

SUPREME COURT OF INDIA

L.M.L. Ltd.

Vs.

Commnr. of Customs

C.A.No.3764 of 2003

(Dr. Mukundakam Sharma and Anil R. Dave JJ.)

21.09.2010

JUDGEMENT

Dr.Mukundakam Sharma, J.

1. An application being I.A. No. 3 was filed in this appeal and the same was allowed by this Court vide Order dated 26/02/2004. The dispute in the present appeal is between the customs authority and the assessee regarding liability to pay duty by the appellant. The Airport Authority of India has absolutely no role to play in the said dispute. The I.A. No. 3 was filed only because the consignment imported by the appellant is in the custody of the Airport Authority of India since 29.01.2002 but that cannot be a ground to allow the applicant to take part in the dispute of liability or otherwise of the appellant to pay the duty that is being decided in this appeal. We, therefore, do not wish to hear the applicant on the dispute between the parties as the contentions raised in the application have no relevance at all with the dispute which we have been called upon to resolve. The issue that is sought to be raised by the intervener could be a separate cause of action. We, however, clarify that we have not passed any adverse order against the intervener in our Judgment and Order passed today. Nothing further is required to be stated in so far the applicant is concerned.

2. The classification of "CD ROM" containing images of drawing and designs of engineering goods is the issue of dispute in the present Appeal. The present Appeal assails the judgment and order dated 31.1.2003 passed by the Customs Excise and Gold (Control) Appellate Tribunal (referred to herein as "CEGAT") which rejected the plea of the appellant that CD-ROM containing images of drawings and designs of engineering goods was classifiable under the Tariff Heading 49.06 of the First Schedule to the Customs Tariff Act 1975 (hereinafter referred to as the `Tariff Act') as drawings for engineering purposes or under heading 49.11 as other printed matter. The alternative plea of the appellant for classifying the same under Sub-Heading Nos. 8524.39 or 8524.90 of the Tariff was also not accepted. Incidentally, the aforesaid stand taken by the CEGAT was by way of confirmation of the view taken by the Commissioner-Appeals.

3. The appellant herein filed a Bill of Entry No. 369686 dated 29.1.2002 for clearance of the goods at Nil rate of duty by claiming classification of the goods under the Tariff Heading 4906.00 read with Central Excise Tariff Heading 4901.90 coupled with the benefit of Nil rate of duty under Notification No. 17/2001 dated 1.3.2001. The import was made in the month of January, 2002 and the authorities were requested by the appellant to allow the clearance of the goods at Nil rate of duty. The Adjudicating Officer, however, decided the case against the appellant holding that the latter is not entitled to the aforesaid classification as claimed. The adjudicating authority recorded a finding that the imported goods are covered under Central Excise Tariff Heading 8524.90.

4. Being aggrieved by the said order, the appellant filed an appeal before the Commissioner of Customs (Appeals) Airport, Mumbai, which however came to be dismissed by order dated 15.11.2002. The appellant, thereafter, filed an appeal before the Tribunal wherein again the appellant claimed that the imported goods should be held as entitled to Nil rate of duty. The Tribunal, however, by the impugned judgment and order dismissed the said appeal as against which the present appeal has been preferred.

5. Mr. R. Santhanam, learned counsel appearing for the appellant has taken us through the heading Nos. 49.06 and 49.11 and relying on the same submitted that the CD-ROM imported by the appellants containing drawings and designs of engineering goods and documents of title of the drawings and designs representing the right to use information and technology would be covered under one of the aforesaid headings and would therefore call for Nil rate of duty. He also made an alternative submission that even if it is held that the aforesaid drawings and designs contained in the CD-ROM does not fall under the aforesaid classification of heading, the same would at least qualify for Nil rate of duty under the heading 85.24.

6. Mr. Parag P. Tripathi, learned Additional Solicitor General appearing for the respondent, however, refuted the aforesaid submission and contended that a CD-ROM can never be covered under Chapter 49 and that the definition of printed will not apply to CD-ROM and also that it will also not be covered under the Heading 85.24 as claimed by the appellant. It was also submitted by him that when there is a specific heading in Chapter 85 covering the impugned product, the said heading is to be preferred and not any other heading.

7. In order to appreciate the contention of the counsel appearing for the parties, we have considered the rival Headings of the Tariff on which reliance is placed by the counsel appearing for the parties which read as follows:- Chapter 49 - Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans 49.06 Plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand; hand-written texts; photographic reproductions on sensitized paper and carbon copies of the foregoing. 49.11 Other printed matter, including printed pictures and photographs Chapter 85 - Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles 85.24 Records, tapes

and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of Chapter 37.

8524.39 Other

8. Although certain, alternative arguments have been made as well, we would like to consider initially as to whether the goods in question could be said to be covered under the heading 49.06 or 49.11 in any manner.

9. Chapter 49 deals with printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans. Heading 49.06 covers within its fold plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand; hand-written texts; photographic reproductions on sensitized paper and carbon copies of the foregoing. Heading 49.09 will cover drawing used for engineering or other similar purposes and hence will also cover within its ambit designs of engineering goods. The only caveat imposed by Heading 49.06 is that the said plans or drawings have to be originals drawn by hand. The qualification that the plans and drawings has to be originals drawn by hand has to be construed strictly and cannot be given a liberal and wide meaning. There is no dispute that the drawings and designs of the engineering goods in issue are not originals drawn by hand but are images of drawings and designs which have been loaded or recorded on a CD ROM. Further, there is no question of considering the said images in the CD ROM as photographic reproductions on sensitized paper or carbon copies of photographic reproductions. Thus, images of drawing and designs of engineering goods recorded in the CD ROM will not fall within the domain of Heading of 49.06.

10. The Explanatory Notes under the Harmonized Commodity Description and Coding System issued by the World Customs Organization popularly referred to as the HSN Explanatory Notes also supports our view. The HSN Explanatory Notes to Heading 49.06 of the Harmonized Commodity Description and Coding System which is worded in a language identical to Heading 49.06 explains as under:

“49.06 Plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand; hand-written texts; photographic reproductions on sensitized paper and carbon copies of the foregoing.

This heading covers industrial plans and drawings the purpose of which, generally, is to indicate the position and relation of parts or features of buildings, machinery or other constructions either as they exist, or for the guidance of builders or manufacturers in their construction (e.g., architects' or engineers' plans and drawings). The plans and drawings may include specifications, directions etc., printed or not.

***** It should be noted that such products fall in the heading only if consisting of originals

drawn or written by hand, or of photographic reproductions on sensitized paper or of carbon copies of such originals.”

11. It is thus clear that products fall under Heading 49.06 only if consisting of originals drawn or written by hand or of photographic reproductions on sensitized paper and carbon copies of such originals. The use of the word "only" in the HSN Explanatory Notes goes to show that the said Heading was meant exclusively for that purpose alone and not otherwise.

12. *Crafts Products Ltd.*¹ it was held by this Court that as expressly stated in the statements of objects and reasons of the Central Excise Tariff Act, 1985, the Central Excise Tariffs are based on the Harmonious System of Nomenclature (HSN) and the internationally accepted nomenclature was taken into account to reduce disputes on account of tariff classification. Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the Harmonious System of Nomenclature (HSN). Although, the decision in the case of *Woodcraft Products* (supra) dealt with the interpretation of the provisions of the Central Excise Tariff there can be no doubt that the HSN Explanatory Notes are a dependable guide even while interpreting the Customs Tariff.

13. The Counsel appearing for the appellant also urged that the said CD ROM could and would fall under Heading 49.11. Heading 49.11 covers within its compass "other printed matter, including printed pictures and photographs". Specific reliance was placed on 4911.99 which Sub-Heading states "Other". This argument is based on the definition of "printed" in Chapter Note 2 to Chapter 49. Chapter No. 2 of Chapter 49 provides - "for the purposes of Chapter 49, the term "printed" also means reproduced by means of a duplicating machine, produced under the control of a computer, embossed, photographed, photocopied, thermocopied or typewritten". In the said Chapter Note goods produced under the control of a computer has been defined to mean printed. We are not impressed with this argument. Heading 49.11 is in the nature of a residuary entry and covers all printed matter not more particularly covered by any of the other Headings of Chapter 49. In general, Chapter 49 is intended to include goods that are executed in paper. Chapter Note 2 contemplates any printing produced under the control of a computer, but to include the images of drawing and designs of engineering goods recorded in the CD ROM within Heading 49.11 on the basis of the said Chapter Note would be incongruous. The scope of Heading 49.11 is completely different. In any case, we do not agree with the argument that Chapter Note 2 would be attracted in the instant case. We are of the view that the images of drawing and designs of engineering goods recorded in the CD ROM will not be covered under any of the Sub-Heading under 49.11.

14. An alternative argument was made by the counsel appearing for the appellant that if it is held that the CD- ROM in question is not covered by the Chapter 49, it would still be covered under the main heading of Chapter 85.

“According to the counsel appearing for the appellant, Chapter 85 would also include Compact Disk Read Only Memory (CD-ROM) for which, the rate of duty provided is Nil. It may be mentioned herein that under the Notification 17 / 2001 Cus dated 1.3.2001, the Central Government exempted the goods of the descriptions as specifically mentioned in the table from payment of duty.”

15. What is made duty free is the Compact Disk Read Only Memory (CD-ROM) as it is and not a disc containing certain drawings and designs and therefore, the contention of the counsel appearing for the appellant that the goods, in question, would be covered by Chapter 85 is also not found tenable.

16. Further reliance was placed by the counsel appearing for the appellant on Serial No. 285 of Notification 17 / 2001 Cus dated 1.3.2001 under the column "chapter or heading No. or sub heading No." which is shown in the table as 49 or 85.24 and for which the description of goods are as follows:-

“i. The following goods namely:- Information Technology software, and Document of title conveying the right to use Information Technology software.

ii. Explanation

iii. "Information Technology software"

means any representation of instructions, data, sound or image including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine.”

17. Therefore, now the question which arises for consideration in this case is whether the disc in question, with designs and drawings of the engineering goods could be said to be information technology software, as was submitted by the counsel for the appellant.

18. The term software is defined by the Advanced Law Lexicon (3rd Ed.) as "distinct from hardware, the computer program enabling a computer to function". The same expression software is also defined in Britannica Concise Encyclopedia as "the entire set of programs, procedures and routines associated with the operation of a computer system, including the operating system". We have also considered the meaning of the word "software" given by the Merriam-Webster Dictionary as "the entire set of programs, procedures and related documentation associated with a system and especially a computer system; specifically computer programs.

19. The aforesaid definitions, therefore, make it crystal clear that software is the set of instructions that allows physical hardware to function and perform computations in a particular manner, be it a word processor, web browser or the computer's operating system.

These expressions are in contrast with the concept of hardware which are the physical components of a computer system, and data, which is information that performs no computation and gives no enabling instructions to computer hardware but is ready for processing by the computer software.

20. In the light of the aforesaid background, the question that arises for our consideration is whether the data in a compact disk falls within the meaning of the term software.

“It is needless to reiterate that data at issue in this case are images of drawings and designs intended to be used for engineering projects, therefore, the core issue to decide is whether such drawings, designs intended to be used for engineering projects be termed "software" so as to entail the benefit of the aforesaid Notification 17 / 2001 Cus dated 1.3.2001.”

21. There can be no doubt that such engineering drawings and designs do not provide instructions for the computer hardware to perform. At best, the said drawings and designs can be said to be are by-products and outputs of the computer software, which generate the designs and drawings. Therefore, such engineering drawings or designs data in a CD cannot be placed in the category of the term "software". It is therefore held that the engineering drawings and designs contained in a CD ROM will not be covered Heading 85.24 of the Tariff.

22. Such a case also does not fall under the sub-heading 8524.99, i.e., "Other", as the same must be relatable to all those which are said to be under the Main Heading 85.24.

“Sub-Heading 8524.99, includes, inter alia, recorded media (excluding discs for laser reading systems, magnetic tapes and cards incorporating a magnetic stripe) for reproducing representations of sound or images in addition to instructions and data, recorded in a machine readable binary form and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine. As stated earlier the Harmonious System of Nomenclature (HSN), which is a safe guide for classification, also supports such a view.”

23. Reliance was placed by the learned counsel appearing for the appellant on the decision of Associated Cements in 2001 (128) ELT-21 (SC). The aforesaid is a decision of this Court wherein the issues urged were four which were specifically noted in paragraph 11 of the said judgment;

“11. In these appeals, the learned counsel for the appellants urged four contentions which had been unsuccessfully raised before the Tribunal.

These contentions were (i) Excise duty cannot be levied on the value of ideas as they are not goods; (ii) Even if what was imported were goods, the valuation of the same has to be nominal; (iii) the show cause notices were issued were barred by time

inasmuch as the extended period of limitation of five years would not be available on the facts of the present case;

(iv) the imports through the courier could not be governed by Heading No. 98.03 of the Customs Tariff Act. The learned Additional Solicitor General, in his able manner, supported the Tribunal's decision.”

24. A bare perusal of the aforesaid issues which were urged would make it apparently clear that the issues urged and the points decided therein are not comparable to the one which arises for our consideration in the present appeal. This decision is no way relatable with interpretation of Headings 49 and 85. The facts are distinguishable and therefore, the aforesaid decision relied upon by the counsel appearing for the appellant has no application.

25. Similarly, in Commissioner of Central Excise, although reliance was placed on the Heading 85.24 like the present case, but the same also cannot be said to be applicable to the facts of the present case as the background facts and the issues raised therein are totally in a different context.

26. This Court in Commissioner of Customs, Chennai 502 relying on a report of an expert on the subject, held that Motion capture animation files or data is computer software recorded in a machine readable (Exabyte cartridge tapes) form and capable of being manipulated, but, by themselves, the files cannot be used as independent entities. In that case, the subject that was dealt with was motion capture files and not industrial drawings and designs. Such decision was rendered being influenced totally by the opinion of the expert on the subject. There is no such expert evidence on record. The said decision also has no application to the facts of the present case.

27. We are therefore of the view that CD-ROM containing images of drawings and designs of engineering goods are not classifiable under the Tariff Heading 49.06 or under Heading 49.11. as other printed matter. The alternative plea of the appellant for classifying the same under Sub-Heading 8524.39 or 8524.90 of the Tariff is also not acceptable. The Appellant is therefore not entitled for the benefit of Nil rate of duty under Notification No. 17/2001 dated 1.3.2001.

28. We would like to point out another aspect arising out of the present Appeal. In the instant case, the Adjudicating Authority, the Commissioner (Appeals) and the Tribunal has rejected the classification sought by the Appellants.

“Classification of goods involves technical and scientific evaluation and analysis. It is therefore important that unless something patently wrong is demonstrated while classifying a particular product this Court should not interfere. This Court in Commissioner of Central Excise, 596, has supported a similar view.”

29. We find no merit in this appeal, which is dismissed accordingly. However, there shall be no order as to costs.

¹(1995) 3 SCC 454