CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 21832 of 2016

(Arising out of Order-in-Appeal No.488/2016 dated 30.06.2016 passed by the Commissioner of Customs (Appeals), Bangalore.)

M/s. Schunk Metal and Carbon (India) Private Limited
No.54, Whitefield Road,
Mahadevapura Post,
Bangalore – 560 048.

Appellant(s)

Versus

The Commissioner of Customs
C.R. Building,
PB No.5400,
Queens Road,
Bangalore – 560 001.

Respondent(s)

Appearance:

Mr. H. Y. Raju, Advocate	For the Appellant
Mr. Neeraj Kumar, AR	For the Respondent

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 24.07.2023
Date of Decision: 03.11.2023

FINAL ORDER No. 21216 of 2023

Per R. BHAGYA DEVI:

M/s. Schunk Metal and Carbon India Pvt. Ltd. were importing various materials from M/s. Schunk Gmbh, Germany and other subsidiary companies of the same group. The authorities below held that the importer and the suppliers are related parties and however, accepted the invoice price as the transaction value under Rule 3(3)(a) of the Customs Valuation Rules, 2007. The Commissioner (Appeals) in the impugned order held that the appellant had accepted the addition of 5% royalty on carbon brushes under Rule 10(1)(c) of the Customs Valuation Rules, 2007, therefore, the issue is related to only addition of royalty on all other imports other than carbon brushes. It is observed by the Commissioner (A) that the appellant had not provided any proof to show that the items imported were also from unrelated suppliers and since the imports were only from the related suppliers, it is assumed that it is a condition for sale for buying only from the related suppliers. Accordingly, as per Rule 10(1)(c), royalty becomes part of the value. It is also noted that carbon strips had to be bought only from the provider of the technical know-how and since there is an implicit condition, royalty of 5% has to be added to the carbon strips.

2. The learned counsel on behalf of the appellant submitted that the import required raw materials, inputs from their associated companies, other unrelated parties and also sourcing them domestically to manufacture pantographs. They had entered into a license agreement with M/s. Schunk Bhan, Salzburg who have provided drawings and allowed to use the technical know-how in the manufacture of pantographs. As per this agreement, the appellant had to use only Schunk carbon strips and the said strips had to be imported from their related supplier. Royalty of single sum of 10,000 Euro was paid for the drawing and in addition to the above, royalty 5% on the net

sales volume of licensed products was to be paid. It was further submitted that though the authorities held that the appellant and their associated companies were related parties, the goods imported from them was not influenced from their relationship and the transaction value was accepted in terms of Rule 3(3)(a) of the Customs Valuation Rules, 2007. It is stated that once the transaction value has been accepted, the question of adding 5% royalty to the transaction value is not sustainable in law. In support of their claim, the learned counsel relied on the decision of the Hon'ble Supreme Court in the case of **Commissioner of Customs vs. Ferodo India Private Limited: 2008 (224) ELT (23) (SC)**. With regard to carbon strips, the learned counsel submitted that they had not admitted their liability as claimed by the Commissioner (A) in the impugned order instead their claim was that the payment of 5% royalty is not a prerequisite condition to import carbon strips and other goods from the associated companies to use in the manufacture of pantographs. The royalty for technical know-how for the manufacture of pantographs is a post import activity and therefore, it cannot be the part of the transaction value for the imported goods. In this regard, reliance is placed on decision of the Hon'ble Supreme Court in the case of **Commissioner of Customs Port, Chennai vs. Toyota Kirloskar Motor Private Limited: 2007 (213) ELT (4) (SC); Commissioner vs. Prodelin India Pvt. Ltd.: 2006 (2002) ELT (13) (SC)** and **Steel Authority of India Ltd vs. Commissioner: 2007 (210) ELT (150) (Tri.-Bang)** which was upheld by the Supreme Court. Hence, he prays for setting aside the impugned order.

3. The learned AR on behalf of the Revenue reiterated the findings of the original authority and the Commissioner (A) and submitted that since the imports are made from the related suppliers, royalty has to be added to the transaction value of the imported items as per Rule 10(1)(c) of the Customs Valuation Rules 2007.

4. On perusal of the records and the submissions made by the learned counsel and the Revenue, the limited point to be decided is whether royalty paid by the appellant needs to be added to the transaction value of the imported goods. The fact that the importer M/s. Schunk Metals & Carbon (India) Private Limited, India and the supplier M/s. Schunk Gmbh, Germany and its associated companies are related in terms of Rule 2(2)(i) of Customs Valuation Rules, 2007 is not under dispute. The goods are imported by the appellant based on the purchase orders and the price lists of the supplier. As per the value declared by the importer, the price was equivalent to the price declared in the price list of the supplier. Further, the appellant had also declared in their income tax returns that the transactions entered by them with their associated enterprises as per the agreement is on the basis of transfer prices. As per the transfer pricing study analysis, it was concluded that the international transaction undertaken by M/s. Schunk India and its associated enterprises was at arm’s length. Based on the cost

analysis and based on the declaration given by the supplier, the original authority concluded that *"I find that the importer has made an attempt to justify the reasonableness that the relationship is not influenced the price as required under rule 3(3)(a) of the Customs Valuation Rules 2007 and therefore the declared price was accepted as transaction value for all the imports made by the appellant"*. In addition, it is also seen that the original authority at para 19(i) of the Order-in-Original has clearly stated in the table that the price declared for the carbon blanks was € 11.84 per piece and the price declared by the appellant in the Bill of Entry was € 11.84. This verification has been done for various grades of carbon blanks/brushes based on other detailed verification of the transaction value of these products was accepted stating that the relationship had not influenced the price.

5. As per the license agreement, Article 10(4) a royalty of 5% shall be paid based on the net sales volume of licensed products and licensed products at Article 1(2) is defined as current transmission systems (Pantographs) and its spare parts not including carbon strips. The Commissioner (A) in the impugned order has confirmed addition of royalty on carbon brushes only on the ground that the appellant has admitted the same but the appellant before us has denied that no such admission was made before the Commissioner (Appeals) hence this inference is baseless. So, the question to be decided is that once the authorities accept that the relationship of the importer

and supplier has not influenced the price, whether addition of royalty on the imported goods that were used in the manufacture of Pantographs needs to be revised with the addition of 5% royalty or not?

6. Once the fact that the pricing pattern has been examined from various angles as discussed supra and the fact that it was factually found that the prices declared by the importer was as per the price list of the supplier, the question of adding royalty of 5% does not arise. The Commissioner (A) in the impugned order has held that the appellants have not shown any imports from unrelated suppliers and therefore, it can be inferred that the import is made only from the related suppliers without substantiating the fact that when the transaction value was accepted as to how the royalty paid on the technical know-how influenced the price of the imported goods.

7. The appellant's submission that once the transaction value of the goods imported from the associated companies are at "arm's length price" under Rule 3(3)(a) of the Customs Valuation Rules, 2007 is accepted, the Department cannot load 5% royalty to the transaction value under Rule 10(1)(c) of the Customs Valuation Rules, 2007 is absolutely valid and sustainable in law as has been held by the Hon'ble Supreme Court in the case of **Commissioner of Customs Vs. Ferodo India Pvt. Ltd.-2008 (224) ELT (23) (SC)** wherein it had held that:

"18. Royalties and licence fees related to the imported goods is the cost which is incurred by the buyer in addition to the price which the buyer has to pay as consideration for the purchase of the imported goods. In other words, in addition to the price for the imported goods the buyer incurs costs on account of royalty and licence fee which the buyer pays to the foreign supplier for using information, patent, trade mark and know-how in the manufacture of the licensed product in India. Therefore, there are two concepts which operate simultaneously, namely, price for the imported goods and the royalties/licence fees which are also paid to the foreign supplier. Rule 9(1)(c) stipulates that payments made towards technical know-how must be a condition pre-requisite for the supply of imported goods by the foreign supplier and if such condition exists then such royalties and fees have to be included in the price of the imported goods. Under Rule 9(1)(c) the cost of technical know-how is included if the same is to be paid, directly or indirectly, as a condition of the sale of imported goods. At this stage, we would like to emphasis the word *indirectly* in Rule 9(1)(c). As stated above, the buyer/importer makes payment of the price of the imported goods. He also incurs the cost of technical know-how. **Therefore, the Department in every case is not only required to look at TAA, it is also required to look at the pricing arrangement/agreement between the buyer and his foreign collaborator. For example if on examination of the pricing arrangement in juxtaposition with the TAA, the Department finds that the importer/buyer has misled the Department by adjusting the price of the imported item in guise of increased royalty/licence fees then the adjudicating authority would be right in including the cost of royalty/licence fees payment in the price of the imported goods. In such cases the principle of attribution of royalty/licence fees to the price of imported goods would apply. This is because every importer/buyer is obliged to pay not only the price for the imported goods but he also incurs the cost of technical know-how which is paid to the foreign supplier. Therefore, such adjustments would certainly attract Rule 9(l))(c).**

Emphasis supplied

25. Rule 4(3)(b) of the CVR, 1988 provides for an opportunity for the importer to demonstrate that the transaction value closely approximates to a "test" value. A number of factors, therefore, have to be taken into consideration in determining whether one value "closely approximates" to another value. These factors include the nature of the imported goods, the nature of the industry itself, *the difference in values etc*. As stated above, Rule 4(3)(a) and Rule 4(3)(b) of the CVR, 1988 provides for different *means* of establishing the acceptability of a transaction value.------ As stated above, in a given case, if the Consideration Clause indicates that the importer/buyer had adjusted the price of the imported goods in guise of enhanced royalty or if the Department finds that the buyer had misled the Department by such pricing adjustments then the adjudicating authority would be justified in adding the royalty/licence fees payment to the price of the imported goods".

8. The Hon'ble Supreme Court in the case of **Commissioner of Customs Port Chennai vs. Toyota Kirloskar Motor Private Limited: 2007 (213) ELT (4) (SC)**, in similar facts and circumstances held that:

> "9. On an evaluation of the relevant clauses in the collaboration agreements and the attendant circumstances, we are of the view that the concurrent judgments of the High Court at Bombay do not merit interference in this appeal. The crucial aspects appearing in the case are that the parties were dealing at arm's length, that the seller and the buyer have no interest in the business of each other, that, ordinarily, the technical know-how of the machine can take in the assembly thereof, that the CKD packs and spares were supplied to the respondents by the collaborator not at a concessional price but at the price at which they were sold to others, that, as agreed to by the respondents, the option was entirely with the respondents to order the parts as per their requirements, that there was no obligation on the respondents to purchase CKD packs at all, that long before the supply of the CKD packs and spares, the royalty due to the collaborators was paid, that there is no material to show that the supply of the CKD packs or spares weighed with the parties in fixing the payments under the collaboration agreement but, on the other hand, the collaboration agreement for the technical know-how and the supply of CKD packs and spares are independent commercial transactions; **in other words, there existed no nexus between the lump sum payment under the agreement for the technical know-how and the determination of the price for supply of CKD packs or spares.** It is by highlighting the above aspects that the learned Single Judge and the Division Bench concluded that the contention that the price quoted in the invoices tendered by Mahindra & Mahindra (respondents) does not reflect the correct price because a part of the value of imported packs and components was already received by foreign collaborator while determining the consideration of 15 million French Francs cannot be accepted, and the collaboration agreement does not support the claim nor was there any material available to the Assistant Collector to warrant such a conclusion, and, therefore, resort to Section 14(1)(b) of the Act and Rule 8 of the Customs Valuation Rules is clearly incorrect and unsustainable and the Assistant Collector was bound to accept the price mentioned in the invoices for the purpose of assessing the customs duty."

9. In the present appeal, the facts have clearly proved that the pricing was at arm's length and the relationship had not influenced the price, which has been accepted by the department hence there is no question of adding the royalty to the transaction value as held by the apex court in the judgement referred above.

10. In view of the above, the impugned order is set aside and the appeal is allowed.

(Order pronounced in open court on ***03.11.2023****.)*

(P. A. AUGUSTIAN)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI
MEMBER (TECHNICAL)

rv