. No. 132/2013 dated 28.06.2013 passed by Commissioner of Customs & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirappalli - 620 001)

Mr. Murugan K.S.,
No.26E/7A, Kamraj Nagar,
Tuticorin – 628 008.

...Appellant

Versus

Commissioner of Customs,
Custom House,
New Harbour Estate,
Tuticorin – 628 004.

...Respondent

APPEARANCE:

For the Appellant : Shri Murugan K. S., Appellant (In Person)

For the Respondent : Shri S. Balakumar, Assistant Commissioner (A.R)

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 20.06.2023

DATE OF DECISION : 03.08.2023

FINAL ORDER No.40636/2023

Order :[Per Mr. Vasa Seshagiri Rao]

Mr. Murugan K.S., who is the appellant herein, has filed the Bill of Entry No. 5401513 dated 07.12.2011 for import of 1976.10 kgs of Polyester Nylon Warp Knitted Fabrics and 8511.90 kgs of Nylon Warp Knitted Fabrics which were purchased on "High Seas Sales" basis from M/s. Sainath Knitex Pvt. Ltd., Surat who originally purchased the said goods from M/s. J.S. Fashions (L.L.C), Dubai, UAE but supplied directly by M/s. Changle Foreign Trade Corporation,

Fujian, China, the manufacturer. Suspecting that the said import consignment was undervalued, officers of DRI, Tuticorin have seized the goods on 27.12.2011 as the declared value at US\$ 5.15 per Kg for Nylon Knitted Grey Fabrics, and at US\$ 3.90 per Kg for Polyester Nylon Knitted Grey Fabrics was considered low compared to the contemporaneous imports which were valued at US\$ 8.55 per kg for "Grey Warp Knitting Fabrics" specification square net 52" "semi dull" and US\$ 9.2 per kg for "grey warp knitting fabric" specification square net 52" "bright" in respect of Invoice No. H07HD054 dated 31.05.2011 of Fujian Holy Trading Company Ltd., China pertaining to the importer M/s. Sai Enterprise, Surat which were imported through Nhave Sheva, Mumbai.

2. On examination, it was found that the imported consignment contained 1976.10 kgs of square net fabrics with slip as "Semi Dull" and 8511.9 kgs of square net fabrics with slip as "Bright".

3. Further, the Revenue noticed two imports of Warp Knitted Fabrics at Tuticorin by M/s. Sainath Knittex Pvt. Ltd., Surat where the value declared of Nylon Warp Knitted Fabrics was at US\$ 9.0 and US\$ 7.22 respectively. The consignment under seizure was bought on high seas sales basis by M/s. Murugan K.S., on 15.11.2011 from M/s. Sainath Knitex P Ltd., Surat, and value declared by them for the said consignment of Chinese Origin received under the invoice of Ms. J.S. Fashions, Dubai was at US\$ 5.15/Kg. Further, the Revenue believed that the person who declared to have bought the goods for US\$ 9.30/Kg and US\$ 7.22/Kg during the above period could not have sold the same variety of goods at far lesser value at US\$ 5.15 Kg. Thus, the value adopted appeared to have been suppressed as seen from the values adopted also by other importer M/s. Star Mint Fields P Ltd., Surat who had imported identical or similar goods where the value declared of Nylon Warp Knitted Fabrics was found to be US\$ 8.9 kg and the value of Polyester Nylon Warp Knitted Fabrics was at US\$ 7.8 kg.

4. Consequent to the above investigation, the Show Cause notice dated 09.06.2012 was issued to M/s. Murugan

K.S. proposing therein for enhancement of the assessable value, confiscation of the imported goods and also for imposition of penalty under Section 112(a) and 114A of the Customs Act, 1962.

5.1 On adjudication of the above Show Cause Notice, the Additional Commissioner of Customs, Custom House, Tuticorin *vide* order dated 29.08.2012 have rejected the assessable value of Rs.23,75,423/- based on US\$ 5.15/kg adopted for Nylon Warp Knitted Fabrics and assessable value of Rs.4,17,620/- based on US\$ 3.90/kg adopted in respect of Polyester Nylon Warp Knitted Fabrics under Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and re-determined the assessable value at Rs.40,24,608/- based on unit price \$ US8.9/kg in respect of Nylon Warp Knitted Fabrics under Rule 4 of *ibid* read with Section 14(i) of the Customs Act, 1962 and the assessable value at Rs.8,35,239/- based on unit price US\$ 7.8/kg in respect of Polyester Nylon Warp Knitted Fabrics under Rule 5 of *ibid* for the above Bill of Entry No. 5401513 dated 07.12.2011. He has ordered for confiscation of the above goods under Section 111(m) of the Customs Act, 1962 and imposed redemption fine of Rs.20,00,000/- under Section 125 of the Customs Act, 1962 and a penalty of Rs.13,04,806/- was also imposed on the importer M/s. Murugan K.S., Tuticorin under Section 112(a) of the Customs, Act 1962. A penalty of Rs.5,00,000/- was also imposed on M/s. MKS Shipping Agencies P Ltd., Tuticorin under Section 112(a) and 114AA of the Customs Act, 1962 who handled the above consignment whose operations are also reported to be managed by Mr. Murugan K.S. But, it is to be pointed out that it is not known whether there is any appeal by M/s. MKS Shipping Agencies P Ltd., Tuticorin CHA regarding the penalty imposed on them as above.

5.2 Being aggrieved, the appellant have filed an appeal with the Commissioner of Customs and Central Excise (Appeals), Tiruchirapalli who rejected their appeal. As such Mr. K.S. Murugan (appellant) came on appeal before this forum.

6. The appellant has submitted the following contentions as revealed from their reply to the Show Cause Notice and also the grounds of appeal.

(i) The proposal for rejection of the declared value and enhancement of value was misconceived and contrary to specific legal provisions in the Customs Act and Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as well as the law laid down in the case of *M/s. Eicher Tractors Ltd.*, [2000 (122) ELT 321 (SC)]. The imported goods need to be assessed to Customs Duty at their transaction value, unless for valid reasons for rejection of the same. In order to reject the transaction value, the circumstances enumerated in Rule 3(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 should warrant and it is mandatory on the part of the Department to indicate under which provision of Rule 3(2) of Valuation Rules, the transaction value cannot be accepted. The circumstances enumerated in Rule 3(2) *ibid* have not been brought out in the Show Cause Notice for rejection of the value declared. The appellant has relied on the decisions rendered in *Motor Industries Co. Ltd., Vs. Commissioner of Customs* [2009 (224) ELT 4 (SC)], *Eicher Tractors Ltd.* [2000 (122) ELT 321 (SC)], *Bureau Viritas Vs. Commissioner of Customs* [2005 (181) ELT 3 (SC)], *Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd* [2007 (214) ELT 3 (SC)] and *Varsha Plastics Pvt. Ltd. Vs. UOI* [2009 (235) ELT 0193 (SC)]. Therefore, it was submitted that the proposal to reject the declared value is against valuation rules provisions of the Customs Act and the judgments of the Hon'ble Supreme Court, CESTAT and hence, on this score alone the proposal to reject/enhance the declared value is liable to be set aside.

(ii) The declared value has been proposed to be enhanced on the basis of Bills of Entry relating to the import of *M/s. Star Mint Fields P. Ltd.*, Surat considering them as a contemporaneous import. While comparing the value of the goods all parameters should match in respect of physical characteristics, quality, quantity and reputation of the products, country of origin and also timing of import as envisaged under Rule 4 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Rule 2(d) *ibid*.

(iii) The contemporaneous import prices cited in the Show Cause Notice and in the impugned consignment are not same in respect of quality, quantity, and hence cannot be compared for enhancing the value. The following summary captures the arguments of the Revenue for enhancement and the appellant's reply in this regard as given below:-

- Details of the imported goods from China are as follows:-

S. No.	Desc. of goods	Quantity in Kgs	Rate Decl. per Kg in USD	Total Value USD
1	Nylon Knitted Grey Fabrics	8511.90	5.15	43836.29
2	Polyester Nylon Knitted Fabric	1976.10	3.90	7706.79

- At the time of drawing the Mahazar, DRI relied on the following:-

S. No.	Invoice details	Desc. Of goods	Rate Decl. per Kg in USD	Importer
1	Inv. No. H07HD054 dt. 31.05.2011 of Fujian Holly Trading Company Ltd., China.	Grey Warp Knitting fabric Square Net 52" bright. [Compared with Nylon Knitted Fabrics]	9.2	Sai Enterprise
2	"	Grey Warp Knitting Fabric, Square net 52" Semi Dull [Compared with Polyester Nylon Knitted Fabric]	8.55	"

- In the Show Cause Notice, DRI had relied on imports made by M/s. Sainath Knitex Pvt. Ltd.

S. No.	B/E No. & Date	Commodity	Supplier	Value Decl. by Importer in USD	Value assessed in USD
1	4775029/28.09.2011	Nylon Warp Knitted Fabrics (Semi Dull)	Fujian Zhongi	7.30	9.0

2	5038412/28.10.2011	Nylon Warp Knitted Fabrics (Grey)	J.S. Fashions	7.22	7.22
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- DRI had considered the following imports made by M/s. Star Mint Fields P Ltd., Surat in Tuticorin Port.

S. No.	B/E No. & Date	Commodity	Value Decl. by Importer per Kg in USD	Value assessed per Kg in USD
1	5520049/21.12.2011	Nylon Warp Knitted Fabrics	8.9	8.9
2	5529220/21.12.2011	Nylon Warp Knitted Fabrics	8.9	8.9
3	5136305/09.11.2011	Nylon Polyester Fabrics	7.8	7.8
4	5515840/20.12.2011	Polyester Nylon Fabrics	7.8	7.8

(iv) There are different varieties of Nylon Warp Knitted Fabrics and department's comparison is only on the basis of general description and not on specific varieties as each variety fetches different prices. In the absence of details and the variety of the fabrics, comparing the value of fabrics and drawing any inference is basically incorrect and unsustainable in law.

7. In the grounds of appeal, the appellant has put forth that the observation of adjudicating authority that they have not furnished the manufacturer's invoice is factually in-correct as they produced the copies of the manufacturer's invoice before the lower adjudicating authorities and the record of PH noted submission of manufacturer's invoice.

(i) The goods were sold by the manufacturer M/s. Changle Foreign Trade Corporation, China to J.S. Fashions L.L.S, Dubai at the following price.

- Nylon Knitted Grey Fabrics -> US\$ 5.10
- Polyester Nylon Knitted Fabrics -> US\$ 3.85

(ii) M/s. J.S. Fashions, Dubai sold to M/s. Sainath Knitex Pvt. Ltd., Surat at the following price.

- a. Nylon Knitted Grey Fabrics -> US\$ 5.15
- b. Polyester Nylon Knitted Fabrics -> US\$ 3.90

(iii) M/s. Sainath Knitex Pvt. Ltd., Surat sold the goods at High Seas to the appellant at the following price.

- a. Nylon Knitted Grey Fabrics -> US\$ 5.15 plus 2% -> US\$ 5.253
- b. Polyester Nylon Knitted Fabrics -> US\$ 3.90 plus 2% -> US\$ 3.978.

8. Even higher values proposed in the Show Cause Notice were taken for assessment, the differential duty would come only to Rs.5,54,910/-. But, the original adjudicating authority had imposed redemption fine of Rs.20 lakhs and penalty of Rs.13 lakhs on the appellant which are abnormally disproportionate to the allegation of mis-declaration of the value of the imported goods.

9. The appellant has put forth that he has amply demonstrated that the contemporaneous imports and the goods in the impugned consignment were not same in quality or quantity and so comparison is not in accordance with law.

10. It is submitted by the appellant that the goods taken for comparison pertaining to M/s. Star Mint Fields P Ltd. were provisionally assessed and their value cannot be taken for the purpose of assessment and market value of the imported goods was not ascertained which is mandatory for the purpose of determination of fine and penalty. According to the provisions of Rules 4 and 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the value cannot be determined based on provisionally assessed goods.

11. Further, it is also contended that the lower adjudicating authority had failed to consider the details of various other contemporaneous imports and when more than one transaction value is noticed, the lowest value shall be used to determine the value of the imported goods.

12. The appellant had put forth that the imported fabrics are still lying in the custody of the department and the quality deteriorated due to prolonged storage which also to be considered before passing the order on the dispute.

13. The appellant / importer Mr. Murugan K.S. during the hearing before this Tribunal had put forth that despite producing evidence in the form of contemporaneous imports of similar / identical goods at around the same prices which were imported through Tuticorin before the original adjudicating authority and also the appellate authority, could not get any relief on the issue of valuation and the impugned imported goods continue to be with the Department for more than ten years. He has produced the Assistant Commissioner's letter dated 19.11.2018 to indicate that the contemporaneous imports considered by the Revenue for enhancement of value pertaining to M/s. Star Mint Fields P Ltd were provisionally assessed and are still pending for test report and the valuation rules do not permit enhancement basing on the values adopted in provisionally assessed Bills of Entry.

14. The Ld. Authorised Representative Shri S. Balakumar has reiterated the finding of the lower adjudicating authority. He has relied on the decisions rendered in the case of *Poonam Plastic Industries Vs. Collector of Customs [1989 (39) ELT 634 (Tri. Delhi)]* to the effect that the Department need not prove actual value with mathematical precision; reliance placed on the documents to be considered as proper when the transaction is veiled in secrecy as the Customs face difficulties to ascertain the correct value in circumstances when the deals are between two parties, the facts are not visible, the transaction is covered by a veil of secrecy and the actual value cannot be proved with mathematical precision. In such conditions, reasonable help can be taken of the documents available and other circumstances.

15.1 We have considered all the submissions made by the appellant and the Revenue and also available records in the appeal.

15.2 We find that the following issues are required to be answered in the present appeal:-

(i) Whether the enhancement of assessable value of the impugned goods under Rule 4 *ibid* read with Section 14(i) of the Customs Act, 1962 is legally sustainable in the facts and circumstances of the case?

(ii) Consequently, whether the order of confiscation and imposition of penalty on the importer is justified?

16. The appellant has imported Nylon Knitted Grey Fabrics declaring a unit value of US\$ 5.15/kg and Polyester Nylon Knitted Grey Fabrics declaring a unit value of US\$ 3.9/kg purchased on 'high seas sales' basis. The Revenue suspected that the importer has undervalued the goods basing on the two contemporary imports of similar goods imported by M/s. Sai Enterprises from Fujian Holy Trading Company Ltd., China, where the value declared for grey warp knitting fabrics was US\$ 9.2/kg and US\$ 8.55/kg.

Enhancement of the transaction value is also based on the proposed imports made by M/s. Sainath Knitex Pvt. Ltd., Surat as under:-

S. No.	B/E No. & Date	Commodity	Supplier	Value Decl. by Importer in USD	Value assessed in USD
1	4775029/28.09.2011	Nylon Warp Knitted Fabrics (Semi Dull)	Fujian Zhongi	7.30	9.0
2	5038412/28.10.2011	Nylon Warp Knitted Fabrics (Grey)	J.S. Fashions	7.22	7.22

Further, reliance is placed on the imports made by M/s. Star Mint Fields Pvt. Ltd., Surat as under:-

S. No.	B/E No. & Date	Commodity	Value Decl. by Importer per Kg in USD	Value assessed per Kg in USD
1	5520049/21.12.2011	Nylon Warp Knitted	8.9	8.9

		Fabrics		
2	5529220/21.12.2011	Nylon Warp Knitted Fabrics	8.9	8.9
3	5136305/09.11.2011	Nylon Polyester Fabrics	7.8	7.8
4	5515840/20.12.2011	Polyester Nylon Fabrics	7.8	7.8

17. The appellant has contended that the Department's comparison is only on the basis of the general description and not on specific varieties as each variety fetches different prices. In the absence of all the commercial details and information as to the type and variety of the fabrics imported, comparing the value of fabrics to draw any conclusion is basically incorrect and un-sustainable. The appellant also has argued that in connection with the impugned imports, he has produced manufacturer's invoice and to this effect, he has given a copy of the personal hearing held by the lower adjudicating authority. We find that appellant has explained at what rate M/s. J.S. Fashions (L.L.C), Dubai sold to M/s. Sainath Knitex Pvt. Ltd., Surat and at what rate he has purchased on "High Seas Sales" basis along with the rate at which the goods were originally sold by the manufacturer viz., M/s. Changle Foreign Trade Corporation, Fujian, China to M/s. J.S. Fashions (L.L.C), Dubai.

18. From the above, we find that the type of fabric i.e, whether grey, semi dull or dull or bright and the quality of fabric and even width affect the price of the products. Even in case of the contemporary imports relied upon by the Department all other factors remaining the same, grey warp knitting fabric 'Bright' value was declared at US\$ 9.2/kg whereas 'Semi Dull' was declared at US\$ 8.55/kg. Similarly the values of Nylon Warp Knitted Fabrics with semi dull and grey having an effect on the price. The contentions of the appellant that where more than one price are available as the contemporaneous prices, the lowest of the prices has to be adopted for the purpose of valuation. We agree with these

arguments of the appellant. We also take note of the fact that the imported goods are still lying pending clearance in the custody of the Department.

19.1 During the hearing before the Tribunal, the appellant has produced the following letter in support of his contention that the imports by M/s. Star Mint Fields Pvt. Ltd., Surat were provisionally assessed and are still pending for test report and as such relying on the values of these Bills of Entry is not in accordance with the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.



To

By SPAD

Shri Murugan K.S.
 26C/1A, Kamaraj Nagar, Third Mile
 Tuticorin - 628008

Gentleman,

Sub.: CUSTOMS - Issue of Certified copies of Bills of Entry - Regarding

With reference to your request vide letter dated 15.11.2018, it is informed that as per entry in the ICES all the following three Bills of Entry have been assessed provisionally pending test report.

- (i) B.E.No.5520049 dt.21.12.2011
- (ii) B.E.No.5529220 dt.21.12.2011
- (iii) B.E.No.5515840 dt.20.12.2011

2. The receipt of the same may be acknowledged.

Yours Sincerely,



[L.MEENAKSHI SUNDARAM]
 ASSISTANT COMMISSIONER

19.2 The above indicates that the Bills of Entry for these imports were dated 20.12.2011 and 21.12.2011. These are yet to be finalised pending test report even on 19.11.2018. These were considered as the basis for determination of contemporaneous prices, which is not legal and so not sustainable.

20. The above facts make it clear that the basis for enhancement of the value of the impugned goods is the declared/assessed value of similar imports by M/s. Star Mint Fields Pvt. Ltd., Surat which are found to be provisionally assessed. On this count also the enhancement of the declared value is not sustainable and is not in accordance with the provision of Section 14 of the Customs Act, 1962 read with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

21. We find that the proper officer can, on 'certain reasons', raise doubts about the truth or accuracy of declared value and these certain reasons can be higher value of identical / similar goods of comparable quantities in a comparable transaction, abnormal discounts or abnormal deduction from competitive prices, mis-declaration on parameters such as description, quality, quantity, country of origin, year of manufacture or production, non-declaration of parameters such as brand and grade and fraudulent or manipulated documents. In these appeals, the only reason for rejecting the transaction value is on account of noticing higher values of the contemporaneous imports. However, while determining a particular import to be considered as a contemporaneous import for enhancement, it is necessary to match all commercial level details like quality, quantity, type whether under a contract, physical characteristics, brand, reputation, country of origin, time of import, stock lot sale, manufacturers sale, etc. This is a necessary requirement. Merely giving the details of the Bills of Entry may be of identical / similar goods or of same country of origin and may be at the same time would not be sufficient because the transaction values are affected by various commercial factors like the quantity imported, the quality differences, reputation and relationship between the supplier and the importer, whether any advance paid or not, etc. In the absence of all the details of the imports whose values have been relied upon as contemporaneous prices by the lower adjudicating authority it is not possible to decide whether the decision of enhancement is reasonable or whether it is in accordance with the valuation provisions or not.

22. We find there was no allegation that the importer has mis-declared the description of goods or whether any excess quantity found or whether there is any mis-declaration of brand or country of origin or type or as to any other aspect in relation to imported goods.

23. We also find that the appellant has clearly explained the sequence of events in respect of impugned goods as to what rate the manufacturer has sold the goods to M/s. J.S. Fashions (L.L.C), Dubai and at what rate M/s. J.S. Fashions has sold to M/s. Sainath Knitex Pvt. Ltd., Surat and considering the rate at which he has purchased the goods on 'high seas sales' from M/s. Sainath Knitex Pvt. Ltd., Surat and considering the fact that Department's reliance was mainly on the basis of the values declared by M/s. Star Mint Fields Pvt. Ltd., Surat, we hold that enhancement resorted to is not legally justified and so un-sustainable. We also find that redemption fine and penalty imposed on the appellant are dis-proportionately high when compared to the declared value of the impugned goods at Rs.27,93,043/- which was enhanced to Rs.48,59,847/-.

24. In view of the above discussion, we order to set aside the impugned order No. 132/2013 dated 28.06.2013 as not sustainable. Consequently, we hold that confiscation of the imported goods, imposition of redemption fine and penalty on the appellant are not legally justified and so set aside. The appeal is allowed with consequential relief, if any, as per law.

(Order pronounced in open court on 03.08.2023)

(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

(P. DINESHA)
MEMBER (JUDICIAL)