

COLLECTOR OF CUSTOMS, BOMBAY

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v.

K. MOHAN & CO. EXPORTS

SEPTEMBER 25, 1989

[M.H. KANIA AND S. RANGANATHAN, JJ.]

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*Customs Act 1962—Customs Tariff Act 1975—Section 3—Import of metallised polyester films rolls—Whether entitled to exemption from payment of countervailing duty under notification No. 228/76 dated 2.8.1976 issued under Section 25(1) of the Customs Act.*

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The Respondent firm imported from Japan, "metallised polyester films" which were in the shape of film rolls several metres long. The goods were cleared on payment of customs duty as well as additional duty/countervailing duty leviable under section 3 of the Customs Tariff Act. Thereafter the Respondent firm moved three applications claiming refund of the additional duty of customs paid by it. The claim was made under 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 Tariff Act was granted in respect of "articles made of plastics, all sort but excluding those specified in the Table annexed and falling under Chapter 39 of the First Schedule to the Customs Tariff Act.

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The Tribunal accepted the claim of refund made by the Respondent. In so doing it relied on the decisions of the Madras High Court in *Precise Impex P. Ltd. v. Collector*, [1985] 21 ELT 84, of the Calcutta High Court in *Continental Marketing P. Ltd. v. Union*, [1987] 28 ELT 11 and of the Bombay High Court in *A.V. Jain v. Union*, WP 2136 of 1986 decided on 30.1.1987. The Tribunal also referred to its earlier decision in *Export India Corporation P. Ltd. v. Collector; and Collector v. Fancy Dying and Printing Works Bombay*.

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The Tribunal held that the goods imported by the Respondent were articles made of plastics but they were "films" and thus not one of the Categories of articles mentioned in the Table.

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Aggrieved by the decision of the Tribunal, the Collector of Customs has filed these appeals under section 130-E(B) of the Customs Act 1962.

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A Before this Court the Department contended that the goods are "sheets" or "foils" or other "rectangular or profile shape" and hence liable to duty. The assessee's assertion is that the goods are "films" though specie of plastics articles yet they are different from any mentioned in the table. According to it even if they are treated only as thin sheets of plastic material, they can be described only as "sheetings" and not sheets.

B On consideration of the rival contentions advanced by the parties and after making reference to the other relevant notifications granting exemption issued under rule 8(1) of the Central Excise Rules in respect of items falling under Item No. 15A of the Central Excise Tariff Act, this Court dismissing the appeals,

C HELD: Films made of plastic fall in a category of their own and do not fall within the categories of articles excepted by the Table. Film is a well-known, distinct and independent category of plastic article known to commerce. [235A]

D The Court agreed with the view of the Bombay High Court that, though for certain purposes there is a distinction between "films", "foils" and "sheets", so far as the article presently in question is concerned it is recognised in trade only as "film". [238F]

E The goods under consideration cannot be described either as "foils or sheets". A film roll of indefinite length and not in the form of individual cut piece can be more appropriately described as "sheetings" rather than "sheets". [238G;239A]

F The expression "other rectangular or profile shapes" in the table is also not appropriate to bring in the items in question. For one thing, the articles have a distinct name in the market as "films" and therefore they are outside the table. It will not be possible to accept the contention that 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. The items imported do not come in a rectangular shape they are imported as rolls of polyester films. They are not articles of rectangular shape. Nor would it be possible to treat them as of other "profile" shape. The Court was unable to attribute any precise meaning to the expression "profile" shape but it cannot be taken to be comprehensive enough to take in any shape whatever. If the expression "rectangular" or other "profile" shape in the table is given

such wide and unrestricted interpretation then practically any article of plastic can be brought within the meaning of one or other of the expressions used in the Table and thus the entire exemption can be altogether deprived of any content. The Court took the view that the articles are "films" and, as, this expression does not find specific mention in the table, the assessee is entitled to exemption under the main part of the notification. [239E-H; 240A]

**CIVIL APPELLATE JURISDICTION:** Civil Appeals Nos. 1573/88, 3954/87 and 3370 of 1988.

From the Judgment and Order dated 1.2.1988, 10.6.1987 and 28.4.1988 of the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No. C/1373/85-C Order No. 87/88-C, 1704/83-D Order No. 463/87-D and Appeal No. C-605/1986(C) in Order No. 429/88-C respectively.

A.K. Ganguli, P. Parmeshwaran, T.V.S.N. Chari and Mrs. Sushma Suri for the Appellant.

S. Ganesh, K.J. John and Sanjay Grover for the Respondent.

The Judgment of the Court was delivered by

**RANGANATHAN, J.** These three appeals under Section 130-E(b) of the Customs Act, 1962 raise the same issue. They are therefore disposed of by a common order.

The respondent—M/s. K. Mohan & Co.—imported, from Japan, "metallised polyester films" under an import licence dated 14.6.1978. 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 (CA) as well as the additional duty of customs (or countervailing duty) leviable under s. 3 of the Customs Tariff Act, 1976 (CTA). Subsequently, the respondent firm 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 s. 25(1) of the CA. Under notification no. 228/76 dated 2.8.1976, an exemption from the customs duty payable under s. 3 of the CTA was granted in respect of "articles made of plastics, all sorts, but excluding those specified in the table annexed hereto and falling within Chapter 39 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)". The annexed table

A 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”.

B Notification No. 443 dated 29.11.76 omitted the words of notification no. 228 which have been underlined above but left the main notification otherwise untouched.

C The assessee's claim for refund was accepted by the Tribunal. The Tribunal held that the goods imported by the respondent were articles made of plastics. But they were 'films' and not one of the categories of articles enumerated in the table. In reaching its conclusion, the Tribunal followed the decisions, of the Madras High Court in *Precise Impex P. Ltd. v. Collector*, [1985] 21 ELT 84, of the Calcutta High Court in *Continental Marketing P. Ltd. v. Union*, [1987] 28 ELT 11 and of the Bombay High Court in *A.V. Jain v. Union*, WP 2136 of 1986, decided on 30.1.1987. The Tribunal also referred to its own earlier decisions in *Export India Corp. P. Ltd. v. Collector* and *Collector v. Fancy Dyeing and Printing works, Bombay*. The Collector of Customs is aggrieved by the orders of the Tribunal and hence these appeals. There are three appeals as there were three applications for refund by the assessee in respect of different periods.

E There is no dispute before us that the goods in question are articles made of plastics. This being so, the assessee is entitled to the exemption conferred by the notification unless the goods answer the description of one or other of the specific items set out in the table. The onus of showing this is clearly on the Revenue. The department contends that the goods are "sheets" or "foils" or "other rectangular or profile shapes" and hence liable to duty. On the other hand the assessee's case is that they are "films", a specie of plastic articles different from any mentioned in the table. It is alternatively contended that, even if they are treated only as thin sheets of plastic material, they can be more accurately described only as "sheetings" and not "sheets". It is pointed out that the goods are in the form of large rolls containing films several metres long. Such huge lengths can only be called "sheetings" for the expression "sheets", it is said, connotes only smaller lengths or bits cut out from "sheetings" which mean sheets of immense lengths. Also, being in the form of rolls, they cannot be said to be articles of "rectangular shape" merely because, when cut into segments, they may fall into rectangular pieces.

After giving the matter our careful consideration, we are of opinion that the view taken by the three High Courts and the Tribunal that "films" made of plastic fall in a category of their own and do not fall within the categories of articles excepted by the table is correct. We have come to this conclusion because there are various statutory indications and other material which support such a conclusion:

(1) Duty under the CTA in respect of artificial resins, plastic materials of various types and articles thereof is leviable under s. 3 read with Chapter 39, containing heading nos. 39.01/06 and 39.01/07 in section VII of the First Schedule to the CTA. This aspect found a reference in the original notification no. 228 but was omitted, apparently as being redundant, by the amendment of 29.11.1976. In Note 3 at the commencement of the said Chapter 39, clause (c) talks of "seamless tubes, rods, sticks and profile shape while clause (d) refers to "plates, sheets, films, foils and strips". This indicates that plates, sheets, films, foils, etc. are categories of plastic articles distinct from one another.

(2) Notification No. 228 contains a reference to the tariff schedule under the Central Excises & Salt Act, 1944 (CESA). The CESA, read with item 15A of its First Schedule, provides for the levy of an *ad valorem* duty of excise on all "artificial or synthetic resins and plastic materials and cellulose esters and ethers and articles thereof" described in greater detail in sub-items (1) to (4) thereunder. Of these, sub-item (2) reads:

(2) Articles made of plastics all sorts, *including* tubes, rods, sheets, foils, sticks, other rectangular or profile shapes, whether laminated or not, and whether rigid or flexible, *including* lay flat tubings and polyvinyl chloride sheets, not otherwise specified";

and Explanation I appended to item 15A clarifies:

"For the purpose of sub-section (2), "plastics" means the various artificial or synthetic resins or plastic materials or cellulose esters and ethers included in sub-item (1)".

Comparing item 15A of the CESA tariff with the notification under consideration, it will be seen that the intention was to exempt, from countervailing duty, "articles made of plastics, all sorts" (the expression "plastic" having the very wide meaning given to it in Explanation

A I of the CESA tariff) and falling within the main part of sub-item (2) of item 15A and to deny exemption to goods which fall under the second (inclusive) part of the said sub-item. In this context it is of some interest to refer to item 15A as substituted by the Finance Act, 1982. This item describes in greater detail than before various "artificial and synthetic resins and plastic materials" liable to duty. Of these item (2) reads:

"Article of materials described in sub-item (1) including the following, namely:

C Boards, sheeting, sheets and *films*, whether lacquered or metallised or laminated or not: layflat tubings not containing any textile material.

This item, it will be seen, does not stick to the classification made earlier in sub-item (2). However, it does make a distinction between "sheeting, sheets and films".

D (3) There are a number of exemption notifications issued under rule 8(1) of the Central Excise Rules in respect of items falling under Item No. 15A of the CESA Tariff which make a pointed reference to 'films' and draw a similar distinction as above. Notification No. 68 of 1971 dated 29.5.1971 exempts articles made of plastics, all sorts, falling under sub-item (2) of Item No. 15A except (i) rigid plastic boards, sheeting, sheets and films, whether laminated or not; and (ii) flexible polyvinyl chloride sheeting, sheets, films and lay-flat tubings not containing any textile material. Notification No. 69 of 1971, dated 29.5.1971, read with notification No. 7417 and 107/73, exempts articles made of polyurethane foam except, *inter alia*, sheets and sheetings.

E Notification No. 70 of 1971, of the same date, restricts the duty on rigid polyvinyl chloride boards, sheeting, sheets and films. Notification No. 71 of 1971, also of the same date, grants limited exemption, subject to certain conditions to rigid plastic boards, sheeting, sheets and films, whether laminated or not, other than those manufactured from polyvinyl chloride. Notification No. 72 of 1971 of the same date limits the excise duty in respect of flexible polyvinyl chloride sheeting, sheets, films and lay-flat tubings, not containing any textile material and falling under sub-item (2) of Item No. 15A to 25 per cent (amended later to 30%) *ad valorem*, subject to certain conditions. Notification No. 39 of 1973 dated 1.3.1973, exempts rigid and flexible polyvinyl chloride films of thickness below 0.25 mm as well as polyvinyl chloride lay flat tubings in certain circumstances. By notifi-

cation No. 151 of 1975 dated 31.5.1975 exemption was granted in respect of cellulose tri-acetate, when intended for use in the manufacture of cine-films, X-ray films or photographic films. Item 15B talks of "film or sheet" of cellulose and a notification of 1981 specifically added item 15BB to the Tariff under CESA dealing with polyster films as a separate item, though this entry was subsequently omitted by the Finance Act of 1982. All these indicate that 'film' is a well-known, distinct and independant category of plastic article known to commerce.

(4) There is a like distinction maintained even by the notifications issued under section 25 of the Customs Act in regard to items falling within chapter 39 of the First Schedule to CETA. Notification No. 227 dated 2.8.1976 limits the rate of duty on various items, two of which are—"film scrap" and "cellulose nitrate sheets and cellulose nitrate films". We then have notification No. 223 of the same date, which falls for interpretation now and which omits a reference to "films" while enumerating various other categories of plastic articles. Notification No. 229, also of 2nd August, 1976, restricted the customs duty on metallised or plain plastic films imported for certain specified purposes to 60%. Notification Nos. 230 dated 2nd August, 1976 and 36 of 1.3.1978, also granted limited exemption to other types of polyster films. (We must, however, point out that these last two notifications are somewhat ambiguous for our present purposes as they also specifically provide for an exemption to the said articles from the additional duty which, on the argument of the assessee before us, would be really unnecessary.

The Revenue's stand is that the articles in question may be films in a generic sense but that, in this particular case, they are either 'foils' or 'sheets'. For this purpose our attention is drawn to the discussions contained in the Bombay case where the issue was decided on the basis of evidence produced by both parties. This shows that according to the glossary of terms used in the plastic industry issued by the Indian Standards Institution (IS 2828-1954, as well as in 1979), a film is "a sheeting having nominal thickness not greater than 0.25 mm". A report of the Chief Chemist of the Customs Department as well as extracts from certain text books were produced to show that 'foil' is the term "applied to materials which are made in continuous rolls and are less than 1/1000th of an inch thick (0.254 mm). In the present case, the film rolls were of thickness varying between 0.025 mm to 0.501 mm. It is, therefore, submitted that to the extent the material was less than .0254 mm in thickness it would constitute 'foils' and to the extent

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A it exceeded 0.25 mm in thickness it will be a 'sheet'. It is urged that since 'sheets' and 'foils' are specifically mentioned in the entry in question, the imported goods, at least to the extent indicated above, cannot qualify for exemption.

B The answer given by the Bombay High Court to the contention that the goods were 'foils' was that while it may be that, technically and scientifically speaking, the articles in question may be capable of being characterised as 'foils', one is concerned in a customs or excise matter not so much with the technical or scientific definitions of these terms but rather with commercial usage. One has to see how the trade understands the expression "films" and one should also bear in mind in this connection that the expressions set out in the table are applicable not merely to the articles with which we are at present concerned but also to various other types of articles of plastics with varied commercial use. The question is whether the trade understands the article presently in question as a 'film' or whether there is a distinction in trade usage also between 'foils' and 'films'. It has been pointed out by

C the Bombay High Court, on the basis of the evidence before it, that in the understanding of those who are in this particular trade, metallised polyester films are referred to as 'films'. Reference has been made to the classification made by the only manufacturer of polyester films in India for purposes of CEA. Reference has also been made to the brochures brought out by the Japanese manufacturers of the goods in question which show that metallised polyester 'films' could consist of films of the thickness of even 12 to 25 microns. It has been pointed out that, under the Import-Export Policy of India for 1984-85, reference has been made to metallised polyester 'films' having thickness of even less than 6 microns which are used in the electronic industry.

F In the light of the above material and the absence of any additional material led in the present case, we agree with the view of the Bombay High Court that, though for certain purposes there is a distinction between 'films', 'foils' and 'sheets', so far as the article presently in question is concerned it is recognised in trade only as 'film'. It is difficult to imagine any person going to the market and asking for these films by describing them either as 'foils' or as 'sheets'. We are therefore of opinion that the goods under consideration cannot be described either as 'foils' or as 'sheets'.

H There is also another reason why the articles in the present case, to the extent they have thickness of more than 0.25 mm cannot be described as 'sheets'. Shri Ganesh for the assessee contended—and we

think rightly—that a film roll of indefinite length and not in the form of individual cut pieces can be more appropriately described as 'sheetings' rather than 'sheets'. 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. We have also earlier pointed out that there are various items in various notifications making distinct reference to sheets and sheetings. Actually, we also think that there is a factual confusion on this aspect. While one of the Collectors has referred to the goods as being of thickness varying between 0.025 mm and 0.501 mm, it is seen from another of the orders that the goods are 3000 metres in length, 0.501 mm in width and 0.025 mm in thickness. If the latter is the correct version and all the goods are only 0.025 mm in thickness, the question now posed will not at all arise. However, as indicated above, there is force in the contention of Shri Ganesh that if the articles be held not to be 'films', because they exceed 0.25 mm in thickness, they would be 'sheetings' rather than 'sheets' and would therefore not fall within the meaning of the expression "sheets" in the table.

We would also like to add that the expression 'other rectangular or profile shapes' in the table is also not appropriate to bring in the items in question. For one thing, the articles have a distinct name in the market as 'films' and therefore they are outside the table as already pointed out. For the same reasons as we have mentioned in the context of 'foils' and 'sheets'; it will not be possible to accept the contention that 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. The items imported do not come in a rectangular shape; they are imported as rolls of polyester films. They are not articles of rectangular shape. Nor would it be possible to treat them as of other 'profile' shapes. We are unable to attribute any precise meaning to the expression 'profile' shape but it cannot be taken to be comprehensive enough to take in any shape whatever, as is contended for. If we give the expression 'rectangular or other profile shapes' in the table such wide and unrestricted interpretation as is suggested, then practically any article of plastic can be brought within the meaning of one or other of the expressions used in the table and thus the entire exemption can be altogether deprived of any content.

For the above reasons, we are of opinion that the articles are

**A** 'films' and, as this expression does not find specific mention in the table, the assessee is entitled to exemption under the main part of the notification. The conclusion arrived at by the Tribunal is therefore upheld and these appeals are dismissed with no orders as to costs.

**B** Y. Lal

Appeals dismissed.