

(1987) 01 BOM CK 0026
In the Bombay High Court
Case No : Writ Petition No. 2136 of 1986

A.V. Jain

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 30-01-1987

Acts Referred:

Customs Act, 1962 — Section 27
Customs Tariff Act, 1975 — Section 23

Citation : AIR 1987 Bom 50 : (1987) 12 ECC 23 : (1987) 29 ELT 872

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Judgement

1. This petition under Article 226 of the Constitution of India seeks to quash an order rejecting an application for refund of Additional Duty and a consequential direction to respondents to pay the same along with interest and costs.

2. Points that arise for determination in this petition have to be considered in the following background :-

In 1982-83, under two Bills of Entry, petitioner imported metallised polyester film in different quantities. The import was assessed to various duties, including Additional Duty. Under the latter head, a total sum of Rs. 17,445.96 P. was paid. In November 1985, petitioner moved the Assistant Collector of Customs (Refund), alleging that the Additional Duty had been wrongly recovered, that this was pursuant to a mistake of law entertained by both the parties, that metallised polyester film was not liable to Additional Duty, it having been so held in *Precise Impex (P) Ltd. Vs. Collector of Customs, Madras*, and that respondents had no right to retain the aforementioned amount. The application having been rejected by the Assistant Collector of Customs, Petitioner went in appeal to the Collector of Customs (Appeals). This respondent felt that the rejection of the applications by the Assistant Collector u/s 27 of the Customs Act, 1962, hereinafter referred to as "the Act", was perfectly correct. Under this section, a claim for refund had to be made within six months of the payment of the duty. That could not be said

of the applications moved by the petitioner. For that reason, the appeal was also dismissed. The dismissal of the appeal led petition to this Court, the petition having been lodged in the last week of August, 1986.

3. Shortly stated, the case of the petitioner is that the imported article being a film, was entitled to exemption from Additional duty vide Notification No. 228-Cus., dated August 2, 1976, as amended by Notification No. 443-Cus., dated November 29, 1976 - hereinafter referred to as "the Exemption Notification/Ex. "A". The notification exempted articles made of plastics, all sorts. There was a table contained in the notification which excluded various substances from the benefit of the exemption, but a film would not fall under any of the excluded categories. The decision in *Precise Impex* (supra) covered this point wholly. In so far as the reason given by the Assistant Collector and the appellate authority for the rejection of the refund applications was concerned, petitioner contended that the same was in disregard of numerous authorities of this as also other High Courts, wherein it had been held that Section 27 of the Act did not apply to claims for refund of duty recovered in violation of law. Petitioner discovered the mistake of law within a month or two preceding August, 1986. The claim for refund having been made within three years of the knowledge as required by the ordinary law of limitation, should have been acceded to. The failure of the authorities had compelled petitioner to come to this Court invoking its jurisdiction under Article 226 of the Constitution of India. The order of the Assistant Collector, as confirmed in appeal, be quashed and a direction be given to respondents to make a refund of the amount collected together with interest at the rate of 18 per cent annum, right from the date of collection.

4. Respondents through affidavits tendered by the Deputy Collector and the Assistant Collector of Customs, take the stand that the petition is ill-conceived. As a preliminary objection, they question the advisability of the petitioner resorting to Article 226 of the Constitution of India when there are serious questions of fact which require determination. The determination of these questions is within the proper purview of the statutory authorities. Next, it is not correct to say that the article imported by the petitioner was an article entitled to the benefit of the exemption under Ex. "A". On the contrary, films of the thickness which had been imported by the petitioner amounted to "foil" which was within the exclusions in the Table given in the notification. The decision in *Precise Impex* did not have a bearing on the issues that arose in the present case. In *Precise Impex*, the matter was considered without reference to the all important aspect of thickness of the film. For that reason, the said decision would not apply to the instant case. In regard to the applicability of Section 27 of the Act, the petition itself showed that the petitioner was doubtful about the lawfulness of the demand for Additional duty at the date he was required to pay the same. Therefore, it could not be said that the mistake of law was discovered just some time prior to the institution of the petition. Apart from this aspect, which justified the orders passed by the Assistant Collector and the Collector, the petitioner was guilty of laches. If a direction to refund was made, petitioner

would be unjustly enriched. This is because the Additional Duty which had been paid must have been passed on to the Customers. In law, a double advantage could not be conferred upon the petitioner by giving a direction for refund of the duty. There was, of course, no question of petitioner being entitled to the interest claimed.

5. Having regard to the aforesaid submissions, the points that arise for determination, are :-

(1) Whether the article imported was within the exemption or fell within the tabular exclusion "foil" vide Ex. "A" ?

(2) Whether the petition occasions consideration of factual aspects and is recourse to Article 226 of the Constitution of India, therefore, nor proper ?

(3) Whether the rejection of the claim for refund by relying upon Section 27 of the Act was wrong ?

(4) Is petitioner entitled to interest, and, if so, terms thereof ?

(5) What order ?

My findings, for reasons given below, are :-

(1) It was within the exemption.

(2) Recourse to Article 226 of the Constitution of India is proper.

(3) Yes, it was wrong.

(4) Interest at the rate of 12 per cent per annum as from dates specified in the order.

(5) See order.

REASONS

6. For a proper consideration of the crucial question, it is necessary to set out in full Ex. "A". It reads thus :-

"In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962) the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts articles made of plastics, all sorts, but excluding those specified in the Table annexed hereto, from payment of so much of the duty of customs as is leviable thereon u/s 3 of the Customs Tariff Act, 1975 (51 of 1975).

Explanation :- For the purpose of this notification, the expression "articles made of plastics" shall have the same meaning as in sub-item (2) of Item No. 15A of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944).

TABLE

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

7. Before turning to the decision in *Precise Impex*, the trade usage and the academic or academic world, I will consider the question in the light of a proposition canvassed by Mr. Dhanuka. The proposition is that Ex. "A" must be considered in the proper context and setting. The context is the issue of the notification under a power conferred upon the Central Government by Section 25 of the Act. This section empowers the Central Government to exempt generally, either absolutely or subject to such conditions as may be specified, goods of any specified description from the whole or any part of duty of customs. What has been exempted under Ex. "A" is "articles made of plastics, all sorts". What is the extent of the exemption ? According to Ex. "A", it is "payment of so much of the duty of customs as is leviable thereon u/s 3 of the Customs Tariff Act, 1975." This provision, namely Section 3 of the Customs Tariff Act - hereinafter referred to as "the C.T.A." - deals with the levy of Additional Duty equal to excise duty. To the extent relevant, Section 3 of the C.T.A. reads thus :-

"Any article which is imported into India shall, in addition, be liable to a duty (hereinafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India....."

The Explanation goes on to specify what the expression "articles made of plastics" shall mean. It says that the expression shall have the same meaning as in sub-item (2) of Item No. 15A of the First Schedule to the Central Excises and Salt Act (CESTA), 1944. The Table gives the items excluded from the exemption and one such item is "foils". A reasonable reading of Ex. "A" would be that Additional Duty leviable on imported articles would be the same as is excise duty leviable upon like articles if manufactured or produced in India under CESTA. The exemption would cover all articles made of plastics, except those specified as excluded in the Table. The expression "all articles of plastics" shall be read in the same manner as in sub-item (2) of Item No. 15A of the First Schedule to CESTA. Sub-item (2) of Item No. 15A in the First Schedule to CESTA reads thus :-

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

Boards, sheeting, sheets and films, whether lacquered or metallised or laminated or not; lay flat tubings nor containing any textile materials."

Similarly, Item No. 39.3(d) of C.T.A. is worded thus :-

"3. Heading No. 39.01/06 is to be taken to apply to materials in the following forms only :

(d) plates, sheets, films, foil and strip, etc. etc."

Significantly, while the CESTA and C.T.A. Items both refer to "films", it is only in

the C.T.A. Item that "films" and "foils" are both mentioned. In the CESTA Item, there is no reference to "foils". According to the Explanation given in Ex. "A", the exempted articles are to be construed in the same manner as they have been dealt with by CESTA. The necessary implication is that "films" are covered by the umbrella of "all articles", in contradistinction to the exclusions spelt out in the Table. Mr. Dhanuka submitted that the reference to CESTA was inappropriate as the sources of power being considered arose from different enactments. But if there is a reference to a statute when exercising power under another statute, the first cannot be ignored and treated as if totally inappropriate as a device for construction of the 2nd statute's language. Prima facie, therefore, petitioner establishes that a film is within the exemption and not the exclusion clause of Ex. "A". This satisfies the basic requirement in construing fiscal statutes that a person who wants to take the advantage of a provision relating to a concession or advantage must satisfactorily show that he falls within that provision. [See *Dharamsi Morarji Chemical Co. Ltd. V. Union of India* 1980 E.L.T. 454 (Bom.)]. The burden will now shift to the Revenue which is intent upon establishing that petitioner is not entitled to the benefit of the exemption, inasmuch as the article imported was "foils". The reply to this is, that this is an innocuous circumstance because the C.T.A. entry shown in the Bills of Entry would cover "films" as also "foils". But the entries reproduced above from the Schedules to the CESTA and C.T.A. are different. In the CESTA Schedule, there is no mention of "foil". For the purposes of that Schedule, a film and foil could not be said to be synonymous. Even in the C.T.A. Schedule, "films" and "foils" are not treated as synonyms but separately specified. This would show the legislative intent to treat the two entries as distinct and different. It would, therefore, mean that "films" mentioned in CESTA Item No. 15A(2) would be within the sweep of the words "all articles made of plastics". Though "foil" is mentioned in the C.T.A. Schedule, it is not so specified in the CESTA Schedule, but the C.T.A. Schedule refers to "films" and "foils" both. The conclusion is that the two words mean and imply different things. According to Ex. "A", all plastics, except those mentioned in the exclusionary Table, are entitled to exemption from Additional Duty. Therefore, the "film" would be within the exemption, rather than the exclusion.

8. Mr. Dhanuka canvasses the proposition that the question as to whether the imported article is a "film" or a "foil", is of a technical nature, and, that the determination thereof is within the province of the statutory authorities. The learned Counsel is right when he says that Courts, generally speaking, are not equipped to deal with classification disputes. But he concedes that if the dispute is susceptible of an easy resolution or is covered by some direct authority, it would be redundant to compel the assessee to go to the statutory forum. His submission is that a serious question in regard to facts has been raised and both the parties have armed themselves with technical and trade usage material in support of their respective submissions. For this reason, he urges that the objection raised by the respondents in relation to the inappropriateness of the petition under Article 226 of the Constitution, should be sustained. For the

present, I shall keep aside the effect of the decision in *Precise Impex*, but there are other circumstances which make it necessary that even though the dispute be one in regard to classification, it should be decided by the writ Court rather than compel the petitioner and others like it - there are several others - to go back to the statutory authorities. First and foremost is the absence of any dispute upto the stage of filing an affidavit-in-reply in this case. When the Bills of Entry were presented by the petitioner, the goods were classified as falling under Item No. 39.3(d) of the C.T.A. and Item No. 15A(2) of CESTA. In terms, the article was described as a "film".

9. Next, Dr. Kantawala rightly presses into service the response of the Assistant Collector and the Collector (Appeals) as raising an inference against the contention now put forth by the respondents. Neither authority questioned the right of petitioner to get a refund on the ground that the article imported fell within the exclusionary Table of Ex. "A". Respondents, faced with this argument, made light of it by saying that the statutory authorities being sure of their view on the point of limitation, did not consider it necessary to raise a classification dispute. This may be an answer of sorts, but only adds upto the difficulties in the path of respondents and this is, the inference cannot be disputed that they are raising the classification dispute for the first time, when all along they were banking upon another reason to defeat petitioner's claim. This is not to say that, for that reason, the dispute raised by them need not be considered or straightway be dubbed as a baseless afterthought.

10. This brings me to the technical data relied upon by parties. Let me first set out the pleading of respondents on this aspect of the matter. In their affidavit-in-reply, the relevant excerpts read thus :-

"If the thickness of the film is above 0.025 mm., the item in question would not amount to "Foil". However, the thickness of the film in the instant case is 25 micron which is equal to 0.025 mm and therefore the same comes under the term "Foil". Since the foil which is nothing but very thin film of a thickness not exceeding 0.025 mm the same is expressly excluded from the exemption under the said notification. As the Petitioners' goods fall within the expression "Foil" in all respects, it is outside the purview of the said notification. In effect film and foil upto a thickness of 0.025 mm is synonymous. Technically and scientifically the term "foil" is very thin film having a thickness upto 0.025 mm. The goods in the present petition being metallised polyester film of a thickness of 25 micron (0.025 mm) therefore fall within the term "foil". The expression "Foil" scientifically and technically means very thin material or sheeting or film having a thickness upto 0.025 mm."

Reliance is placed upon an opinion given by the Chief Chemist of the Customs. A copy of the report has been made available and therefrom I reproduce the portion relied upon :-

"Film :- A sheeting having nominal thickness not greater than 0.25 mm.

Foil :- Note. In the case of some materials this term is reserved for the thinner materials, e.g., unsupported PVC film is less than 0.003 inch (0.0762 mm). "Modern Plastics" by Harry Barron (Page 355) defines technically foil, film and sheet, according to thickness.

"Foil" is the term applied to materials which are made in continuous rolls and is less than 1/1000th of an inch thick (0.0254 mm). Foil is familiar as the well-known wrapping materials such as "Cellophane".

In the book "Basic Chemistry of Textile Preparation" by S. R. Cockett and K. A. Hilton (page 73) it is stated that thinnest sheet plastics of thickness upto 1 mil (0.025 mm) are termed as "foil".

From the above information it can be said that a thin film (upto 0.025 mm in thickness) can be recognised as a "foil". Although no lower limit of thickness of film has been specified, very thin film of dimension of thickness not exceeding 0.025 mm, can be optionally termed as "foil" and hence distinguished from "film".

11. Dr. Kantawala, representing petitioner, takes exception to the opinion of the Chief Chemist. According to him, the Book aforementioned does not refer to the article under consideration. In fact, it refers to "thermoplastic polymers". That this is so is clear from what follows the sub-heading "Sheets, Films and Foils" in the Book relied upon by the Chief Chemist. For all we know, thermoplastic polymers" may be something other than plastics. Even otherwise, the aforementioned opinion does not establish the respondents' contention that there is no distinction between a "film" and "foil", or, that a thin film upto a certain thickness is a "foil". The deduction made by the Chief Chemist on the basis of the data considered by him is worded thus :-

"... it can be said that a thin film (upto 0.025 mm. in thickness) can be recognised as a "Foil".

An exercise in optional terminology is not what is necessary to establish the point raised by the respondents. Far better material in support of the contrary view is tendered by the petitioner. It is to be found in the meaning given to the expression "film" in the "ISI Glossary of Terms Used in the Plastics Industry". Therein, a "film" has been defined as :-

"A sheeting having nominal thickness not greater than 0.25 mm."

Mr. Dhanuka argues that effective as the ISI fiat may be for quality control, it is of no assistant to resolve a dispute in regard to a classification dispute governable by tariff schedules. In support of this contention, Counsel relies upon Indian Aluminium Cables Ltd. Vs. Union of India and Others, . The passage reads thus :-

"The specifications issued by the Indian Standards Institutions are for ensuring quality control and have nothing to do with the class to which the goods belong

in a tariff schedule."

The opinion in which the above lines occur, arose from a case where the point to be decided was whether Properzi Rods were a specie of wire rods classifiable under a particular entry. To establish a contention that a Properzi Rod was something other than a wire rod, reliance was placed upon separate specifications made by the ISI as between the two rods. It was in that context that the Court made the observation extracted above. But here, the Glossary relied upon by petitioner cannot be so discarded. The purpose of the Glossary has been stated thus in the Foreword :-

"This standard has been prepared with a view to eliminating the ambiguity and confusion arising from different interpretation of terms used in plastics trade and industry and to establish a generally recognised usage. It is hoped that this glossary will be useful to the trade in general and the industry in particular."

The scope of the Glossary has been set out in para 1.1., and is shown as meant to define the terms commonly used in the plastics trade and industry. In this background, the definition cannot be ignored. The ISI Glossary has been prepared for use in the plastics trade and industry. The user cannot be restricted to problems of quality control. As the premier institution laying down standards for different trades and industries, the definition evolved by it, carries weight. Even otherwise what should not be lost sight of, is that the Glossary was prepared after the finalisation of the draft by the Institution's Plastics Sectional Committee, which draft had been approved, by the Chemical Division Council. This information, we get from para 0.1 of the Glossary. It is certainly entitled to greater weight when compared to the inadequate and inexact - based deductions made by the Chief Chemist from the works quoted by him in his report.

12. Now, I turn to how the trade understands the two expressions "film" and "foil". It is not necessary to mention in support of the proposition that one principle fairly well-settled in determining the meaning or connotation of words and expressions describing an article in a tariff schedule, is, that those words and expressions should be construed in the sense in which they are understood in the trade by the dealer and the consumer. According to the case of Indian Aluminium Cables Ltd., the reason is, that it is the understanding of those who are in the trade which constitutes the definitive index of the legislative intention. Petitioner relies upon Brochures brought out by Japanese manufacturers of polyester films, metallised or otherwise. In the Brochure of Sakurame Metallic Yarn, polyester films, metallised with micron 12 to 25, are categorised as "films". In Dia Luster Film Brochure, the thickness of films is shown to range from 0.012 mm. to 0.025 mm. In the Nakai Mamilon Brochure, material of 12 to 25 microns Brochure, the fine metallic yarn produced by them is described as an item made of 12 microns or 25 microns polyester film which is metallised. In the Brochure of Sanwa, metallised polyester film is shown as being of 12 microns or 25 microns. This would not mean that there cannot be films of lesser microns. As pointed out

by Dr. Kantawala, the Import and Export Policy, 1984-85 lists at serial No. 116 in Appendix 13, page 206, the following :-

"Polyester film plain/metallised except metallised film below 6 microns used in the electronics industry."

Petitioner also refer to the CESTA classification made by the only manufacturer of polyester metallised films in India. The relevant documents will be found at Exs. 1 and 2, produced along with the affidavit-in-rejoinder made by the petitioner. In these documents, the thickness of the article is shown as 24 microns. Mr. Dhanuka contends that this does not furnish any indication, for his submission is that a "film" can include a "foil".

As learned Counsel puts it, the expression "film" is generic, while a "foil" is a specie thereof. If this interpretation is accepted, very few articles made of plastic would escape the tabular exclusions, for every article could somehow be fitted into the words "tubes, rods, sheets, foils, sticks, etc. etc.". The legislative intent was to maintain a distinction between the two expressions. This is clear from what has been stated above vis-a-vis the words used in the C.T.A. and CESTA entries. Additional Duty under C.T.A. is in lieu of excise. Excise is leviable under CESTA. Under CESTA, the Indian manufacturer describes a "film" as being of 24 micron thickness. The ISI Glossary accepts sheetings of a thickness not greater than 0.25 mm. as being a film. Scientifically and commercially, the imported article would, therefore, be a "film", and, not in the generic sense of including a "foil", but something distinct and different, therefrom. This brings me to the Precise Impex decision.

13. Respondents, with a view to avoid this decision, have come forth with the interesting argument that in that case an attempt was made to persuade the Court to read the word "film" as being a part of the Table. The problem was considered de hors thickness of the goods. That made all the difference. The decision does not show what was the thickness of the film involved in that case. Here, it is the definite case of parties that the article imported was metallised polyester film of a thickness not exceeding 0.025 mm. This, according to respondents, would cover the tabular exclusion "foil". Shorn of verbiage, what the argument amounts to, is, that a new aspect of the question has been discovered by the respondents, which aspect was not considered in the Precise Impex's decision. If this be correct, I would, of course, have to make an independent appraisal of the problem. This is not to say that the decision of Sathiadev, J. binds me, and, that I cannot consider the matter independently even on the footing that the product before the learned Judge is identical to that figuring here. The submission is not entirely correct, for para 7 reads thus :-

"To add further strength to this plea put forth by Petitioner, reliance is placed on I.S.I. standards relating to plastic industry, wherein "film" is described as "A sheeting having nominal thickness not greater than 0.25 mm"."

From this, it would appear that the question of thickness as having a bearing on

the issue, was raised and considered. Sathiadev, J. accepted the ISI Glossary as determinative of the question. Of course, the specific submission that a film could include a foil was not placed before the learned Judge. But, as said earlier, the exemption notification has to be construed with reference to CESTA Item No. 15A(2). Thus, a "film" would appear to be specifically exempted from Additional Duty. The precedent is another reason fortifying the conclusion that petitioner has justified the claim to concession under the exemption notification.

14. On the issue of limitation, Mr. Dhanuka argued that the petition itself makes a reference to petitioner, at the very date of payment of duty, being of the view that Additional Duty was not leviable and that the same had been wrongly recovered from it. Now, in a general sense, every payer of Government imposts, whether legal or otherwise, does feel that he should not have been required to pay the same. This natural distrust of the taxman, not to say the tax laws, and the general aversion to pay taxes, cannot be looked upon as excluding the discovery of mistake of law relied upon by petitioner. It is only when law is expounded that those labouring under a mistake in relation thereto, realise their mistakes. A general feeling that the recovery has been wrongly, if not illegally, made from him, does not amount to a mistake or misconception of law. The starting point of limitation in such a case is discovery of the mistake by the claimant. In the legal sense, it was the decision in *Precise Impex* which made all persons similarly situated of the mistake of law under which they had paid and the authorities recovered Additional Duty, from them. This decision was rendered on July 27, 1984 and reported in the June, 1985 issue of E.C.R. This Court has in a number of decisions, e.g. *Shalimar Textile Mfg. Pvt. Limited Vs. Union of India* and others, , and *Rapidur (India) Ltd. Vs. Union of India* and another, , held that claims for refund in respect of duty paid under mistake of law are not governed by Section 27 of the Act. The petition has been filed within three years of the rendition of the decision, not to speak of the reporting of the same. Therefore, the authorities were in error in repelling the claim for refund by taking recourse to Section 27 of the Act.

15. The contention that the petitioner is guilty of laches, sounds a bit strange. After all, the Customs Authorities should have known the law better than a layman like the petitioner. As soon as petitioner became cognisant of the decision in *Precise Impex*, the present petition was filed. Prior thereto, it had given an opportunity to the statutory authorities to make amends. Having regard to this background, I do not see how the charge of laches can be levelled, much less held established, against the petitioner.

16. There is next the contention that petitioner has passed on the burden of the Additional Duty paid by it to its customers, and, that by directing a refund of the same unto it, it will be unjustly enriched. So far as I am concerned, I am bound by the prevalent view of this High Court, last expounded in *Rapidur (India) Ltd. Vs. Union of India* and another, . Relying thereupon, I negative the plea that the doctrine of unjust enrichment applies and disentitles petitioner from seeking a

refund.

17. Lastly, there remains for consideration petitioner's claim for interest at the rate of 18 per cent per annum, and, that from the date on which the Additional Duty was recovered. This cannot be permitted. The proper course will be to give respondents time to refund the amount of Additional Duty wrongfully recovered, and make interest payable, if the deadline for the refund, is not observed.

18. Hence the order.

ORDER

19. The order of the Assistant Collector of Customs, rejecting the claim for refund, and that confirming this rejection, in appeal, are hereby quashed. Respondents do refund to petitioner the sum recovered as Additional Duty within eight weeks from today. In case the same is not refunded, the amount shall carry interest at the rate of 12 per cent annum from the expiry of eight weeks upto the date on which the payment is eventually made. Petitioner shall get its costs from respondents, who shall, in addition, bear their own. Rule, in the above terms, is hereby made absolute.