 <p>OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS, CUSTOM HOUSE: MUNDRA, KUTCH MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421 Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62</p>	
A. File No.	: VIII/48-20/Adj/Pr.Commr./MCH/2017-18
B. Order-in- Original No.	: MUN-CUSTM-000-COM- 04-18-19
C. Passed by	: Shri Sanjay Kumar Agarwal Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order / Date of issue	: 04.04.2018/ 06.04.2018
E. SCN No. & Date	: F.No. S/15-13/ENQ/SIIB/CHM/17-18 dated 26.10.2017.
F. Noticee(s)/Party/ Importer	: 1.JMD Trading Co., House No. 933/3, 1st Floor, Pachranga Bazar, Panipat, Haryana-132102. 2. Shri Mohit Soin, Proprietor of M/s JMD Trading Co., House No. 933/3, 1st Floor, Pachranga Bazar, Panipat, Haryana-132102.

- यह अपील आदेश संबंधित को निःशुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.
- यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 6(1) के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 129 A (1) के अंतर्गत प्रपत्र सीए- 3 में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है।
Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:
"केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवा कर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ, 2nd फ्लोर, बहुमाली भवन, मंजुश्रीमिल कंपाउंड, गिर्धनगर ब्रिज के पास, गिर्धनगर पोस्ट ऑफिस, अहमदाबाद 380 004"
"Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, 2nd floor, Bahumali Bhavan, Manjushri Mill Compound, Near Girdharnagar Bridge, Girdharnagar PO, Ahmedabad 380 004."
- उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।
Appeal shall be filed within three months from the date of communication of this order.
- उक्त अपील के साथ 1000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, दंड या शास्ति रुपये पाँच लाख या कम माँगा हो, 5000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, शास्ति या दंड पाँच लाख रुपये से अधिक किंतु पचास लाख रुपये से कम माँगा हो, 10,000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, दंड, व्याज या शास्ति पचास लाख रुपये से अधिक माँगा हो। शुल्क का भुगतान खण्डपीठ बैंक आहरित ट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीयकृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा।
Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs.10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.
- उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची-1, न्यायालय शुल्क अधिनियम, 1870 के मद सं-6 के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए।
The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paise only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.
- अपील ज्ञापन के साथ ड्यूटी/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।
Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
- अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम, 1982 और CESTAT (प्रक्रिया) नियम, 1982 सभी मामलों में पालन किया जाना चाहिए। While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.
- इस आदेश के विरुद्ध अपील हेतु जहाँ शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहाँ केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा। An appeal against this order shall lie before the Tribunal on payment of 7.5 % of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

Sub: SCN F No. S/15-13/ENQ/SIIB/CHM/17-18 dated 26.10.2017 issued to M/s JMD Trading Co., House No. 933/3, 1st Floor, Pachranga Bazar, Panipat, Haryana-132102 and others.

BRIEF FACTS OF THE CASE:


An intelligence gathered by DRI, Ahmedabad indicated that M/s JMD Trading Co., House No. 933/3, 1st Floor, Pachranga Bazar, Panipat, Haryana-132102 (*hereinafter referred to as "the importer"*), were importing goods namely Polyester Woven Fabrics (classifiable under CTH-5407) by mis-declaring the same as "100% Polyester Quilt Cover" and classifying the same under CTH- 6304 vide bill of Entry No. 8523622 dated 13.02.2017. Polyester woven fabrics falling under chapter 5407 attract basic Customs duty @ 10 % ad-valorem or Rs 11/- to 87/- per Sqm or Rs 115 to Rs 150/- per Kg whichever is higher. Whereas the "Polyester Quilt Cover" falling under Chapter 6304 attracts basic Customs duty @ 10% ad-valorem. Thereby evading Customs duty leviable thereon. The importer had filed one bill of entry with the following details:

Sr. No.	Bill of entry no and date	Description of the goods as declared by the importer	Assessable Value (INR)	No of pieces
1	8523622 dated 13.02.2017	100% Polyester Quilt Cover Specification 225X225 cm (22800 Pcs)	3307742/-	22800

2. The above live consignment were examined by the officers of Special Intelligence Investigation Branch (SIIB), Mundra vide panchnama dated 02.05.2017 (**RUD-1 of SCN**). During the course of the examination, it was found that there were 380 packages (60 pieces per package) of rectangular shape of printed fabrics, folded and loosely stitched from two sides. The measurement of the textile material of the goods was 225 cms X 225 cms.

3. Representative samples were drawn from the said consignment and forwarded to the Textiles Committee, Mumbai vide letter F.No VIII/48-566/Gr.III/Test/Misc/16-17 dated 07.03.2017 (**RUD-2 of SCN**) for ascertaining whether the said samples fall under the category of "made-ups" as defined under HSN (Harmonized System of Nomenclature).

3.1 Test Report No. 0153051617-9591 dated 04.04.2017 (**RUD-3 of SCN**) of Textiles Committee, Mumbai was received at Mundra Custom House which opined as under:-

 प्रयोगशालाएँ वस्त्र समिति वस्त्र मंत्रालय, भारत सरकार वस्त्र प्रयोगशाला एवं अनुसंधान केंद्र पी. बालु रोड, प्रभादेवी चौक, प्रभादेवी, मुंबई - 400 025. Tel : +91-22-6652 7541 / 545 / 550 Fax : +91-22-6652 7554 E-mail : dlab.tea.nic.in / telabmumbai@gmail.com Website : www.textilescommittee.nic.in		LABORATORIES TEXTILES COMMITTEE Ministry of Textiles, Government of India Textile Laboratory & Research Centre P. Balu Road, Prabhadevi Chowk, Prabhadevi, Mumbai-400 025. Tel : +91-22-6652 7541 / 545 / 550 Fax : +91-22-6652 7554 E-mail : dlab.tea.nic.in / telabmumbai@gmail.com Website : www.textilescommittee.nic.in	
TEST REPORT		Format No. 06/25B/03	
Test Report No. 0153031617-9591 Name & Address of Customer			
		OFFICE OF THE PRINCIPAL COMMISSIONER CUSTOM: KACHCHH COMMISSIONERATE MUNDRA CUSTOM HOUSE PORT AND SPECIAL ECONOMIC ZONE, MUNDRA-370421(KACHCHH) GUJRAT	
Sample forwarding letter No. & date: F.No. VIII/48-566/Gr.III/Test/Misc/16-17 dt. 7/3/17 (Test Memo No. 1989 dt 6.3.17)			
Date of receipt of sample 17 Mar 2017			
Buyers Name & address (Optional): JMD Trading Co.			
Customer Sample No. BE No.8523622 / 13.2.17		Lab. Sample No. 0153031617-9591	
Sample Description: 100% Polyester Quilt Cover (Bulk Packing) size 225 x 225 CM - mr.			
Sample Characteristics: Fabric			
Date of Performance of Tests 17 Mar 2017 - 04 Apr 2017			
TEST RESULTS			
Sample Mark		Laboratory Sample No. 0153031617-9591	
1	Identification of fibre (IS 667:1981)	Warp & Weft	Polyester
2	Fibre Blend Composition (%)	Polyester	100
3	Weight of Sample (TC/Lab TM-03)	Weight per Square meter (g)	156.4
4	Whether Texturised/ Non texturised yarn (In house)	Warp	Texturised Yarn
		Weft	Cannot be ascertained as the yarn is found to be ruptured
	Percentage of Texturised/ Non Texturised yarn	Texturised Yarn	47.8
		Cannot be ascertained:	52.2
5	Whether Woven/Knitted/Non woven	Woven	
6	Whether Unbleached/Bleached/Dyed/Printed/Yarns of Different Colour (In house)	Printed	
7	H S Code (.) EP & QA		
	Whether sample fall under the category of madeup as defined under the HSN	Sample cannot be classified as "madeups" but may be appropriately classified as "Polyester woven fabric".	
	Correct description & Classification of the sample	Could not ascertain whether the weft is filament yarn or staple spun yarn. Hence, appropriate H.S. code is not provided.	
SHAILAJA SOOREJ Quality Assurance Officer			
Sample not drawn by Textiles Committee, Results relate only to sample tested. This test report shall not be published in any form without the explicit written consent of the Textiles Committee. Please quote Test Report No. and date for all future correspondence. Sample conditioned and tested at a temp. of 27 ± 2° C (instead of 20/21 ± 2/1° C) and 65 ± 2% RH wherever ISO / ASTM / AATCC test methods adopted. Complaints, if any, are to be received within 45 days of date of issue of the test report.			
Avail of services of Textiles Committee - Most Reliable and Most Accurate.			

4. In view of the above, 22800 pcs of polyester woven fabrics (size 225 cms X 225 cms) imported vide Bill of Entry No. 8523622 dated 13.02.2017 by mis-declaring the same as "100% Polyester Quilt Cover (size 225 cms X 225 cms)" totally valued at **Rs.33,07,742/-** was placed under seizure under the provisions of the Customs Act, 1962 vide seizure memo dated 02.05.2017 (**RUD-4 of SCN**), under reasonable belief that the same were liable for confiscation under the Customs Act, 1962.

5. Another set of sample drawn under Panchnama dated 02.05.2017 from the cargo pertaining to Bill of Entry No. 8523622 dated 13.02.2017 was sent to ATIRA (Ahmedabad Textile Industry's Research Association), Ahmedabad, vide letter F.No S/15-13/Enq/CHM/17-18 dated 09.05.2017 (**RUD-5 of SCN**) for ascertaining 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, vide their test report no CTD/68-9/ dated 15.05.2017 (**RUD-6 of SCN**) confirmed that the samples are made up of 100% polyester. The fabric is woven and printed. It contains all texturized filament yarns in both warp and weft. The filaments of weft are getting broken due to peaching process done on fabric. In the report dated 15.05.2017, ATIRA also confirmed that "As the fabric has been peach finished, the filament yarns are damaged. Hence actual strength of the warp and weft yarns used in making the fabric cannot be determined. Generally, high tenacity yarns are not used in home textiles. These are used in Industrial fabrics". The ATIRA Report No. CTD/68-9/ dated 15.05.2017 is reproduced as under:

अहमदाबाद वस्त्र उद्योग अनुसंधान संस्थान

पी.ओ. अंबवादी विस्तर, अहमदाबाद - 380015, भारत
फोन : (079) 2630 7921 - 7922 - 7923 - 5132
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AHMEDABAD TEXTILE INDUSTRY'S RESEARCH ASSOCIATION

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CTD/68-9/
Date: 15/05/2017

To
Deputy Commissioner(SIIB)
Office of The Principal Commissioner of Customs
Customs House, Port User Building
Mundra Port & SPL Economic Zone
Mundra, Kutch
Gujarat-370 421

K.A.: Mr. T. Samaya Murali

Sub: The Test Report of the sample submitted in the sealed cover

Ref: F. No. S/15-13/Enq/CHM/17-18/270 dated 11.05.2017
Test memo No-74 dt 09/05/17

BE No. & Date 8523622 dt. 13.02.2017

Party Name: M/s. JMD Trading Co, Panipat, Haryana.

Date of receipt of Sample at ATIRA: 12/05/2017

Description of Goods: 100% Polyester Quilt Cover

Test report

- Loosely Stitched Fabric
- The fabric contains 100% polyester.
- The fabric contains all texturised filament yarns in warp and weft.
- The filaments of weft are getting broken due to peaching process given to the fabric.
- The fabric is woven and printed.
- As the fabric has been peach finished, the filament yarns are damaged. Hence actual strength of warp and weft yarns used in making the fabric cannot be determined. Generally, high tenacity yarns are not used in home textiles. These are industrial fabrics.



Regards,

Bipasha Maiti/ D.S. Trivedi
Chemical Technology Division

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The tested samples will be kept for 45 days from the date of this report, and then discarded
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6. In view of the above, it appeared that the M/s JMD Trading Co. had declared their goods as "100% Polyester Quilt Cover" falling under chapter 63041990 attracting basic customs duty @ 10% Ad valorem. As per Chapter Note 1 of Chapter 63 "**Sub-chapter I applies only to madeup articles, of any textile fabrics**". Sub-chapter I covers goods falling under chapter heading 6301 to 6307 and madeups are defined under Note 7 of Section XI "Textile and Textile Articles". Plain reading of chapter note 1 of chapter 63 clearly implies that if the goods imported do not fall under the category of "madeups" they

cannot be classified under chapter 63 of the Customs Tariff. In view of the opinion of the Textiles Committee, it appeared that the said goods do not fall under the category of "madeup". The said goods appeared to be mis-declared by M/s JMD Trading Co. as "100% Polyester Quilt Cover" and do not fall under chapter 63041990 of the Customs Tariff, as declared by the importer.

7. The goods imported by M/s JMD Trading Co. vide bill of entry No. 8523622 dated 13.02.2017 as detailed in **Annexure "A"** to the SCN, have been appropriately categorized and classified as "Polyester Woven Fabric" by the Textiles committee and ATIRA, Ahmedabad. It appeared that "polyester woven fabrics" fall under chapter 54 or 55 of the Customs Tariff depending on the type of yarn used in the weaving of such fabrics. From the details of the test reports of the Textiles committee, in respect of the said consignment, it appeared that the warp component was more than 50% and the weft component was cannot be ascertained by weight. ATIRA, Ahmedabad in their test reports has identified the yarn in the warp and weft as "texturized yarn" and since the fabric has undergone a process of peaching, the same was getting broken/ruptured. Chapter 5407 of the Customs Tariff deals with "Woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404" and Chapter 5512 to chapter 5516 of the Customs Tariff deals with "Woven fabrics of Synthetic Staple Fiber". In the instant case, the fabric is "made out of filament yarn, which is texturized". Hence the said fabrics are appropriately classifiable under chapter 5407 of the Customs Tariff. Hence the said fabrics are appropriately classifiable under chapter 5407 of the Customs Tariff.

7.1 Fabric made out of high tenacity yarns are generally used for Industrial purpose while textile fabric in the instant case are generally meant for the manufacture of textile articles used in household and not in Industries. Accordingly, the goods in the instant case cannot be classified under chapter 540710 of the Customs Tariff. Note 9 mentions "the woven fabrics of chapter 50 to 55 include fabrics consisting of layers of parallel textile yarns superimposed on each other at acute or right angles. These layers are bonded at the intersections of the yarns by an adhesive or by thermal bonding. Further these fabrics are not woven by strips and are not fabrics specified in Note 9 to Section XI, hence, they do not fall under chapter 540720 or 540730 of the Customs Tariff. The fabric is made up of 100% Polyester Filament Yarn but not of any Nylon or other Polyamides, hence, the CTH 540740 is also not applicable in the instant case.

7.2 Chapter 540750 covers "other woven fabrics, containing 85% or more by weight of textured polyester filaments;" In the instant case as evident from the test reports issued by ATIRA, Ahmedabad as discussed in the foregoing para, that the fabric is made entirely of "texturized yarn" and hence it appeared that the same falls under the category of "fabrics with composition of texturized yarn more than 85% of the total weight". Further these fabrics are printed in nature and are not "Terylene and Dacron sarees", "polyester

shirting", "polyester saree" but fabrics used for making bed sheet/bed cover/quilt cover etc. It therefore appeared that the goods imported by M/s JMD Trading Co. under Bill of Entry as detailed in **Annexure "A" to the SCN**, fall under chapter 5407 5490 under the head "printed - other fabrics" attracting duty @ 10% advalorem or Rs 20 per Sq. meter whichever is higher. Since the total value of the goods in the instant case is **Rs. 33,07,742/-** (as per **Annexure "A" to the SCN**), Basic Customs duty @ 10% would come to **Rs. 3,30,774/-**, whereas, if calculated on Sq. Meter basis, the same would be calculated as follows :

Total Sq. Meter (as per Annexure "A" to the SCN) = 2,30,850 Sq. Meter
Basic Customs duty @ Rs 20 per Sq. Meter = 2,30,850 X 20 = 46,17,000/-

7.3 On comparison of the two basic Customs duty i.e. 10 % ad-valorem and Rs. 20 per Sq. Meter it is found that the amount calculated by applying the specific rate of duty @ Rs. 20 per Sq. Meter is higher and the same is applicable in the instant case.

8. From the facts discussed in the foregoing paras and material evidences available on record, it transpires that M/s JMD Trading Co. had imported "polyester woven fabrics" from the overseas suppliers, and had resorted to mis-declaration, by declaring the description of the goods, which is other than the correct description of the goods, in the invoices and the documents filed before the Customs authority at the time of imports, with an intent to evade customs duty leviable thereon. The product (goods) declared by the importer before the Customs authority for clearance of the said imported consignments of "polyester woven fabrics" was not the correct description (as is evident from the opinion of the Textiles Committee, Mumbai & ATIRA, Ahmedabad), whereas it was declared as "100% Polyester Quilt Cover", before the customs at the time of Import. In the instant case, the importer had furnished wrong declaration, statement & documents to the Customs while filing of the bill of entry as detailed in Annexure "A" to the SCN thereby suppressing the actual description of the goods imported by them, with an intention to evade Customs duty leviable thereon, by adopting the modus as detailed hereinabove. Thus, the declared description and classification in respect of the said imported consignments of "Polyester Woven Fabrics", mis-declared as "Polyester Quilt Cover" by M/s. JMD Trading Co. is liable to be rejected and the same needs to be reclassified under CTH 54075490.

9. From the above, it appeared that M/s JMD Trading Co. in connivance with the overseas supplier had wilfully mis-stated the description of "Polyester Woven Fabrics" before the Customs authority at the time of import with a view to evading higher applicable customs duty. The correct description and classification of the imported product was also suppressed at the time of filing of bill of entry by presenting an invoice with a different description of the goods. Thus, it appeared that the applicable customs duty liability had not been discharged by the importer by way of wilful mis-statement/ mis-

declaration and suppression of facts and therefore, the differential customs duty is liable to be recovered under Section 28(4) of the Customs Act, 1962.

10. From the facts discussed in the foregoing paras and material evidences available on record, it appeared that the importer has contravened the provisions of Section 46(4) of the Customs Act, 1962 in as much as they had intentionally mis-declared the description of their imported product as "Polyester Quilt Cover" whereas the actual product was "Polyester Woven Fabrics", thereby suppressing the correct description and classification of the imported goods, while filing the declaration, seeking clearance at the time of the importation of the impugned goods. This act on the part of importer had rendered the goods, as detailed in **Annexure- "A" to SCN** liable for confiscation under the provisions of Section 111(m) of the Customs Act, 1962.
11. It also appeared that the consignments of **22800 pcs of "Polyester Woven Fabrics" totally measuring 230850 Sq. Meter totally valued at Rs 33,07,742/-**, imported vide bill of entry as per Annexure "A" to the SCN in the name of M/s JMD Trading Co. and subsequently placed under seizure vide seizure memo dated 02.05.2017, was imported by mis- declaring the same as "Polyester Quilt Cover" and classifying the same under CTH 63041990 as against the actual description of the goods i.e. "Polyester Woven Fabrics" falling under CTH 54075490. The total customs duty leviable on the said goods amount to **Rs. 61,39,163/-** needs to be demanded and recovered from the importer under Section 28 (4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act, 1962. However the importer has paid an amount of **Rs. 9,73,832/-** at the time of assessment of goods in respect of the said Bill of Entry which is required to be appropriated towards duty demanded. Therefore, the Customs duty not paid /short paid amounting to **Rs. 61,39,163/-** as indicated in the Annexure - A to the SCN, payable on the seized goods is liable to be recovered from M/s JMD Trading Co. under Section 28 (4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act, 1962. The said acts of omission and commission on the part of the M/s JMD Trading Co. have rendered themselves liable for penal action under the provisions of Section 114A/112(a) of the Customs Act, 1962. The said seized goods as detailed in Annexure-A to the SCN also appear liable for confiscation under Section 111(m) of the Customs Act, 1962.
12. Summons dated 21.06.2017, 14.07.2017 & 03.08.2017 were issued to M/s JMD Trading Co. but No one turned up in response of the Summons (**RUD 7 of SCN**). As M/s JMD Trading Co. is a Proprietorship firm & Shri Mohit Soin, is the Proprietor of M/s JMD Trading Co. Shri Mohit Soin was looking after import/export of the firm and also interacting with the overseas suppliers for import of these goods. Being concerned with imports and their documentation, it appeared that he was responsible for the said mis-declaration of imported goods viz. "polyester woven fabrics" as "100% Polyester Quilt

Cover", in order to evade Customs duty leviable on the imports of "polyester woven fabrics". The aforesaid acts of willful mis-statement and mis-declaration of the description of the goods by M/s JMD Trading Co., with a view to evade higher Customs duty leviable thereon, as detailed in Annexure-A of SCN, have made the subject goods liable for confiscation under Section 111 (m) of the Customs Act, 1962. For the above mentioned acts of omission and commission on the part of Shri Mohit Soin, has rendered himself liable for penal action under the provisions of Section 112 (a) of the Customs Act, 1962. Shri Mohit Soin, had knowingly and intentionally made, signed and fabricated documents as discussed in detail hereinabove, which were presented to the Customs authorities which they knew were false and incorrect in respect of the description of the imported goods. Hence, the said acts on the part of them have rendered themselves liable for penalty under Section 114AA of the Customs Act, 1962. Further, penalty is also proposed on M/s JMD Trading Co. under the provisions of Section 114A / 112(a) of the Customs Act, 1962 for importing such mis-declared goods.

13. Therefore, M/s JMD Trading Co., H. No. 933/3, 1st Floor, Pachranga Bazar, Panipat, Haryana-132102 (IEC 3314006349) vide show cause under F.No. S/15-13/Enq/SIIB/CHM/17-18 dated 26.10.2017 were called upon to show cause to the Commissioner of Customs, having his office at, Port User Building, Mundra Port, Mundra, Kutch, Gujarat as to why:-

- (i) The classification of the imported goods i.e "polyester woven fabrics" imported by mis-declaring the same as "100% Polyester Quilt Cover" under CTH 63041990 should not be rejected and the same should not be re-classified correctly under CTH 5407 54 90 of the Customs Tariff Act, 1975;
- (ii) The goods viz. 22800 pcs of "Polyester Woven Fabrics" admeasuring 230850 Sq. Meter, imported vide bill of entry as per Annexure "A" to the SCN, valued at Rs. 33,07,742/- (as detailed in Annexure A) by mis-declaring the same as "100% Polyester Quilt Cover", which were seized vide Seizure Memo dated 02.05.2017, should not be confiscated under the provisions of Section 111 (m) of the Customs Act, 1962;
- (iii) The total customs duty leviable on the said goods amount to **Rs. 61,39,163/- (Rupees Sixty One Lakh Thirty Nine Thousand One Hundred and Sixty Three only)** (as detailed in Annexure A to the SCN) leviable on the seized imported goods, should not be demanded and recovered from them under Section 28 (4) of the Customs Act, 1962. As the importer has already paid an amount of **Rs. 9,73,832/-** the same should not be appropriated towards duty demanded.
- (iv) Interest should not be charged and recovered from them under Section 28AA of the Customs Act, 1962 on the duty demanded at (iii) above;
- (v) Penalty should not be imposed upon M/s JMD Trading Co., under the provisions of Section 114A /112(a) of the Customs Act, 1962;

14. Further, Shri Mohit Soin, Proprietor of M/s JMD Trading Co., H. No. 933/3, 1st Floor, Pachranga Bazar, Panipat, Haryana-132102 were hereby called upon to show cause to the Commissioner of Customs, having his office at, Port User Building, Mundra Port, Mundra, Kutch, Gujarat as to why penalty should not be imposed upon him under the provisions of Section 112(a)/114AA of the Customs Act, 1962;

15. DEFENCE REPLY AND PERSONAL HEARING:

15.1. The personal hearing was fixed on 26.03.2018 wherein Shri Sagar Rohatgi, Advocate on behalf of the notice appeared and submitted the written submission and stated that:-

- Present Show Cause Notice deals with the issue of classification and has already settled by different Commissionerate in favour of Noticee.
- Previously Bombay Commissionerate in case of M/s Shoetex Fabric where the goods which has also been folded in middle and stitched across the width (two sides) forming two layers and one side is completely open and in the said matter the Commissioner (Appeals) after relying on the report of Textile Committee stated that the sample is made out of 100% polyester knitted fabric, by stitching across the width (two side making the sample close in three and one side is kept completely open) making a quilt for use in bed and therefore, it falls under the expression "made up".
- Calcutta Commissionerate on behest of the West Bengal(Preventive) and the sample was again sent to Textile Committee for the opinion which vide their letter dated 19.11.2014 opined that the sample is made out of woven printed fabric, this sample is made by folding piece of fabric on length and stitching on both side to form a rectangular shape. One side is open and in the opinion of the textile committee such type of sample classified as quilt case under HS 6302.22.
- In the case of Thakur Textile pertaining to Calcutta Commissionerate, the adjudicating authority has not accepted the contention about the article. However, the Commissioner of Customs (Appeal) has decided the matter vide OIA No. CUS/RPM/002/2015 dated 08.01.2015 in favour of the assessee that the goods is "made up" and thereafter, the department has filed an appeal against the said order and the matter is pending before the Tribunal (Kolkata Bench) for consideration and stay has not been passed against the order of Commissioner (Appeal).
- Testing of sample has been done in a particular manner which itself reflects that arbitrary and biased attitude of the investigating agency.
- The investigation for the purpose of issuance of the classification only relied on the report of the textile committee, ATIRA & hence it does not have any evidentiary value. However, they have not discussed the basic definition of "made up" as described in Chapter Note 7 of Section XI of Customs Tariff Act, 1975.
- Report of ATIRA cannot be relied as in the said report the ATIRA expressed their

view that the fabric has been peached finished, the filament yarn are damaged hence actual strength of warp and weft yarn used in marking the fabric cannot be determined; that the fabric content all texturized filament yarn in warp and weft; that filaments of weft are getting broken due to peaching process given to the fabric. The finding of the report is itself contradictory to each other as in fourth point they stated that the actual strength of warp and weft yarn cannot be determined as the yarns are damaged. Therefore, if the yarn is damaged how can they know the nature as to whether it is texturized or non-texturized. It is submitted that the Textile Committee has already expressed the opinion that the nature of the yarn cannot be described in weft as they are damaged.

- The peaching process the cloth has been rubbed by sand paper so the yarn in warp and weft has broken and create a touch of velvet. Therefore, it is beyond imagination and not possible that by peaching process in all the fabrics only weft yarn has been ruptured.
- The investigating agency has sent the sample with the intention to take the report as per their dictates and therefore, the notice has serious doubts as to whether the said report is given by the lab, committee whatsoever independently and not under any influence and hence the said report is not impartial and correct and re-testing of the sample is required.
- None of the copy of sample has been supplied to the Noticee. The department has sent one sample to the Textile Committee and thereafter, again sent the sample before ATIRA. That they have not sent the sample in packed condition. Therefore, for the purpose of re-testing the re-sampling is required and the Noticee requested for the re-testing and re-sampling of the goods in reference to the circular No.30/2017-Cus dated 18.07.2017. The Noticee has further requested for supply of the sample so they can also seek the independent opinion from other government accredited lab.
- The investigating agency only relied on the report of the Textile Committee and ATIRA and not discussed the basic definition of "made up" as described in Chapter Note 7 of Section XI of CTH.
- The investigating agency has corroborated the reports which have been procured under influence made the allegation of mis-declaration and issued SCN. The high handedness of the department has itself reflected from the facts that nowhere in the SCN they have even discussed the statutory provisions to examine whether the goods are made ups or not in reference to the definition prescribed in Chapter Note 7 of Section XI of CTH.

The classification of the goods shall be determined according to terms of the heading and any corresponding chapter or Section notes. If a statutory definitions of the particular entry, word or item is provided then classification shall be decided as per the definition in statute and it cannot be construed in terms of their commercial or trade understanding or according to these popular meaning. In support of their defence, they

relied upon the judgement in case of Comm. of C.Ex, New Delhi V/s Connaught Plaza Restaurant (p) Ltd., 2012 (286)E.L.T. 321(S.C).

As regards the description and classification, they stated that the impugned goods are "made up" i.e Bed/Quilt Cover articles and cannot be classified as the fabric. In support of the same they stated that:

- ✓ The investigating agency at the time of examination described the goods in panchnama as "printed fabric" which has been folded at mid length and having loose stitching on two sides and even the description of the goods at the time of examination itself made it clear that the impugned goods are "made up" article.
- ✓ The definition as per note 7 of Chapter XI of the Customs Tariff Act defines the "made up" and among those the impugne goods fall in the Note 7(f) which are as follows:
"7(f) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joint end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded)"
- ✓ The definition mentioned in the Customs Tariff is itself completer definition of the "made up" articles with the exclusion clause; that the said provisions defined the "made up" articles and those are assembled either by sewing, gumming or otherwise but at the same time there are exclusion mentioned in definition which excluded certain assemble from the definition of made up articles.
- ✓ All the assemble by virtue of sewing, gumming or otherwise is not considered as made up articles and those are more specifically mentioned in HSN Explanatory notes and those are follows:
"These articles which are very numerous, include garments. It should be noted, however that piece goods consisting of two or more lengths of identical material joined end to end or composed of two or more textiles assembled in layers, are not regarded as "Made-up" nor are textile products in the piece composed of one or more layers of textile materials assembled with padding by stitching or otherwise."
- ✓ The plain reading of the explanatory notes made it clear that two category of assemble textile material could not fall under the definition of "made up" first one are those piece goods which consisting of two or more lengths or identical material joined end to end and secondly those piece goods which composed of two or more textiles assembled in layers whether or not padded.
- ✓ The impugned goods as per the investigating agency description in panchnama "printed fabric" which had been folded at mid length and having stitching on two sides. It means the impugned goods consist of one length only which is folded and stitched from two sides. It means there is an assembly by virtue of stitching and not covered under the exception and therefore, it is "made up" articles.
- ✓ The impugned goods i.e "Quilt 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. It does not specify the kind of sewing.

- ✓ The word used is otherwise" in addition to sewing or gumming. That implies most important is assembling and not the means of assembling. Explanatory note 20 of HSN under heading 6307 read as under:
"Packing clothes which, after use as bale wrappings, are roughly or loosely stitched together at the edges, but which do not constitute sacks or bags or unfinished sacks or bags of heading 63.05"
- ✓ It is submitted that unless article of textile fall under the meaning of note 7, it will not be treated as made up. This fact is supported by CBEC circular No. 557/53/2000 dated 3-11-2000. Even the goods which were used as Dhoti / Sarees were not classified as made up because they were 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 shall be treated as made-up irrespective of their use.
- ✓ It was also concluded in the tariff-cum-general conference of Chief Commissioners of Central Excise held at Mumbai on 29th August, 2000 that Dhoties and Sarees cannot be put at par with the bed spreads / bed linens because Saree and dhotis are articles which are in running length and joined end to end.
- ✓ It is further submitted that for classification of goods it is not important what will happen to goods after clearance but more important is how they are presented at the time of clearance.

In support of their above defence, they relied upon following judgements:

- a. Hon'ble Tribunal of Mumbai decision in case of M/s T.P.I India Ltd V/s Commissioner of Central Excise, Mumbai-II (2005 (189) E.L.T. 311 (Tri. - Mumbai) wherein it is held that:
"In any case, the bags in question would be classifiable under Heading 63.01 as "other made-up textile articles" attracting the same rate of duty as discharged, as applying Section Note 5 which defines 'made-up'. Since there is statutory definition of 'made-up', resort cannot be made to general understanding of 'made-up'. Note 5 (e) defines 'made-up' means, assembled by sewing, gumming or otherwise. When the bags in question are assembled by cutting, gumming and stitching, then the bags in question satisfy the definition of 'made-up' given in Section Note 5(e) to Section XI of the Schedule."
- b. Apex Court judgment in the case Hyderabad Polymers (P) Ltd. v/s Commissioner of C. Ex. Hyderabad [2004 (166) E.L.T. 151 (S.C.)],
- c. Hon'ble Apex Court of India in the case of Hyderabad Polymers (P) Ltd. v/s Commissioner of Central Excise, Hyderabad [2004 (166) E.L.T 151 (SC) wherein it is held that:
"It is not denied that the fabric would have fallen, at the relevant time, under Tariff item 54.08. Thereafter, the fabric is cut and one end of the fabric is sewed up without the aid of power and a sack is manufactured. It is not denied that such a sack would fall under Tariff item 6301 as made up."
- d. Hon'ble Apex court in the case of Pioneer Embroideries Ltd. v/s Commissioner of Customs, Mumbai [2015 (322) E.L.T. 602 (S.C.)] wherein it is held that the classification and essential character of the goods under import has to be determined

with reference to the state or condition of the goods at the time of importation and not with reference to the purpose for which the goods have been imported or the use to which such goods are put to after importation.

- e. Commissioner of Customs (Appeals) vide their OIA No. CUS/RPM/002/2015 dated 08.01.2015 has decided the matter in favour of M/s Thakur Textile that the goods is made up; department filed an appeal with CESTAT, Kolkata and the same is pending.

In view of above submission, they stated that the impugned goods i.e Quilt cover should be classified under made up articles and not as fabric.

As regards the burden of proof to prove in the present case, they stated that the department has not discharged their burden of proof as they have not conducted any market inquiry or any trade inquiry; that department relied on the presumption of the likelihood of use of the imported goods as fabric and raised entire demand on this kind possibility or probability, which is against the principals of classification with regards to made up articles. That the department only on the presumption that a textile made up after cutting and dividing threads would become another product ignoring the General Explanatory Note 7(b) to Section XI of Customs Tariff which states that if product is separated by cutting, dividing threads, still it will remain within ambit of made ups articles classifiable under Chapter 63 of Tariff. They relied upon the judgement in case of Union of India Vs. Garware Nylons Ltd., reported as 1996 (87) ELT 12 (SC).

As regards mis-declaration, confiscation and penalty, they stated that there is difference of opinion between the importer and the department in respect of classification Polyester Quilt Cover, which the importer wanted to clear under CTH 63041990, whereas the department wanted to classify the same under CTH 54075490. In support of their defence, they relied upon the judgement in case of Northern Plastic Ltd. v/s Collector of Customs & Central Excise, reported in (1998) 6 SCC 44 and Jay Kay Exports & Industries Vs Commissioner Of Cus. (Port), Kolkata reported in 2004 (163) E.L.T. 359 (Tri. - Kolkata) and Shree Ganesh International Vs Commissioner of C. Ex., Jaipur, reported as 2004 (174) E.L.T. 171 (Tri. - Del.).

Further stated that the SIIB classified the imported product under CTH 54075490 and at the same time goods imported by same supplier but imported at Chennai Port, Ahmedabad SIIB later on cleared as 100% polyester woven fabrics under CTH 54076190 and stated that it is impossible that how the same description is classified differently at two places. Therefore, the classification suggested by the investigating agency is not correct.

Also referred the judgements (i) CESTAT Order No. FO/77308-77315/2017 dated 11.09.2017 and (ii) OIO No. 23/2017 dated 07.11.2017 passed by the Commissioner of Customs, ICD, Tughlakabad in support of their defence.

From the above referred their reply and contention, they stated that there is no mis-declaration and this is not a case of fraud or mis-declaration as the goods is correctly classified as mad up articles and therefore are not liable for confiscation and no penalty should be imposed on them. Accordingly, they requested to drop the show cause notice.

DISCUSSION & FINDINGS

16. I have gone through the Show Cause Notice, relied upon documents, import documents, submissions made in written reply as well as submission made during personal hearing. I have also gone through the test report of the Textile Committee Mumbai received by SIIB, Customs, Mundra and the test report of ATIRA.

17. I find that the following main issues are involved in the subject Show Cause Notice, which are required to be decided:-

- (i) Correct classification of the goods imported goods by notice by mis-declaring the same as "100% Polyester Quilt Cover" and classified under CTH 63041990 of the first schedule of the Customs Tariff Act, 1975;
- (ii) Whether the goods viz. 22800 pcs of admeasuring 230850 Sq. Meter, imported vide bill of entry as per Annexure "A" to the SCN, valued at Rs. 33,07,742/- and seized vide Seizure Memo dated 02.05.2017, are liable for confiscation under the provisions of Section 111 (m) of the Customs Act, 1962;
- (iii) Whether the total customs duty leviable on the said goods amount to **Rs. 61,39,163/- (Rupees Sixty One Lakh Thirty Nine Thousand One Hundred and Sixty Three only)** (as detailed in Annexure A to the SCN) leviable on the seized imported goods, can be demanded and recovered from them under Section 28 (4) of the Customs Act, 1962. As the importer has already paid an amount of **Rs. 9,73,832/-** the same can be appropriated towards duty demanded;
- (iv) Whether interest can be recovered under Section 28AA of the Customs Act, 1962;
- (v) Whether penalty can be imposed upon M/s JMD Trading Co., under the provisions of Section 114A /112(a) of the Customs Act, 1962;
- (vi) Whether penalty can be imposed upon Shri Mohit Soin, Proprietor of M/s JMD Trading Co. under the provisions of Section 112(a)/114AA of the Customs Act, 1962;

18. After having framed the main issues to be decided, now I proceed to deal with each of the issues individually, herein below:

18.1 The foremost issue before me to decide in this case is as to whether the goods imported by the noticee by declaring the same as "Polyester Quilt Cover" are classifiable under CTH 63041990 or under CTH 54075490 of CTA, 1975 as "Polyester Woven Fabrics" as alleged in the show cause notice.

18.2. I find that in order to verify the identity and characteristics of the imported goods representative sample was sent to Textile Committee for their opinion/ testing as to whether the samples are covered under the category of "made-ups" as defined under HSN (Harmonized System of Nomenclature) and also to ascertain the composition, correct description, GSM etc., in respect of the said item and the textile committee vide their test results opined that "Sample cannot be classified as "made-ups" (quilt cover/ bed cover) but appropriately as "Polyester woven fabric".

18.2.1 The Textile Committee has been created by an Act of Parliament i.e. Textile Committee Act 1963 (41 of 1963). The Textile Committee, as an organization, started functioning from 22nd August, 1964. By virtue of Section 3 of the said Act, the Textile Committee is a statutory body with perpetual succession. The Textile Committee is under the administrative control of the Ministry of Textiles, Government of India. Acting as a facilitator, the Committee acts as 'a one stop service provider' to the textile trade, industry and other stakeholders', including state governments. It is the only organization in the country to provide HS classification of textile items, star rating of ginning and pressing factories and promoting hand-woven products through Handloom mark scheme. As per the web-site of textile committee, (<http://textilecommittee.nic.in/services/classification-textiles>) in matter relating to classification of textile they are designated authority to advise Customs. The exact text taken from the said url is reproduced below:

"All legally traded commodities in the world trade are classified under universally accepted" Harmonized commodity Description and coding System" popularly known as HS. The system of classification assigns a unique code to each product depending upon its composition of raw materials, characteristics and end-use. Such codes are universally applied for the purpose of customs duties, quotas and other schemes such as duty drawback etc.,

The Textile Committee is the designated authority to advise the Indian Custom authorities, exporters and importers on the matter related to classification of textile and clothing articles in India"

18.3 I find that in order to verify the identity and characteristics of the imported goods representative sample were drawn from the consignments of the noticee by the investigating officers during investigation were also sent to ATIRA (Ahmedabad Textile Industry's Research Association), Ahmedabad 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. I find that ATIRA, vide their test report no CTD/68-9 dated 15.05.2017 confirmed that the samples are made up of 100% polyester. The fabric is woven and printed. It contains all texturized filament yarns in both warp and weft. The filaments of weft are getting broken due to peaching process done on fabric. In the report dated 15.05.2017 ATIRA also confirmed that "As the fabric has been peach finished, the filament yarns are damaged. Hence actual strength of the warp and weft yarn used in making the fabric cannot be determined.

Generally high tenacity yarns are not used in home textiles. These are used in Industrial fabrics".

18.4 I find that the reports of the Textile Committee, Mumbai and ATIRA, Ahemdabad are in line with each other and establish identity of the imported goods as fabrics instead of made-ups.

18.5 I find that the noticee in their written submission dated 26.03.2018 has referred Section note 7(f) of Chapter XI of the Customs Tariff and has contended that for the consideration of any textile article whether they are made-ups or not, it is necessary firstly that it should be assembled and secondly that it should be assembled by sewing, gumming or otherwise. The noticee has also contended that the goods imported are folded at mid length and having stitching on two sides and that means the impugned goods consist of one length only which is folded and stitched from two sides and the noticee has further urged that the assembly is by virtue of stitching and so not covered under the exclusionary provision. Further the noticee has stated that as per the plain reading of Note 7(f), the goods presented for assessment can only be treated as made-ups irrespective of the quality of stitching, which may be poor in some cases. I find that the noticee had declared their goods as "polyester quilt cover" covered under CTH 63041990 attracting basic customs duty @ 10% Ad valorem. As per Chapter Note 1 of Chapter 63 "Sub-chapter I applies only to made-up articles, of any textile fabrics". Sub-chapter I covers goods falling under CTH 6301 to 6307 and "made-ups" are defined under Note 7 of Section XI "Textile and Textile Articles". The Section Note 7 of Section XI of "Textile and Textile Articles" reads:

- 7- For the purpose of this Section, the expression "**made up**" means:-
- (a) Cut otherwise than into squares or rectangles;
 - (b) **Produced in the finished state, ready for use (or merely needing separation by cutting dividing threads) without sewing or other working (for example, certain dusters, towels, table cloths, scarf squares, blankets);**
 - (c) **Cut to size and with at least one heat-sealed edge with a visibly tapered or compressed border and the other edges treated as described in any other subparagraph of this Note, but excluding fabrics the cut edges of which have been prevented from unravelling by hot cutting or by other simple means;**
 - (d) **Hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics the cut edges of which have been prevented from unravelling by whipping or by other simple means;**
 - (e) Cut to size and having undergone a process of drawn thread work;
 - (f) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded);
 - (g) Knotted or crocheted to shape, whether presented as separate items or in the form of a number of items in the length.

As per Section Note 7(b), 'made-ups' means the articles "produced in finished stage" and excludes fabrics, cut edges of which have been prevented from unravelling by hot cutting or by other simple means and as per Section Note 7(c) fabrics, cut edges of which have been prevented from unravelling by hot cutting or by other simple means are excluded from the definition of made-ups. As per Section note 7(d) the made-ups were

defined as articles with hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics, the cut edges of which have been prevented from unravelling by whipping or other simple means. However, as per the identity of the goods established above the goods imported are single piece fabrics which had uneven, temporary stitches on two sides, easily removable and rough in nature. The edges found on these fabrics are rough which have not been hemmed/ rolled / knotted at any side of the edges and the constituent material/ yarn was clearly visible and the constituent material / yarn can be easily unravelled by simple means like pulling etc. Thus I find that the contention of the noticee is not correct and the goods cannot be considered as made-ups as they are not the finished product, their edges are not hemmed or with rolled edges, or with a knotted fringe at any of the edges and they do not satisfy the conditions of the Section note 7 to be classified as made-ups.

18.6 Further, I find that in the case of Collector of Central Excise Meerut *Vs.* Kapri International Pvt. Ltd. Reported at 2002(142)ELT 10(SC), the Apex court has held that by cutting the cotton fabric from running length into small pieces and giving them a definite required shape to form new articles like bed sheet, bed spreads, table cloths etc. produce a commodity which has a definite commercial identity in the market. In the matter of Kapri International Pvt. Ltd. *Vs.* Collector of Central Excise Meerut reported at 1986(23)ELT 538(Tribunal), the Hon'ble tribunal has held that bed-sheets, bed covers, table cloths etc. are articles of daily use in practically every household. No expertise is required to say that bed-sheets and bed-covers etc. are different from fabrics in running length. The fabric in running length cannot be used as bed-sheets, bed-covers or table cloths. Nor are the fabrics in length known as bed-sheets, bed covers or table cloth. The cloth must be cut to required size and then hemmed and stitched. Only then, it assumes the shape of the bed-sheets, bed-covers, table cloths etc. Tribunal also held that the processes of cutting, hemming and stitching of running cloth bringing into existence new and distinct commercial products such as bed-sheets, bed-covers, table cloth etc. amounts to manufacture.

18.7.1 The noticee has referred the CBEC Circular No. 557/53/2000-CX dated 03.11.2000 and has stated that unless articles of textile fall under the meaning of Note 7, it will not be treated as made-up. I find that vide the said circular it has been clarified that unhemmed/ unstitched Dhotis/ Sarees which are basically woven as fabrics in running lengths with same pattern of weaving and which do not contain extra threads contributing greater thickness to the cloth with the outermost line running at or near the edge at regular intervals, so as to provide a substitute for hem (i.e. to protect unravelling of yarn or to prevent fraying of the edges), will continue to be classifiable as fabrics under Chapter 52/ 54/ 55. Rectangular (including square) articles simply cut out from such long running length fabrics without other working and not incorporating fringes formed by cutting dividing threads, even if sold folded or put up in packing will not be regarded as "product

in the finished state” and would merit classification as fabrics as per this practice followed hitherto.

18.7.2 Further, in the said circular a clarification given by Directorate General of Foreign Trade has been referred that as per Policy Circular No. 15 (RE-99)/ 1999-2000, dated 2-7-1999 that unhemmed and/or unstitched odhanies are classifiable as fabric whereas hemmed and/ or stitched odhanies are classifiable as made-ups under DEPB scheme. Thus the circular referred by the noticee itself clarifies that articles which are Rectangular (including square) articles simply cut out from such long running length fabrics without other working and not incorporating fringes formed by cutting dividing threads, even if sold folded or put up in packing will not be regarded as “product in the finished state” and would merit classification as fabrics. In the instant case also the goods imported are single piece fabrics which had uneven, temporary stitches on two sides, easily removable and rough in nature; Also, the edges found on these fabrics are rough which have not been hemmed/ rolled / knotted at any side of the edges cannot be regarded as product in the finished state and so merit classification as fabrics.

18.8 Thus if a fabric has undergone processes of cutting, hemming and stitching of running cloth bringing into existence a new distinct commercial product, then only the new product is classifiable as made-up, otherwise the same merit classification as fabric only. Therefore, in light of the above discussions and various test reports, I find that the goods imported by the noticee declaring them as “Polyester Quilt Cover are not hemmed, stitched and are not in ready to use condition. These are just rectangular (including square) articles simply cut out from such long running length fabrics without other working and also are not incorporating fringes formed by cutting dividing threads and cannot be regarded as “product in the finished state” and cannot be sold in the market as bed cover/quilt cover and thus I find that they would merit classification as “Polyester woven fabrics” only.

19. The noticee also referred to CESTAT Order No. FO/77308-77315/2017 dated 11.09.2017. The referred order of Hon’ble CESTAT has been perused by me. The case before the CESTAT was that the appellant had imported the goods classifying them as “Polyester Quilt Cover” and the department has contended the same to be “double bed sheet”. While allowing the appeal the Hon’ble CESTAT observed that the customs duty is equal on the quilt cover as well as the bed sheet and there is no loss to the exchequer. Further the Textile Committee, Mumbai vide Test Report No. 0153051617-9591 dated 04.04.2017 also classified the goods as quilt cover under HS 6302.22 and thus was in favour of the appellant. I find that the case before CESTAT was for classification between two made-up articles i.e. “polyester quilt cover” and “polyester double bed sheet”. However in this case, the dispute is not between two made-up articles but between fabric and article made-up from that. Therefore, the reference to this case law is out of context.

20. I have also gone through the OIO No.23/2017 dated 07.11.2017 passed by the Commissioner of Customs, ICD, Tughlakabad and relied by the noticee in this case. I find that while passing the said order dated 07.11.2017, the adjudicating authority found, *"though the samples drawn by Customs ICD Tughlakabad were sent to Textile Committee for their opinion, the test memo forwarded do not seek any opinion in the matter of correct classification of the said goods or on the question as to whether the said goods in dispute are "made ups" classifiable under Chapter 3 or upholstery fabrics classifiable under heading 5407. The test Memo has sought the view of the textile committee on issue such as composition etc. of the material. I am totally at loss to understand how such questions were relevant for addressing the present controversy. Since no opinion is sought by the department in the test memo in respect of present controversy the report/ opinion given by the said textile committee is silent on this aspect."* I find that the adjudicating authority in the referred order has dropped the issue raised by the department on the ground that no opinion from Textile Committee was sought by the department addressing the present controversy of classification. However, in the case before me, specific opinion from the textile committee has been taken and the report/ opinion is against the noticee. Thus facts and circumstances of that case were different from the present case.

21. Now, as the identity of the goods is decided, I proceed further to decide the correct classification of the imported goods i.e. "polyester woven fabrics". Polyester woven fabrics are covered under Chapter 54 or 55 of the Customs Tariff Act, 1975 depending on the type of yarn used in the weaving of such fabrics. The CTH 5407 of the CTA, 1975 deals with "woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404" and CTH 5512 to CTH 5516 deals with "woven fabrics of synthetic staple fibre". In the instant case, the fabric is "made out of filament yarn, which is texturized". Hence the said fabrics are appropriately classifiable under CTH 5407.

22. Further, I find that fabric made out of high tenacity yarns are mostly used for industrial purpose and textile fabric in the instant case are mostly meant for the manufacture of textile articles used in household and not in industries. Accordingly, the goods in the instant case cannot be classified under sub-heading 540710. Further these fabrics are not woven by strips and are not fabrics specified in Note 9 to Section XI, they do not merit classification under sub-heading 540720 or 540730. Since the constituent material used in the manufacture of these fabrics is polyester filament/ polyester staple fibre and not filament of nylon or other polyamides, these goods cannot be classified under sub-heading 540741 to 540744. The sub-heading 540751 to 540754 covers "other woven fabrics, containing 85% or more by weight of textured polyester filaments". As per above discussed test report issued by ATIRA, Ahmedabad, the fabric is made entirely of "texturized yarn" and hence it appeared that the same is covered under the category of "fabrics with composition of texturized yarn more than 85% of the total weight". Further these fabrics are printed in nature and are not "terylene and dacron sarees", "polyester

shirting", "polyester saree" but are fabrics used for making bed sheet/ bed cover/ quilt cover etc. Thus I hold that the goods imported by the noticee under the subject Bills of Entry are appropriately classifiable under tariff item 54075490 as "printed - other fabrics" which attract BCD @ 10% ad valorem or Rs 20 per sq. Meter, whichever is higher. Thus, as discussed above, the classification of the goods imported by the noticee by mis-declaring the same as "polyester quilt cover" under CTH 63041990 is liable for rejection and I hold that it should be re-classified as "polyester woven fabrics" under tariff item 54075490 under the first schedule to the Customs Tariff Act, 1975.

23. After deciding appropriate classification, I consider the next issue i.e. as to whether the imported 22800 pcs admeasuring 230850 Sq. meters, covered under the above mentioned Bills of Entry and seized vide Seizure Memo dated 02.05.2017, are liable for confiscation under the provisions of Section 111(m) of the Customs Act, 1962. I find that from the test reports that the impugned goods were "polyester woven fabrics" but in connivance with the overseas supplier the noticee had wilfully mis-stated description of the imported goods as "Polyester Quilt Cover" and accordingly sought to mis-classify the same under tariff item 63041990 as against the actual classification i.e. under tariff item 54075490 with intent to evade higher applicable customs duty. The noticee has thus violated the provisions of Section 46 (4) of the Customs Act, 1962. Accordingly, for the said act of wilful mis-declaration of description of the said imported goods, the same are liable to confiscation under Section 111(m) of the Customs Act, 1962.

24. I find that on appropriate classification total differential duty in respect of impugned consignments comes to Rs. 51,65,331/- as detailed below:

(i) The total value of the goods is Rs. 33,07,742/-.

BCD @ 10% ad valorem = Rs 3,30,774/-.

(ii) Total Sq. Meter (as per Annexure "A" to the SCN) = 2,30,850 Sq. Meter

Basic Customs duty @ Rs 20 per Sq. Meter = 2,30,850 X 20 = 46,17,000/-

(iii) On comparison of the rates of BCD i.e. 10 % ad valorem and Rs. 20/- per Sq. Meter, it is found that the amount calculated by applying the specific rate of duty @ Rs. 20/- per Sq. Meter is higher and the same is applicable in the instant case. The Total Customs Duty payable as per re classification works out to be Rs. 61,39,163/-. The noticee has already paid duty of Rs. 9,73,832. Thus the differential duty works out to be Rs. 51,65,331/-.

24.1. In the show cause notice it has been proposed to demand and recover the said amount of differential duty under Section 28(4) of the Customs Act, 1962. The Section 28(4) of the Customs Act, 1962 reads:

"Section 28(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of-

(a) collusion; or

(b) any wilful mis-statement; or
 (c) suppression of facts,
 by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

24.2 The term "relevant date" For the purpose of Section 28, has been defined in Explanation 1, as under:

"Explanation 1. - For the purposes of this Section, "relevant date" means,-
 (a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;
 (b) in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after the final assessment thereof;
 (c) in a case where duty or interest has been erroneously refunded, the date of refund;
 (d) in any other case, the date of payment of duty or interest."

24.3 I find that the provision of Section 28(4) of the Customs Act, 1962 provides for demand of duty not levied or short levied by reason of collusion or wilful mis-statement or suppression of facts. As the noticee wilfully mis-declared the description of impugned imported goods by suppressing material facts, the said condition of Section 28 ibid is fulfilled in the instant case. Further, I find that the said provision provides that duty can be demanded by proper officer within five years from the relevant date. Thus, I find that Section 28(4) ibid provides mechanism to demand duty during the period starting from the relevant date and within five years from such relevant date. The relevant date has been defined in above mentioned *Explanation-1* of Section 28. I find that in this case subject Bills of Entry was filed for clearance of the impugned goods but order for clearance of the goods under Section 47 ibid could not be granted as the goods were seized vide seizure memo dated 02.05.2017. Therefore, after importation, the impugned goods are still lying in customs area and out of charge under Section 47 ibid is yet to be granted. In view of clause (a) of the said *Explanation-1*, I find that the relevant date in this case will start from the date on which proper officer of Customs will make an order for the clearance of impugned goods. As till date no order for clearance of impugned goods has been granted, I find it premature to demand the duty under Section 28(4) ibid, as this Section would kick in only after clearance of goods by customs after importation.

24.4 I find that total amount of differential duty involved in this case comes to Rs. 51,65,331/-. As discussed above, the impugned goods are liable to confiscation under Section 111(m) of the Customs Act, 1962. Since the impugned imported goods are not prohibited goods, an option of redeeming the goods is required to be granted to the noticee, against the order of confiscation by paying redemption fine as provided under Section 125 of the Customs Act, 1962. The amount of redemption fine will be decided here-in-below. I find that as provided under Section 125(2) ibid, the noticee will have to pay the above

mentioned amount of differential duty along with the redemption fine while exercising option to redeem the confiscated goods. Thus, in view of these provisions, I hold that the differential duty can be recovered along with redemption fine if the noticee chooses to exercise the option to redeem the confiscated goods.

25. It has also been proposed to demand and recover interest on the said differential duty of Rs. 51,65,331/- under Section 28AA of the Customs Act, 1962. The Section 28AA *ibid* provides that when a person is liable to pay duty in accordance with the provisions of Section 28 *ibid*, in addition to such duty, such person is also liable to pay interest at applicable rate as well. Thus, the said Section provides for payment of interest automatically along with the duty. I have already held that differential Customs Duty of Rs. 51,65,331/- is not recoverable under Section 28(4) *ibid* but can be demanded and recovered only if the noticee, opts to redeem the goods after confiscation. Therefore, I hold that the interest on differential duty cannot be demanded and recovered under the provisions of Section 28AA of the Customs Act, 1962 at this stage.

26. Further, I consider the proposal of imposition of penalty upon the noticee under the provisions of Section 114A and 112(a) of the Customs Act, 1962. The penalty under Section 114A can be imposed only if duty is demanded under Section 28 *ibid* by alleging wilful misstatement or suppression of facts etc. As discussed in foregoing para the noticee has wilfully misstated the description of goods and also mis-classified the goods with intent to evade customs duty, however, since the goods have been seized in customs area before giving out of charge, I have hold that the differential duty cannot be demanded and recovered under Section 28(4) of customs Act, 1962. As the provision of imposition of penalty under Section 114A is directly linked to Section 28(4) *ibid*, I find that penalty cannot be imposed under upon the noticee under Section 114A *ibid* in this case. Further, in respect of imposition of penalty under Section 112(a) of the Customs Act, 1962, I find that once the goods are held liable for confiscation under Section 111(m) of the customs act, 1962, the person who in relation to such goods has done an act which has rendered goods liable for confiscation is liable for penalty under Section 112(a) of the Customs Act, 1962. In this case the goods have been held liable for confiscation for the act of mis-declaration of description of the subject goods by the noticee, therefore, the noticee is liable to penalty under Section 112(a) *ibid*.

27. As regards imposition of penalty on Shri Mohit Soin, Proprietor of M/s JMD Trading Co., Panipat, Haryana, I find that he was interacting with the overseas suppliers for import of these goods. Shri Mohit Soin made purchase contracts of imports, look after the imports including documentation in M/s JMD Trading Co., Panipat, Haryana and thus, he was responsible for the said mis-declaration of imported goods viz. "polyester woven fabrics" as "Polyester Quilt Cover", in order to evade higher Customs duty leviable on the imports of "polyester woven fabrics". As accepted by him in the statements that the

product imported by them does not fall under "madeups" and still the same was imported by him by declaring it as 'Polyester Quilt Cover'. He also accepted that the same is 'polyester woven fabrics' and correctly classifiable under chapter 5407, instead of chapter 63 of the CTH and also accepted the duty liability. Thus, I find that he was well aware of the exact nature/use of the imported goods and was also aware of the feature of imported goods and thereby knowingly and actively concerned himself in the act of mis-declaration and mis-classification before the Customs and thereby attempted to evade Customs duty to the tune of Rs. 51,65,331/- (as detailed in Annexure A to the SCN). He, had knowingly and intentionally concerned himself in making of fabricated documents which were presented to the Customs authorities which they knew were false and incorrect in respect of the description of the imported goods and thus liable to confiscation under Section 111(m) of the Customs Act, 1962 and thus Shri Mohit Soin is also liable to penalty under Section 112 (a) of the Customs Act, 1962. However, since M/s JMD Trading Co., Panipat, Haryana being a proprietary concern, I refrain from imposing separate penalty on Shri Mohit Soin, Proprietor of the firm under Section 112(a) of the Customs Act, 1962.

27.1. There is also a proposal for penalty under Section 114AA on Shri Mohit Soin, Proprietor of M/s JMD Trading Co., Panipat, Haryana in addition to Section 112(a) of the Customs Act, 1962. From the facts of the case it is evident that he knowingly / intentionally mis-declared the description of the goods to mis-classify the same in order to attract lower rate of duty. Shri Mohit Soin, had knowingly and intentionally made, signed and fabricated documents, which were presented to the Customs authorities which he knew were false and incorrect in respect of the description of the imported goods in order to attract lower rate of duty. Therefore, I hold that Shri Mohit Soin is liable to penalty in terms of the provisions of Section 114AA of the Customs Act, 1962.

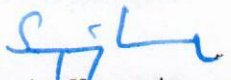
28. In view of the forgoing discussions and findings, I pass the following order:-

O R D E R

- (i) I hold description of the goods imported under the Bill of Entry No. 8523622 dated 13.02.2017 as "polyester woven fabrics", correctly classifiable under tariff item 54075490 of the first schedule to the Customs Tariff Act, 1975. Accordingly, I reject the classification of the imported goods declared under tariff item 63041990 under self-assessed bill of entry and order to re-classify the goods under tariff item 54075490 to re-assess duty accordingly.
- (ii) I order to confiscate the goods viz. 22800 pcs of "polyester woven fabrics" admeasuring 230850 Sq. Meter, imported vide bill of entry no. 8523622 dated 13.02.2017 valued at Rs. 33,07,742/-, under the provision of Section 111(m) of the Customs Act, 1962. I hereby give an option to the noticee to redeem the impugned confiscated goods on payment of redemption fine of Rs.6,00,000/- (Rs.Six Lacs

Only) in lieu of confiscation, along with payment of duty as applicable in terms of Section 125 of the Customs Act, 1962.

- (iii) I hold that demand of Customs Duty of **Rs. 51,65,331/- (Rs. Fifty One Lacs Sixty Five Thousand Three Hundred Thirty One only)**, from M/s JMD Trading Co., Panipat, Haryana under Section 28(4) of the Customs Act, 1962 prior to clearance of goods is premature and thus do not demand the same under that provision. Accordingly, the proposal to demand of interest on such duty under Section 28AA of the Customs Act, 1962 is also premature and thus do not demand the same.
- (iv) I impose a penalty of **Rs. 51,65,331/- (Rs. Fifty One Lacs Sixty Five Thousand Three Hundred Thirty One only)**, on M/s JMD Trading Co., Panipat, Haryana under Section 112(a) of the Customs Act, 1962.
- (v) I impose a penalty of Rs.2,00,000/- (Rs. Two Lacs Only) on Shri Mohit Soin, Proprietor of M/s JMD Trading Co., Panipat, Haryana under Section 114AA of the Customs Act, 1962.


(Sanjay Kumar Agarwal)
Commissioner of Customs
Custom House Mundra

BY SPEED POST/RPAD

F.NO.VIII/48-20/Adj/Pr.Commr./MCH/2017-18

Dated: 06.04.2018

To,

- 1) M/s JMD Trading Co., House No. 933/3, 1st Floor, Pachranga Bazar, Panipat, Haryana-132102
- 2) Shri Mohit Soin, Proprietor of M/s JMD Trading Co., House No. 933/3, 1st Floor, Pachranga Bazar, Panipat, Haryana-132102

Copy to:

- (i) The Chief Commissioner of Customs, CCO, Ahmedabad,
- (ii) The Additional Director General, DRI, Ahmedabad Zonal Unit, Ahmedabad.
- (iii) The Deputy Commissioner, Import Assessment, Group-III, Custom House, Mundra
- (iv) The Deputy Commissioner (RRA), Custom House, Mundra.
- (v) The Deputy/Assistant Commissioner (Recovery), Custom House Mundra.
- (vi) The Deputy/Assistant Commissioner (EDI), Custom House, Mundra.
- (vii) Guard File