

M/S. NORTHERN PLASTIC LTD. ETC. A
v
COLLECTOR OF CUSTOMS AND CENTRAL EXCISE ETC.

JULY 14, 1998

[S.C. AGRAWAL AND G.T. NANAVATI, JJ.] B

Central Excises & Salt Act, 1944/The Customs Act, 1962 :

Central Excise Tariff/Customs Tariff : Item 3702.20/Heading 3702.41

Appellant imported 59 jumbo rolls of Photographic Colour Films (Unexposed) Positive—In the Bill of Entry it was described as Cinematographic Colour Films (Unexposed) Positive—Classified under the Excise Tariff Item 3702.20 and under Customs Tariff heading 3702.41—Claimed exemption of customs and countervailing duty—On examination by the customs authorities found to be “colour films-jumbo rolls”, not entitled to exemptions—Appellant charged of misdeclaration —Also not found to be an actual user (industrial)— After enquiry, Collector found it not to be a case of misdeclaration—Accepted the appellant to be an actual user on the basis of its SSI Registration Certificate—CBSC found the order improper and asked Collector to apply before CEGAT—CEGAT found that the appellant misdeclared the goods and was not an actual user (industrial) in the absence of an industrial licence— Remanded to Collector—Collector charged appellant of misdeclaration and unauthorized importation—Appeal filed before CEGAT—Challenge to findings regarding misdeclaration and illegal import not permitted—personal penalty reduced—On appeal, Held : Photographic Film (Unexposed) or Cinematographic film (Unexposed) are covered under asme heading 37.02—It was not necessary for the appellant to describe the goods as jumbo colour Films as there was no separate heading for it — As the goods imported were being and intended to be used as Cinematographic Films, those were correctly classified under sub-heading 3702.20. C D E F

Import & Export Policy, 1988-91 : Chapter 5. Paragraph 56(3) and Appendix 6 : G

Appellant, a small scale industry registered with Director of Industries, UP—Registered for conversion/cutting jumbo rolls into Cinematographic Films (Unexposed) Positive—Held—Appellant using the imported raw H

A *material for its own use—Furnished its registration certificate at the time of customs clearance—Appellant entitled to import the jumbo rolls under Open General Licence.*

Words & Phrases :

B *'Factory'—Meaning of in the context of Industries (Development & Regulation) Act, 1951.*

C In 1981, the appellant imported 59 jumbo rolls of Photographic Colour Films (Unexposed) Positive describing the goods as “Cinematographic Colour Films (Unexposed) Positive” falling under Customs Tariff Heading 3702.41 and the Central Excise Tariff Item 3702.20 and claimed exemption of customs duty under Notification No. 52/86 read with Notification No. 157/88-Customs and of countervailing duty under Notification No. 50/88-C.Ex. The imported goods being Item No. 186(1) of Part I of List 8 of Appendix 6 of AM 85-88, clearance was also sought under the Open General Licence. On examination the goods were found to be “Colour Films Jumbo Rolls” and, therefore, not entitled to the benefit of exemptions under the said notification. Consequently, the appellant was charged for misdeclaring the goods as “Cinematographic Colour Films (Unexposed) Positive”, with a view to evade Government revenue. As the appellant was having only SSI Certificate for cutting/converting jumbo rolls, the appellant was not considered to be an actual user (industrial). The goods were also not found to be eligible for exemption in the rates of duty as claimed in the Bill of Entry.

F After the enquiry, the Collector held that the appellant had not misdeclared the goods as the specific description of the goods, in the Bill of Entry, had been given and also it was mentioned that the goods, being a raw material, were covered by the OGL. The Collector accepting the appellant's case that slitting, cutting and perforating is a manufacturing process and the appellant had the SSI registration certificate issued by the District Industrial Centre for “Cinematographic Colour Films (Unexposed) Positive”, held the appellant eligible to import the said goods as actual user (industrial) in terms of Entry No. 297 of Part I of List 8 of Appendix 6 of the Import-Export Policy for the year 1988-91. However, at the same time the Collector also held that the appellant was not entitled to the benefit of exemption Notifications Nos. 52/86-Cus and 50/88-C.Ex.

H The Central Board of Excise and Customs, on finding the order passed by the Collector as not legal and improper, directed the Collector to apply

to CEGAT for determination of the points specified by the Board in its order. Treating the said application of the Collector as an appeal, the CEGAT held that the appellant had misdeclared the goods for claiming exemptions under the notifications as it had imported jumbo rolls of Photographic Film and not Cinematographic Films. The appellant was further held not to be not an actual user (industrial) in view of its not possessing an industrial licence issued under the Industries (Development & Regulation) Act, 1951 which was necessary for claiming benefit of OGL. Therefore, the goods were held to be imported without a valid import licence. After recording the above findings, CEGAT remanded the case to the Collector for re-adjudication.

The Collector issued a Show Cause Notice charging the appellant with misdeclaration of goods in order to avail exemption benefits and evade payment of customs duty. The said notice was based on unauthorized importation of goods i.e. import without an industrial licence issued under the IDR Act. It was also alleged that the goods imported by the appellant were 'jumbo rolls' and not 'Cinematographic Colour Films (Unexposed) Positive' as the goods were not ready for use on projector or a camera and were required to undergo the process of slitting/cutting and perforation along the length of the film. Thus, the appellant was called upon to show cause, under Section 111 (d) and 111 (m) of the Customs Act, as to why the imported goods be not confiscated and why personal penalty under Section 112 (a) (i) of the Act be not levied. Ultimately, The Collector held that the charges of misdeclaration and unauthorized importation were established and ordered confiscation of the 59 rolls; imposed a redemption fine of Rs. 5 lacs and also a personal penalty of Rs. 10 lacs on the appellant.

The appellant, feeling aggrieved, appealed to CEGAT but the appellant was not permitted to challenge the findings regarding misdeclaration and illegality of import as the bench hearing the appeal was of the view that it being a bench of coordinate jurisdiction could not sit in appeal over the findings recorded by the earlier bench. The CEGAT observing that the appellant had not filed any appeal on the question of entitlement to the benefits of the exemption notifications and also that the writ petition filed before the Gujarat High Court had been withdrawn, held that it was not open to the appellant to agitate the question again. The appellant's contention that Additional Licences acquired by it covered the import, was rejected on the ground that only unattested photocopies of the additional licences were produced and moreover, the question of acceptance or otherwise of additional licences could have arisen only if the appellant was held actual user

A (industrial). The amount of redemption fine was found to be reasonable by CEGAT. However, the amount of penalty was reduced to Rs. 5 lacs from Rs. 10 lacs and the appeal was disposed of. Hence, these appeals.

B The appellant contended that it was a small industrial unit and was engaged in “conversion/cutting of jumbo rolls of Cinematographic Colour Films (Unexposed) Positive as ready for production” and the photographic films were imported only for making them ready as Cinematographic Films and no other use was intended. It was also contended that the goods were not misdeclared. It was further contended that the Collector and CEGAT were wrong in holding that the appellant was not an actual user (industrial) as it did not had an industrial licence under the IDR Act. The appellant also emphasised that the CEGAT had committed a grave error of law in relying upon the definition of ‘factory’ as contained in the Factories Act even though it was required to go by the definition of word “factory” as contained in the IDR Act.

D The respondent contended that the goods imported by the appellant were jumbo rolls of ‘Photographic Colour Films (Unexposed) Positive’ and not ‘Cinematographic Colour Films’ as they were not ready for use by putting them on a projector or a camera. In order to make them ‘Cinematographic Colour Films’ it was necessary to subject them to the process of slitting and perforation.

E Allowing the appeals, this Court

F HELD : 1.1. According to Section 111(m) of the Customs Act, 1962, if the description of the imported goods given to the customs authorities does not correspond in respect of value or in any other particular including its description as mentioned in the entry made under the Act, then only they can be said to have been misdeclared and, therefore, liable to confiscation. The word “Entry” in the context of the facts of this case meant an entry made in the Bill of Entry. Therefore, before holding that the goods were misdeclared the authorities were required to come to the conclusion that the imported goods did not correspond in respect of value or in any other particular with the description and the value of the goods as stated in the Bill of Entry.

G 1.2. In the Bill of Entry the imported goods were described as Cinematographic Colour Films (Unexposed) Positive. The size of the goods was also mentioned in the Bill of Entry. There was no dispute in respect of correct valuation of the goods or any other particular except its description

H

as Cinematographic Colour Films. Since the proceedings were initiated for the purpose of confiscation, the burden was on the department to show that the goods imported were not Cinematographic Colour Films but were Photographic Colour Films only. Whether the film was Photographic Film (Unexposed) or Cinematographic Film (Unexposed), it was included under the heading 37.02. Whether with sprocket holes or without sprocket holes they were all described as Photographic Film in Rolls and there was no separate heading or sub-heading in respect of Cinematographic Films having sprocket holes and of width not exceeding 105 mm. Therefore, the scheme of Chapter 37 did not disclose that only those Photographic Films in Rolls (Unexposed) could legitimately be described as Cinematographic Films if they were slitted into a width not exceeding 105 mm and had sprocket holes. Thus, for the purpose of being included under heading 37.02 it was not necessary that the film should have been cut to useable sizes or should have been of a particular width only. All Photographic Films, including Cinematographic Films with or without sprocket holes and having normal width of Cinematographic Film or otherwise were covered by heading 37.02 and since the film imported by the appellant was without sprocket holes and exceeded width of 610 mm and length of 200 mm, it was correctly classifiable under 3702.41 only.

1.3. The goods which were imported by the appellant were Photographic Colour Films (Unexposed) and they were meant for being used as Cinematographic Films. The appellant was engaged in the activity of using such films as raw material for making it ready for use as Cinematographic Film by subjecting the said raw material to the process of slitting, cutting and perforation or making of sprocket holes. It was not even suggested by the customs authorities that the imported goods were ordinarily used for or intended to be used for any other purpose. Therefore, even though the imported goods were not ready for being used as Cinematographic Films in the sense that they could be straightaway put on a projector or a camera, the appellant cannot be said to have misdeclared them by describing and classifying them as Cinematographic Colour Films (Unexposed).

1.4. The word "jumbo" is only indicative of size of the goods and the appellant having specifically stated the size of each roll it was not necessary, as there was no such requirement of law, for him to have described the goods which were in the form of rolls as jumbo rolls. It was also not necessary for him to describe them as the 'jumbo colour film' as there was no separate heading or sub-heading for jumbo colour film in Chapter 37. Merely because the appellant claimed that it was entitled to exemptions in respect of customs

A duty under exemption notification No. 52/86 as amended by 157/88 and because there was a separate exemption notification in respect of jumbo colour films, it cannot be said that the declaration made in the Bill of Entry did not correspond with “any other particular” of the imported goods. Whether the appellant was entitled to benefit of exemption under the said notification or not was a matter of belief of the appellant and not a matter of ‘any other particular’ with respect to the goods. It is also relevant to note that the appellant’s earlier consignment bearing the same description, same classification and identical claim for exemption was cleared by the Delhi Customs House in the previous year.

C 1.5. As the goods imported by the appellant were being used and intended to be used as Cinematographic Film, the appellant had described them as Cinematographic Films covered by sub-heading 3702.20. No attempt was made by the customs authorities either before the Collector or before CEGAT to show that the goods imported by appellant were ordinarily not used as Cinematographic Films or were not intended by the appellant for such a use. Moreover, looking to the heading 3702 and its sub-heading, it does not appear that such goods duty were intended to be covered by sub-heading 3702.90.

E 1.6. As regards the claim for exemption in payment of countervailing duty the appellant had stated that it was entitled to the benefit under notification No.50/88-C.Ex. This declaration made by the appellant had been found to be wrong by the Collector and CEGAT on the ground that there was a separate exemption notification in respect of jumbo rolls for Cinematographic Films. Regarding the claim in respect of payment of customs duty, the declaration was in the nature of a claim made on the basis of the belief entertained by the appellant and therefore, cannot be said to be a misdeclaration as contemplated by Section 111 (m) of the Act. As the appellant had given full and correct particulars as regards the nature and size of the goods, it is difficult to believe that it had referred to the wrong exemption notification with any dishonest intention of evading proper payment of countervailing duty.

G 2.1. Appellant’s undertaking was a small scale industrial undertaking and was registered as such with the Director of Industries, Uttar Pradesh. It was registered for conversion/cutting of jumbo rolls into Cinematographic Films (Unexposed) Positive. Under Paragraph 56 (3) of Chapter 5 of the H Import Export policy, 1988-91, actual users were permitted to meet the

requirements of their imported inputs under OGL subject to the conditions prescribed in Appendix 6. Consistently with the Policy, for the year 1988-91, the central Government, in exercise of the powers conferred under Section 3 of the Import and Export Act, 1947, had issued an order on 30th March, 1988 giving general permission with effect from 1st April, 1988 to actual user (industrial) to import raw materials, components and consumables subject to the conditions specified therein. Condition No. 3 was that the raw material, components and consumables should have been required by the actual user (industrial) concerned for his own use. Condition No. 5 required the actual user (industrial), at the same time of clearance of the goods, to furnish the Customs authorities, a declaration giving particulars of the industrial licence or the registration certificate issued by the appropriate government authority. Thus, a small scale industrial unit could import raw material, components or consumables required by it under OGL on the basis of its industrial licence or registration certificate obtained from the appropriate government authority.

2.2. The position under the Industries (Development & Regulation) Act was that unless the scheduled industry was carried on in a factory as defined by the Act itself, it was not required to take out a licence even though it was an undertaking pertaining to a scheduled industry. This aspect has been totally overlooked by CEGAT. Even the guidelines issued by the Government of India, Ministry of Industry for the benefit of the industries stated that no industrial licence was necessary if the industrial undertaking was not carried on in a factory as defined by the IDR Act. It was the case of the appellant, and it had produced material in support of it, that in its factory not more than 12 workers were ever employed. This fact was never disputed by the Customs authorities. It thus becomes clear that the appellant's industrial undertaking, though engaged in the industrial activity pertaining to the scheduled industry, was not carrying on such industry in factory as defined by the IDR Act. It was, therefore, not necessary for it to obtain a licence under the IDR Act. It did have a certificate of registration issued by the Director of Industries, Uttar Pradesh.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4196 of 1989 Etc.

From the Judgment and Order dated 14.8.89 of the Customs, Excise and Gold (Control) Appellate Tribunal New Delhi in Appeal No. 2092/89-C in (Order No. 388 of 1989-C).

Dushyant A. Dave, Parag P. Tripathi and A.T. Patra, (Gautam Khaitan)

A for M/s Khaitan & Co., for the Appellant/Assessee.

M. Gauri Shanker Murthy, V.K. Verma and P. Parmeswarn for the Revenue/Respondent.

S.K. Mehta for the Applicant in I.A. No. 2.

B

The Judgment of the Court was delivered by

NANAVATI, J. The appellant in both these appeals is Northern Plastics Limited. Civil Appeal No. 4196 of 1989 is filed against the order of remand dated 14.8.89 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as the 'CEGAT') in Customs Appeal No. 2092/89-C. Civil Appeal No. 3325 of 1990 is filed against the order dated 20.4.90 passed by the CEGAT in Customs Appeal No. 2720/89-C, which appeal was against the order of the Collector passed after the remand.

C

D

In January 1989 the appellant imported 59 jumbo rolls of Photographic Colour Films (Unexposed) Positive. On or about 11.1.89 it produced before the Deputy Collector of Customs, Kandla Port the documents required for clearance of the said goods wherein the goods were described as "Cinematographic Colour Films (Unexposed) Positive" falling under Customs Tariff Heading 3702.41 and the Central Excise Tariff Item 3702.20 and entitled to exemption of customs duty under Notification No. 52/86 read with Notification No. 157./88-Customs and of countervailing duty under Notification No.50/88-C.Ex. Clearance of the goods was sought under OGL, the imported goods being Item No. 186 (1) of Part I of List 8 of Appendix 6 of AM 85-88.

E

F

On examination at Kandla Customs House they were found to be "Colour films-jumbo rolls" and, therefore, not entitled to the benefit of exemptions under the said notifications. Therefore, the Collector of Customs, Rajkot initiated proceedings for confiscation under Section 111 (m) of the Customs Act, 1962 and imposition of penalty. The appellant waived show cause notice and requested for a personal hearing. The appellant was charged for misdeclaring the goods as "Cinematographic Colour Films (Unexposed) Positive", with a view to evade Government revenue to the tune of Rs. 51,89,698. The appellant was told that the misdeclaration consisted of wrong description of the goods, in the Bill of Entry and was for the purpose of availing of exemptions in payment of customs duty and countervailing duty.

G

H The appellant was also told that it was having SSI Certificate for only cutting/

conversion of jumbo rolls, and as it was not a manufacturing activity it could not be considered as 'actual user (industrial)'. On this basis it was charged that it had imported the goods illegally. The third point which was raised by the Collector was with respect to eligibility of the goods for exemption in the rates of duty as claimed in the Bill of Entry. A

On completion of the enquiry as regards misdeclaration of goods, the Collector held that the appellant had given a specific description of the product including its length and width and had also shown at the bottom of Bill of Entry that the product was covered by OGL Appendix 6, List 8, Part I of Import Policy A.M.85-88 being raw material. He therefore, held that though the imported item could not be straightaway put on a projector or a camera, nonetheless, it was 'Cinematographic Colour Film (Unexposed) Positive' imported for slitting and perforating and converting it into Cinematographic Colour Films (Unexposed) ready for use on a projector. The Collector also held that the appellant was eligible to import the said goods as actual user (industrial) in terms of Entry No. 297 of Part I of List 8 of Appendix 6 of the Import-Export Policy for the year 1988-91. He accepted the appellant's case that slitting, cutting and perforating, is a manufacturing process and it did have SSI registration certificate issued by the District Industrial Centre, Ghaziabad for "Cinematographic Colour Films (Unexposed) Positive. As ready for production for conversion/cutting of jumbo rolls". The Collector also relied upon the fact that in 1987 the appellant was permitted by the Delhi Customs House to clear an identical consignment under OGL. B
C
D
E

Accordingly he held that it was not a case of misdeclaration of goods either in respect of classification under the Customs Tariff or for showing eligibility to import under OGL.

As regards entitlement to the exemptions claimed, he held that as there were two sets of exemption notifications, one for the Cinematographic Films (Unexposed) and the other for the Jumbo Films (Unexposed) that clearly indicated that the Notifications regarding Cinematographic Films were not applicable to Jumbo Films and, therefore, the appellant was not entitled to the benefit of exemption Notifications Nos.52/86-Cus. dated 17.2.86 and 50/88-C.E. dated 1.3.88. The Collector did not examine whether the appellant was entitled to any other exemption as that was a matter of assessment of duty and not a subject-matter of the proceedings initiated by him. F
G

The Central Board of Excise and Customs found the order passed by the Collector as not legal and proper and, therefore, in exercise of its powers H

A under Section 129D(1) of the Customs Act, directed the Collector to apply to CEGAT for determination of the points specified by the Board in its order. As directed, the Collector made such an application to CEGAT and it was heard as an appeal against the order of the Collector. It may be stated that before the Board the appellant had produced SSI Registration Certificate dated 24.8.85 issued by the Director of Industries, Gaziabad and the Central Excise L-4 Licence dated 23.12.86.

B The CEGAT agreeing with the finding of the Collector that the appellant had imported jumbo rolls of Photographic Films and not Cinematographic Films held that for claiming exemptions under the aforesaid notifications it had misdeclared the goods. It further held that the appellant was not an actual user (industrial) as it did not have an industrial licence issued under the Industries (Development and Regulation) Act, 1951, necessary for claiming the benefit of OGL and, therefore, the goods were imported without a valid import licence. After recording these findings CEGAT observed that all these relevant aspects were not taken into consideration by the Collector while passing the order and, therefore, it remanded the case to the Collector with a direction to re-adjudicate the matter keeping in mind what was said in its order.

E The Collector, accordingly, issued a show cause notice dated 30.8.89 charging the appellant with misdeclaration of goods in order to avail of the exemption benefits and evade payment of customs duty to the tune of Rs. 81,80,698. The basis of the notice was an allegation that the import was unauthorized as the appellants did not have an industrial licence issued under the Industries (Development and Regulation) Act, 1951 and thus it was not an actual user (industrial) entitled to import the said goods under OGL. It was also alleged that the goods imported by the appellant were "jumbo rolls" and not 'Cinematographic Colour Films (Unexposed) Positive' and that the said misdeclaration was made with an intention to wrongly avail of concessional rates of duty even though the goods imported were not entitled to such concessional rates of duty. The basis of this charge was that the goods were not ready for use on a projector or a camera and were required to undergo the process of slitting/cutting and perforation along the length of the film and, therefore, could not be considered as Cinematographic Colour Films. On the basis of these allegations the appellant was called upon to show cause why the imported goods be not confiscated under the provision of Section 111 (d) and 111(m) of the Customs Act, 1962 and why personal penalty should not be levied under Section 112(a)(i) of the Customs Act.

The Collector possibly was inclined to agree with the submissions of the appellant, but held that in view of the finding recorded by CEGAT that "in so far as the identity of the goods is concerned, it is quite clear that what has been imported are jumbo rolls and not cinematographic colour films....." he had no option but to hold that the act of describing the imported goods as "Cinematographic Films" amounted to misdeclaration. The Collector also held that in view of the finding recorded by CEGAT that the appellant did not possess a valid industrial licence under the IDR Act and was thus not an actual user (industrial), he was required to hold that the appellant was not eligible to import the said goods under OGL. In view of the findings recorded by CEGAT, the Collector had no other option and he also expressed his helplessness by observing that "these findings and conclusions of Hon'ble CEGAT forecloses any arguments pleas of the importer against requirement of an industrial licence under IDR Act and hence the charge of unauthorised importation in the absence of such a licence." He then held that the charges of misdeclaration and unauthorised importation were established, rendering the goods liable to confiscation under Sections 111(d) and 111(m) of the Customs Act and rendering the appellant liable to penalty under Section 111(a) of the Customs Act. He ordered confiscation of the 59 rolls, imposed a redemption fine of Rs. 5 lacs and also imposed a personal penalty of Rs. 10 lacs on the appellant.

The appellant feeling aggrieved by the order of the Collector appealed to CEGAT. It was not permitted to challenge the findings regarding misdeclaration and illegality of import as the bench hearing the appeal was of the view that it being a bench of coordinate jurisdiction could not sit in appeal over the findings recorded by the earlier bench. Even though on the earlier occasion, the matter was remanded to the Collector for re-adjudication, all the questions were considered by CEGAT in detail and findings were recorded categorically. On the question of entitlement to the benefits of the said exemption notifications CEGAT held that as the appellant had not filed any appeal against that part of the order of the Collector whereby its claim for exemption was denied and the writ petition filed before the Gujarat High Court was withdrawn, it was not open to the appellant to agitate that question again, particularly when such an issue did not arise out of the Collector's second order passed after remand. The appellant's contention that Additional licences acquired by it covered the import was rejected by CEGAT on the ground that only unattested photo copies of the additional licences were produced and moreover the question of acceptance or otherwise of additional licences could have arisen only if the appellant was held actual user (industrial).

A CEGAT found the amount of redemption fine as reasonable but the amount of penalty was found excessive and, therefore, reduced it from Rs. 10 lacs to Rs. 5 lacs. With this little modification the appeal was disposed of.

B Before we consider the contentions raised on behalf of the appellant, it has to be stated that the findings recorded by CEGAT are inconsistent. For the purpose of holding that there was misdeclaration, CEGAT held that the goods imported were not 'Cinematographic Colour Films (Unexposed) Positive'. It has been so held both in respect of classification and eligibility for benefit of the exemption notifications. However, while holding that the import was illegal it proceeded on the basis that the goods being 'Cinematographic Colour Films (Unexposed) Positive' was not entitled to import them under OGL as it was not an 'actual user (industrial)'. We take it that CEGAT has recorded the later finding on the basis that even if the imported goods were considered as 'Cinematographic Colour Films (Unexposed) Positive' their import under OGL was illegal.

D Mr. Dushyant Dave, learned counsel appearing for the appellant severely criticized the manner in which CEGAT had disposed of the earlier appeal. He submitted that it was highly improper and unfair. CEGAT considered all the points in detail and recorded categorical findings and then remanded the matter to the Collector for re-adjudication. He drew our attention to various parts of the order passed by the Collector to point out how he felt helpless and bound by the findings recorded by CEGAT and could not decide the questions of misdeclaration and legality of import independently. He also drew our attention to the observations made by the subsequent bench to show that even the said bench felt bound by the findings recorded earlier. We find much substance in this grievance made by the learned counsel. On the second occasion also CEGAT did not deal with the appellant fairly as it allowed its business rival to oppose the appeal as an intervenor.

G It is, however, a fact that the appellant had not preferred any appeal against the first order of the Collector whereby it was held that the appellant was not entitled to the benefit of the exemption notifications Nos.52/86-Cus and 50/88-C.Ex. It had filed a writ petition in the High Court of Gujarat against that order but it was withdrawn after CEGAT had disposed of the appeal of the appeal on 14/8/89. The remand was only on the points of misdeclaration and illegality of import and the consequential issues of confiscation and penalty. Since there was no appeal or cross-objection against the order of the Collector rejecting the appellant's claim for exemption under the said notifications CEGAT naturally did not direct the Collector to readjudicate that

H

question also and the order passed by it was not capable of being misunderstood. That part of the order of the Collector having thus become final it is now not open to the appellant to challenge it. A

Therefore, even if the appellant succeeds in satisfying us that the goods imported by it were not misdeclared and that it was entitled to import them under OGL, only relief that can now be granted would be in respect of fine in lieu of confiscation and personal penalty. It was contended by Mr. Dave that the appellant was a small scale industrial unit and was *inter alia* engaged in "conversion/cutting of jumbo rolls of "Cinematographic Colour Films (Unexposed) Positive as ready for production". The Photographic Films were imported by the appellant for making them ready as Cinematographic Films and it was nobody's case that the said goods were intended or could be used for any purpose other than as Cinematographic Films. He also submitted that the appellant having given full description of the goods in the Bill of Entry cannot be said to have misdeclared them and, therefore, the Collector and CEGAT were wrong in holding that the appellant had misdeclared the goods with a view to evade payment of proper customs duty. On the other hand it was contended by the learned counsel for the respondents that the goods imported by the appellant were jumbo rolls of 'Photographic Colour Films (Unexposed) Positive' and not "Cinematographic Colour Films" as they were not ready for use by putting them on a projector or a camera. He submitted that in order to make them "Cinematographic Colour Films" it was necessary to subject them to the process of slitting and perforation. B C D E

As stated earlier, the charge of misdeclaration was based on two counts. Classification of goods was alleged to have been stated incorrectly and secondly the declaration with respect to entitlement of exemptions, under the notifications mentioned in the Bill of Entry was also incorrect. F

We will examine the question of correct classification first. The appellant had imported goods in January, 1989 and the Bill of Entry and related necessary documents were produced by the appellant before the Customs authorities at Kandla sometime between 11.1.1989 and 19.1.1989. Therefore, Chapter 37 of the Customs Tariff for the year 1988-89 was applicable. Chapter 37 dealt with Photographic or Cinematographic goods. It divided those goods under several heads and various sub-heads. Heading No. 37.02 was in respect of "PHOTOGRAPHIC FILM IN ROLLS, SENSITISED, UNEXPOSED, OR ANY MATERIAL OTHER THAN PAPER, PAPER BOARD OR TEXTILS, INSTANT PRINT FILM IN ROLLS, SENSITISED, UNEDXPOSED" If the width of the roll G H

A of 'Photographic Colour Film' exceeded 610 mm and the length exceeded 200 m then such goods were included under sub-heading No.3702.41. In the explanatory notes to HSN in Chapter 37, while explaining the heading 'Photographic Films in Rolls (Unexposed)' falling under heading 37.02 it was stated that the heading 'Photographic Films in Rolls' included Cinematographic Film, normal width of which is 35, 16, 9.5 or 8 mm. It was also stated by way of an explanation that Photographic Films not cut to useable sizes remained classifiable under the same heading. In the whole Chapter Cinematographic Films (Unexposed) in Rolls were not shown separately under a different heading except heading No. 37.06 which was in respect of Cinematographic Film, 'Exposed and Developed'. In this case we are concerned with Cinematographic Films (Unexposed). Therefore, whether the imported goods were Photographic Films in Rolls or Cinematographic Films in Rolls they were covered by heading No. 37.02 and as the width and length of the said rolls exceeded 610 mm and 200 m respectively they had to be classified under sub-heading No. 3702.41. There was no heading or sub-heading in Chapter 37 which could have covered the imported goods. Moreover, the term 'Photographic Film' is wider than the term 'Cinematographic Film' and, therefore, would include within its meaning Cinematographic Films also. The difference between the two lies in this that a Cinematographic Film is one which is slitted and perforated and thus made ready for use on a projector or a camera. Yet there was no separate heading or sub-heading in respect of Cinematographic Film (Unexposed). When all this is considered along with the explanatory notes to HSN of Chapter 37 it becomes apparent that Cinematographic Film, the normal width of which used to be 35,16, 9.5 or 8 mm, was not considered as a separate item and Photographic Films in Rolls useable as Cinematographic Films (ready) were treated almost as interchangeable terms. Neither the customs tariff nor the central excise tariff for the years 1988-89 indicated that the term 'Cinematographic Films' was intended to mean 'Photographic Film' made ready by slitting, cutting and perforation (i.e. making sprocket holes), for use on a projector or a camera.

The only reason why the Collector of Customs and CEGAT held that the classification of the goods was misdeclared was that they were Photographic Films in Rolls and not Cinematographic Films in Rolls as they could not have been straightaway put on a projector or a camera and for making them ready for that purpose it was necessary to subject them to the process of slitting, cutting and perforation. This reasoning of the Collector and CEGAT is clearly erroneous and misconceived. The charge of misdeclaration of goods was based upon Section 111(m) of the Customs Act.

According to the said provision the goods brought from a place outside India are liable to confiscation if the goods. "do not correspond in respect of value or in any other particular with the entry made under this Act." Therefore, if the description of the imported goods given to the customs authorities does not correspond in respect of value or in any other particular including its description as mentioned in the Entry made under the Act, then only they can be said to have been misdeclared and, therefore, liable to confiscation. The word "Entry" in the context of the facts of this case meant an Entry made in the Bill of Entry. Therefore, before holding that the goods were misdeclared the authorities were required to come to the conclusion that the imported goods did not correspond in respect of value or in any other particular with the description and the value of the goods as stated in the Bill of Entry. In the Bill of Entry the imported goods were described as Cinematographic Colour Films (Unexposed) Positive. The size of the goods was also mentioned in the Bill of Entry. There was no dispute in respect of correct valuation of the goods or any other particular except its description as Cinematographic Colour Films. Since the proceedings were initiated for the purpose of confiscation the burden was on the Department to show that the goods imported were not Cinematographic Colour Films but were Photographic Colour Films only. We have already referred to the scheme and the relevant heading and sub-headings of Chapter 37 of the Customs Tariff for the year 1988-89 and observed that there was no separate heading or sub-headings in respect of Cinematographic Colour Films (Unexposed). Whether the film was Photographic Film (Unexposed) or Cinematographic Film (Unexposed), it was included under the heading 37.02. Whether with sprocket holes or without sprocket holes they were all described as Photographic Film in Rolls and there was no separate heading or sub-heading in respect of Cinematographic Films having sprocket holes and of width not exceeding 105 mm. Therefore, the scheme of Chapter 37 did not disclose that only those Photographic Films in Rolls (Unexposed) could legitimately be described as Cinematographic Films if they were slitted into a width not exceeding 105 mm and had sprocket holes. Thus for the purpose of being included under heading 37.02 it was not necessary that the film should have been cut to useable sizes or should have been of a particular width only. All Photographic Films, including Cinematographic Films with or without sprocket holes and having normal width of Cinematographic Film or otherwise were covered by heading 37.02 and since the film imported by the appellant was without sprocket holes and exceeded width of 610 mm and length of 200 m, it was correctly classifiable under 3702.41 only. It is, therefore, difficult to appreciate how for the purpose of the Customs Act and for payment of customs duty the goods cannot be said to have been correctly classified. The goods which were imported by the appellant were Photographic Colour Films (Unexposed) and they were

A

B

C

D

E

F

G

H

A meant for being used as Cinematographic Films. The appellant was engaged in the activity of using such films as raw material for making it ready for use as Cinematographic Film by subjecting the said raw material to the process of slitting, cutting and perforation or making of sprocket holes. It was not even suggested by the customs authorities that the imported goods were ordinarily used for or intended to be used for any other purpose. Therefore, even though the imported goods were not ready for being used as Cinematographic Films in the sense that they could be straightaway put on a projector or a camera, the appellant cannot be said to have misdeclared them by describing and classifying them as Cinematographic Colour Films (Unexposed).

C The second ground on which it was held that the imported goods were misdeclared was that the appellant had wrongly stated in the Bill of Entry that it was entitled to the benefit of exemption notification No.52/86-cus as amended by notification No. 157/88-cus. and notification No.50/88-C.Ex. In the Bill of Entry and other related documents the appellant had given specific and clear description of the goods as can be seen from the following extract from the Bill of Entry:

“Cinematographic Colour Films (Unexposed) Positive.

Size: Length 1250 mtrs.x width 1140 mm.

E (Useable length 1250 mtrs.x width 1085 mm)

Total Linear Metres:

59 Rolls x 1250 m = 73, 750 mtrs.

F Total sq. m. $1250 \times 1140 \times 59 = 84075$.”

The appellant had not described the rolls as jumbo rolls but had given the length and width of each roll. The word “jumbo” is only indicative of size of the goods and the appellant having specifically stated the size of each roll it was not necessary, as there was no such requirement of law, for him to have described the goods which were in the form of rolls as jumbo rolls. It was also not necessary for him to describe them as the ‘jumbo colour film’ as there was no separate heading or sub-heading for jumbo colour film in Chapter 37. Merely because the appellant claimed that it was entitled to exemptions in respect of customs duty under exemption notification No.52/86 as amended by 157/88 and because there was separate exemption notification

in respect of colour jumbo films, it cannot be said that the declaration made in the Bill of Entry did not correspond with "any other particular" of the imported goods. Whether the appellant was entitled to the benefit of exemption under the said notification or not was a matter of belief of the appellant and not a matter of 'any other particular' with respect to the goods. It is also relevant to note that the appellant's earlier consignment bearing the same description, same classification and identical claim for exemptions was cleared by the Delhi Customs House in the previous year. The Collector and CEGAT were, therefore, clearly in error in holding that by claiming benefit of exemptions under notifications which really did not apply to the imported goods, the appellant had intentionally tried to evade proper payment of customs duty.

For the purpose of claiming benefit of exemption in respect of countervailing duty, the appellant had stated in the Bill of Entry that the goods imported by it were covered by the heading 3702 and by the sub-heading 3702.20 of Chapter 37 of the Central Excise Tariff and that it was entitled to the exemption to the extent provided under notification No.50/88-C.Ex. Under Central Excise Tariff for the year 1988-89 also Chapter 37 dealt with Photographic or Cinematographic goods. The relevant heading in respect of Photographic Film in Rolls was 37.02 and it read as under:-

"PHOTOGRAPHIC FILM IN ROLLS, SENSITISED, UNEXPOSED OF ANY MATERIAL OTHER THAN PAPER, PAPER BOARD OR TEXTILES; INSTANT PRINT FILM IN ROLLS, SENSITISED, UNEXPOSED."

Photographic Film in Rolls (Unexposed) were covered by heading 37.02. If it was meant for X-Ray then the proper sub-heading for it was 3702.10. Cinematographic Films (Unexposed) were covered by sub-heading 3702.20 and for other types of Photographic Films in Rolls the proper heading was 3702.90.

As the goods imported by the appellant were being used and intended to be used as Cinematographic Films, the appellant had described them as Cinematographic Films covered by sub-heading 3702.20. No attempt was made by the customs authorities either before the Collector or before CEGAT to show that the goods imported by the appellant were ordinarily not used as Cinematographic Films or were not intended by the appellant for such a use. Moreover, looking to the heading 3702 and its sub-heading, it does not appear that such goods were intended to be covered by sub-heading 3702.90. As regards the claim for exemption in payment of countervailing duty the appellant had stated that it was entitled to the benefit under notification

A No.50/88-C.Ex. This declaration made by the appellant has been found to be wrong by the Collector and CEGAT on the ground that there was a separate exemption notification in respect of jumbo rolls for Cinematographic Films. While dealing with such a claim in respect of payment of customs duty we have already observed that the declaration was in the nature of a claim made on the basis of the belief entertained by the appellant and therefore, cannot be said to be a misdeclaration as contemplated by Section 111(m) of the Customs Act. As the appellant had given full and correct particulars as regards the nature and size of the goods, it is difficult to believe that it had referred to the wrong exemption notification with any dishonest intention of evading proper payment of countervailing duty.

C We, therefore, hold that the appellant had not misdeclared the imported goods either by making a wrong declaration as regards the classification of the goods or by claiming benefit of the exemption notifications which have been found not applicable to the imported goods. We are also of the view that the declarations in the Bill of Entry were not made with any dishonest intention of evading payment of customs and countervailing duty.

D The order of confiscation has also been upheld by CEGAT on the ground that the appellant did not have an industrial licence under the IDR Act and, therefore, it was not an 'actual user (industrial)' eligible to import the said goods under OGL. It was contended by Mr. Dave that the Collector and CEGAT have committed a grave error in holding that the appellant was not an 'actual user (industrial)', as it did not have an industrial license under the IDR Act. He submitted that under the Import and Export Policy for the year 1988-91 items included in Part 1 of List 8 of Appendix 6 could be imported under Open General Licence by actual user (industrial). Jumbo rolls of Cinematographic Colour Films (Unexposed) were included at Serial No. 297 in the said list. Thus, it was permissible to actual user (industrial) to import jumbo rolls of Cinematographic Colour Films under OGL. The Import and Export Policy defined actual user (industrial) to mean an industrial undertaking, be it in the large scale, small scale or cottage industry sector, engaged in the manufacture of any goods for which it holds a licence or registration certificate from the appropriate government authority, wherever applicable.

G Therefore, the question which arises for consideration is whether the appellant was an actual user (industrial) as per this definition. Appellant's H undertaking was a small scale industrial undertaking and was registered as

such with the Director of Industries, Uttar Pradesh. It was registered for conversion/cutting of jumbo rolls into Cinematographic Colour Films (Unexposed) Positive. Under Paragraph 56(3) of Chapter 5 of the Policy, actual users were permitted to meet the requirements of their imported inputs under OGL subject to the conditions prescribed in Appendix 6. Consistently with Import and Export Policy for the year 1988-91, the Central Government, in exercise of the powers conferred under Section 3 of the Import and Export Act, 1947, had issued an order on 30th March, 1988 giving general permission with effect from 1st April, 1988 to actual user (industrial) to import raw materials, components and consumables subject to the conditions specified therein. Condition No. 3 was that the raw material, components and consumables should have been required by the actual user (industrial) concerned for his own use. Condition No. 5 required the actual user (industrial), at the time of clearance of the goods, to furnish the Customs authorities, a declaration giving particulars of the industrial licence or the registration certificate issued by the appropriate government authority.

Thus, a small scale industrial unit could import raw material, components or consumables required by it under OGL on the basis of its industrial licence or registration certificate obtained from the appropriate government authority.

What has been held by CEGAT is that the appellant required an industrial licence issued under the IDR Act as slitting and cutting of jumbo rolls, was a controlled/scheduled industry under that Act. Under that Act it was necessary for a new industrial undertaking to obtain a licence if it was an undertaking pertaining to a scheduled industry carried on in a factory. CEGAT relying upon these provisions of IDR Act and the definition of factory as contained in Factories Act held that the appellant's undertaking being a new undertaking was required to obtain a licence as it was pertaining to a scheduled industry carried on in its factory. It was, however, contended by Mr. Dave, learned counsel for the appellant that CEGAT committed a grave error of law in relying upon the definition of 'factory' as contained in the Factories Act even though it was required to go by the definition of factory as contained in the IDR Act. He rightly submitted that as the IDR Act itself contains definition of word "factory" that definition should have been considered instead of the definition given in the Factories Act. The IDR Act defines factory to mean "any premises, including precincts thereof, in any part of which a manufacturing process is carried on or is ordinarily so carried on- (i) with the aid of power, provided that fifty or more workers are working or were working thereon on any day of the preceding twelve months; or (ii)..." It also

- A defines industrial undertaking to mean any undertaking pertaining to a scheduled industry carried on in one or more factories by any person. Thus, the position under the IDR Act was that unless the scheduled industry was carried on in a factory as defined by the IDR Act, it was not required to take out a licence even though it was an undertaking pertaining to a scheduled industry. This aspect has been totally overlooked by CEGAT. Even the guidelines issued by the Government of India, Ministry of Industry for the benefit of the industries stated that no industrial licence was necessary if the industrial undertaking was not carried on in a factory as defined by the IDR Act. It was the case of the appellant, and it had produced material in support of it, that in its factory not more than twelve workers were ever employed.
- B
- C This fact was not disputed by the Customs authorities. It thus becomes clear that the appellant's industrial undertaking, though engaged in the industrial activity pertaining to the scheduled industry, was not carrying on such industry in a factory as defined by the Act. It was, therefore, not necessary for it to obtain a licence under the IDR Act. It did have a certificate of registration issued by the Director of Industries, Uttar Pradesh. Even the definition of 'actual user (industrial)' which we have quoted above makes it clear that licence under the IDR Act was required if the provision of the IDR Act in that behalf was applicable. As pointed out earlier, for the purpose of answering the definition of 'actual user (industrial)' it was not necessary for the appellant to obtain a licence under the IDR Act. It was sufficient, for the appellant to be called an actual user (industrial), to have a certificate of registration issued by the competent authority. The CEGAT was, therefore, in error in holding that importation of 59 jumbo rolls of Cinematographic Films by the appellant was unlawful and, therefore, liable to confiscation.
- D
- E

Therefore, neither on the ground of misdeclaration nor on the ground of import being unauthorized or illegal, the goods imported by the appellant were liable to confiscation. We, therefore, allow these appeal, set aside the order of confiscation and also the order levying fine of Rs. 5 lakhs in lieu of confiscation. We also set aside the order of penalty imposed upon the appellant. In view of the facts and circumstances of the cases, the parties shall bear their own cost.

G

R.K.

Appeals allowed.