CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 119 OF 2009

[Arising out of Order-in-Original No: 163/2008/CAC/CC(I)/SR/Gr.VA dated 28th November 2018 passed by the Commissioner of Customs (Import), Mumbai – I.]

Arcil Catalyst Pvt Ltd
Birlagram, Nagda, Dist: Ujjain, Madhya Pradesh … ***Appellant***

versus

Commissioner of Customs (Import)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 227 OF 2009

[Arising out of Order-in-Original No: 163/2008/CAC/CC(I)/SR/Gr.VA dated 28th November 2018 passed by the Commissioner of Customs (Import), Mumbai – I.]

Commissioner of Customs (Import)
New Custom House, Ballard Estate, Mumbai - 400001 … ***Appellant***

versus

Atofina Catalyst India Pvt Ltd
Birlagram, Nagda, Dist: Ujjain, Madhya Pradesh ***…Respondent***

APPEARANCE:

Shri T Viswanathan, Advocate with Mr. Akhilesh Kangsia, Advocate for the assessee-appellant

Shri Ramesh Kumar, Assistant Commissioner (AR) for Revenue

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87371-87372 /2021

DATE OF HEARING: 20/09/2021
DATE OF DECISION: 22/12/2021

PER: C J MATHEW

The confrontation between M/s Arcil Catalyst Pvt Ltd (previously known as M/s Atofina Catalyst India Pvt Ltd), and the customs authorities has its origins in the scope of, and extent to which, the payment clause in two separate contracts – one for supply of goods and the other for providing of 'technical know-how' in connection with their facility for production of 'aluminium chloride anhydrous' – are both attributable to the import of goods and, thereby, to be assessed to duty under the authority of section 12 of Customs Act, 1962. The constitutional scheme of taxation envisages levy of duties of customs on goods crossing the international boundaries; taxing of services under that authority is anathema. Yet, an uncharacteristic enablement was necessary to ensure that the 'transaction value' was well and truly captured for *ad valorem* assessment. Under the empowerment, of section 14 of Customs Act, 1962 to frame rules for valuation, specifically enumerated intangibles, and circumscribed with precision, are permissible to be taxed along with the commodity. It is the inextricable association with goods under import that imparts the necessity for inclusion in the assessable

value and lying, as it does, on the very edge that separates the tangible from the intangible, approval of inclusion has to be carefully considered to avoid opening the floodgates of revenue enthusiasm that may transcend constitutional intendment. It is that monitorial assignment which falls to us in resolution of this dispute.

2. The appellant-assessee had filed bill of entry no. 172123/26.02.2001 for the import of 'reactor set' valued at ₹ 24,66,854/- on which duties of customs totaling ₹ 15,65,381.90 had been discharged. In the course of investigation, the revelation of two payments – US$ 1,00,000/- (₹ 47,18,000/) for 'technical know-how' against commercial invoice dated 10th December 2002 and US$ 27,061 (₹ 13,01,364/-) for 'technical assistance agreement' against commercial invoice dated 19th December 2002 – was considered sufficient to initiate proceedings for including these in the assessable value under the empowerment of rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Thereafter, order-in-original no. CAO/163/2008/ CAC/CC (I)/SR/Gr.VA dated 28th November 2008 confirmed duty liability of ₹ 40,38,173/- under section 28 of Customs Act, 1962 arising from upward revision of the assessable value by ₹ 60,19,364/-, along with applicable interest thereon under section 28AB of Customs Act, 1962, besides imposing penalty of ₹ 2,00,000/- under section 112 of Customs Act, 1962. Furthermore, the goods, confiscated under section 111(m) of Customs

Act, 1962, were permitted to be redeemed on payment of fine of ₹ 7,50,000/-. These detriments are under challenge in appeal of importer and Revenue is in appeal against the non-imposition of penalty under section 114A of Customs Act, 1962.

3. The notice issued to the appellant alleged that the goods intended to be imported and the support to be rendered for establishing the manufacturing facility, though purporting to be independent transactions, were connected through 'licence agreement' dated 15th September 1999, which preceded both the purchase order dated 13th December 2000 for the 'reactor set', and the 'certificate of conformity' dated 11th July 2001 documenting adherence to the 'basic engineering package' in the licence agreement for the two-stage collaboration in de-bottlenecking of the existing plant and subsequent upgradation to achieve expansion of capacity. On the concatenation of this factual matrix, the adjudicating authority concluded that the impugned capital goods could not have been commissioned for production without the 'technical know-how' and 'technical assistance' rendered by the overseas supplier of the goods. It was also held that the purchase of the capital goods from the collaborator was integral to the 'licence agreement' as evidenced by the pre-requisite of 'certificate of conformity' issued before the commencement of production. The addition to assessable value relied upon the information furnished by the importer about payments made to M/s

Atofina, France.

4. The findings of the adjudicating authority, Commissioner of Customs (Import), Mumbai, that

> *'26. The contention of the noticee that the technology fee was a post import event is not acceptable as the agreement of technology transfer was signed on 15.09.1999 much before the actual date of import on 26.02.2001 and the fees was paid only after the complete setting of manufacturing unit by using that technology. Therefore both technology and plant are part and parcel of each other. This fact is supported by two things; one the plant would not have been set up and run without supply of the technical knowledge. Second the technical assistance agreement and licence agreement for survey of plant and machinery were signed on same day i.e. 15.09.1999. Therefore in such circumstances the technology know how fees becomes liable to be included in the transaction value of plant for the purpose of assessment of Customs duty.*
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> *27. I find that the noticees suppressed the fact that they had procured technical know how alongwith said plant, knowingly from the department at the time of import of said goods with a view to evade the Customs duty Rs. 40,38,173/- as calculated in the show cause notice. Further, the noticee did not disclose the conditions and agreements related to sale/procurement of said plant in the GATT declaration filed at the time of import. Hence the extended period of limitation envisaged under proviso to section 28(1) of the Customs Act, 1962 is invokable for demand of recovery of Customs duty not paid at the time of import. Therefore, the Noticee has contravened the provisions of of Section 14, 28C, 46 of the*

Customs Act, 1962 read with Rule 9 and Rule 10 of the Customs Valuation Rules,1988 by way of not observing the provisions of said Rules for inclusion of Technical Know How Charges in the Transaction Value of the goods i.e. Plant & Machinery.

28. In terms of Rule 9(1)(c) and 9(1)(e) of the Customs Valuation Rules, 1988, if buyer pays any amount to the seller on account of Royalty / Licence fees / other payments as a condition of sale, to the extent that such payments are not included in the price actually paid or payable, then such payments are to be added to the transaction value of the goods. In the present case, it is evident that the imported plant and machinery cannot work without the technical know-how provided by the supplier and as per agreement both the payments i.e payments for Plants and machinery and payment for technical know-how are related to each other as both are on account of condition of sale. Therefore, the importer was supposed to declare both the payments / values to the proper officer at the time of import. This action on the part of the importer would be treated as wilfull suppression of facts and duty may be recovered within extended period as per proviso to Section 28(1) of the Customs Act, 1962.'

was referred to by Learned Counsel for appellant as he took us through the contents of the 'licence agreement' and it is contended that the absence of any provision therein requiring that capital goods be procured exclusively from the overseas supplier was overlooked by the adjudicating authority as was the sourcing of other capital goods valued at ₹ 4,77,53,735 from others, both within and outside the country, in comparison with which the goods, valued at ₹ 24,6,854,

supplied by M/s Atofina, France pales to relative insignificance. According to Learned Counsel, 'licence fee' is not a condition for sale of imported goods and, hence, beyond the scope of the addition envisaged in rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. It is further submitted that the several decisions relied upon in the impugned order had been handed down during the early stages of evolution of jurisprudence in taxation of 'royalties and licence fees' as is evident from the decisions of the Hon'ble Supreme Court in *Commissioner of Customs (Import), Mumbai v. Hindalco Industries Ltd [2015 (320) ELT 42 (SC)],* in *Commissioner of Customs (Port), Chennai v. Toyota Kirloskar Motor Pvt Ltd [2007 (213) ELT 4 (SC)],* in *Commissioner of Customs, Ahmedabad v. Essar Steels Ltd [2015 (319) ELT 202 (SC)]* and in *Commissioner of Customs (Port), Kolkata v. J K Corporation Limited [2007 (208) ELT 485 (SC)]* which have placed the relied upon judgments within contextual limit before going to on to elaborate the legislative intent of the enumerated inclusions.

5. It is also contended by him that, with the demand having been computed solely from the details available in the books of accounts and public documents such as financial statements, the finding of suppression for justifying resort to the extended period of limitation under section 28 of Customs Act, 1962 is bereft of credibility. Reliance was placed on the decision of the Tribunal in *UT Limited v.*

Commissioner of Central Excise, Calcutta-I [2001 (130) ELT 791 (Tri.-Kolkata)], in *Hindalco Industries Ltd v. Commissioner of Central Excise, Allahabad [2003 (161) ELT 346 (Tri.Del.)]* and in *Blackstone Polymers v. Commissioner of Central Excise, Jaipur-II [2014 (301) ELT 657 Tri.Del.)]* to argue against the appeal of Commissioner of Customs seeking imposition of penalty under section 114A of Customs Act, 1962 despite the absence of circumstances that empower so.

6. Learned Authorised Representative contends that the impugned order has covered all the relevant aspects for enhancement of the declared value and that, in view of the finding that the importer had mis-declared and suppressed facts to evade duty leviable at the time of import, the appeal of Revenue is limited to the legality of imposing penalty under section 112 of Customs Act, 1962 when circumstances warranted the alternative penalty under section 114A of Customs Act, 1962.

7. Learned Authorized Representative further placed reliance on the definition of ‘process’ in the ‘licence agreement’ and the statements of the General Manager (Commercial) on the chronological sequence of contracting, as well as essentiality of certification of the equipment, in the upgradation programme set out in the agreement. Several judicial decisions were cited to suggest that

payments arising from any agreement for providing services in the use of imported goods should be levied to duties of customs.

8. Likewise, reliance was placed on the decision of the Tribunal in *Indian Seamless Metal Tubes Ltd v Commissioner of Customs, Mumbai [2016 (342) ELT 157 (Tri.Mumbai)]* holding that

> *'4. On careful consideration of the submissions made by both sides, we find that from the contract and appendix thereto, it is clear that the foreign supplier of the machine is under obligation to provide the technical know-how and training along with supply of the machine. Therefore, the technical know-how is the integral condition of the supply agreement. Thus it is a condition of sale of the machine. In such situation, the technical know-how fees was rightly added to the extent of 10% as was held by the Hon'ble Supreme Court in the case of Essar Gujarat Ltd. - 1996 (88) ELT 609 (SC). On going through the said judgment, we find that even technical services, engineering and consultancy even provided by the third party, the fees thereon was held to be added in the value of the imported capital goods under Rule 9 of the Customs Valuation Rules, 1988. Therefore, in our considered view, the ratio of the judgment of Essar Gujarat Ltd. (supra) is clearly applicable. As regards the judgment in the case of Tata Iron & Steel Co. Ltd. v. Commissioner - 2000 (116) ELT 422 (SC), the facts of the said judgment are different from the facts of the present case. Therefore, the same is not applicable. We have also gone through the findings of the learned Commissioner (Appeals) for upholding the order-in-original. On going through the findings of the learned Commissioner (Appeals)'s order, we do not find any infirmity therein. The learned Commissioner (Appeals) has*

considered all the judgments relied upon by the appellant and came to conclusion that 10% towards technical know-how fees is includible in the value of the goods.'

9. It was also contended by him that the advisory information 4.12 of the Technical Committee of World Customs Organisation pertaining to

'ROYALTIES AND LICENCE FEES UNDER ARTICLE 8.1 (c) OF THE AGREEMENT

1. Importer I and seller S enter into a sales contract for the supply of rolling millequipment This equipment is to be incorporated into a continuous copper rod plantalready existing in the country of importation, incorporated in the roiling mill equipmentis technology involving a patented process which the rolling mill is intended to perform;. The importer, in addition to the price of the equipment has to pay 15 million c.u. as licence fee for the right to use the patented process. Seller S will receive payment for theequipment and the licence fee from the importer and will then transfer the entire amountof the licence fee to the licensor.

2. The Technical Committee on Customs Valuation expressed the following view. The licence fee is for a technology incorporated in rolling mill equipment which enables it to perform the patented process. The rolling mill equipment has been purchased specificallv to carry out the patented production process. Thus, since the process for which the 15 million c.u. licence fee is paid is related to the qoods beinq valued and is a condition of the sale, it should be added to the price actually paid or payable for the imported rolling mill equipment.'

is indicative of the universal understanding of the includability of payment for intangibles in the value of tangible goods.

10. He places further reliance on the decision of the Tribunal in *Mukund Limited v. Commissioner of Customs (Import), Mumbai [2000 (120) ELT 30 (Tribunal)],* and as counter to the reliance placed on *Commissioner of Customs (Port), Chennai v. Toyota Kirloskar Motor P Ltd [2007 (213) ELT 4 (SC)]* by the Learned Counsel, owing to the peculiar circumstances of the present agreement in which the capital goods would serve no purpose and the capacity enhancement remain unachieved without the 'process' for the imported machines supplied by the overseas contracting party. The decisions of the Tribunal in *Agro Tech Foods Pvt Ltd v. Commissioner of Customs (Import), Nhava Sheva [2015 (330) ELT 448 (Tri.-Mum)]* and in *Aquatech Systems (Asia) Pvt Ltd v. Commissioner of Customs (Import) v. Mumbai [2019 (369) ELT 935 (Tri.-Mumbai)],* on failure to declare contents of an agreement and failure to produce royalty agreement while filing the documents of import, were relied upon to contend that similar withholding of relevant information and documents by the importer sufficed to invoke the extended period permissible under section 28 of Customs Act, 1962

11. In the resolution of such disputes, we could do worse than re-acquaint ourselves with the statutory scheme of assessment of

imported goods as the crux of the impugned demand are the goods in the trans-border commercial engagement but for which customs authorities would have no jurisdiction. By default, the rate of duty intended in section 12, after adjustment in accordance with notification, if any, issued under section 25, is applied to the value of goods as intended in section 14 of Customs Act, 1962 for determination of duty; these are the twin, and parallel, tracks to confine assessment within the law. Our concern here being the latter of the two, we must, necessarily dwell on valuation at some length. Value - susceptible, even at the best of times, to multifarious dimensions and which, for commercial engagement, is manifest as a figure agreed upon between buyer and seller - is further complicated when it comes to public finance; the mandate of uncompromising adherence to consistency in treatment and the imperative of consensual constancy across customs jurisdictions compels eschewing of specificity which, all too often, nudges cost minimization and revenue maximization into conflict. The balance of the twain lies in the transposing of legislative intent designed for universal acceptance in the subordinate legislation crafted for national needs.

12. During the relevant time, the concept of 'value', evolved by international agreement, was legislated as

> ***14.Valuation of goods.-***
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> *(1)……'the price at which such or like goods are ordinarily*

sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be in the course of international trade where

(a) the seller and the buyer have no interest in the business of each other; or

(b) one of them has no interest in the business of the other,

and the price is the sole consideration for the sale or offer of sale…'

with the further provisioning for specific circumstances by the empowerment in

'(1A) Subject to the provisions of sub-section 1, the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf…'

in furtherance of which Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, with effect from 16th August 1988, in

'3. Determination of the method of valuation. - For the purpose of these rules, -

(i) the value of imported goods shall be the transaction value;

(ii) if the value cannot be determined under the provisions of Clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules.'

provided the gold standard of the concept and also provisioned for

contingencies of gradually distancing approximation of 'transaction value' meaning

> *'(f) … the value determined in accordance with Rule 4 of these rules.'*

of rule 2 therein. From October 2007, with the amendment effected in section 14 of Customs Act, 1962 and reformulation of the subordinate legislation as Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the gold standard was elevated as the concept itself reflecting the continuous evolution of the engagement of international trade with tax administration. As we are here concerned with the provisions before that amendment, the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 is relevant as is the approximation of all, including declared 'transaction value', with the concept in section 14 of Customs Act, 1962.

13. Beyond the enumeration of definitions, the Rules comprise three parts: the standard in rule 3 and 4 reflecting the primacy of the 'transaction value' of imports, the 'substitute values' of rule 5 to 8 – ranged as 'transaction value' of 'identical' and 'similar' goods, the deductive or computed value, and the ascertained value - and the invisibles, or cost of services, in rule 9 with the first two being mutually exclusive as is evident from rule 3 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. The interpretative notes, appended as Schedule to the Rules, are integral to

appraisal of value for assessment.

14. There is no whiff of suggestion in the proceedings thus far that there is any dispute on the contracted value of the goods requiring resort to one of the 'substitute value' by sequential elimination. Hence, it is the cost of services that are liable to be subjected to duties of customs in accordance with

> *'4. Transaction value. - (1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules....'*

of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 which is of concern to us. Again, from rule 4, it is apparent that rule 9 of the said Rules is intended only for addition to the price actually paid or payable. This is a natural corollary of the 'substitute values' under rule 5 to 8 having to be on the same, or almost the same, terms as the imported goods to qualify as acceptable approximations and, therefore, inclusive of the cost of services, to the extent applicable, required to be added. The show cause notice has not disputed the insurance, freight and landing charges, mandated by rule 9(2) of the Rules, as not included in the assessable value declared in the bill of entry. The impugned order has narrowed down the proposed inclusions within the empowerment of rule 9(1)(c) and 9(1)(e) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

15. These deal with separate and independent payments made to overseas entities, *viz*., royalty and licence fees related to the imported goods as a condition of sale of the goods being valued, and any other payments contracted as a condition for the sale of imported goods respectively. Of the five contingencies enumerated, for subjecting cost of services to duties of customs, payments contracted as 'condition of sale' is restricted to only these two and the distinction between the two, other than the specific description of the purpose in the former, is that the 'condition of sale' as far as 'royalties and licence fees' is concerned is related to 'the goods being valued' while, for 'other payments', it is to 'imported goods' which does not appear to have been crafted for aesthetic variation or as relief from the tedium of repetition.

16. Hence, the two are intended to apply to mutually exclusive situations. The expression 'goods being valued' is not defined in Customs Act, 1962 while 'imported goods' is as goods brought into India and yet to be cleared for home consumption; the implication is that the addition envisaged in rule 9(1)(e) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 is restricted to consideration that is paid or payable to overseas entity for rendering of services that add value to the goods before clearance for home consumption. 'Royalties and licence fees', on the other hand, are not so restricted though the terms of contract linking the payment to value

of ‘imported goods’, which are undoubtedly valued, would require to be added while those paid after clearance would need to be linked to the goods supplied as a specific condition of sale.

17. Customs Act, 1962 is legislatively erected on the constitutional empowerment at serial no. 83 of List I of the Seventh Schedule to the Constitution. The Rules framed under section 14 of Customs Act, 1962 provide transcending the goods to include value of services, though in the restricted context elaborated *supra*. This contrived subjecting of specified, and unspecified, services to duties of customs predates the assumption of legislative jurisdiction to tax services - both domestic and overseas – and survives even after Finance Act, 1994 did impose levy on services. Therefore, neither can there be a claim that the unfilled gap was taxable without bounds before 1994 nor that tax levied on services provided from outside the country from 2006 blurs the bounds to such extent as to erase any restriction in the inclusion envisaged in rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Clearly, the services leviable to tax by the inclusion thereof are not services rendered by an overseas provider that are liable to tax within the meaning of section 66A of Finance Act, 1994 and, as the provisions under Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and the successor Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 did not vary owing to unveiling of tax

on services, we can gauge the extent to which services offered by the overseas entity is liable to tax upon assessment of imported goods. This, then, is the pole star for clearing a swathe through the conceptual commotion in the proposition of customs authorities.

18. Furthermore, in rule 9 of the said Rules, the caveat of

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> *(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.*
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> *(4) No additions shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.’*

limits the extent to which the assessing officer may subject ‘services’ procured by the importer to duties of customs. It is also abundantly clear from

> *’11. Settlement of dispute. - In case of dispute between the importer and the proper officer of customs valuing the goods, the same shall be resolved consistent with the provisions contained in sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962).’*

that the context, and no less significance than the text, is restricted to the utility derived to the importer before the ‘time and place of importation’ within the customs jurisdiction even if the contract provides for payment of consideration for such after arrival in the country. That is the test which all proposals for adding value of

services to 'transaction value' of the goods under import must pass and it is only the 'transaction value', accepted as declared, that may be subjected to the test.

19. For further elucidation of the propriety of the inclusions proposed by Revenue, we turn to judicial pronouncements. In *Commissioner of Central Excise (Preventive), Ahmedabad v. Essar Gujarat Ltd [1996 (88) ELT 609 (SC)]*, the Hon'ble Supreme Court had before it the claim of the importer that the 'condition of purchase', inserted in the agreement at their instance, was not 'condition of sale' permitted as the authority for inclusion of licence fee in assessable value prompting the finding that

> *'12. Reading all these agreements together, it is not possible to uphold the contention of Mr. Salve that the pre-condition of obtaining a licence from Midrex was not a condition of sale, but a clause inserted to protect EGL. Without a licence from Midrex, the plant would be of no use to EGL. That is why this overriding clause was inserted. This overriding clause was clearly a condition of sale. It was essential for EGL to have this licence from Midrex to operate this plant and use Midrex technology for producing sponge iron in India. Therefore, in our view, obtaining a licence from Midrex was a pre-condition of sale. In fact, as was recorded in the agreement, the sale of the plant had not taken place even at the time when the contract with Midrex was being signed on 4-12-1987, although the agreement with TIL for purchase of the plant was executed on 24th March, 1987. Therefore, we are of the view that the Tribunal was in error*

in holding that the payments to be made to Midrex by way of licence fees could not be added to the price actually paid to TIL for purchase of the plant.

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15. It is difficult to see how these Interpretative Notes come to the aid of the importer in this case. Midrex has granted licence to EGL not only for the right to produce in the Midrex Direct Reduction Process Plant and sell the products produced by the plant worldwide, but has also given the licensee (EGL) the right to use all patents, confidential information for the operation of the plant. Midrex has undertaken to supply all confidential information and patents updated from time to time during the period of the agreement. Therefore, we are of the view that licence fees paid to Midrex will have to be added to the price of the plant to arrive at the transaction value of the plant.

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17. The entire purpose of Section 14 is to find out the value of the goods which are being imported. The EGL in this case was purchasing a Midrex Reduction Plant in order to produce sponge iron. In order to produce sponge iron, it was essential to have technical know-how from Midrex. It was also essential to have an operating licence from them. Without these, the plant would be of no value. That is why the pre-condition of a process licence of Midrex was placed in the agreement with TIL. It will not be proper to view that agreement with TIL in isolation in this case. The plant would be of no value if it could not be made functional. EGL wanted to buy the plant in working condition. This could only be achieved by paying not only the price of the plant, but also the fees for the licence and the technical know-how for

making the plant operational. Therefore, the value of the plant will comprise of not only the price paid for the plant but also the price payable for the operation licence and the technical know-how. Rule 9 should be construed bearing this in mind.

18. Mr. Salve, appearing on behalf of the EGL has laid great stress on the various clauses of the agreement between Essar and TIL to show that the title to the plant had passed to the purchaser without any pre-condition after payment was made in terms of Clause 2 of the agreement. The delivery was also deemed to have taken place at the time and on the date of payment in full, in accordance with Clause 2.

19. Clause 2 merely states that the purchaser shall purchase the property from the seller at an inclusive purchase price of 26 million German Marks. 10 per cent of the purchase price had to be paid within fifteen days of the declaration of the buyer that the Government of India has given approval under Clause 11 of the agreement and the balance 90 per cent, within 60 days of the approval given by the Government of India. There is no mention of the other condition in Clause 11 that the agreement would be subject to "the purchaser obtaining the transfer of the operation licence from Messrs Midrex of Charlotte, USA". It appears from the agreements with V.A. and Midrex that unless and until the requisite licence and know-how was obtained from Midrex and also V.A., it would be impossible to shift the plant from Emden, West Germany and install it at Hazira, India and produce sponge iron from that plant. It appears that if Midrex did not grant operation licence for running the plant, the usefulness and value of the plant will considerably diminish if not evaporate altogether.'

on that limited argument in which the connection with the imported

goods was not disclaimed by the importer. This decision, therefore, does not offer assistance in ascertaining the scope of inclusion of value of services in assessment to duties of customs.

20. It is, therefore, in the light of the limited issue considered therein that the Hon'ble Supreme Court felt obliged to elaborate on the legal empowerment thus

> *'16. It is nobody's case that the seller had an obligation towards a third party which was required to be satisfied by it and the buyer (i.e. the appellant) had made any payment to the seller or to a third party in order to satisfy such an obligation. The price paid by the appellant for drawings and technical documents forming subject matter of contract DM 301 can by no stretch of imagination fall within the meaning of `an obligation of the seller' to a third party. There was also no payment made as a condition of sale of imported goods as such. Rule 9(1)(e) also, therefore, has no applicability.*
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> *17. So far as Interpretative Note to Rule 4 is concerned it is no doubt true that the Interpretative Notes are part of the Rules and hence statutory. However, the question is one of their applicability. The part of Interpretative Note to Rule 4 relied on by the Tribunal has been couched in a negative form and is accompanied by a proviso. It means that the charges or costs described in clauses (a), (b) and (c) are not to be included in the value of imported goods subject to satisfying the requirement of the proviso that the charges were distinguishable from the price actually paid or payable for the imported goods. This part of the Interpretative Note cannot be so read as to mean that those charges which are not covered in clauses (a) to (c) are available to be included*

in the value of imported goods. To illustrate, if the seller has undertaken to erect or assemble the machinery after its importation into India and levied certain charges for rendering such service the price paid therefor shall not be liable to be included in the value of the goods if it has been paid separately and is clearly distinguishable from the price actually paid or payable for the imported goods. Obviously, this Interpretative Note cannot be pressed into service for calculating the price of any drawings or technical documents though separately paid by including them in the price of imported equipments. Clause (a) in third para of Note to Rule 4 is suggestive of charges for services rendered by the seller in connection with construction, erection etc. of imported goods. The value of documents and drawings etc. cannot be "charges for construction, erection, assembly etc." of imported goods. Alternatively, even on the view as taken by the Tribunal on this Note, the drawings and documents having been supplied to the buyer-importer for use during construction, erection, assembly, maintenance etc. of imported goods, they were relatable to post- import activity to be undertaken by the appellant. Such charges were covered by a separate contract, i.e. contract MD 301. They could not have been included in the value of imported goods merely because the value of documents referable to imported equipments and materials was mixed up with the value of those documents which were referable to equipment which was yet to be procured or imported or manufactured by the appellant; the value of the latter category of documents also being neither dutiable nor clubbable with the value of imported goods. The Tribunal has not doubted the genuineness of the contracts entered into between the appellant and SNP. Rather it has observed vide para 10.2 of its order that entering into two contracts (MD 301 and MD 302) was a legal necessity. The Tribunal has also stated that

> *it was not recording any finding of `skewed split up'. Shri Ashok Desai, the learned senior counsel for the appellant has pointed out that under Chapter Heading 49.06 of the Customs Tariff Act, 1975 plans and drawings for engineering and industrial purposes being originals drawn by hand as also their photographic reproductions on sentisized papers and carbon copies thereof are declared free from payment of customs duty. Sub-rules (3) and (4) of Rule 9 clearly provide that additions to the price actually paid or payable is permissible under the Rules if based on objective and quantifiable data and no addition except as provided for by Rule 9 is permissible.'*

in *Tata Iron and Steel Company Limited v. Commissioner of Central Excise and Customs, Bhubaneshwar [2000 (3) SCC 472]* upon an attempt by customs authorities to fasten duty on 'drawings' and 'technical documents', that were not otherwise dutiable, as 'machinery' that was imported. The admonition of that administrative overreach was taken note of in *Commissioner of Customs (Port), Kolkata v. JK Corporation Ltd [2007(208) ELT 485 (SC)]* to distinguish the circumstances in which the judgement in re *Essar Gujarat* had been handed down and as inapplicable to a dispute in which the agreements, both for tangible goods and for invisibles, were entered into with two entities of the same conglomerate by holding that

> *'8. The sole question which, therefore, arises for consideration in this appeal, is as to whether customs duty would be payable on the purchase price of the goods by*

adding the value of licence and technical knowhow, etc. to the value of the imported goods.

9. The basic principle of levy of customs duty, in view of the aforementioned provisions, is that the value of the imported goods has to be determined at the time and place of importation. The value to be determined for the imported goods would be the payment required to be made as a condition of sale. Assessment of customs duty must have a direct nexus with the value of goods which was payable at the time of importation. If any amount is to be paid after the importation of the goods is complete, inter alia by way of transfer of licence or technical knowhow for the purpose of setting up of a plant from the machinery imported or running thereof, the same would not be computed for the said purpose. Any amount paid for post-importation service or activity, would not, therefore, come within the purview of determination of assessable value of the imported goods so as to enable the authorities to levy customs duty or otherwise. The Rules have been framed for the purpose of carrying out the provisions of the Act. The wordings of Sections 14 and 14(1A) are clear and explicit. The Rules and the Act, therefore, must be construed, having regard to the basic principles of interpretation in mind.

10. Rule 12 of the Rules provides that the interpretative notes specified in the Schedule appended thereto would apply for construction thereof. They are statutory in nature being integral part of the Rules themselves. The relevant portion of Interpretative Note to Rule 4 reads as under :

> *"The value of imported goods shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods :*
>
> *(a) Charges for construction, erection, assembly, maintenance or technical assistance, undertaken after*

importation on imported goods such as industrial plant, machinery or equipment;

(b) The cost of transport after importation;

(c) Duties and taxes in India."

11. What would, therefore, be excluded for computing the assessable value for the purpose of levy of custom duty, inter alia, has clearly been stated therein, namely, any amount paid for post-importation activities. The said provision, in particular, also apply to any amount paid for post-importation technical assistance. What is necessary, therefore, is a separate identifiable amount charged for the same. On the Revenue's own showing, the sum of US $ 14,00,000.00 was required to be paid by way of remuneration towards services to be offered by the companies in respect of matters specified in Part-A of the said Memorandum of Agreement. The said sum represents amount of licence or amount to be paid by the respondent for the licence for the manufacturing process for production of goods which were covered by the patents held by M/s. Samsung as also for technical knowhow. In the said Memorandum of Agreement, it was provided that;

"The SELLER shall provide to the BUYER the TECHNICAL. DOCUMENTATION containing, inter alia, the KNOW-HOW and the same shall be delivered by the SELLER to the BUYER in Republic of Korea or such other place or places as may be mutually agreed by and between both the parties thereto."

12. The technical documentation comprises of : (1) process, (2) mechanical, (3) electrical, and (4) instrumentation in respect of grant of licence. The Memorandum of Understanding provides :

"4.1. The SELLER hereby grants to the BUYER a non-exclusive and non-transferable right and licence including rights to use existing patents of SELLER to manufacture the PRODUCT in the PLANT with the KNOW-HOW including the PROCESS and to sell and market the PRODUCT

worldwide. For exports to Republic of Korea and Japan, the first option shall be given to the SELLER.

4.2 The BUYER shall be entitled to and shall have the right to use and practice the KNOW-HOW and to manufacture therewith the product in the PLANT."

13. No part of the knowhow fee was to be incurred by the respondent herein either for the purpose of fabrication of the plant and machinery or for any design in respect whereof M/s. Samsung held the patent right.

xxxxx

16. Reliance has been placed by Mr. Radhakrishnan on a decision of this Court in Essar Gujarat Limited (supra). In that case, the licence fee was paid to the supplier of the plant and machinery for a licence to operate the plant which was in reality nothing but was held to be an additional price payable for the plant itself and was, therefore, held to be includible in its assessable value. It is in the afore-mentioned fact situation, this Court held :

"12. Reading all these agreements together, it is not possible to uphold the contention of Mr. Salve that the pre-condition of obtaining a licence from Midrex was not a condition of sale, but a clause inserted to protect EGL. Without a licence from Midrex, the plant would be of no use to EGL. That is why this overriding clause was inserted. This overriding clause was clearly a condition of sale. It was essential for EGL to have this licence from Midrex to operate this plant and use Midrex technology for producing sponge iron in India. Therefore, in our view, obtaining a licence from Midrex was a pre-condition of sale. In fact, as was recorded in the agreement, the sale of the plant had not taken place even at the time when the contract with Midrex was being signed on 4-12-1987, although the agreement with TIL for purchase of the plant was executed on 24th March, 1987. Therefore, we are of the view that the Tribunal was in error in holding that the payments to be made to Midrex by way of licence fees could not be added to the price actually paid to TIL for purchase of the plant."

Likewise, the decision in *Mukund Limited v. Commissioner of*

Customs, ACC, Mumbai [1999 (112) ELT 479] was also referred therein and the approval of opinion of the Tribunal on includability of cost of 'design and engineering drawings' in the assessable value of 'machinery' was taken note of before placing emphasis upon the restricted scope for additions by recourse to rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 in *re Tata Iron and Steel Company Ltd* to conclude that appeal of Revenue was without merit.

21. Though these decisions pertained to the chargeability of duty on 'design and engineering drawings', the principle therein that rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 cannot be accorded such latitude as to permit all service transactions relating to imported goods to be includible in assessable value of the goods has now been well and truly settled. A service rendered in India after import, even if directly related to imported goods, cannot justifiably enhance the assessable value and 'condition of sale' has to be construed as that which is inseparable from the contract of import.

22. In *Commissioner of Customs (Port), Chennai v. Toyota Kirloskar Motor P Ltd [2007 (213) ELT 4 (SC)]*, specifically on rule 9(1)(c) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, the legal provisions and all the decisions referred

supra were considered before concluding that

> *'30. The observations made by this Court Essar Gujarat Limited (supra) in Paragraph 18 must be understood in the factual matrix involved therein. The ratio of a decision, as is well-known, must be culled out from the facts involved in a given case. A decision, as is well-known, is an authority for what it decides and not what can logically be deduced therefrom. Even in Essar Gujarat Limited (supra), a clear distinction has been made between the charges required to be made for pre-importation and post-importation. All charges levied before the capital goods were imported were held to be considered for the purpose of computation of transaction value and not the post-importation one. The said decision, therefore, in our opinion, is not an authority for the proposition that irrespective of nature of the contract, licence fee and charges paid for technical know-how, although the same would have nothing to do with the charges at the pre-importation stage, would have to be taken into consideration towards computation of transaction value in terms of Rule 9(1)(c) of the Rules.*
>
> *31. The transactional value must be relatable to import of goods which a fortiori would mean that the amounts must be payable as a condition of import. A distinction, therefore, clearly exists between an amount payable as a condition of import and an amount payable in respect of the matters governing the manufacturing activities, which may not have anything to do with the import of the capital goods.'*

23. In the light of judicial decisions that, unarguably, restrict import duties to 'service' rendered in the transaction of import, advisory information 4.12 of the Technical Committee of World Customs

Organisation does not advance the case of Revenue.

24. It is on record that the licence agreement for 'know-how' and 'technical assistance' and the purchase order for supply of the impugned goods, were both contracted separately with M/s Atofina France. Thereafter, M/s Arcil Catalyst Pvt Ltd, a producer of 'aluminum chloride anhydrous' and intending to expand manufacturing capacity, placed order for 'reactor set' from M/s Atofina France on 13th December 2000 which was assessed to duty on the contract value of the goods in bill of entry filed on 26th February 2001. Well before this, on 15th September 1999, the 'licence agreement' for collaboration in 'debottlenecking' of existing process and 'upgradation' of facility was entered into; it is the payment due on invoice dated 10th December 2002 for 'technical knowhow' and invoice dated 19th December 2002 for 'technical assistance' raised by M/s Atofina France in pursuance of the agreement which was sought to be added to assessable value of the goods.

25. From the justification offered up in the impugned order, and vehemently canvassed in the submissions of Learned Authorized Representative, it would appear to have been assumed that the qualifying expression, 'as a condition of sale', in rule 9(1)(c) and 9(1)(e), can be stretched limitlessly to encumber the transaction value of imported goods with any, and all, other outflows of the importer to

the seller merely by being so. The mismatched concatenation of facts, contrived for confirming the demand in the impugned order, is mirrored in the confused categorization of the impugned payments under two different, and mutually exclusive, contingencies that permitted inclusion of 'services' in assessable value. We cannot accord judicial sanction to a proposition that subsumes all commercial transactions between two entities merely for sharing commercial objective in common with a cross-border transaction in goods. The facts of the case must lead to that conclusion for approval of the proposed addition.

26. The payment for the services, sought to be included by customs authorities in the assessable value of 'reactor set', became due well after the import and the obligation for providing the 'technical know-how' and 'technical assistance' – the services in question – was contingent upon 'certificate of conformity' with the basic engineering package or, in other words, the readiness of the facility for 'debottlenecking' and 'upgradation' in accordance with the agreement. It is seen that this certificate was issued on 13th September 2001 following which the payment contracted in the agreement was made due by M/s Atofina France. From these, it is apparent that the rendering of the contracted service was to be contingent on readiness of the existence facility and that the purchaser order for the 'reactor set' was issued much after those terms of the service agreement was

finalized. The rendering of service could not, therefore, have been a 'condition of sale' of the goods. Furthermore, the services were to be rendered in India for upgradation of the manufacturing facility as a whole and not only for the imported goods on which, too, the service would impact after delivery at the site of the importer. The 'certificate of conformity' which, according to the adjudicating authority, is the pivot also clearly pertains to provision of service in India after import. None of these facts find fitment within the scheme of taxing of services rendered by an overseas provider at the rate of duty for assessment of imported goods as intended by rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 set out and in the judicial pronouncements referred *supra*.

27. Hence, the demand fails along with appeal of Revenue. Appeal of assessee is allowed.

(Order pronounced in the open court on 22/12/2021)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*