

(2009) 10 BOM CK 0096
In the Bombay High Court
Case No : Writ Petition No. 1995 of 2008

Engineering Enterprise

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 01-10-2009

Acts Referred:

Citation : (2010) 2 BomCR 213 : (2009) 170 ECR 167 : (2009) 244 ELT 342

Hon'ble Judges : Ferdino I. Rebello, J;D.G. Karnik, J

Bench : Division Bench

Advocate : M.H. Patil and Aparna Hirandagi, for the Appellant; R.V. Desai and R.B. Pardeshi, for the Respondent

Final Decision : Allowed

Judgement

D.G. Karnik, J.—The short question that arises for our consideration is whether fibre tip pens exported by the petitioner fall under Chapter Heading 96 of the Drawback Schedule entitling the petitioner to claim a duty drawback.

2. The petitioner manufactures and exports goods which are classified by it as fibre tip pens. On export of the goods, the petitioner made a claim for duty drawback claiming them to be "fibre tip pens". A show cause notice was issued to the petitioner by the Assistant Commissioner of Customs, Drawback (EDI) Air Cargo Complex, Sahar, Mumbai (respondent No. 3 herein) on 21st April 2004 as to why the duty drawback claims made by it be not rejected on the ground that the goods exported were not writing instruments, but were parts of a plotter or a plotter used as a marking system. The petitioner showed cause. However, by an order dated 29th April 2005, the respondent No. 3 rejected the claim of the petitioner holding that the goods exported by the petitioner were not writing instruments and as such the petitioner was not entitled to claim duty drawback under the classification "fibre tip pens". On appeal, the Commissioner of Customs (Appeals) by his order dated 4th August 2005 allowed the appeal and held that the petitioner was entitled to a duty drawback under Chapter Heading 96 of the Drawback Rules. At the instance of the Commissioner of Customs, the

Government of India by its order dated 20th February 2007 revised the order of the Commissioner (Appeals) and rejected the claim of the petitioner for duty drawback on the grounds and reasons stated therein. On a petition filed in this Court, bearing Writ Petition No. 2099 of 2007, the Court remanded the matter back to the Government for reconsideration in the light of the observations made therein. After remand, by an order dated 22nd May 2008, the Government of India again allowed the revision application and rejected the application of the petitioner for duty drawback. That order is impugned in this petition.

3. In the impugned order, the Government has stated that they have carefully perused the literature and samples produced by the petitioner and thereupon has come to the conclusion that the goods classified as "fibre tip pens" were not capable of being used on their own and could be used only after they were attached to some equipment (plotter) and as such were not covered by Chapter Heading 96. Copies of the literature as well as the samples which were produced before the Government for perusal of the Revisional Authority are also produced before us for our perusal and we have perused the same. For the reasons indicated below, we are of the view that the goods of the petitioner clearly fall within the Chapter Heading 96 of the Duty Drawback Rules, and as such the impugned order cannot stand.

4. Entry 96.03 of Chapter Heading 96 reads as under:

Fountain pens, ball point pens, fibre tip pens, colour pens, highlighter pens, sketch pens, roller ball pens, gel pens, marker pens, all sorts (including gift sets with or without box).

We have to consider whether the goods exported by the petitioner fall within this Entry 96.03 and whether the decision of the Government holding otherwise is in any way perverse.

5. Admittedly, the fibre tip pens manufactured by the petitioner are not ordinary fibre tip pens used as writing instruments by hand by human beings. But the fibre tip pens manufactured by the petitioner are usually attached to a machine called as a "plotter" or other similar machine. Fibre tip pens are of different colours and the plotter machine uses the fibre tip pens attached to it for drawing graphs and designs in different colours and colour combinations. However, they are exported by the petitioner and purchased by the foreign buyers as "fibre tip pens". They are described in the shipping bills/exports as "fibre tip pens" and the customs had cleared the exports as "fibre tip pens". Mr. Patil, learned Counsel for the petitioner, invited our attention to the catalogues of international manufacturers of repute making similar products. In all the catalogues, similar instruments which are used as writing tips in the plotters are described as "fibre tip pens/disposable pens". The petitioner's product is sold and bought in the international market by description as "fibre tip pens" though they are used in plotters. Mr. Patil further submitted that people in the trade understand and describe the product of the petitioner as "fibre tip pens" and, therefore there was

no justification for the Government to exclude them from the expression "fibre tip pens" not falling under Chapter Heading 96.03.

6. Per contra, Mr. Desai, learned Senior Advocate appearing for the respondents, submitted that the words "fibre tip pens" used in Entry 96.03 under Chapter Heading 96 take colour from the preceding words, namely "fountain pens, ball point pens" as well as subsequent words, namely "colour pens, highlighter pens, sketch pens, roller ball pens, gel pens, marker pens". He submitted that all the words preceding and following the words "fibre tip pens" relate to the instruments which are used for drawing or writing by hand by human beings. The words "fibre tip pens" therefore must be construed ejusdem generis. Mr. Desai further submitted that in any event the view taken by the Government that the words "fibre tip pens" refer to the writing instruments used by humans and not by machines is a possible view and in the absence of perversity, this Court should not interfere.

7. We are unable to agree with the submissions of Mr. Desai. Firstly, the rule of ejusdem generis does not apply to the facts of the case. Black's Law Dictionary, Eighth Edition defines the "rule of ejusdem generis" thus:

A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animal the general language or any other farm animal ? despite its seeming breadth ? would probably be held to include any four legged, hoofed mammals typically found on farms and thus would exclude chickens.

In the present case, the words "fibre tip pens" do not follow the general words or phrase, but the words "fibre tip pens" appear in the middle, some words preceding and some following them. Secondly, the rule of ejusdem generis ordinarily apply to an interpretation of a statute or a rule. Here, we are interpreting only an entry appearing in the Schedule of Duty Drawback. We are of course conscious of the fact that the general rule that where several words (particularly signifying same genus) are used in a sentence or an entry, the words would take colour from each other. Even if this rule is applied to the words "fibre tip pens" and it is held that they would take colour from the preceding or subsequent words, namely "fountain pens, ball point pens, highlighter pens, sketch pens, roller ball pens, gel pens and marker pens", the common genus of all the words is that the items described by them are writing instruments whose object is to write, draw or highlight any written portion (highlighter pens). The common genus is that they write or draw lines on a paper. That is the common genus and not that they are used by hand. They may be used by hand or may be used by a machine, but all of them write or draw lines or figures. Fibre tip pens exported by the petitioner are also used for the same purpose, namely drawing of lines, graphs or figures with the help of a plotter machine though not by hand.

8. We also notice from the first appellate order of the Commissioner of Customs (Appeals) that it was not disputed before him by the Revenue that the goods imported by the petitioner were fibre tip pens (see last but one paragraph of the order dated 4th August 2005). Even before us, the respondents did not dispute that the goods exported by the petitioner are fibre tip pens, but contended that the expression "fibre tip pens" appearing in Entry 96.03 was restricted to fibre tip pens which are used by hand as writing instruments. We find no justification for giving meaning restricted to the expression "fibre tip pens" in the manner as suggested by the respondents.

9. In *G.S. Auto International Limited Vs. Collector of Central Excise, Chandigarh*, the Supreme Court has held that in the matter of classification of goods, the proper test to be applied is not the functional test (i.e. the function which the product performs) but the test of commercial identity. In determining whether the goods fall under a particular entry or not, the Court should consider how the goods are known and are classified by the men usually dealing or trading in the said product. In the present case, the catalogues of international manufacturers of repute show that similar goods are classified as fibre tip pens/disposable pens. The goods are exported by the petitioner by branding them as "fibre tip pens" in the export bills and are accepted by the purchasers as such. In the affidavit in reply dated 26th November 2008 filed on behalf of the respondents by Mr. V.S. Wayal, Assistant Commissioner of Customs, he has annexed a copy of a literature/brochure relied upon by the respondents. The brochure firstly describes what are disposable pens and how they help trim operating costs. Then drawings of such disposable pens are given at pages 111 to 113 (internal pages 5 to 7 of the affidavit) of the compilation. It is thus clear that even the respondents construed this product as "pens" (i.e. writing instruments) but seeks to exclude them only on the ground that they are not used by hand. We do not find any justification for applying the test of use by hand for determining whether the petitioner's product is "fibre tip pens". In our opinion, the respondents applied the test which is unsustainable in law for holding that the petitioner's product was not "fibre tip pens".

10. Consequently, the petition has to be allowed. Accordingly, the impugned order is quashed and the order of the Commissioner of Customs (Appeals) dated 4th August 2005 (Exhibit-G to the petition) is restored. Rule is made absolute in terms of prayer Clauses (a) and (b) with no order as to costs.