IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI, PRINCIPAL BENCH, NEW DELHI

Date of Hearing: 07.12.2017
Date of Decision: 26.12.2017

Appeal No. C/50558/2017-DB

[Arising out of Order-in-Appeal No. CC(A)Cus/D-I/GEN/24/2017 dated 10.02.2017 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

M/s Fujitsu Ten India Pvt. Ltd. Appellant

Vs.

Commissioner of Customs, New Delhi Respondent

Appearance:
Rep. by Sh. Lalitendra Guliani , Advocate for the Appellant
Rep. by Sh. P. Juneja, AR for the Respondent

Coram: Hon'ble Shri Justice Dr. Satish Chandra, President
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No.58597/2017

Per B. Ravichandran:

The appeal is against order dated 10.02.2017 of Commissioner of Customs (Appeals), Airport, New Delhi.

2. The brief facts of the case are that the appellant is regularly importing goods from Thailand, China and Philippines. The suppliers of these imported goods viz. parts used in the manufacture of car infotainment systems like semi-conductor components, etc, are related to the appellants. The foreign suppliers are subsidiaries of same parent entity and are related to the appellant in terms of Rule 2(2) of Customs Valuation Rules, 2007. The appellants entered into a license agreement with M/s Fujitsu Ten Limited, Japan on 30.05.2013. The said agreement allowed the appellant the right to use IPR and know how, for the manufacture of

car infotainment system. The valuation of imported goods were examined by the Special Valuation Branch, New Customs House, New Delhi in terms of Circular dated 23.02.2001 of the Board. On completion of verification of various documents, the Original Authority held that royalty paid by the appellant to Fujitsu Ten Limited and Patent and Software usage fee paid are required to be added in the assessable value in terms of Rule 10 of Customs Valuation Rules, 2007.

3. The appellants contested the above finding before the Commissioner (Appeals). The Commissioner (Appeals) vide the impugned order held that the above charges are rightly includible in the assessable value and accordingly, rejected the appeal. Aggrieved by this, the appellant preferred this appeal.

4. Ld. Counsel appearing for the appellant submitted that the lower authorities erred in applying the provisions of Rule 10(1)(c) of the Customs Valuation Rules, 2007, to the present imports. Drawing our attention to the statutory provisions, the ld. Counsel submitted that for addition of royalty in the admissible value, the said royalty should have been paid in relation to the imported goods and payment of royalty should be a condition for sale of the imported goods. These twin conditions have not been fulfilled in the present case. He further submitted that there is no clear nexus between the payment of fees by the appellant to the foreign supplier and the goods under import. He relied on various decided cases in support of his assertion.

5. Ld. Counsel also submitted that the loading of value attributable to software fee is not legally sustainable. The ld. Counsel submitted that Rule 10 (1)(e) of the Valuation Rules covers all other payments made as a condition of sale of the imported goods. The software imported includes the application/operating software

for the final product. They are not disputing the coverage of the valuation with reference to firmware/embedded ware already part of the imported goods. The ld. Counsel submitted a chart to reiterate that there were various software relating to functionality and display in the final product, which has no direct relation to the imported items. The payment of software fee to Japan Co. as “third party” does not satisfy the obligation of the exporters. The ld. Counsel prayed for setting aside the impugned order.

6. Ld.AR supported the findings of the lower authorities. He submitted that the Original Authority examined in detail the scope of agreement, nature of payment made by the appellant and applicable statutory provisions under Valuation Rules. Since the royalty payment is determined based on the gross sales, which includes the cost of imported goods, the appellant cannot plead that there is no nexus between the royalty paid and the import. Similarly, the various softwares were used by the appellant, which are essential for making the imported components for integration as well as functionality. The submission of the appellant that operating/application software used in the final product has no relevance to the imported goods is misleading and erroneous. In the manufacture of electronic items, such compartmentalization of individual components with reference to the operating/application software and firmware/embedded ware will be artificial and not tenable. The software fee paid by the appellant is clearly for functionality and utility of the imported goods in the overall manufacture and final operation of the car infotainment system. He supported the findings of the lower authorities on both the points.

7. We have heard both the sides and perused the appeal records.

8. The agreement dated 30.05.2013 explained the scope of "IPR", "licensed products", and "know how".

9. We have carefully perused the said agreement. "Licensed products", means products in which the foreign company approve the appellant's use of industrial property rights and know-how for the manufacture and sale by the appellant. The appellants are liable to pay royalty on gross sale value of the manufactured goods. Admittedly, such value includes cost of goods imported by the appellant. The lower authorities held that there is no provision for exclusion of cost of imported goods in such situation. Reliance was placed on the decision of the Hon'ble Supreme Court in **Matsushita Television & Audio Co. -** 2007 (211) ELT 200 (SC).When the cost of imported items were included in the net ex factory sale price of the manufactured goods and the importer pays royalty as a percentage of turnover of final product, which included the cost of imported components, it becomes a condition of sale of finished goods. Hence, both the conditions of Rule 9(1)(c) of the Valuation Rules are satisfied. The Tribunal, in the case of **Herbalife International India Pvt. Ltd. – 2016 (341) ELT 257 (Tribunal-Mum.)** and **Husco Hydraulics Pvt. Ltd. – 2016 (341) ELT 113 (Tribunal-Mumbai)**, held that when the cost of imported goods is included in the amount, which is considered for payment of royalty, then such royalty should be added in the assessable value of imported goods.

10. Regarding payment of patent/software fee, the claim of the appellant is that they are reimbursing the said fee on behalf of the various patent /software owners for which agreement dated 30.05.2013 was entered into with Fujitsu Ten India Ltd., Japan. This is to get volume discount. These softwares are essentially

required to make the imported components integrated and functional as well as for final operation of the manufactured goods. Admittedly, these patent/softwares are required for the functional utility of the imported items as well as the finished final product. The appellants are under obligation to pay fee for the said third party patent/software. Rule 10(1)(e) of the Valuation Rules stipulates that all other payments actually made are to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to the third party to satisfy and obligation of the seller to the extent that such payments are not included in the price actually paid or payable, shall be added to the price actually paid or payable for the imported goods. Explanation to the said rule provides that whether the royalty, license fee or any other payment for a process, whether partial or otherwise, is includible.

11. Accordingly, in view of the above analysis, we find no infirmity in the impugned order. The appeal is dismissed.

[Pronounced in open court on 26.12.2017]

(Justice Dr. Satish Chandra)
President

(B.Ravichandran)
Member (Technical)

ckp