

CASE NO.:
Appeal (civil) 1520 of 2001

PETITIONER:
Nanya Imports & Exports Enterprises

RESPONDENT:
Commissioner of Customs, Chennai

DATE OF JUDGMENT: 10/04/2006

BENCH:
ASHOK BHAN & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

Bhan, J.

The point involved in the present appeal is:-
Whether the expression "insoles, midsoles and sheets thereof" used in the exemption Notification No.20 of 1999 issued under the Customs Act, 1962 (for short "the Act") can be interpreted to mean that the sheets rolled up for the convenience of loading and transport, would disentitle the assessee from the benefit of the Notification?

FACTS

Appellant is a partnership firm based in New Delhi dealing in the business, inter alia, of leather footwear materials and accessories. One of the items regularly imported by the appellant is "PU coated leather fabrics" which are extensively used in the leather footwear industry as "insoles and midsoles". This item was covered originally by Notification No.224/85 and thereafter by the successor Notification No.45/94. As on the date this item figures under the description "insoles, midsoles and sheets thereof" figuring in Sl. No.108 of List 3 (A) (3) in Notification No.20/99 which replaced the earlier Notification. The same reads:

TABLE

S.
No.
Chapter
or
heading
No. or
sub-
heading
No.

Description of
Goods
Stand
ard
Rate
Addit
ional

Duty
rate
Condi
-tion
No.
(1)
(2)
(3)
(4)
(5)
(6)

108
.
64 or
any
other
chapter

Xxx
The following
goods for use in
the leather
industry, namely:
(1) Parts,
consumables and
other items
specified in List
3(A)
(2) Other parts,
consumables and
items specified
in List 3(B)
xxxx

20%

20%

--

--

--

14
xxx

xxxx

LIST 3(A) (Sec. S.No.108 of the Table)
PARTS, CONSUMABLES AND OTHER ITEMS

(1) Leather, plastic, rubber coco board, masonite board or plastic board, heels with or without rubber/PVC top lift (2) Toe caps and counters for leather footwear (3) Insoles or midsoles and sheets therefor (4) Welts made from leather or plastic (5) shoes eyelets (6) Felt sleeves (7) Heel tips etc.

XXXX

Before proceeding further it is relevant to mention that PU coated leather fabrics was the subject matter of a contested adjudication proceeding between the parties in 1995 in which the appellant sought to clear a consignment claiming the benefit of the Exemption Notification No.45/94. A show cause notice was issued by the Customs Authorities at Chennai claiming that the goods were not classifiable as "insoles, midsoles and sheets thereof"; the said goods had no use in the leather industry and that the goods were capable of other uses and hence the end use requirement was not satisfied. The Commissioner of Customs, Chennai by a considered order dated 28.2.1995 held that the subject goods were indeed capable of use in leather footwear industry as insole material. It was further held that the capability of the goods for being used in the footwear industry having been proved, the Notification did not contemplate any end use restriction. Consequently, goods were accepted as "insole" and the benefit of Notification No.45/94 was granted to it. This order of the Commissioner of Customs was cited with the approval by Eastern Bench of the Tribunal reported in Mod Apparel Exports Vs. CC Calcutta, 1996 (14) RLT 174 (CEGAT). This order of the Tribunal was upheld by the High Court of Calcutta in C.A. No.1717 of 1995 - Tirupati Garments & another Vs. Union of India & others dated 11.6.1996. Thereafter, the appellant have been clearing several consignments of the same material and the department had permitted the clearance following the order of Commissioner which had become final since no appeal, review or revision had been preferred against it.

In February, 1996 another consignment imported by the appellant and cleared by the Customs Authorities at Chennai was seized by the New Delhi Preventive Wing when the goods were being unloaded at the appellant's Karol Bagh godown. The said seizure resulted in a fresh adjudication in Chennai wherein the Commissioner passed an order holding that the appellant had failed to establish actual use in leather industry and consequently denied the benefit of the Notification No.45/94. This order was set aside and the case was remitted back for a fresh decision. The appellant participated in the fresh adjudication. After hearing the parties, the judgment was reserved by the adjudicating authority

but according to the appellant the decision is still awaited.

Appellant received a consignment of PU coated insoles sheets for leather fabrics at Chennai in June, 1999. Revenue ("the respondent" herein) denied the benefit of the Notification No.20/99. Appellant waived show cause notice and the personal hearing and placed submissions before the adjudicating authority based on the earlier imports by it and the order passed by the Commissioner therein. The adjudicating authority held that though the end use of the subject goods was established, but denied the benefit of the Notification No. 20/99 to the appellant on the ground that the subject goods were not "sheets" but "films" or "running sheets" and therefore, not entitled to the exemption from customs duty. For this adjudicating authority relied upon the judgment of this Court in Collector of Customs, Bombay Vs. M/s. K. Mohan and Company Exports, 1989 (2) SCC 337. Aggrieved by the above, the appellant preferred an appeal before the Customs Excise and Gold (Control) Appellate Tribunal, South Zone Bench at Chennai (for short "the Tribunal") which was numbered as C/457 of 1999 and that has been dismissed by the impugned order dated 25.4.2000. It has been held that the earlier decision of the Commissioner at Chennai in the adjudication arising in proceedings relating to the year 1995 was no longer valid in view of the later judgment of this Court in M/s. K. Mohan and Company Exports, (supra). The contention raised by the counsel for the appellant that the judgment in M/s. K. Mohan and Company Exports (supra) was distinguishable was rejected by observing that the finding recorded by the apex Court in the said case in the context of description of goods in the Notification were para materia to the description available in the present Notification under consideration. Adverting to the finding recorded on the alternative submission of the counsel for the assessee in the said case it was observed:

"...In the Apex Court judgment referred to, the term "sheets" and "sheetings" has been dealt with and the raw material was 'plastic films' in rolled form and the Apex Court after due consideration held that they are to be considered as "sheetings" and not 'cut to size'. It has been held that sheets has to be understood only with regard to the items which have been cut to size and not those in rolled form. In the present case also, admittedly, appellants have imported the material in length of 50 mtrs on the requirement of customers. They are themselves carrying out the activity of cutting to size before it is sold to customers for the purpose of manufacture of Insoles and Midsoles. The term "sheets thereof" should refer to the words 'which

should have been cut to size' for the purpose of manufacture of Insoles and Mid Soles. The words "thereof" has to be read along with the terms "In-soles and Mid soles". Where sheets has been imported in cut form and being utilized solely for the purpose of manufacture of in-soles and Mid soles, they go along with it in terms of the entire reading of the terms of the notification."

Learned counsel for the appellant strenuously contended that the impugned goods had been imported by the appellant in the form of "sheets" but for loading convenience; the sheets, being 50 metres long and the material being highly flexible, had been rolled up for loading, which did not detract from the facts that the goods were sheets in rolls. The Notification merely required the goods to be in the form of sheets in contradistinction to being cut in shapes and forms. There is no distinction between being in rolls or loose sheets. The judgment of this court in M/s. K. Mohan and Company Exports (supra) is distinguishable as in the said case subject goods were film rolls and the Court brought out the distinction between "films, foils and sheets" as well as the contrast between "sheets" and "sheetings". The said judgment has no applicability to the present case which on the other hand is directly covered by the judgment of the Tribunal in the case of Plast Fabs Vs. Collector of Customs, 1993 (66) ELT 441 wherein the Tribunal specifically dealt with "PVC flocked sheets in rolls". It was further contended that the issue as to whether the subject goods imported in rolls had already been the subject matter of several judicial pronouncements, some of them between the parties, were binding on the revenue as the same had attained finality.

As against this the learned counsel for the respondent contended that the judgment of this court in M/s. K. Mohan and Company Exports (supra) was fully applicable to the facts of the present case and in view of this judgment which is later in point the earlier judgments rendered by the Tribunal or the Commissioner interpreting the Notification in the present case are no longer good law that the Tribunal has rightly ignored them in view of the judgment of this Court. That the goods imported by the appellant were not "sheets" and were "sheetings" as has been held in M/s. K. Mohan and Company Exports (supra).

Finding regarding the end use is not in question. Finding recorded by the Commissioner (Appeals) in favour of the assessee regarding the end use was not challenged by the revenue before the Tribunal and the same has attained finality.

The only point to be considered is, whether the judgment in M/s. K. Mohan and Company Exports (supra) is applicable to the facts of the present

case or not. In the said case M/s. K. Mohan and Company Exports was importing "metallised polyester films" from Japan under an import licence. The goods were admittedly in the shape of film rolls several metres long. They were cleared on payment of customs duty leviable under the Customs Act, 1962 (Customs Tariff) as well as the additional duty of customs (or countervailing duty) leviable under Section 3 of the Customs Tariff Act, 1976. Subsequently, the assessee made three applications for the refund of the amount of the additional duty of customs paid by it. The claim for refund was based on the terms of a Notification of exemption issued under Section 25(1) of the Customs Act. Under notification No. 228/76 dated 2.8.1976, an exemption from the customs duty payable under Section 3 of the Customs Tariff Act was granted in respect of "articles made of plastics, all sorts, but excluding those specified in the table annexed thereto and falling within Chapter 39 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)". The annexed table excepted the following items from the purview of the exemption:

"Tubes, rods, sheets, foils, sticks, other rectangular or profile shapes, whether laminated or not, and whether rigid or flexible including tubings and polyvinyl chloride sheets."

The case of the department was that the goods were "sheets" or "foils" or "other rectangular or profile shapes" and hence liable to duty. On the other hand the assessee's case was that they were "films", a specie of plastic articles different from any mentioned in the table annexed. It was alternatively contended that, even if they are treated as thin sheets of plastic material, they can be more accurately described only as "sheetings" and not "sheets". The assessee's claim for refund was accepted by the Tribunal. It was held that the goods imported by the assessee were articles made of plastic. The subject goods were 'films' and did not fall in any of the excepted articles enumerated in the table annexed to the Notification.

In the appeal this Court keeping in view that the articles in question were recognized in the trade as "films" rejected the contention of the revenue that the same were either "foils" or "sheets". Assessee's contention was accepted. It was observed that it was difficult to imagine any person going to the market and asking for the films by describing them either as 'foils' or as 'sheets'. The alternative submission of the learned counsel for the assessee in the said case that a film of indefinite length and not in the form of individual cut pieces can be more appropriately described as "sheetings" rather than "sheets" was accepted. It was observed that the Indian Standard Institution also defines 'sheets' as a piece of plastic 'sheeting' produced as an individual piece rather than in a continuous length

or cut as an individual piece from a continuous length.

Revenue's contention that articles were covered by the expression "other rectangular or profile shapes" was also rejected by observing that such articles had a distinct name in the market as 'films' and therefore they are outside the table as already pointed out. That it will not be possible to accept the contention that the articles which have a clear commercial identity as 'films' should be brought within the wide and vague expression "other rectangular or profile shapes", because, if the film is cut into small pieces, each piece will be rectangular in shape.

It would be thus seen from the facts enumerated above and the finding recorded by the Court that the assessee had imported the goods in the form of "films" and the trade also understood the articles in question to be "films" and not "sheets" and therefore, this Court primarily held that the goods imported by the assessee were "films" and not "sheets". Assessee in the present case is importing "PU quoted insole sheets" in a rolled up form for loading convenience. Even as per the ISI specifications for "PVC coated fabrics for footwear industry" requires the packing to be in the form of rolls so as to ensure safe transportation. Clause 5.1 of Indian Standard Institution specification for PVC coated fabrics for footwear industry IS:8699-1977 provides:

"5.1 Packing \026 The material shall be securely packed in the form of a roll so as to ensure safe transportation."

Contention of the assessee that the goods had been imported in the form of sheets being 50 metres long were rolled up as specified by the ISI standards for loading and safe transportation has gone un rebutted. The burden was on the revenue to prove that the subject goods were not "sheets" for which no evidence whatsoever was led by the revenue. The burden of proof as to whether the item in question is taxable in the manner claimed by the revenue is on the revenue. Mere assertion in that regard is of no use. It has repeatedly been held by this Court that it is for the taxing authority to lay evidence in that behalf. [See Union of India and Others Vs. Garware Nylons Ltd. & Others, 1996 (10) SCC 413 \026 Para 15 and Hindustan Ferodo Ltd. Vs. Collector of Central Excise, Bombay, 1997 (2) SCC 677 \026 Para 4). The burden was on the revenue to prove that the said goods were not "sheets" for which no evidence whatsoever was led by the Tribunal. The goods, imported in the form of the sheets but rolled up for loading and transportation purposes, would not convert them into 'films' or 'sheetings' thereby denying the assessee the benefit of the exemption Notification.

Exports (supra) was reverse case where the assessee's case was that the subject goods were "metallised polyester films imported in the shape of film rolls" entitling him to the exemption from the customs duty. The revenue's case was that the subject goods were "sheets" which was one of the excepted goods mentioned in the table annexed to the Notification and therefore, not entitled to the exemption from duty. In the present case, the situation is just the reverse. Assessee says that it has imported "sheets" of running length in a rolled up form for the sake of convenience for loading and transportation purposes as per the ISI specifications. Assessee sold the subject goods in different lengths as per requirement of the customer. The customer then used the same by cutting them into different sizes (shape or size of the shoes) as per the requirement to insert them into shoes. In M/s. K. Mohan and Company Exports (supra) this Court considered a different exemption Notification set out in the context of different facts, its import and meaning. In the context of the present notification the distinction drawn by this Court while accepting the alternative submission of the learned counsel in M/s. K. Mohan and Company Exports (supra) between "sheet" and "sheeting" would not be attracted. To illustrate, if the exemption is granted to the 'carpets' and the assessee imports the carpet in a running length of 50 meters length in a rolled up form, and then sells the same in pieces after cutting them from the running length as per requirement of the customer would not disentitle the assessee from the benefit of the notification exempting duty on carpets simply because the carpets were brought in a rolled up form in a running length.

For the reasons stated above, we accept this appeal, set aside the order of the Tribunal and that of the authorities below with consequential effects. No costs.