

(2005) 08 SC CK 0076

In the Supreme Court Of India

Case No : Civil Appeal No's. 8565-8569 of 2001

Commissioner of Customs (General), New Delhi

APPELLANT

Vs

Gujarat Perstorp Electronics Ltd.
Commissioner of
Customs (Air Cargo) and Others Vs Pearl Engineering
Polymers Ltd. and Others

RESPONDENT

Date of Decision : 05-08-2005

Acts Referred:

Customs Act, 1962 — Section 111, 112, 25(1), 28(1)

Customs Tariff Act, 1975 — Section 2

Income Tax Act, 1961 — Section 32, 43, 43(3)

Citation : (2005) 101 ECC 577 : (2005) 186 ELT 532 : (2005) 7 JT 490 : (2005) 7 SCC 118 : (2005) 2 SCR 389 Supp

Hon'ble Judges : Ruma Pal, J;C. K. Thakker, J;Arijit Pasayat, J

Bench : Full Bench

Advocate : Mohan Parasaran, Additional Solicitor General, A.K. Ganguli, Rajiv Dutta, T.A. Khan, Rupesh Kumar, P. Parmeswaran and B. Krishna Prasad, for the Appellant; Suresh A. Shroff and Co., V. Lakshmi Kumaran, V. Balachandran and Rajesh Kumar, for the Respondent

Final Decision : Allowed

Judgement

C.K. Thakker, J.—These appeals are directed against a common judgment and order dated December 19, 2000 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as 'CEGAT'). By the said order, CEGAT disposed of five appeals filed by M/s. Pearl Engineering Polymers Limited ('Company' for short) and by its Directors as also by the Commissioner of Customs, New Delhi. CEGAT, by the order impugned in the present appeals, allowed three appeals filed by the Company and its two Directors and dismissed two appeals filed by the Commissioner of Customs. CEGAT set aside the Order in Original passed by the Commissioner of Customs, New Delhi on December 30, 1997.

2. To appreciate the controversy raised in the present appeals, relevant facts as

noted in the Order in Original by the Commissioner of Customs may be stated in brief.

3. According to the Commissioner of Customs - appellant herein, M/s. Pearl Engineering Polymers Limited ('Company') was registered under the Companies Act, 1956. Mr. Chand Seth was the Chairman-cum-Managing Director of the Company and Mr. Arun Gupta was whole time Director. The Company was engaged in the manufacture of Polyester Chips (High Pressure and Molding Grades) and other Polyethelene Terephthlate (PET) Bottle Grade and Film Grade since 1995. For the purpose of the said products, the Company set up a plant at Kurkumbh, District Pune in the State of Maharashtra. The plant had been set up on the basis of the technical know how. For that the Company entered into a 'Know how' and 'Basic Engineering Agreement' with M/s. Zimmer AG of Germany ('Zimmer' for short) on May 4, 1993. The agreement was negotiated and signed by Mr. Chand Seth and Mr. Arun Gupta. Both of them thus were aware of the terms and conditions and contents of the agreement. The agreement was approved by the Ministry of Industry and also by the Reserve Bank of India. The primary object of the agreement was to acquire requisite know how for the products of the company.

4. According to the Revenue, Intelligence was gathered by the Officers of Directorate of Revenue Intelligence (DRI), Mumbai that the Company had imported actual goods under the Export Promotional Capital Goods (EPCG) Scheme at the concessional rate of duty and thereafter diverted some of the goods in the local market. It thus appeared that the Company violated conditions of import of capital goods under Para 14 of the "Export and Import Policy, 1992-97" as the import of goods was subject to actual user condition till the export obligation was completed. In view of the Intelligence Report, details of the import by Company under EPCG Scheme were collected. As per the details, the Company was issued licence Nos. (a) p/CG/2133135 dated 2.6.94, (b) p/CG/2133262 dated 9.7.94 and (c) P/CG/2133763 dated 30.12.94. After scrutiny of import documents, licences were issued. The goods appeared to be imported in conformity with the items permitted under the licences. The Company also submitted copies of Letter of Credit (L/C), Equipments Supply Agreement between Zimmer and the Company and copy of Proforma Invoice No. 1863 dated 4th May, 1993. Physical inspection of imported goods was also made by visiting the plant site. The plant was in working condition and the capital goods indicated that there was no divergence of capital goods under EPCG Scheme. On verification of EPCG Scheme between Zimmer and the Company, it was noticed that the Company had collected from Zimmer Know how, Basic Engineering Agreement and Technical Assistance Agreement. The Company had imported designs, drawings and plans under the Know how and Basic Engineering Agreement on which appropriate amount of customs duty had not been paid.

5. A show cause notice was, therefore, issued on November 16, 1996 to the Company, Mr. Chand Seth, Chairman-cum-Managing Director and Mr. Arun

Gupta, whole time Director asking them to show cause as to why custom duty amounting to Rs. 4,18,12,425/- should not be demanded u/s 28 of the Customs Act, 1962; an amount of Rs. 20,00,000/- deposited by the Company voluntarily should not be adjusted against the duty demanded; the goods i.e. drawings, designs, plans etc. imported in three consignments having a total assessable value of Rs. 7,98,33,370/- should not be held liable to confiscation u/s 111 of the Act and penalty should not be imposed on each of them u/s 112 of the Act.

6. Mr. Chand Seth, Chairman-cum-Managing Director of the Company replied to the show cause notice stating therein that he being the Chairman-cum-Managing Director of the Company was not involved in day-to-day functioning of the Company which was taken care by Executives and other employees of the Company. As the Chairman-cum-Managing Director, overall policy decisions were taken by him. He was, hence, not liable to penal action u/s 112 of the Act as he was not involved in the actual import of drawings, designs, plans, etc.

7. Mr. Arun Gupta, Director of the Company, in his reply, contended that Know how and FEEP were procured through courier after declaration to Customs Authorities and one of the consignments was sought to be cleared vide Bill of Entry dated December 28, 1993. While the classification in the Bill of Entry was claimed under Chapter Heading 4906 and exemption under Notification No. 36/93, the Customs Authorities were of the view that Heading No. 4906 was not applicable. According to him, the books were exempted from custom duty. He, therefore, refuted the custom's claim for reassessment under Chapter Heading 4911. According to him, at any rate, the entire value for the consignment which came under Air Way Bill was of Rs. 63.11 lacs (approx) as per Invoice Nos. 1836-02A and 1836-92B dated December 22, 1993 which could not be taken as value of drawings for the reason that the consideration was to be appropriated against several other obligations of Zimmer under the agreement. The consignment came after full declaration to the Custom Authorities and there was bona fide belief on the part of the company that the drawings were fully exempted under Chapter Heading 4906. At any rate, books were exempted under various notifications. There was thus no intention to evade payment of custom duty. The plea taken on valuation of drawings at DM 1,30,000/- in the letter dated September 30, 1997 was without prejudice to the basic contention that the entire consignment was exempted as 'books' and not liable to payment of duty. No penalty, therefore, could be imposed either on the Company or on the officers.

8. Personal hearing was afforded to the Company on October 01, 1997. Advocates for the Company appeared. Mr. Chand Seth, Chairman-cum-Managing Director, Mr. Arun Gupta, Director and K. Srinivas, Consultant contested the matter. Time was sought for filing written arguments which was granted and written submissions were filed on 10th October, 1997 raising several contentions on the basis of various clauses in the agreement and on the merits of the matter. Reliance was also placed on certain decisions of this Court as well as of CEGAT.

The main argument on behalf of the Company was that the supply was of printed books which was covered by Chapter Heading 49.01. Since they were exempted under Notification No. 107/93-Cus dated March 30, 1993 and Notification No. 38/'94-Cus dated March 1994, the Company was not at all liable to pay custom duty. The Company also contended that the notifications were omnibus notifications and even if goods were covered by Chapter Heading 49.06 or 49.11, full exemption was granted. Thus, notwithstanding the fact that FEEP could be classified under Chapter Heading 49.11, in view of them being "Book" they were covered by Exemption Notifications and there was no liability of the Company to pay custom duty. Reference was also made to HSN notes and it was submitted that Drawings, Designs and Plans could be classified as Printed Books by virtue of Interpretation Rules of 1988. The entire FEEP, therefore, could be exempted and there was no substance in the allegation of the department that the Company was liable to pay custom duty. Objections were also raised as to limitation and on valuation.

9. The case of the department, on the other hand, was that FEEP and Drawings, Designs and Plans ought to be classified under Chapter Heading 49.11. As they could neither be covered by 4911.10 (Trade Advertising Material, Commercial Catalogues and the like) nor by 4911.11 (Pictures, Designs and Photographs), the relevant entry was sub-heading 4911.99 (Others) and was liable to pay customs duty at 25%.

10. The Commissioner of Customs considered the averments of the department and the reply submitted by the Company and by Mr. Gupta. According to the Commissioner, an agreement was entered into between Zimmer and the Company and the said fact was admitted by the Company. In consideration of supply of FEEP, an amount of BM 34,00,000/- equivalent to Rs. 7,98,33,370/- was to be paid by the Company to Zimmer. Out of the said amount, DM 26,00,000/- was to be paid for FEEP and DM 8,00,000/- was for Know how. Considering the decisions cited before him, the Commissioner held that the goods imported under Know how pertained to processes and were in the shape of manuals, brochures or leaflets. According to him, printed books and manuals both were classified under sub-heading 4901.99 but were distinguishable. Exemption Notifications referred by the Company applied to Printed Books under Chapter Heading 49 but did not apply to the goods in question. He, therefore, held that the technical documents imported by the Company as part of Know how were not 'Books' but were manuals/brochures classifiable under Chapter sub-heading 4901.99 and were not exempted under the Exemption Notifications. The Company was, therefore, liable to pay duty thereon.

11. Accordingly, the following order was passed :

ORDER

"54. In view of the findings hereinabove:-

a) I confirm duty demand of Rs. 4,18,12,425/-.

- b) I order adjustment of the amount of Rs. 30 lakhs deposited by M/s. Pearl Engineering Polymer Ltd., voluntarily, towards the above confirmed demand of duty and direct that the remaining amount be paid forthwith.
- c) I hold that the goods are liable to confiscation u/s 111 of the Customs Act, 1962. However, since the goods are not available, I refrain from ordering confiscation.
- d) I impose u/s 112 of the Customs Act, 1962 a penalty of Rs. 1 crore (Rupee one crore) on M/s. Pearl Engineering Polymer Ltd.,
- e) I impose penalty of Rs. 50 lakhs (Rupees fifty lakhs) on Shri Chand Seth, Chairman-cum-Managing Director of M/s. Pearl Engineering Polymer Ltd., u/s 112 of the Customs Act.
- f) I also impose a penalty of Rs. 25 lakhs (Rupees twenty five lakhs) on Shri Arun Gupta, Director of M/s. Pearl Engineering Polymers Ltd., u/s 112 of the Customs Act, 1962.

55. The penalties shall be paid forthwith."

12. Being aggrieved by the Order in Original passed by the Commissioner of Customs, five appeals came to be registered before CEGAT. One appeal was preferred by the Company against the decision of the Commissioner holding that the goods were liable to payment of custom duty and not covered by Chapter Heading 4901. Two appeals were filed by Mr. Chand Seth, Chairman-cum-Managing Director and Mr. Arun Gupta, Director against payment of penalty of Rs. 50,00,000/- and Rs. 25,00,000/-respectively. Two cross appeals were filed by the Department against quantum of penalty imposed on Mr. Chand Seth and Mr. Arun Gupta contending that the penalty imposed by the Commissioner of Customs was inadequate and was required to be enhanced.

13. CEGAT took up for consideration all the appeals. It observed that an identical question come for consideration before a Larger Bench of CEGAT in Parasrampuriah Synthetics Ltd. v. Commissioner of Customs, New Delhi,. It noted that the Larger Bench was faced with the issue as to whether the law laid down by a two-member Bench in 1994 (52) ECR 277 , was correct or decisions of Coordinate Benches in 1990 (25) ECC 232 , 1990 (26) ECC 220 , 1991 (32) ECC 354 , 1995 (78) ELT 370 1996 (84) ELT 271 , were correct. CEGAT proceeded to state that after a survey on the entire case law, the Larger Bench in Parasrampuriah Synthetics Ltd. took the view that the law laid down by two-member Bench in Tractors & Farm Equipment Ltd. did not lay down correct law and accordingly overruled it. The decisions in other cases were correct and the said view was affirmed. In those decisions, it was held that printed materials could be said to be "Books" covered under Chapter Heading 4901 and were entitled to full exemption and consequently no duty was leviable on the goods imported. CEGAT noted that the decision of the Larger Bench was binding on it. Accordingly, the appeals filed by the Company as well as by the Chairman-cum-

Managing Director and the Director were allowed by setting aside the order passed by the Commissioner imposing duty and penalty. Resultantly, two appeals filed by the Department for enhancement of penalty on Chairman-cum-Managing Director and Director were dismissed.

14. Against the order passed by CEGAT, the department has filed these appeals. One of the appeals came up for preliminary hearing before a three Judge Bench on December 14, 2001. Delay was condoned and appeal was admitted. Notice was also issued for interim relief. In the meantime, stay was granted against refund of amount if not already refunded. The interim order was thereafter continued and hearing was expedited. On May 01, 2003, the appeals were placed for hearing before a two Judge Bench and the following order was passed :

"Heard the learned counsel for the parties.

Learned counsel for the appellant submits that the question involved in these appeals is covered by the decision rendered by this Court in Commissioner of Customs, New Delhi Vs. M/s. Parasrampuriah Synthetics Ltd., which reveals that the tribunal's judgment on which the reliance was placed was set aside. As against this, Dr. A.M. Singhvi, learned senior counsel appearing on behalf of the respondent relied upon the decision rendered by this Court in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, .

Considering the aforesaid two decisions, there appears some conflict in the ratio laid down in both the cases. Hence, these appeals are referred to a larger Bench.

Registry to place the papers before Hon'ble the Chief Justice of India for appropriate direction in this regard to place it before an appropriate Bench."

15. That is how the matters were placed before us for final hearing. We have heard learned counsel for the parties.

16. At the time of hearing of appeals, the learned counsel for the appellant stated that three questions arise for consideration of this Court :

(i) Whether the goods imported by the Company in the form FEEP (Front End Engineering Package) comprising of technical documentation, designs and drawings are classifiable under Chapter sub-heading 4911.99 of the Customs Tariff?

(ii) Whether the goods imported by the appellant in the form of know-how containing latest up-to-date technical data and information including secret technical knowledge relating to the processes and their employment to the design, operation and maintenance of the plant, are classifiable under Chapter sub-heading 4901.99 of the Customs Tariff?

(iii) Whether goods, as described in (a) & (b) above, can be considered as "Printed Book" classifiable under Chapter 49 of the Customs Tariff in order to avail the benefit of Notification Nos. 107/93-Cus and 38/94-Cus?"

17. It was urged that CEGAT had allowed appeals filed by the Company, Chairman-cum-Managing Director and Director and dismissed the appeals filed by the Department solely on the ground that the point was covered by a Larger Bench decision of CEGAT in Parasrampuriah Synthetics Ltd. It was submitted that the decision of the Larger Bench of CEGAT in Parasrampuriah Synthetics Ltd. was challenged by the Department in this Court and this Court in Commissioner of Customs, New Delhi Vs. M/s. Parasrampuriah Synthetics Ltd., , set it aside allowing the appeal filed by the Department. Since the decision of the Larger Bench of CEGAT cannot be said to be a good law in view of the decision of this Court referred to above, all the appeals deserve to be allowed by setting aside the order passed by CEGAT.

18. The learned counsel for the respondent-Company, on the other hand, submitted that the view taken by Larger Bench of CEGAT in Parasrampuriah Synthetics Ltd. was correct and in accordance with law. It, therefore, could not have been interfered with by this Court as has been done in an appeal against the decision and the decision of this Court in Commissioner of Customs, New Delhi v. Parasrampuriah Synthetics Ltd. does not lay down correct law and deserves to be overruled. It was also submitted that in that case, this Court did not consider in their proper perspective several decisions particularly decisions in Commissioner of Income Tax, Gujarat-II Vs. Elecon Engineering Co. Ltd., and of this Court in Scientific Engineering House (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh, . It was submitted that though the point was directly covered by an earlier decision of this Court, a two Judge Bench attempted to distinguish the said case and came to incorrect conclusion. It was also submitted that earlier when these appeals were placed for hearing, a two Judge Bench was prima facie satisfied that Parasrampuriah Synthetics Ltd. was not correctly decided and hence the matter was referred to a three Judge Bench. It was, therefore, submitted that the appeals deserve to be dismissed by confirming the order passed by CEGAT.

19. In the alternative, it was submitted that since CEGAT allowed the appeals filed by the Company, Chairman-cum-Managing Director and Director relying upon a Larger Bench decision in Parasrampuriah Synthetics Ltd. holding that the goods imported by it could be said to be "Books" and hence were exempted from payment of excise duty, other points though argued and pressed into service at the time of hearing were not considered. It was, therefore, submitted that in case this Court holds that the contention raised by the Department is well founded and the order passed by CEGAT are liable to be set aside, the matters may be remitted to CEGAT directing it to consider all the points and to decide them in accordance with law.

20. The question for consideration before us is whether the goods and materials imported by the Company in the form of FEEP comprising of Equipments, Drawings, Designs and Plans are classifiable under Chapter Heading 49.01 or 49.06 of Schedule I of the Customs Tariff Act, 1975 and the Company is entitled

to the benefit under notification Nos. 107/93-Cus and 38/94-Cus or they are classifiable under Chapter Heading 4911.99 as contended by the department.

21. Before we deal with the actual question, it may be appropriate to refer to the relevant provisions of law. Section 2 of the Customs Tariff Act, 1975 declares the rates at which the custom duty is levied under the Customs Act, 1962 as specified in the First and the Second Schedule to the Act. Chapter 49 of Schedule I deals with "Printed books, newspapers, pictures and other products of the printing industry, manuscripts, typescripts and plans and reads as under :

CHAPTER 49

Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans

Notes:

1 ...

2. ...

3. ...

4. Heading No. 49.01 also covers:

(a) A collection of printed reproductions of, for example, works of art or drawings, with a relative text, put up with numbered pages in a form suitable for binding into one or more volumes;

(b) A pictorial supplement accompanying, and subsidiary to, a bound volume; and

(c) Printed parts of books or booklets, in the form of assembled or separate sheets or signatures, constituting the whole or apart of a complete work and designed for binding.

5. ...

6. ...

22. The relevant headings and sub-headings read thus :

"49.01 Printed books, brochures, leaflets and similar printed matter, whether or not in single sheets 4901.10 - In single sheets, whether or not folded 25% 4901.91 - Dictionaries and encyclopedias, and serial instilment thereof 25% 4901.99 - Other 25% 49.06 4906.00 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 25% 49.11 Other printed matters, including printed pictures and photographs 49.11.10 - Trade advertising material, commercial catalogues and the like 25% 4911.91 - Pictures, designs and photographs 25% 4911.99 - Other 25%

23. The relevant notifications are notification Nos. 107/93-Cus., dated March 30, 1993 and 38/94-Cus; dated March 1, 1994. The relevant part of notification No. 107/93-Cus reads as follows;

"Exemption to specified goods of Chapters 49 and 97

In exercise of the powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of finance (Department of Revenue) No. 36/93 - Customs, dated the 28th February, 1993, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in column (3) of the Table hereto annexed and falling within the Chapter or under the heading No. of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), as specified in the corresponding entry in column (2) of the said Table, when imported into India, from the whole of the duty of customs leviable thereon which is specified in the said First Schedule.

TABLE

S.No. Chapter of Heading No. Description of Goods 1. 49 Printed books (including covers for printed books) 2. 49.02 Periodicals (including newspapers). 3. 49.04 Music manuscripts. 4. 49.05 Maps. 5. 49.05 Charts 6. 49.06 Plans, drawings and designs 7. 97.04 Postage stamps, used or if unused not of current or new issue in the country to which they are destined. 8. 97.05 Metals [Notification No. 107/93-Cus., dated 30.3.1993]

24. The other notification is notification No. 38/94-Cus., 1st March, 1994. It is "General Exemption No. 193B". The relevant part thereof reads as under:

"Effective rates for specified goods falling within Chapters 40, 41, 43, 44, 47, 48, 49 and 97

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 goods of the description specified in column (3) of the Table hereto annexed, and falling within Chapters, heading Nos. or sub-heading Nos. of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, from so much of the duty of customs leviable thereon which is specified in the said First Schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table, subject to the conditions, if any, laid down in the corresponding entry in column (5) of the said Table.

S.No. Chapter/heading No. Description of Rate Condition Sub-heading No. goods
1 - 11 12. 49 Printed books (including covers for printed books) Nil 13. - 19 [Notification No. 38/94-Cus., dated 1.3.1994]

25. Notification No. 25/95-Cus. dated 16th March, 1995 is also important.

The relevant part of which reads thus;

**"19. EFFECTIVE RATES OF DUTY FOR GOODS OF VARIOUS CHAPTERS/HEADINGS
GENERAL EXEMPTION NO. 121**

Effective rates of duty for specified goods of Chapters 40, 41, 44, 47, 48 and 49. 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 goods specified in column (3) of the Table hereto annexed, and falling within Chapter, heading No. or sub-heading No. of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, from so much of the duty of customs leviable thereon which is specified in the said First Schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table, subject to the condition, if any laid down in the corresponding entry in column (5) of the said Table.

S.No.	Chapter or heading	Description of Rate	Conditions	No. of sub heading	No. of goods
9.				10.	49. Printed books (including covers NIL for printed books) and printed manuals including those in loose-leaf form with binder)
11. - 16.					

26. It is also appropriate at this stage to refer to Harmonized System of Nomenclature (HSN). The relevant part reads thus;

"49.01 - PRINTED BOOKS, BROCHURES, LEAFLETS AND SIMILAR PRINTED MATTER, WHETHER OR NOT IN SINGLE SHEETS.

4901.10 - In single sheets, whether or not folded - Other 4901.91 - Dictionaries and encyclopedias, and serial instalments thereof 4901.99 - Other

This heading covers virtually all publications and printed reading matter, illustrated or not with the exception of publicity matter and products more specifically covered by other headings of the chapter (particularly) heading 49.02, 49.03 or 49.95. It includes:

(A) Books and booklets consisting essentially of textual matter of any kind and printed in any language or characters, including Braille or shorthand. They include literary works of all kinds, text books and technical publications: books of reference such as dictionaries, encyclopedias and directories; catalogues for museums and public libraries (but not trade catalogues); liturgical books such as prayer books and hymn books (other than music hymn books of heading 49.04); children's books (other than children's picture, drawing or colouring books of heading 49.03). Such books may be bound (in paper or with soft or stiff covers) in one or more volumes, or may be in the form of printed sheets comprising the whole or a part of the complete work and designed for binding.

Dust covers, clasps, book-marks and other minor accessories supplied with the books are regarded as forming part of the book.

(B) Brochures, pamphlets and leaflets, whether consisting of several sheets of reading matter fastened together (e.g., stapled), or of unfastened sheets, or even of single sheets. These include publications such as : shorter scientific theses and monographs, instruction notices, etc., issued by government departments or other bodies, tracts, hymn sheets. Etc.

(C) Textual matter in the form of sheets for binding in loose-leaf binders.

The heading also covers :

(1) Newspapers, journals and periodicals bound otherwise than in paper, and sets of newspapers, journals or periodicals comprising more than one number under a single cover, whether or not containing advertising material.

(2) Bound picture books (other than children's picture books of heading 49.03).

(3) A collection of printed reproductions of works of art, drawings, etc. with a relative text (for example, a biography of the artist), put up with numbered pages and forming a whole suitable for binding.

(4) A pictorial supplement accompanying and subsidiary to a bound volume containing the relative text.

27. A question similar to one with which we are concerned came up for consideration before the authorities in Parasrampuriah Synthetics Ltd. The Central Excise Authorities held that Drawings, Designs and Plans imported by the Company could not be said to be "Books" within the meaning of Chapter Heading 49.01 but would be covered under sub-heading 4911.99 and hence were liable to custom duty. The demand made by the authority, therefore, came to be confirmed by the Commissioner of Customs. Being aggrieved by the order passed by Commissioner, the Company approached CEGAT. A two member Bench felt that there were conflicting decisions on the point which could appropriately be resolved by a Larger Bench and accordingly by an order dated March 14, 2000, the matter was ordered to be placed before the President for constituting a Larger Bench. As already observed earlier, the Larger Bench in 2001 (94) ECR 354 decided the question in favour of assessee and against the Department. Resultantly, the appeals were allowed by holding that printed materials imported by the Company could be said to be "Books" falling within Tariff Heading 49.01 and were entitled to exemption as 'Printed books'.

28. It was conceded by the Department before us is that no doubt in Parasrampuriah Synthetics Ltd., the Larger Bench of CEGAT decided the question of law in favour of assessee and against the Department, but the Department had taken the matter further and this Court reversed the decision of the Larger Bench in Commissioner of Customs, New Delhi Vs. M/s. Parasrampuriah Synthetics Ltd., . It was, therefore, submitted that the decision of CEGAT impugned in these

appeals deserves to be quashed and set aside by allowing the appeals of the Department. It was submitted that two appeals have been filed by the Department for enhancement of penalty imposed by the Commissioner of Customs since the penalty was inadequate and required to be enhanced. In view of the fact, however, that CEGAT allowed the appeals of the assessee and quashed the Order in Original passed by the Commissioner of Customs, the appeals filed by the Department were dismissed. In the light of the decision of this Court in Parasrampuriah Synthetics Ltd. the decision of CEGAT deserves to be reversed. In that case, both the appeals filed by the Department for enhancement of penalty should be allowed. In the alternative, they may be remitted to CEGAT for fresh consideration on merits for passing an appropriate order in accordance with law.

29. The submission on behalf of the Company and Chairman-cum-Managing Director and Director was that the decision of this Court in Parasrampuriah Synthetics Ltd. does not lay down correct law. It was submitted that Designs, Drawings and Plans imported by the Company are covered under Chapter Heading 49.01 as they could be said to be 'Books' and could not fall under sub-heading 4911.99. CEGAT in several cases had taken a similar view. The Larger Bench also upheld the reasoning in and conclusion arrived at in those cases. It was also submitted that a similar point came for consideration before this Court in Scientific Engineering House Ltd. and this Court in the light of the provisions of the Income Tax Act, 1961, held that drawings and designs would come within the term 'book' and hence, would be said to be 'plant'. It was also submitted that the High Court of Gujarat in Elecon Engineering Ltd. considered the question and decided in favour of the assessee. The observations of the High Court of Gujarat had been approved by this Court in Scientific Engineering House Ltd. The Division Bench of this Court in Parasrampuriah Synthetics Ltd. misinterpreted and misapplied the ratio laid down in that case and erroneously held that the decision in Scientific Engineering House Ltd, does not support the Company. On the contrary, the observations in that case supported the case of the Department. It was urged by the learned counsel for the assessee that the decision of the Division Bench in Parasrampuriah Synthetics Ltd. is also not in conformity with the decision of three Judge Bench in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, . It was, therefore, submitted that the appeals deserve to be dismissed.

30. So far as CEGAT is concerned, in our opinion, the learned counsel for the assessee is right in submitting that the point is finally concluded in favour of assessee and against the Department in Parasrampuriah Synthetics Ltd. The Larger Bench observed that in several cases, Drawings, Designs and Plans were held to be covered under Chapter 49 and would fall under Heading 49.01 (Printed books, brochures, leaflets and similar printed matter whether or not in single sheets); 49.06 (Plans and drawing etc for architecture, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand; had-written texts; photographic reproductions on sensitized paper and

carbon copies of the foregoing); and 49.11 (other printed matter, including printed pictures and photographs) and not under 49.11.99 (other). The Larger Bench also noted that in some cases, a contrary view was taken. But relying on the majority of the decisions, it was held that the relevant heading was 49.01 of Schedule I of the Act.

31. No doubt this Court in an appeal against the order passed by the Larger Bench reversed the decision of CEGAT. The question, however, is whether the order passed by a two Judge Bench in Parasrampuriah Synthetics Ltd. lays down correct law on the point.

32. Now, let us consider some decisions on this aspect.

33. In Elecon Engineer Co. Ltd., the High Court Gujarat was called upon to consider the question whether 'drawings and patterns' acquired by the assessee from foreign company relating to 'know-how' which formed basis of business of the assessee could be said to be "books" within the meaning of Sub-section (3) of Section 43 of the Income Tax Act, 1961 and hence, "plant" as defined in the said sub-section and whether the assessee could claim depreciation on the said purchase? The High Court noted that Sub-section (3) of Section 43 expressly declared that "book" used for the purpose of business or profession of the assessee was covered by the inclusive definition of the word "plant". The question, however, was whether drawings and patterns could be said to be "book"? The Court observed that the word "book" had not been defined in the Act. It was not a term of art. It was an ordinary English word of every day use and must, therefore, be assigned its natural meaning as understood in the common parlance, subject, of course, to the context in which it was used. The Court stated;

"We will first consider the question whether drawings and patterns acquired by the assessee are "books", for the inclusive definition of the word "plant" in Section 43(3) of the Act expressly declares that "books" used for the purposes of the business or profession of the assessee, that is, used for the purpose of enabling the assessee to carry on his business or profession and earn income therefrom, are "plant" within the meaning of Section 32. Now, the word "book" has not been defined in the Act and it is not a term of art. It is an ordinary English word of everyday use and it must, therefore, be assigned its natural meaning as understood in common parlance subject, of course, to the context in which it is used here."

34. In popular sense, "book" means a collection of a number of leaves or sheets of paper or of other substance, blank, written or printed, of any size, shape and value, held together along one of the edges so as to form a material whole and protected on the front and back with a cover of more or less durable material. The Court also referred to dictionary meaning. It was observed that one must refer not only to the physical, but also functional characteristic of "book". It must be functionally useful for the purpose of assessee's business or profession. To put

it differently, it must be a tool of his trade - an article which must be part of the apparatus with which his business or profession was carried on. It must have utility value enabling its owner to pursue his business or profession with greater advantage. It must, thus, satisfy a dual test. It must bear both physical and functional characteristics of a book. It must be a collection of a number of sheets of paper or of other substance, having suitable size, shape and value, bound together at one edge so as to form a material whole and protected on the front and back with covers of some kind and functionally useful to the assessee for carrying on his business or profession.

35. The Court also referred to English decisions on the point. A reference may be made in this connection to a decision of Court of Chancery in *Pretymen v. Pretymen*, (1931) 1 Ch 521. The testator in that case had by his will inter alia bequeathed "all the pictures, prints, statues, sculptures, articles of vertu books, furniture and plate" to his trustees. The estate of the testator included 155 original manuscripts of the series of letters and papers known as Paston letters. Those letters and papers were not in the form of loose sheets included in portfolios or kept in a safe. They were mounted, or inlaid in sheets of paper and bound up in three volumes. The question before the Court was whether those three volumes could be said to be "articles of vertu" or "book" within the meaning of the relevant statute.

36. Replying the question in affirmative, Maugham, J. stated;

"To my mind it is plain that a book is not necessarily a printed book.... But in addition, according to the ordinary meaning of the English word 'book'. There are many books which are not necessarily the sort of books which one finds in a library at all, and which yet are books. I might mention as an example the book which I have before me, a judge's notebook. I do not know how that could be described otherwise than as a book."

37. Referring to earlier decisions, the Court concluded;

"In the present case I have come to the conclusion that these three volumes are books. The factors leading me to that conclusion are these : The volumes are in book form; to the outward eye they look like books, and in the ordinary course they can be, and are, handled like books. Next, I observe that they can be used like books, in the sense that, as one turns over the sheets, one can, if able to decipher the handwriting, read the various letters as a collection of letters bound up in the books. I observe further that they are not detachable letters in the ordinary sense, but have been so inserted in the sheets that they are in substance permanent parts of the volumes, unless, indeed, they should be cut out or removed by some forcible effect."

38. A similar question came up for consideration before this Court in *Scientific Engineering House Ltd.* referred to above. In that case, the assessee entered into collaboration agreement for manufacture of scientific instruments. The collaborator was to supply technical know-how by drawings, designs, charts,

plants, etc. The question was whether those documents in the form of "documentation service" under the agreement could be said to be 'book' and 'plant' within the meaning of the Income Tax Act and whether the assessee was entitled to claim depreciation? The Court considered two questions; viz. (i) whether the 'documentation service' agreed to be and actually rendered by the foreign collaborator to the assessee was incidental to other services as a result whereof the assessee acquired technical know-how requisite for the purpose of manufacturing its products; and (ii) whether the expenditure could be said to be of a capital nature brought into existence a depreciable asset?

39. Considering the provisions of Sections 32 and 43 of the Act, the Court held that the word 'plant' would include any article or object fixed or movable, live or dead, used by a businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business.

40. The Court quoted with approval the following passage of Lindley, L.J. in *Yarmouth v. France*, (1887) 19 QBD 647:

"There is no definition of 'plant' in the Act : but, in its ordinary sense, it includes whatever apparatus is used by a businessman for carrying on his business, - not his stock-in-trade which he buys or makes for sale ; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business."

41. The Court also referred to functional test formulated by Lord Guest in *Inland Revenue Commissioners v. Barclay Curie & Co. Ltd.*, (1970) 76 ITR 62 (HL):

"In order to decide whether a particular subject is an 'apparatus' it seems obvious that an inquiry has to be made as to what operation it performs. The functional test is, therefore, essential at any rate as a preliminary."

42. The Court then formulated the test thus;

"Does the article fulfill the function of a plant in the assessee's trading activity? Is it a tool of his trade with which he carries on his business? If the answer is in the affirmative it will be a plant."

43. The Court proceeded to observe that applying the said test, the drawings, designs, charts, plans, processing data and other literature comprised in the 'documentation service' specified in the agreement would constitute 'book' and hence 'plant' within the meaning of the Act. The Court, therefore, held that it was clearly of the opinion that the capital asset acquired by the assessee, namely, the technical know-how in the shape of drawings, designs, charts, plans, processing data and other literature fell within the connotation 'plant' and, therefore, a depreciable asset. The Court referred to *Elecon Engineering Co. Ltd.* and said;

"Counsel invited our attention to the decision in *CIT v. Elecon Engg. Co. Ltd.* where the Gujarat High court has, after exhaustively reviewing the case law on

the topic, held that drawings and patterns which constitute know-how and are fundamental to the assessee's manufacturing business are 'plant'. we agree and approve the said view".

(emphasis supplied)

44. It is, no doubt, true that in Parasrampuriah Synthetics Ltd., a two Judge Bench of this Court reversed the decision of CEGAT and held that Drawings, Designs and Plans imported by the assessee from Zimmer under an agreement for transfer of technology for setting up a plant to manufacture specified goods could not be said to be 'book' and hence was not covered by Chapter Heading 49.01 nor exempted under notification of 1975. It is also true that the Court considered both the decisions, viz., Scientific Engineering House Ltd. decided by this Court and Elecon Engineering Co. Ltd. decided by the High Court of Gujarat.

45. Regarding Scientific Engineering House Ltd., a two Judge Bench said;

"While there is some factual divergence as noticed above but the factum of the drawings etc. not forming part of a book within the exemption notification stands accepted in Scientific Engg. as would be evident from the emphasized portion in para 13 noticed above. In this view of the matter, the aforesaid decision of this Court in Scientific Engg. does not lend any assistance to the assessee, rather runs counter to the respondent's contentions. As can be seen from one of the volumes produced before us, it contains documents in loose sheets merely put up in a folder. It has none of the characteristics of a book known in the common trade parlance. At any rate, the principal interest in the goods is related to transfer of technology to the assessee in the form of drawings, designs and plans for setting up a plant to manufacture polyester, polyester filament yarn and polyester staple fibre. Thus viewed from any angle, the goods imported by the assessee are not covered by Sl.No. 10 but are covered by Sl. No. 15 of the said exemption notification."

46. The Court proceeded to observe;

"The question thus arises as to whether articles imported satisfy the requirement of Serial No. 10 of the notification. Incidentally, this Court in Scientific Engg. categorically posed a question as to whether apart from the physical form, the documents satisfy the functional test! The basic issue thus would be the nature of articles imported. Now what these documents are : admittedly in terms of the agreement between the parties, these documents cannot be attributed to be technical know-how in the shape of drawings, designs, plans and other literature: it is a literature or specification for a particular plant to manufacture polyester, polyester filament yarn and polyester staple fibre even without adverting to the general trade parlance of the word "book" and its known features a plain look at the book itself denotes it to be an installation and planning manual. The documents though loosely kept in a binder is known as Zimmer Documentation as regards the Fisher-Fosemount Systems. It is a technology transfer agreement which stands documented in a folder. The heading itself records "Installing CHIP

Products and Application Software". The heading itself thus indicative of not being a work of art by an author - it is a record of scientific progress achieved and this particular achievement is being transferred by way of transfer of technology agreement between the two parties and thus cannot but be termed to be a "technical know-how in the shape of drawings, designs, charts, plans and other literature" - these items have been ascribed to be a part of the plant for the purposes of depreciation allowance in terms of Sections 32 and 43(3) of the Income Tax Act. Merely by reason of the factum of certain writings on various sheets of paper, one cannot ascribe the documentation to be a "book". The word "book" has not been defined in the Act but the "book" in common acceptance is a literary composition from which one may extend or advance his or her knowledge and learning."

47. As to Elecon Engineering Co. Ltd., it was stated;

"Incidentally, the decision of the High Court of Gujarat in the case of CIT v. Elecon Engg. Co. Ltd. has been strongly relied upon by the Tribunal and it has also been recorded in the order impugned that the decision was subsequently approved by this Court. While it is true that Elecon Engg. stands approved by this Court but para 14 in the decision in Scientific Engg. would make the situation clear enough to indicate that the same does not convey what the learned Tribunal wanted to convey."

48. The learned counsel for the assessee, however, is right in submitting that a Bench of two Judges proceeded on the basis of submission on behalf of the Revenue by the learned Attorney General wherein he contended that a book must certain features. This is clear if one reads paragraph 10 of the Report, which reads thus;

"Turning attention on to Serial No. 10, be it noted that in Chapter 49 "printed books" and "printed manuals" including those in loose-leaf form with binder, have been specifically referred to as "nil" duty article. It is in this context that the learned Attorney-General in support of the appeal contended that in general trade parlance a book is known by features like (i) a book has an author, (ii) a book has a publisher, (iii) a book is a priced publication, (iv) the book is available to all and sundry who pay for it, (v) the book does not have a memorandum of understanding, (vi) there is no confidentiality about the book, (vii) a book has a subject to deal, with, (viii) the pages are serially numbered and neatly bound, and (iv) last but not the least, it should have ISBN Code i.e. International Standard Book Number."

49. Our attention was also invited by the learned counsel to dictionary meaning of the word 'Book'.

50. In the Penguin English Dictionary, it is stated;

"Book is a set of written, printed, or blank sheets bound together into a volume."

51. The Concise Oxford Dictionary, defines 'book' as "a written or printed work

consisting of pages glued or sewn together along one side and bound in covers; a main division of a literary work or of the Bible; a set of records or accounts; a book maker's record of bets accepted and money paid out; a set of tickets, stamps, matches, etc. bound together...."

52. According to the New Webster's Dictionary,

'Book' means "A writing or document; a written or printed work of some length, as a treatise or other literary composition, esp. on sheets fastened or bound together; a volume; cap. the Bible. A libretto; a division of a literary work, esp. one of the larger divisions; a record of bets, as on a horse-race; any collection of sheets fastened or bound together; a number of sheets bound together and used for making entries, as of commercial transactions; a pile or package of leaves, as of tobacco; a trick at cards, or a number of cards forming a set; bridge, six tricks taken by one side."

53. According to Words and Phrases (Permanent Edition), "A "book", in its popular sense, is understood to be a volume, bound or unbound, written or printed."

54. In our opinion, the counsel is right in submitting that when the expression 'book' is not defined in the Act, natural and ordinary meaning of the said expression must be kept in view. According to him, nowhere it is provided that all the nine characteristics or ingredients as highlighted by the learned Attorney General in Parasrampuriah Synthetics Ltd. and referred to by this Court in paragraph 10 must be considered essential or sine qua non. He, therefore, submitted that a wrong test was applied by this Court in Parasrampuriah Synthetics Ltd. and Scientific Engineering House Ltd. was erroneously distinguished. The proper way on the part of the Court was to consider the test laid down in Scientific Engineering House Ltd. and to come to a conclusion whether on the facts and in the circumstances of the case, Drawings, Designs and Plans in the case on hand could be said to be 'book'. By not doing so, a clear error of law had been committed and the decision deserves to be overruled.

55. It was also submitted that so far as factual aspect is concerned, CEGAT was right in holding that Drawings, Designs and Plans imported by the assessee were covered by Tariff Heading 49.01 and were also entitled to exemption under notifications No. 107/93-Cus and 38/94-Cus. Alternatively, it was submitted that if this Court is of the view that CEGAT has not entered into the said question in view of the Larger Bench decision, the matter may be remitted to CEGAT directing it to consider the case afresh by applying correct test and to take an appropriate decision.

56. The learned counsel for the Revenue submitted that Elecon Engineers Ltd. and Scientific Engineering Housing Ltd. were rendered in different context. The basic issue was - whether 'books' were covered by the entry 'plant' under the Income Tax Act. Those decisions, therefore, have no relevance to the issue in question since the entries are different. It was also submitted that since the

article in question was to be used by the assessee and was prepared according to his requirement, it had no utility to others. Hence, it cannot be said to be a 'book' in general sense. It was argued that this Court has considered the factual position in Parasrampuriah Synthetics Ltd. and held that the article was not a book. It would not, therefore, be appropriate to hold otherwise in the present case.

57. In our opinion, all these questions have to be considered and decided by the CEGAT in the fact-situation of the case in hand. As already noted by us, some of the tests applied in Parasrampuriah Synthetics Ltd. were not relevant and appropriate. The CEGAT will now consider the ratio in Parasrampuriah Synthetics Ltd. in the light of the observations made by us in this judgment and decide the issue raised in the instant case.

58. The matter could be looked at from another angle also. As noted earlier, HSN has dealt with the point and as per Explanatory Note, it would fall under Chapter Heading 49.01. If it is so, it would not be covered by sub-heading 4911.99.

59. In this connection, we may refer to a three-Judge Bench decision of this Court in Collector of Central Excise, Shillong Vs. Wood Craft Products Ltd., . The Court, in that case, considered the question whether 'plywood' was classifiable under subheading 4408.90 or sub-heading 4410.90? HSN Explanatory Notes was considered by this Court and it was observed;

"We are of the view that the Tribunal as well as the High Court fell into the error of overlooking the fact that the structure of the Central excise tariff is based on the internationally accepted nomenclature found in the HSN and, therefore, any dispute relating to tariff classification must, as far as possible, be resolved with reference to the nomenclature indicated by the HSN unless there be an express different intention indicated by the Central Excise Tariff Act, 1985 itself. The definition of a term in the ISI Glossary, which has a different purpose, cannot in case of a conflict, override the clear indication of the meaning of an identical expression in the same context in the HSN. In the HSN, block board is included within the meaning of the expression "similar laminated wood" in the same context of classification of block board. Since the Central Excise Tariff Act, 1985 is enacted on the basis and pattern of the HSN, the same expression used in the Act must, as far as practicable, be construed to have the meaning which is expressly given to it in the HSN when there is no indication in the Indian tariff of a different intention."

60. The ratio laid down in Wood Craft Products Ltd. was followed and reiterated in The Collector of Central Excise, Hyderabad, Vs. M/s. Bakelite Hylam Ltd., and in Collector of Customs, Bombay Vs. Business Forms Ltd. Thr. O.L., . Hence, even that aspect has to be considered and kept in mind while deciding as to whether Drawings, Designs and Plans could or could not be said to be 'printed book' covered by Chapter Heading 49.01, 49.06 or sub-heading 4911.99?

61. There is still one more aspect which is relevant. It cannot be disputed and is

not disputed before us and is also concluded by a decision of a three-Judge Bench in Associated Cement Co. Ltd. that the basic heading is 49.01. It deals with "Printed books, brochures, leaflets and similar printed matter, whether or not in single sheets". 49.11 covers "Other printed matter, including printed pictures and photographs". Thus, specific or basic heading is 49.01 and residual entry is 49.11. Priority, therefore, has to be given to the main entry and not the residual entry. According to the Company, the case is covered by the main entry under 49.01, and in that view of the matter, one cannot consider the residual entry 49.11.

62. In Indian Metals and Ferro Alloys Ltd., Cuttack Vs. The Collector of Central Excise, Bhubaneshwar, , this Court held that residuary item can be referred to and such item can be applied only when goods are shown to be not falling under any other specific item. If they are covered by a specific item, residuary item has no application.

63. The Court stated;

"One more aspect of the issue should be adverted to before we conclude. The assessee is relying upon a specific entry in the tariff schedule while the department seeks to bring the goods to charge under the residuary Item 68. It is a settled principle that unless the department can establish that the goods in question can, by no conceivable process of reasoning, be brought under any of the specific items mentioned in the tariff, resort cannot be had to the residuary item...." [See also M/s. Bharat Forge and Press Industries (P) Ltd. Vs. Collector of Central Excise, Baroda, Gujarat,]

64. In our considered opinion, all these contentions raised by the assessee have to be dealt with and decided in the light of relevant statutory provisions of the Act and the Rules as also on the basis of decided cases on the point. As CEGAT has disposed of all the appeals merely on the basis of Larger bench decision in Parasrampuriah Synthetics Ltd. and has not considered rival contentions on merits nor recorded findings thereon, it would be appropriate and in the fitness of things to remit the matters to CEGAT, now to Customs, Excise and Service Tax Appellate Tribunal (CESTAT) to decide them on all points in accordance with law in the light of observations made in this judgment.

65. For the foregoing reasons, all the appeals are allowed. The order passed by CEGAT is hereby set aside and the matter is remitted to CESTAT for reconsideration and for passing fresh order in accordance with law. In the facts and circumstances of the case, however, there shall be no order as to costs.