

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3
Customs Appeal No.10501 of 2016

(Arising out of OIA-JMN-CUSTM-000-APP-132-15-16 dated 15/12/2015 passed by Commissioner of CUSTOMS-KANDLA)

Indorama Industries Ltd

Plot No. 10, Industrial Area, Lodhimajra, Baddi,
Solan, Himachal Pradesh

.....Appellant

VERSUS

C.C.-Kandla

Custom House, Near Balaji Temple,
Kandla, Gujarat

.....Respondent

WITH

Customs Appeal No.11014 of 2017

(Arising out of OIA-JMN-CUSTM-000-APP-054-16-17 dated 18/01/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

Indorama Industries Ltd

Plot No. 10, Industrial Area, Lodhimajra, Baddi,
Solan, Himachal Pradesh

.....Appellant

VERSUS

C.C.-Jamnagar(prev)

Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar
Gujarat

.....Respondent

APPEARANCE:

Shri Surjeet Bhadu, Advocate for the Appellant

Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
 HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No 11579-11580 /2024

DATE OF HEARING: 18.04.2024
DATE OF DECISION:16.07.2024

RAJU

Two appeals have been filed in the same proceedings. First appeal has been filed by M/s Indorma Industries Ltd., against an order of remand with directions for re-determination of Customs duty. Another appeal has been

filed by appellant against the order quantifying the demand in terms of aforementioned remand order. Both orders relate to same goods..

2. Learned Counsel for the appellant pointed out that the Appellant-Importer filed Bill of Entry No. 4667577 dated 17.09.2011 for import of following goods:

Sr.	Description of Goods	Qty.	CTH
1	Polymer Storage Tank A- part of plant and machinery to manufacture spandex yarn	6	84482000
2	Blower part of plant and machinery to manufacture spandex yarn	4	84482000
3	Solvent Condensate facility part of plant and machinery to manufacture spandex yarn	2	84482000

The Bill of Entry was assessed provisionally on 23.09.2011, the appellant was asked for submission of installation certification from the relevant Excise office/Chartered Engineer and also to inform about charges for license fee/ Technical know-How, the supervision charges for erection and commissioning of said imports. The Lower Authority has included in the assessable value the charges for erection and commissioning amounting to Rs. 4,19,00,000/- and the amount of license fee of Rs. 3,49,12,500/-paid by the appellant to the seller in terms of the contract for purchase dated 30.07.2010. The transaction value was revised invoking provisions of Rule 9 (1)(b)(ii) and Rule 9(1)(iv) read with Rule 4 of Customs valuation Rules, 2007 and Section 14 of the Customs Act, 1962. The import were under EPCG Scheme and therefore an additional amount was debited in the EPCG license. The original adjudicating authority assessed the Bill of Entry finally under Section 18 (2) of the Customs Act, 1962 and appropriated an amount to Rs. 1,71,30,570/- debited through EPCG license toward payment of Customs

Duty. Consequently, differential duty amounting to Rs,. 17903038/- along with interest was demanded under Section 18 (3) of the Customs Act, 1962. The issue relates to inclusion of the supervision charges and license charges for process Know-How in the assessable of goods imported by the appellant. Second order passed in the remand proceeding this demand was just re-quantification of the demand in lesan of earlier remand orders.

3. Learned Counsel relied on the following decision to assert that such charges are not includable in the value of goods imported as the same have been incurred after the import of machinery into India. The same are examined in para 5 below.

4. Learned AR relies on the impugned order.

5. Heard both sides and considered rival submissions. The issue in the instances case, pertains to includability of the license fee for process Know-How and supervision of erection and commissioning charges in the assessable value of the goods imported by the appellant. The Commissioner (Appeals) has upheld the includability by both this charges in the assessable value. However, since only a small part of the total machinery covered in the contract was imported in this consignment, the Commissioner (Appeals) had remanded the matter back to the original authority to apportion only the fraction of the both the charges to the extent attributable to the value of machinery imported in these Bills of Entry.

5.1 From the remand order, it is seen that the Commissioner (Appeals) had not examined the decision relied by the appellant in details. He has

simply discarded the decision which pertain to the period prior to the notification of Customs valuation (Determination of Value of Imported Goods) Rules, 2007. According to him, the said decisions are not applicable after introduction of said Rules. He has also simultaneously discarded the other decisions pertaining to period after 2007 being not squarely applicable to the instance case. The appellants have produced before us the following decision in this regard

- Commissioner of Customs, Chennai vs. Denso Kirloskar Industries Pvt. Ltd.-2015 (324) E.L.T. 431 (SC)
- Commissioner of Customs, (Import), Mumbai Vs. Hindalco Industries Ltd. 2015 (320) E.L.T 42 (SC)
- Inspiron Engineering P. Ltd. Vs. C.C.(A) JNCH, Nhava Sheva, Mumbai-II-2017 (357) E.L.T 801 (Tri.- Mumbai)
- Bright Brothers Ltd. Vs. Commissioner of Customs (i), Mumbai
- 2017 (346) E.L.T. 292 (Tri.-Mumbai)

6. The relevant legal provision invoked in Order-In-Original is those of Rule 10 of the Customs Valuation Rules, 2007 which is reads as under:

"10. Cost and Services.- (1)*In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods.-*

(a)the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-

(i)commissions and brokerage, except buying commissions;

(ii)the cost of containers which are treated as being one for customs purposes with the goods in question;

(iii)the cost of packing whether for labour or materials;

(b)The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent

that such value has not been included in the price actually paid or payable, namely:-

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the Imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

Explanation.- Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods."

7. The Order-In-Original invokes Rules 10(1)(c) and 10(1)(e) of the Customs Valuation Rules, 2007 reads as under:

"Rule 10(1)(c) : royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;"

"Rule 10(1)(e) : all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable."

8. It is apparent that the said license fee relates to the post importation activity of manufacture of goods. In the instant case, the license fee being

paid relates to process Know-How for production of Spandex yarn for textile application.

A perusal of the Para 2.2 of the contract shows as follows:-

2.2 SCOPE OF WORK

Under this Contract, the Seller has agreed, for consideration separately Identified and concurred, to perform the following activities:

- (a) Supply of basic and detailed engineering drawings and designs in relation to the setting up of the Plant (Refer, Article 3 of this Contract);*
- (b) Supply of the Equipment by the Seller and all engineering and technical drawings and designs in relation thereto (Refer, Article 4 of this Contract);*
- (c) Supervision of erection of the Plant (Refer, Article 5 of this Contract);*
- (d) Supervision of commissioning of the Plant;*
- (e) Grant of licence of process know-how for production of Spandex yarn by using the Plant. (Refer, Article 6 of this Contract); and,*
- (f) Executing the performance Test-Run."*

From the above clause, it is apparent that the multiple activities are being done by the seller for the buyer.

8.1 The relevant para of the contract between parties reads as follows:-

"6. LICENCE OF PROCESS KNOW-HOW

6.1 The Seller hereby grants to the Buyer, a licence to use the technical information/ process know how for production of Spandex yarn for textile application.

6.2 The know-how so licenced shall be used by the Buyer exclusively for the purpose of production of Spandex yarn for textile application.

6.3 The Buyer will have access to all the process improvements, recipe for new products, Research and Development ("R&D") documents and information concerning the Process and new or improved processes and/or products Including recipe for such products for a period of five (5) years commencing from the date of signing of the Acceptance Protocol. The Buyer shall not disclose the R&D documents and information to any third parties. If necessary, the Seller shall provide

the Buyer technical instruction to enable the information can be applied in the Plant after acceptance. The related charges (if pertaining to equipment modifications) shall be borne according to the conditions and items negotiated by both parties.

6.4 The Licence granted under this Article is non-transferable and non-assignable and the Buyer shall not, without the written consent of the Seller, disclose, transfer or assign the Licence to any person, other than any person resulting from any process of reorganization of the Buyer, any member of the group companies of the Buyer or any permitted assignees.

6.5 The Seller shall provide continuous technical support to the Buyer's technical team. Specific additional areas of support shall be in product development, quality improvements, new polymer developments etc.

6.6 The Licence only applies for the engineering design, erection, operation, production and maintenance, including Know How suitable for producing spandex suitable for textile application by the Plant and is not allowed to be used outside of Plant by the Buyer."

8.2. The contract in relation to the charges for supervision of Erection and

Commissioning reads as under:-

"5. SUPERVISION OF ERECTION AND COMMISSIONING OF THE PLANT

"5.1 The scope of services of the Seller with respect to the erection of the Plant shall involve supervision of erection, testing, commissioning of the Plant, conducting Start-Up and performance and guarantee tests, and conducting of Test-Run of the Plant.

5.2 The detailed conditions and specifications for and associated with the supervision of erection of the Plant by the Seller are contained in Annex 3 to this Contract.

5.3 The Plant shall be erected, commissioned and started-up under the Instructions of the Seller, directly or indirectly by the Buyer.

5.4 The Seller undertakes and warrants that the supervisory services for supervision of erection of the Plant shall be completed (Mechanical Completion) within a period of one hundred and fifty (150) days from the date of commencement of erection of the Plant. Commissioning and Test- Run of the Plant shall be within 90 days from StartUp date, as per 1.2.12.

5.5 The Parties agree that the aforesaid time period of one hundred and fifty (150) days is of the essence of the obligation stipulated under this article and the Buyer shall, in addition to any right to damages or indemnity that the Buyer may have under this Contract, be free to terminate this Contract so far as

and to the extent that the same relates to supervision of erection of the Plant in case the Start Up of the Plant is not successfully completed within the aforesaid period of one hundred and fifty (150) days due to the Seller's reason. For the removal of doubts, and subject to the provisions of clause (3) of article 26 hereof, it is clarified that the termination by the Buyer, under this clause, shall not affect the validity or operation of the remainder of this Contract and such termination shall not ipso jure, result in or be construed as the termination of the remainder of this Contract and shall not discharge or release the Parties hereto from the other obligations stipulated elsewhere under this Contract.

5.6 The Seller shall render the services of supervision of erection of the Plant by deputing the personnel of the Seller at the Job Site."

8.3. In the case of Kirloskar Industries Pvt. Ltd. 2015 (324) E.L.T. 431

(SC) Vs. Denso Hon'ble Apex Court has observed as follows:

"2. *We may point out that there was a technical know-how agreement as well entered into between the respondent and the Japanese company and the consideration which was paid for the technical know-how provided by the Japanese company was sought to be included in the transaction value. As per this agreement, technical information which was to be provided is of the following nature : -*

"(4) "TECHNICAL INFORMATION"

(i) Designs, engineering data, manufacturing land process data, basic machinery and facility layouts, testing and quality control data, and production and testing equipment data (including drawings of tool, jig, die and drawings of special machines and equipment of LICENSOR's design which LICENSOR and LICENSEE mutually agree as being necessary in the manufacture of CONTRACT PRODUCTS by LICENSEE) RELEASED IN AND USED BY licensor - during the term of this Agreement in the commercial production of CONTRACT PRODUCTS specifically excluding :

(1) Information for innovative technology different from that at EFFECTIVE DATA,

(2) such information concerning integral components and materials per se which, although forming part of or used in the manufacture of CONTRACT PRODUCTS, involve techniques or relate to fields of research, development, design, engineering or manufacture separate and distinct from CONTRACT PRODUCTS (such as, but not limited to, semiconductor devices, and other components and materials including bolts and nuts which are not manufactured in LICENSOR's facilities), and

(3) information for excluded components, unit and assembly specified in Annex. I.

(ii) Purchase specifications and available material - standards for the purchase of those integral components and materials excluded in the above as not being manufactured in LICENSOR's facilities."

3. *Though the Commissioner included the aforesaid value the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') has vide the impugned judgment dated 22-7-2005 [[2005 \(192\) E.L.T. 1104](#) (Tri. - Bang.)] held that the consideration paid for the aforesaid*

technical information provided by the Japanese company cannot be included as the same is for post importation.

4. *On the plain reading of the aforesaid agreement, it becomes clear that the technical information which was to be provided by the Japanese company to the respondent was for the manufacture of the contract products by the respondent herein, naturally, after the setting up of the plant. This cost is, thus, incurred after the importation of the goods.*

5. *The matter is squarely covered by the judgment of this Court in Civil Appeal No. 3042 of 2004 dated 13-4-2015 in the case of 'Commissioner of Customs, Ahmedabad v. M/s. Essar Steel Limited' [[2015 \(319\) E.L.T. 202](#) (S.C.)]. We, thus, do not find any merit in this appeal which is accordingly, dismissed.*

8.4. Similarly, in the case of Hindalco Industries Ltd -2015 (320) E.L.T 42

(SC). The Hon'ble Apex Court has observed as follows:

“5. *On going through the order of the CESTAT, it becomes clear that the CESTAT has gone into the various provisions of the three agreements and has come to the conclusion that neither the fees paid under the Licence Agreement nor under the Basic Engineering, Training and Technical Services Agreement related to the import of the capital goods nor was it a condition of sale and on that basis it has recorded the finding that the provisions of Rule 9(1)(b)(iv) or Rule 9(1)(c) or Rule 9(1)(e) of the aforesaid Rules would apply to the facts of the case.*

6. *That apart, it further finds that both the Agreements, viz., Licence Agreement as well as Basic Engineering, Training and Technical Services Agreement, pertained to the services that were to be provided post import of the aforesaid goods. On this ground also, the value of these services could not have been loaded into the value of the goods at which those were imported.*

7. *It is also to be borne in mind that the respondent had purchased various capital components from many other parties and the goods for which the agreement was signed with OEC constituted only 16% of the total value. On these facts, we are of the opinion that the matter is squarely covered by the recent judgment of this Court in Commissioner of Customs, Ahmedabad v. M/s. Essar Steel Ltd. [Civil Appeal No. 3042 of 2004] decided on 13th April, 2015 [[2015 \(319\) E.L.T. 202](#) (S.C.)].*

8. *For all these reasons, we do not find any infirmity in the impugned order of the CESTAT. Thus, this appeal, which is bereft of any merit, is accordingly dismissed.*

Civil Appeal No. 3469 of 2015

9. *In this appeal, we find that almost on identical terms, as noted in the above Civil Appeal No. 2420 of 2005, agreements were entered into by the assessee with one M/s. Davy Dravo. Apart from the agreement for supply of equipments, other agreements are Basic Engineering and Training Agreement, Process Licence Agreement and Supervisory Services Agreement.*

10. *The consideration of these three agreements is laid into the valuation of supplies made by M/s. Davy Dravo. Not only the supplies which the assessee took from the said Company constituted merely 16 per cent of the total capital goods and the remaining capital goods were purchased from some other exporters as well as indigenous, we also find that all these agreements pertained to rendering of services which are post import. Therefore, this case is also squarely covered by the judgment of this Court in Commissioner of Customs, Ahmedabad v. M/s. Essar Steel Ltd. [Civil Appeal No. 3042 of 2004] decided on 13th April, 2015 [[2015 \(319\) E.L.T. 202](#) (S.C.)].*

11. *The Tribunal, however, in the instant case, took a different view, i.e., in favour of the Revenue and against the assessee. For the reasons recorded in the judgment in M/s. Essar Steel Ltd. (supra) as well as the salient features noted while deciding the above appeal, being Civil Appeal No. 2420 of 2005, this*

appeal warrants to be allowed, setting aside the orders of the CESTAT. It is directed accordingly.

8.5 In the case of Inspiron Engineering P. Ltd.-2017 (357) ELT 801 (Tri.-Bom.) Following has been observed:-

5. We find that Id. Adjudicating authority after careful considerations of the reply to the questionnaire and know-how agreement came to very reasonable conclusion that value declared by the appellant is acceptable. The relevant findings of the Order-in-Original reproduced below :-

As regards royalty, it is calculated on net selling price of the product by deducting the cost of standard bought out components both imported as well as indigenous, all taxes and forwarding expenses. So the royalty is being calculated only on indigenous value addition of the product. Hence it is not related to value of imported components. The royalty is being charged for having given them right to produce end product in India with know-how supplied by the foreign company. As the royalty payment has no relation with the imported component, the said amount cannot be added to the value of imported components and other parts.

From the above findings, we observed that as per know-how agreement, it is for manufacture of final product at the appellant's end, the royalty is payable on the net sale price by deducting the cost of bought out components both imported as well as indigenous, all taxes and forwarding expenses therefore it is not related to the imported components. From the technical know-how agreement nowhere it appears that the technical know-how fees/royalty is condition of sale of the imported components. Id. Commissioner (Appeals) in the impugned order given following findings :

I have carefully gone through the case records and the submissions of the Respondent as well as the record of the personal hearing. I find that the lower authority has passed the impugned order on the ground that the relationship has not affected the price of the imported goods. But I find that imports were made from the foreign company both components and capital goods. The fact the foreign company has a 40% equity participation and has directs in the Respondent's board establishes the relationship under Rule 2(2) of the CVR, 1988. I agree with appellant that without technical know-how, the imported goods would have no value since no manufacturing activity can take place without the technical know-how. Therefore, the DM60000 paid in consideration for transfer of technical know-how would be addable to the price of imported goods in terms of Rule 9(1)(c) of the CVR, 1988 on a pro rata basis. However, regarding the payment of royalty, I do not agree with the appellant since, royalty is to be paid on sales of finished goods which is post importation activity and therefore cannot have any bearing on the price of imported goods.

From the above findings, we observed that adjudicating authority has discussed about technical know-how whether the same is condition of the sale or otherwise and also discussed about calculation of the royalty on net sale price, the same was not dealt with by the Commissioner (Appeals) in the impugned order. The reasoning given by the Id. Commissioner (Appeals) that without technical know-how the imported goods would have no value since no manufacturing activity can take place, is absurd. If this view of the Commissioner (Appeals) is accepted then invariably in every case where technical know-how agreement exist the royalty/technical know-how fees will be added in the declared value without going into the fact whether it is condition of sale or otherwise. Therefore this contention of the Id. Commissioner (Appeals) is absolutely unacceptable to us. Id. Commissioner (Appeals) has also not dealt with vital aspect that royalty is only on net selling price of the product. It is settled legal position by Hon'ble Supreme Court in case of *Matsushita Television & Audio (I) Ltd. v. Commissioner of Customs* [2007 (211) E.L.T. 200 (S.C.)] that when the royalty is related to the final product on the net selling price that is without inclusion of cost of imported components it was considered that royalty is not the condition of sale of the imported goods. As per our above discussion and settled legal position the impugned order is not sustainable, hence the same is set aside. The Order of the Original Adjudicating authority is upheld. Appeal is allowed."

From the above decisions, it is apparent that before such consideration are included in assessable value it has to be established that such charges are a condition of sale. Moreover, it has to be established that the charges are not in relation to post importation activities. It's only in such conditions that such charges can be added to the assessable value.

9. There is nothing in the contract which shows that the procurement of licenses for process Know-How or the activity of the supervision of erection and commissioning plant are in any way, condition for the sale of goods to the appellants. The impugned order also does not identify any such conditions of sale. Moreover, the licence fee also relates to the manufacture process which is a post importation activity, just like supervision of Erection and Commissioning. In these circumstances, since the activities are clearly post importation activities and also not a condition for sale, the price paid for the same cannot form part of the assessable value of the goods.

10. In view of the above impugned order cannot be sustained and it is set aside and appeals are allowed.

(Pronounced in the open court on 16.07.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)