CASE NO.:
Appeal (civil) 2576 of 2001

PETITIONER:
Commissioner of Customs, Chennai

RESPONDENT:
M/s Pentamedia Graphics Ltd.

DATE OF JUDGMENT: 09/05/2006

BENCH:
ASHOK BHAN & MARKANDEY KATJU

JUDGMENT:
J U D G M E N T

BHAN, J.

The issue involved in the present case is: Whether the imported goods, i.e. 'Motion Capture Animation Files' will come under the purview of Customs Notification No. 29/99 as 'information technology software' for claiming exemption from payment of duty?

Respondent/assessee (for short "the Respondent") imported 'Motion Capture Animation Files' valued at Rs. 7,02,58,125/- and classified them under heading 85.24 and claimed exemption from payment of customs duty under Notification No. 20/99-Cus. It will be convenient to refer to the relevant portion of the notification:

"85.24 - (i) Information technology software, and
(ii) Document of title conveying the right to use Information Technology software.

Explanation:- "information technology Software ' means any representation of instructions, data, sound or image including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine.

[Hereinafter referred to as the 'amended notification']

It may be noted that this explanation substituted the explanation in the earlier notification no. 23/98 which read as:

"Explanation. - 'Computer software'

means any representation of instructions, data, sound or image, including source code or object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine falling under heading No. 84.71, but does not include software required for operation of any machine performing a specific function other than data processing, and incorporating or working in conjunction with an automatic data processing machine.

[Hereinafter referred to as the 'original notification]

The assessing authority vide his order dated 25.11.1999 denied the benefit of the notification although he did not dispute the classification of the goods under heading 85.24 as software. Against the order of the Assessing Authority, Respondent filed an appeal before the Commissioner of Customs (Appeals) who vide his order dated 14.3.2000 dismissed the appeal although it was accepted by him that the files contain data in a machine readable form. It would be useful to refer to the conclusion arrived at by the Commissioner of Customs (Appeals), the same reads:

"As seen from the records the goods are in the nature of files containing positional information i.e certain actors are asked to perform with sensors attached to their bodies and these motions are shot with the help of infrared cameras and recorded in the tapes. This positional information is transferred on the created objects so that they perform in a similar manner. The transfer of this data on to the object is done with the help of a software known as 'soft image'. In other words, the goods imported are in the nature of data recorded in the tapes which can only be transferred to other objects using software which is not part of the imported consignment. It is significant that the goods imported do not consist of a programme which would enable the manipulation of the files. In that sense, in the condition in which they have been imported, they are not capable of being manipulated but remain mere information. Thus, even though the files contain data in a machine readable form, they are not capable of manipulation. They also do not provide interactivity to the user, as it is only a data and no programme or set of

instructions are contained in the cartridges. For the above reasons, I find no infirmity in the order of the lower authority holding that the goods are not eligible for the benefit of exemption under Sl.No. 231 of the Table to the notification 20/99 cus."

Respondent being aggrieved filed an appeal before the Customs Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as "the Tribunal"). The Tribunal by the impugned order has accepted the appeal; set aside the orders impugned before it and held the assessee to be entitled to the exemption under the amended notification. It has been held by the Tribunal that the deletion of the words "but does not include software required for operation of any machine performing a specific function other than data processing, and incorporating or working in conjunction with an automatic data processing machine" from the earlier notification are very relevant and has increased the scope of the kind of softwares which can now be imported duty free under the amended notification. That under the amended notification, any kind of data which is capable of being manipulated by means of automatic data processing machine would be covered by the term 'information technology software'.

Shri B.B. Singh, learned counsel appearing for the Revenue contended that the imported goods are only data and not programme or set of instructions and therefore not covered under the notification. He further contended that the imported files were mere information and not capable of being manipulated by automatic data processing machine. That the amended notification though has expanded the width and scope of the exemption notification but the same was not enough for the software in question to be included.

As against this, Shri V. Sridharan, learned counsel appearing for the Respondent contended that the scope of the amended notification is much wider then the earlier exemption notification. As per amended notification any kind of data which is capable of being manipulated by automatic data processing, would be covered by the term 'information technology software'. It was further contended by him that the goods under import are computer software recorded in a machine readable form and capable of being manipulated by means of an automatic data processing machine. For this he has placed reliance upon the letter written by Prof. S. Raman, Associate Professor, Department of Computer Science and Engineering, at IIT, Madras, in response to the query raised by the Department. He also referred to certain dictionaries explaining the meaning of the word "software".

Random House Compact Unabridged Dictionary defines software to mean: "anything that is not

hardware but is used with hardware esp. audiovisual material such as film, tape records etc,". According to Mc Graw Hill Encyclopedia of Science and Technology, "software" means the totality of programme usable on a particular kind of computer, together with the documentation associated with a computer program". Encyclopedia Britannica defines "software" to mean, "Software is an entire set of programs procedure, and routines associated with the operation of a computer system, including the operating system. The term differentiates these features from hardware, the physical components of a computer system, including the operating system. The term differentiates these features from hardware, the physical components of a computer system. Two main types of software are systems software, which controls a computer's internal functioning, and application software, which directs the computer to execute commands that solve practical problems. \005. Software is written by programmers in any number of programming languages. This information, the source code, must then be translated by means of a compiler into machine language, which the computer can understand and act on."

A. C. Downton, Computer and Microprocessors postulates that if a software is required to load a programme on the computer then the programme which has to be loaded on the computer does not cease to be a software and the same continues to be a software.

Prof. S. Raman, Associate Professor, Department of Computer Science and Engineering, at IIT, Madras, responded to the query raised by the Revenue as under:

"The motion capture animation files, normally referred to as software in the industry which could only be manipulated and modified by 3D animation software to apply the motion to computer Graphics models in the computer. These manipulations are using interactive tools within the software to control various parameters to make the computer graphics director achieve his imagination seen on the computer screen. These motion files are captured from live actors performing, using special suits to transfer their motion information to the computer. These are then processed for compatibility with animation software, and the processed files at various stages of capture are sent to us. One is a positional capture file, the other is rotational capture file and the last is texture file of natural effects like water animated for various camera and wind velocity. These files can be interactively modified and used for various domestic

requirements of the advertising broadcast and film industry.

We further bring to your kind attention that the Motion Capture Animation files or data are computer software recorded in a machine readable (Exabyte cartridge tapes) form and capable of being manipulated, but, by themselves, the files cannot be used as independent entities."

Thus according to Prof. S. Raman, who is an expert on the subject, Motion Capture Animation files on data are computer software recorded in a machine readable form and capable of being manipulated, though by themselves the files cannot be used as independent entities.

Submission of the learned counsel appearing for the Revenue that the 'Capture Animation Files' are not software since another software is required to load the same is without any substance. It is evident from the book of Computers and Microprocessors by A.C. Downton, that a loader programme is required to load software on the disk of the computer. This concept is called as boot strapping. In other words, if software is required to load a programme on the computer then the programme which has to be loaded on the computer continues to be software. Simply because the 'Motion Capture Animation Files' requires another software known as 'soft image' to get the final result does not detract the goods under import from being software. The same continues to be a software and entitled to exemption under notification No. 20/90-Cus.

Prof. S. Raman, Associate Professor, of IIT, Madras, who is an expert on the subject has opined that the 'Motion Capture Animation Files' are normally referred to as software in the industry and the same can be manipulated and modified by 3D animation software. These files can be interactively modified and used for various domestic requirements of the advertising, broadcast and film industry. According to him 'Motion Capture Animation Files' on data are computer software recorded in a machine readable form and capable of being manipulated and the same are software.

Random House Compact Unabridged Dictionary refers to "software" as anything that is not hardware and is used with hardware. Encyclopedia Britannica refers to "software" to designate non-hardware items, namely internal programmes or routines and programming aids. Thus the programming aids are also known as software and thus the goods in question would fall within the meaning of the word "software". The goods under import are admittedly data recorded on tapes. Under the existing Notification No. 20/99 any kind of data in a machine readable form and capable of

being manipulated by means of an automatic data processing machine would be covered by the term "Information Technology Software".

For the reasons stated above, the goods under import are computer software recorded in a machine readable form and capable of being manipulated by means of an automatic data processing machine. We do not find any infirmity in the impugned order of the Tribunal.

For the reasons stated above, we do not find any merit in this appeal and dismiss the same. Parties shall bear their own costs.

JUDIS