

**Customs, Excise & Service Tax Appellate Tribunal  
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

**Customs Appeal No.10475 of 2021**

(Arising out of OIO-MUN-CUSTM-000-COM-03-20-21 dated 07/09/2020 passed by Commissioner of CUSTOMS-MUNDRA)

**UTKARSH CHEMICALS**

B.G. 32, Pushpa Complex, Delhi Road  
Hisar, Haryana

**.....Appellant**

*VERSUS*

**C.C.-MUNDRA**

Office Of The Principal Commissionerate Of Customs, Port User Buld. Custom House Mundra,  
Mundra, Kutch, Gujarat-370421

**.....Respondent**

**APPEARANCE:**

Shri Prem Ranjan Kumar, Advocate for the Appellant  
Shri Vinod Lukose, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR  
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

**Final Order No. A/ 11212 /2022**

DATE OF HEARING: 08.07.2022  
DATE OF DECISION: 17.10.2022

**RAMESH NAIR**

The present appeal has been filed against the Order-In-Original No. MUN-CUSTM-000-COM-03-20-21 dated 07.09.2020.

1.1 Brief facts of the case are that the Appellants were importing goods namely Polyester Bed Cover. The Appellants filed bills of entry declaring the goods as 100% polyester bed cover under CTH 6304, the goods imported were examined by Revenue. The officers of SIIB, Mundra examined the goods and it was observed that the clothes material were of 3 pieces of clothes sheets roughly and unsymmetrically stitched on two sides, one side fold and one side open. Revenue sent a letter to Textile Committee, Mumbai along with samples for testing and classification purpose. The textile committee in its test report dated 06.06.2017 reported that the item is 100% Polyester and warp is textured yarn but the weft cannot be ascertained and expressed opinion that 39.8% is textured yarn and remaining 60.2% cannot be ascertained. With regard to query about the correct description and classification, it was stated that it could not be ascertained as to whether the weft yarn is filament yarn or staple spun Yarn,

hence HS code could not be provided. The revenue also sent the samples to Ahmedabad Textiles Industry's Research Association (ATIRA) to ascertain whether the said fabrics are made up of filament yarn/ staple yarn and to ascertain the other components of the fabric which the textiles Committee was unable to ascertain. ATIRA again could not confirm the actual strength of the warp and weft yarn.

1.2 A Show Cause Notice dated 26.10.2017 was issued to the Appellant proposing classification of the imported goods as " Polyester Woven Fabrics" under Chapter 54075490 of the Customs Tariff Act 1975 against the declaration as " Polyester Bed Cover" under CTH 63041990 and differential duty of customs apart from confiscation and imposition of penalty. The show cause notice was adjudicated vide impugned order dated 02.07.2018. The Adjudicating authority has confirmed the demands Therefore, the present appeal.

02. Shri Prem Ranjan Kumar, learned counsel appearing for the appellant submits that to decide the correct classification of the goods in question the Learned Commissioner has referred sub-heading 540751 to 540754 which cover "Other Woven Fabric containing 85% or more weight or textured polyester filament". The Learned Commissioner referred the test report of ATIRA which stated that the fabrics is made entirely of " texturised yarn" to be covered under the above heading the fabrics should contain 85% or more by weight of texturised Polyester filament. However it is admitted facts in the test reports of both the textiles Committee and ATIRA the percentage could not be ascertained as the weft ruptured. Therefore, the basic condition of 85% could not be fulfilled and could not be ascertained whether weft is texturised yarn or not. When the basic criteria to cover the products under this sub-heading cannot be fulfilled relying upon the test reports, as it clearly mentioned that they could only ascertain the warp which was only 39.8% of the textured yarn. To classify as textured yarn the warp and weft should be more than 85% which is not the case as per the test reports. Thus department failed to discharge the burden. He placed reliance on the Judgment of Hon'ble Supreme Court in the case of UOI Vs. Garware Nylons Ltd. – 1996(87) ELT 12 (SC).

2.1 He also submits that Learned Commissioner wrongly relied upon the report of textiles committee and ATIRA as none of the Reports are conclusive. The request of drawal of sample and re-testing were rejected,

hence in the absence of any conclusive test report to classify the goods as “Polyester Woven Fabric” any inconclusive test report cannot be relied upon as held by the CESTAT in case of Alpha Foam Pvt. Ltd. Vs. Commissioner of Central Excise, Pune -I 2019(365) ELT 636 (Tri.)

2.2 He further submits that the finding of the Learned Adjudicating authority holding on the basis of quality of sewing is erroneous as sewing can be hand or by machine. The Chapter Note of relevant tariff heading does not specify the kind of sewing to be carried out. Further the word used is “otherwise” in addition to “sewing” or “gumming” which implies that the most important consideration for falling under the definition of ‘Made ups’ is assembling and not the means of assembling. The impugned goods i.e. ‘bed cover’ are closed from three sides with two sides machine stitched. Hence, a plain reading of Note 7 in general and (f) in particular makes it obvious that the goods so presented for assessment can only be treated as “made-ups” irrespective of the quality of stitching. Unless an article of textiles falls under the meaning of Note 7, it will not be treated as made up. This facts is supported by CBEC circular No. 557/53/2000 dated 03.11.2000 which clarified that Dhoti/Sarees are not classified as made up because they are not covered under the meaning of made-up under Sections Notes on textile. This also implies that if goods are covered under the meaning of made-up as per note 7, they will be treated as made-up irrespective of their use.

2.3 He also submits that on the identical issue in case of other importers this Hon’ble bench vide Final Order No. A/10013-10026/2022 dated 11.01.2022 and A/10046-10047 dated 25.01.2022 has been pleased to allow the appeals.

03. On the other hand, Shri Vinod Lukose, learned Superintendent (AR) reiterates the findings of impugned order.

04. Heard both sides. On careful consideration of the submissions made by both sides and perusal of the records, we find that the issue is no longer *res integra* as the same was already decided by this bench vide Final Order No. A/10013-10026/2022 dated 11.01.2022 and A/10046-10047/2022 dated 25.01.2022. The relevant part of the said Tribunal’s decision is extracted below:

3. The other appeals from the bunch have been disposed of vide this Tribunal's Final Order No A/10013-10026/2022 dated 11.01.2022. The common issue involved in all the appeals of the bunch as well as in the present appeals is of classification of goods declared by the appellant as Bed Cover and the revenue's claim is that imported goods is "polyester woven fabric" classifiable under CTH 54075490. This issue has been decided in other appeals of the bunch as per the following order:

"2. Heard both sides and perused the records. The department to classify the goods as "polyester woven fabric" under CTH 54075490 and to prove that the goods are polyester woven fabric has relied on three textile committee reports reproduced in the impugned order. By perusing the reports dated 28.02.2017 it is clearly mentioned in the column of correct description & Classification of the sample that appropriate HS Code could not be provided due to rupture of yarn in weft while untwisting.

2.1 On the other hand in report dated 21.03.2017 in correct description & classification column it is mentioned, sample is classified as polyester woven printed quilt case under HS code 630222 as classified by the appellants. Another reliance of the department is on the report of ATIRA (Ahmedabad Textile Industry Research Association) dated 27.03.2017 states that the actual strength of the warp and weft used in making fabric cannot be ascertained. If we go by all the above reports mentioned except for the report dated 21.03.2017 which classifies the goods as quilt cover all the other reports are inconclusive. If at all any report to be relied upon it is report dated 21.03.2017 which was brushed aside as tampered by the department without giving any details who tampered with the report and what action was taken.

2.2 Even if we accept the corrected report and all other reports they are all inconclusive and instead of relying upon them they should have been sent for retesting which the commissioner categorically denied stating that he does not find any cogent reason to grant resampling and retesting at this stage as samples were tested at two different recognised institutions and expert committee.

2.3 The department has relied upon M/s Rudra Vyaparchem vs Commissioner of Customs, Kolkata 2019 (370) E.L.T. 412 (Tri. - Kolkata) as similar goods to Appellant. The above case cannot be relied upon as it is based on the conclusive textile committee reports while in the present case undisputedly inconclusive as to the composition of samples, therefore the order of CESTAT in Rudra Vyaparchem case is distinguishable.

2.4 Secondly to decide the correct classification of goods the commissioner held the Subheading 540751 to 540754 cover "other woven fabric, containing 85% or more weight of textured polyester filaments. For that the authority has relied upon report of ATIRA stating the fabric is made entirely of texturised yarn to be covered under the above heading the fabric should contain 85% or more weight of texturised polyester filaments, now as per the report of ATIRA as well as report of Textile committee, that could not be ascertained as the weft ruptured, therefore the basic condition of 85 % percent could not

*be fulfilled and could not be ascertained whether weft is texturised yarn or not. There is no possible reason to cover the product under this subheading when basic criteria not fulfilled and in all the reports relied upon by the department it is clearly mentioned that they could only ascertain the warp which ranges from 34% to 47% of texturised yarn and to be classified as textured yarn the warp and weft should be more than 85% which is not the case in all the test reports. Therefore, the only conclusion that could be drawn from the above facts is department has not discharged their burden of proof and the classification of the department should be rejected as held by Hon'ble Supreme Court and CESTAT in various decisions; In case of UIO vs Garware Nylons Ltd. 1996 (87) E.L.T. 12 (S.C.) held:*

*"The burden of proof is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the authority first adjudicating."*

*In HINDUSTAN FERODO LTD. Vs COLLECTOR OF CENTRAL EXCISE, BOMBAY 1997 (89) E.L.T. 16 (S.C.) :*

*"It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed."*

*Also in recent order Cestat held in the matter of ALPHA FOAM PVT. LTD. Vs COMMISSIONER OF CENTRAL EXCISE, PUNE-I 2019 (365) E.L.T. 636 (Tri. - Mumbai):*

*"The impugned order clearly recognises that the test report is not final. However, he continues to rely on the said report. He has relied on the fact that the original adjudicating authority has evaluated the product in terms of the technical literature available. We find that the office of the chemical laboratory is not sure of exact classification and has raised some doubts about classification, it is not open to original adjudicating authority to decide the issue suo motu without going back with the said clarification to the office of the Chemical Examiner. The Commissioner (Appeals) has in his order observed that the technical basis of the Dy. Chief Chemist is quite clear whereas the report itself shows that the office of Chemical Examiner is not clear about the classification and needs further clarification before arriving at final decision. It is seen that the onus of establishing the change of classification is on Revenue and from the records it is apparent that Revenue has been unable to produce sufficient evidence to substantiate the claim."*

*The facts in the above judgment of Cestat is similar to the Appellant's case as in the above case also there is an inconclusive report which has been relied upon as in the appellant's case and the Cestat was pleased to allow the Assessee's appeal.*

2.5 Without prejudice to above findings, it is a settled legal position that if the goods are not classifiable under the chapter heading proposed by the revenue thereafter even the goods is classified under the chapter heading claimed by the assessee is correct or not, the case of the department will fail. This gets support from the following judgments:

• **PEPSICO HOLDINGS PVT.LTD.- 2019(25) GSTL 271 (Tri.-Mum)**

"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."

The above decision of the tribunal is based on the view taken by the Hon'ble Supreme Court in the case of WARNER HINDUSTAN LIMITED – (1999) 6 SCC 762 wherein the Hon'ble Supreme Court has held as under:

"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 confectionary under Heading 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 confectionary. 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 authorities below."

In view of the above settled law, irrespective whether the classification claimed by the appellant is correct or not since the classification proposed by the Revenue is absolutely incorrect, the entire case of the Revenue will not sustain.

3. Since the revenue has not been able to discharge their burden of proof. Hence the classification of goods declared by the appellants cannot be disturbed.

4. As per our above discussions and findings, the impugned orders are not sustainable. Hence, the same are set aside.

5. The appeals are allowed with consequential relief, if any, in accordance with law."

4. Since the issue already decided in the aforesaid order of this Tribunal passed vide Final Order No A/10013- 10026/2022, following the above order these appeals are also allowed.



05. From the above decision it can be seen that the facts and law point involved in the aforesaid case is absolutely identical to the present case, hence this case is squarely covered by the aforesaid decision. Following the above cited decision, we are of the considered view that the impugned order is not sustainable, hence the same is set aside. Appeal is accordingly allowed.

(Pronounced in the open court on 17.10.2022 )

**(RAMESH NAIR)**  
**MEMBER (JUDICIAL)**

**(RAJU)**  
**MEMBER (TECHNICAL)**

Mehul