

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

**Application No.C/Misc/40247/2018 &
Appeal No.C/41908/2015**

[Arising out of Order-in-Appeal No.471/2015 dt. 24.04.2015 passed by
Commissioner of Customs (Appeals-II), Chennai]

Hyundai Engineering Plastics India Pvt. Ltd. Appellant

Versus

Commissioner of Customs, Chennai-III Respondent

Appearance :

Shri Joseph Dominic, Consultant
For the Appellant

Shri K. Veerabhadra Reddy, JC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 04.06.2018

FINAL ORDER No. 41759 / 2018

Per Madhu Mohan Damodhar

The facts of the case are that M/s.Hyundai Engineering Plastics India Pvt. Ltd., hereinafter referred to as the appellants, imported raw materials such as Polypropylene granules for manufacture of "Polypropylene Compound" from M/s.Guangdong Hyundai SK Advanced Polymer Company Ltd., China. On a *prima facie* finding that both importer and the

foreign supplier are related, the matter was referred to Special Valuation Branch (SVB) of the Customs for investigation. A circular dt. 10.06.2010 was issued for provisional duty assessment with 1% Extra Duty Deposit (EDD). The issue of accepting the invoice value of imported goods was examined by the SVB in 2008 and 2011 and on both occasions it was decided by the Asst. Commissioner, Special Valuation Branch that the relationship did not influence the price and therefore invoice value was acceptable as Customs value. In 2011, the said SVB order relating to imports from the Korean company came up for renewal. During the said proceedings appellants produced copy of License and Technical Assistance Agreement which they had entered with Hyundai Engineering Plastics Co. Ltd., Korea in April 2008. In terms of that agreement, the appellant was to pay an initial amount of US\$ 3,25,000 and running royalty of 4% of the net sale price of the product manufactured and sold by the appellant in India which was reduced to 2% in the revised agreement of April 2013. The Asst. Commissioner (SVB) by an order dt. 20.01.2015, inter alia held that Hyundai Engineering Plastics India Private Ltd., Chennai and M/s.Hyundai Engineering Plastic Co., Korea and M/s.Guangdong Hyundai SK Advanced Polymer Co. Ltd., China are related to each other in terms of Rule 2 (2) of the Valuation Rules; that declared invoice price may be accepted as transaction value under Rule 3 (3) (b) *ibid*; that royalty amount of US\$ 3,25,000 shall be added to any one of the Bills of Entry of the appellant

under Rule 10 (10 (c) *ibid*; that in addition to the above, running royalty of 4% is to be loaded to the invoice price of the goods imported from the related supplier; that Customs duty is to be recovered accordingly. Against this order, appellants preferred an appeal before the Commissioner (Appeals) who vide the impugned order dt. 24.4.2015 held that acceptance of invoice value by original authority is not correct; that there is discrepancy in the quantum of addition ordered by the original authority and the lower appellate authority set aside that portion of the adjudication order accepting the declared value in terms of Rule 3 (3) (b) *ibid* as also the quantum of addition ordered under Rule 10 (1) (c). The Commissioner (Appeals) however agreed with the adjudicating authority's decision that royalty should be added to the invoice value. The authority also directed that 5% of the invoice value of the goods imported from "related suppliers" to be collected towards EDD till the issue of fresh order. Aggrieved, the appellants are before this forum.

2. Today when the matter came up for hearing, on behalf of the appellants, Ld. Consultant Shri Joseph Dominic made a number of submissions which can be broadly summarized as under :

- i) The impugned order has gone beyond the scope of appeal made by them.
- ii) Ld. Consultant drew our attention to pages 26 to 31 wherein copies of the appeal made to the Commissioner (Appeals) have been filed. Ld.

Consultant pointed out that the reliefs claimed in the appeal by them were only for holding as unsustainable, the order of the original authority for inclusion of royalty amount and subsequent inclusion of 4% to be loaded in the invoice value of future imports.

iii) Ld. Consultant took us to copy of the License and Technical Assistance Agreement dt.18.04.2008 between them and Hyundai Engineering Plastics Pvt. Ltd., Korea. He points out that Article 2.1 clearly indicates that the license agreement is only to manufacture, use and sell the products in the territory; that as per Article 1.5, products shall mean PPF of various grades and allied components manufactured by appellant's design, model or by imitation.

iv) Ld. Consultant drew our attention to Article 4.1 onwards wherein the details of down payment of US\$ 325000 and running royalty of 4% has been laid down. He points out that running royalty relates only to net sales price of the products manufactured and sold or otherwise disposed of by the appellants in India.

v) Ld. Consultant also drew our attention to Article 4.1 of the revised agreement dt. 08.04.2003 to submit that the running royalty of 4% had been reduced to 2% by such revision; however, this aspect was not taken into account by the Commissioner (Appeals) in spite of being pointed out.

vi) The License and Technical Assistant Agreement is therefore in no way related or connected with the import of the impugned raw material imported by them.

vii) Although both the original adjudicating authority as well as Commissioner (Appeals) have taken a view that appellants are importing materials only from related supplier, it is pointed out that there is no such addition anywhere in the agreement that the goods had to be bought only from M/s.Guangdong Hyundai SK Advanced Polymer Company Ltd., China.

viii) Appellant imports various grades of Polypropylene and their parent company is only one of the suppliers. Appellants are also importing the same goods from supplier who are not related to them. He placed reliance on the ratio of the following case laws :

- 1) *Can-pack (India) Pvt. Ltd. Vs CC (I) Mumbai* – 2015 (327) ELT 291 (Tri.-Mumbai). In this Tribunal's decision, it is clearly inter alia laid down that technical know-how fee and royalty is not includable in the assessable value of the goods since the agreement for purchase of raw materials did not impose any condition with regard to source of procurement of raw materials subject to maintain quality/standard and that relationship with the principals had not influenced the supply price of the raw materials.

2) *Rhone Poulenc (I) Ltd. Vs CC Mumbai – 2016 (335) ELT 122 (Tri.-*

Mumbai. In this decision, the Tribunal held that agreement between the appellant therein and their foreign supplier concerned overseas does not talk about or restrict the appellant to purchase or procure materials only from the latter, hence loading of value by amount of royalty paid by appellant is not sustainable.

3. On the other hand, on behalf of respondent, Ld. A.R supports the impugned order. He submits that Commissioner (Appeals) is fully within his powers to modify the order appealed against as per Section 128 of the Customs Act, 1962. There is no dispute even from the appellants that they have not paid lump sum amount as well as 4% / 2% royalty to their related person abroad. Since this royalty is being paid in relation to manufacture of the goods in India, the raw materials imported for it will also have to be necessarily loaded to arrive at the correct assessable value. Since the appellants are importing only from provider of technical information and license rights in principal there has to be addition in terms of Rule 10 (1) (c) of the Valuation Rules.

4. Heard both sides and have gone through the facts.

5.0 We first take up the objection of Ld. Consultant with regard to their contention that the impugned has gone beyond the scope of their appeal made to that authority.

5.1 We find from a copy of the Form C.A-1 of appeal to the Commissioner (Appeals), Column No.7, that the reliefs claimed in appeal are as follows :

"Hold that the Order of the Respondent in ordering for the inclusion of the Royalty amount already paid in one of the Bills of the Entry and subsequent inclusion of 4% to be loaded in the Invoice Value on future imports on grounds of such Royalty payment is legally unsustainable, hold the order of the respondent for the provisional assessment of the Capital Goods imported as wrong, hold that the invoice value of such imports be accepted as the correct transaction value and assessed to duty accordingly and pass such other orders as the learned Commissioner (Appeals) deem fit and proper in the facts and circumstances of the case and render justice.

It is also to be noted that the Department did not prefer any appeal at the same time against the order of the original authority accepting the invoice value. In such circumstances, it was not open to the Commissioner (Appeals) to have gone beyond the scope of the appeal and set aside a portion of the order which was not appealed against by the Department. There are specific procedures laid down in Section 128A of the Customs Act, 1962 for agitating such matters which have not been raised in the notice. However, they cannot be done unless the appellant is given notice within the time limit prescribed in Section 128 of the Customs Act, 1962. This has not certainly been done. We therefore find that the order of lower appellate authority to set aside that portion of the original adjudicating authority's order accepting the invoice price cannot sustain and will have to be set aside, which we hereby do.

5.2 The lower appellate authority has however upheld the inclusion of lump sum charges and royalty fees to be included in the assessable value of the impugned imports. In this regard, the payment of lump sum amount of US\$ 32500 and continuing royalty of 4% / 2% by the appellant to the related foreign supplier is not disputed. The short point that comes up for decision is whether such amount will be includible in respect of the impugned imports made by the appellants.

5.3 It is amply clear from the License and Technical Assistance Agreements, one dated 18.04.2008 and a revised agreement dated 08.04.2013 that the products in respect of which such technical assistance was given and for which lump sum payment had to be paid as *quid pro quo* was only in relation to PPF products of various grades and allied components manufactured by the appellants in the territory of India. The terms of payment in Article 4 of the related Agreement also clearly lays down that for the purpose of Article “products” shall include products manufactured wholly or in part using technical information furnished by the licensor. It is also indicated that the royalties relate to the number of products that were sold by the licensee / appellants and the royalty amount due during the actual period would be calculable accordingly.

5.4 The take away from these conditions of the agreement is obviously that royalty and lump sum payments are only in relation to the goods that

would be manufactured by the appellants in India and not in respect of raw materials imported by the appellants.

5.5 We also find merit in the assertion of Ld. Consultant that the agreement does not bar purchase of such raw material from sources other than the related person. On the other hand, as averred by the appellant, their parent company is only one of their suppliers and that they are also importing the same goods from other suppliers who are not related to them. There is also an assertion that even the parent company also is not the manufacturer of the goods but are procuring the same from other manufacturers and supplying it to the appellant after a mark up.

5.6 No doubt, Rule 10 (c) of the Valuation Rules provides for addition to the price actually paid or payable for imported goods royalties and license fees related to the imported goods. However, the Rule 10 (c) also requires that such amounts are those that the buyer is required to pay, directly or indirectly as a condition of the sale of the goods. Thus there has to be a nexus between the goods imported with the royalties or license fees. As already found the nexus is only with respect to manufacturer of the goods. The payment of royalty and licence fees are not a condition of sale with respect to the goods imported from the parent company. The addition of royalties and license fees cannot be related to the imported goods, ergo, these amounts cannot be then made part of the assessable value of such imported goods.

5.7 We find that case laws relied upon by the consultant fully support their stand.

5.7.1 In *Can-Pack (India) Pvt. Ltd. Vs CC (I) Mumbai* – 2015 (327) ELT 291 (Tri.-Mumbai), the Tribunal inter alia held as under :

“4.2 We further find that in the decisions relied upon by the learned Counsel for the appellant, the issue has been settled against the Revenue and in favour of the appellant. In the *Escorts Ltd.* case (cited supra) , the appellant, manufacturer of motor vehicles, entered into a technical know-how agreement with the foreign collaborator for the supply of technology. The argument envisaged payment of lump-sum royalty as well as a running royalty of 10% of the sale value of the goods manufactured. There was also agreement for purchase of parts and components to be supplied at a mutually agreed upon price. The Revenue contended that the royalty paid should be added to the assessable value of the goods inasmuch as the entities were related. This contention was negated by this Tribunal holding that payment of royalty has nothing to do with the supply of components or on the price of the components and inasmuch as the foreign company had no controlling interest in the Indian, buyer the royalty paid cannot form part of the price for the supply of components. Similarly, in the case of *Hindustan Motors Ltd.* case, there was an agreement for supply of technical know-how and lump sum payment was made to the foreign collaborator. The appellant has also entered into component purchase agreement whereby the collaborator supplied the components. The question for consideration was whether the lump sum payment of royalty made for the supply of technical know-how could be included in the assessable value of the components purchased by the appellant from the foreign supplier. It was held that since the imports were made at a price which was normal in the international market for such goods, the technical know-how agreement did not relate to the supply of components and it cannot be inferred that royalty payment made is a condition for the sale of goods. Accordingly, this Tribunal set aside the demand. The said order was also affirmed by the Hon’ble Apex Court in the same case. In *Mahindra & Mahindra Ltd.* case the Hon’ble Apex Court considered a more or less identical issue. There was a technical know-how transfer agreement between the Indian manufacturer and the foreign collaborators for the progressive manufacture of automobiles in India on payment of lump-sum royalty. In the meanwhile, the Indian manufacturer imported CKD packs of engines from the foreign collaborator. The Revenue was of the view that lump-sum payment of royalty made for supply of technical know-how should be included in the value of the CKD packs of engine imported under Rule 9(1)(c) of the Customs Valuation Rules, 1988. The Hon’ble Apex Court negated this contention and held that in the absence of a specific clause indicating that the payment of royalty was connected with the supply of components, the royalty payment cannot be automatically added to the value of the goods imported. The ratio of these decisions would apply to the facts of the present case.”

5.7.2 So also, in the case of *Rhone Poulenc (I) Ltd. Vs CC Mumbai* - 2016

(335) ELT 122 (Tri.- Mumbai), the Tribunal held as under :

“6. On perusal of the order-in-original we find that the adjudicating authority has reproduced important clauses of the agreement entered into by the appellant with their parent concern. The agreement is titled as a technical know-how agreement. The entire agreement is in respect of the finished goods to be manufactured by the appellant in their factory from the technical know-how received from parent concern. The said agreement does not talk about or restrict the appellant to purchase or procure raw materials only from the parent concern. The findings of adjudicating authority are correct. The first appellate authority has not brought on record any evidence to indicate that there was restriction imposed on the appellant to procure the raw materials only from the parent concern. In the absence of any such evidence, we are of the considered view that the loading of the value of by the amount of royalty paid by appellant is not in consonance with the law settled by the higher judicial fora.”

5.7.3 We find further that the same dispute has been addressed and set to rest by the Hon'ble Apex court judgements in a number of judgements. In the case of *CC Chennai Vs Same Engines India Pvt. Ltd.* - 2015 (325) ELT 241 (SC), the Hon'ble Apex Court categorically laid down that cost of technical know-how involving training, procedures and methods for production etc. being post-importation services are not liable to be includible in the assessable value.

5.7.4 In *CC (Imports) Mumbai Vs Hindalco Industries Ltd.* - 2015 (320) ELT 42 (SC), the Hon'ble Apex Court in a case involving import of capital goods for setting up a smelter plant, held that fees for License, Basic Engineering, Training and Technical Services are neither related to import of capital goods nor was it a condition of sale, that they pertain to services that

were to be provided post-import of the goods, hence value thereof should not be loaded on to the value of imported goods.

5.7.5 Similar view has been reiterated time and again by the Hon'ble Apex Court in *CC (Port) Kolkata Vs J.K. Corporation Ltd.* – 2007 (208) ELT 485 (SC), *CC (Port) Chennai Vs Toyota Kirloskar Motor P. Ltd.* – 2007 (213) ELT 4 (SC), *Gujarat Mineral Development Corpn. Ltd. Vs CCE & C Ahmedabad* – 2005 (190) ELT 5 (SC).

5.7.6. There could be an argument that some of these Supreme Court decisions relate to disputes which arose during the pendency of the earlier Valuation Rules. Nonetheless, even though the Customs Valuation Rules have a work in progress and been evolving over the years to its present shape, certain basic tenets of valuation, inter alia, the when and how of includability of royalty etc. payments to assessable value, have certainly remained constant.

6. In view of the discussions herein above, and also following the ratio already laid down by various higher appellate forums, including High Courts and Apex Court, we hold that the royalty and lump sum fees paid in relation to manufacture of goods in India cannot be padded on to the declared import value of the impugned goods.

7. To sum up -

The impugned order is set aside which will have the effect of (i) restoring that portion of the order of the original authority accepting the

declared value in terms of rule 3 (3) (b) of the Customs Valuation Rules (ii) setting aside the upholding of addition of lump sum amount and royalty fees to the assessable value of the impugned imports. Appeal is allowed with consequential relief, if any, as per law.

7. In consequence, the MA numbered as C/Misc/40247/2018 praying for stay of operation of the order of Commissioner (Appeals) will also stand disposed automatically.

(operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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