

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI
COURT HALL No.III**

CUSTOMS APPEAL No. 40973 OF 2013

(Arising out of Order-in-Appeal C.Cus.No.94/2013 dated 29.01.2013 passed by Commissioner of Customs (Appeals), 60, Rajaji Salai, Custom House, Chennai 600 001)

The Commissioner of Customs (Imports), ... **Appellant**
No.60, Rajaji Salai, Custom House,
Chennai 600 001.

Versus

M/s.Vestas Wind Technology India Pvt. Ltd. ... **Respondent**
No.298, Old Mahabalipuram Road,
Solinganallur,
Chennai 600 119.

APPEARANCE :

Ms. Anandalakshmi Ganeshram, Superintendent (A.R)
For the Appellant

Mr. Rohan Muralidharan, Advocate
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 05.07.2023
DATE OF DECISION : 11.07.2023

FINAL ORDER No.40546/2023**ORDER : Per Ms. SULEKHA BEEVI, C.S.**

Brief facts are that the respondent is engaged in the manufacture of Wind Turbine Generator (WTG) suited for large wind farms. The respondent were formerly known as NEG Micon India P. Limited and prior to that as M/s.Asian Wind Turbines P. Ltd. The respondents imported various parts and components and were found related to the supplier, M/s.NEG Micon AS Denmark. Earlier, the Special Valuation Branch (SVB) vide its order No.113/2001 dated 12.01.2001 issued directions to add the licence fee and service fee to the invoice value. After rounds of litigations, the Tribunal, Chennai set aside the said Order-in-Original and held that the licence fee payable is not related to the imported goods and also that it is not a condition of sale and need not be included in the invoice value. The Department accepted the order of Tribunal and the issue came to a settlement. A review order No.6124/2007 dated 30.03.2007 was issued accepting the invoice value for assessment purpose.

2. Later, the matter came up for periodical review and vide OIO No.14240/2010 dated 19.01.2011 the original authority held that the respondent has to include the licence fee in the invoice value. The Commissioner (Appeals) set aside the said order. Aggrieved, the Department is thus before the Tribunal.

3. Ld. A.R Ms. Anandalakshmi Ganeshram appeared and argued for the Department. She submitted that the earlier order was

reviewed and OIO No.6124/2007 dt. 30.03.2007 was issued accepting the invoice value. However, the circumstances have changed. From 09.02.2007 onwards the buyer and seller are governed by a Licence agreement which among other things stipulates as under :

"Licensor shall from time to time during the terms of this Agreement furnish Licensee with improvements to the technology of V82 on an as needed basis.

Licensor shall be entitled to utilize all adjustments to drawings, specifications and information prepared by Licensee based on technology provided under this agreement. After termination of this Agreement Licensee shall at Licensor's request completely return to Licensor all Know-how and shall keep no copies thereof except as shall be required by Licensee to fulfill contractual, warranty and other such obligations."

"As consideration for the license and the rights granted to Licensee hereunder, Licensee shall effective January 1, 2007 pay the Licensor a license fee of EURO 6800 (inclusive of all taxes) for each WTG commissioned".

License fee will be invoiced and charged by Licensor on confirmation of WTG commissioned on a quarterly basis. Licensee shall provide this information on a monthly basis to Licensor in a mutually agreed and prescribed manner...."

(emphasis added)

4. It is argued by the Ld. A.R that from the agreements, it can be seen that the import of the components of the Wind Mill System is of no use to appellant unless the technical know-how of assembling and installation and manufacture of wind mill is also obtained by the appellant. Thus the License Fee is nothing but a condition of sale of the imported items though not specifically mentioned in the agreement. The decision of Hon'ble Apex Court in the case of *Collector Vs Essar Gujarat Ltd. - 1996 (88)*

ELT 609 (SC) relied. Ld. A.R also argued that there has been amendment of the Rules. An Explanation has been added to Rule 10 (1) (c) of CVR 2007 which was not available in earlier Rule 9 (1) (c) of the Rules. Ld. A.R prayed that the appeal may be allowed.

5. Ld. Counsel Sri Rohan Muralidharan appeared and argued for the respondent.

6. It is submitted that for the purpose of manufacturing WTGs, the respondent imports various parts from various foreign suppliers. The respondent and M/s.NEG Micon (foreign company) known as Vestas Wind Systems AS, Denmark had entered into Technical Assistance Agreement on 29.01.2000. Through the said agreement, the technological innovations made by NEG Micron were transferred to the respondent. For such transfer, the respondent would compensate NEG Micron by payment of license fee in respect of every WTG produced. The relevant terms of the agreements are extracted below :

"WHEREAS AWTPL is engaged in the business of, inter alia, assembling and constructing Wind Turbine and TT Power plant and is having its assembling and construction facility located at Kandanchavadi, Chennai.

WHEREAS NEG MICON has centralised Research & Development center that undertakes R&D activities on behalf of AWTPL. NEG MICON's technological innovations are transferred to AWTPL from time through global training program and technology transfers.

WHEREAS NEC MICON desires to get compensated for the R&D costs incurred through a license fee payment

*in respect of every Wind Turbine Generator (WTC)
produced by AWTPL."*

7. Since NEG Micon and the respondent were related parties, the valuation of the goods was investigated by Special Valuation Branch, Chennai (SVB) and Order-in-Original No.113/2001 dated 12.02.01 was issued. As per this order, the Licence and Service fee paid by the respondent to its related parties was to be added to the transaction value. Against such order, the respondent filed appeal before the Commissioner (Appeals) and vide order dated 17.07.2001, the order of the original authority directing to include the licence and service fee was set aside. Against such order, the department filed an appeal before Tribunal and vide Final Order No.440-444/02 dated 21.03.2002 the matter was remanded to the Commissioner (Appeals). Pursuant to remand by order dt. 30.04.2003, it was held that the service fee paid for servicing of WTG as well as the licence fee payable towards technical know-how under the agreement are relatable to the imports and has to be added under Rule 9 (1) (c) of Customs Valuation Rules. The respondent then filed an appeal before the Tribunal at Delhi. The Tribunal vide Final Order dated 13.05.2004 set aside the order passed by the Commissioner (Appeals) dated 30.04.2003 and held that the licence fee payable by the respondent to its related party suppliers is not related to imported goods and cannot be added to the invoice value.

8. Subsequently, the review of OIO dt. 30.03.2007 was taken up. While so, M/s.NEG Micon AS Denmark merged with respondent and the name of the respondent also changed to M/s.Vestas Wind Technology India Private Limited. However, the subsidiary status of the respondent was not changed. NEG Micon and the respondent terminated the technical assistance agreement vide an agreement dated 8.2.2007. Thereafter, the respondent (Licensee) entered into new License Agreement dated 09.02.2007 with Vestas Denmark (Licensor). As per this license agreement the licensor is the sole owner of the technology pertaining to manufacture of V82 models of WTG and the licensee had procured the right to use the technology for assembly and construction of V82 WTGs. For the use of technology and the ongoing technical support, the licensee would pay licensee fee to the licensor. Clause 4 of the License Agreement provides for payment of license fee. The relevant part of agreement read as under :

"4. LICENCE FEE -

4.1 As consideration for the license and the rights granted to Licensee hereunder, Licensee shall effective January 1, 2007 pay the Licensor a License fee of EURO 68,000 (inclusive of all taxes) for each WTG commissioned."

9. It is submitted by the Ld. Counsel for the respondent that vide letter dt. 2.7.2007 the appellant had informed the Department about this new agreement. In addition to the above, it was also informed that the respondent would henceforth import goods from the group

affiliates of M/s.Vestas Wind Systems AS Denmark. Further, the respondent had produced necessary documents and also filed detailed reply to the questionnaire. Based on the documents submitted by them, the matter was taken up for consideration. The present OIO dt. 19.01.2011 was passed. The said order has referred to the change in the name of the companies and also new licence agreements. However, the original authority held that the licensee fee has to be added to the transaction value declared by the respondent. On appeal, the Commissioner (Appeals) has correctly set aside that part of the order of the original authority wherein it was held that the license fee has to be added to the transaction value. It is submitted that department did not file any appeal against the order passed by the original authority and therefore now department cannot challenge the order passed by Commissioner (Appeals) who set aside that part of the OIO which directed to include the licence fee in the transaction value.

10. The department has stressed on the amended rules whereby an Explanation has been added to Rule 10 of CVR 2007. The Explanation to Rule 10 is not applicable to the facts of the case. The said Explanation in Rule 10 is to provide for addition of post importation charges. The Ld. Counsel argued that only if the licence fee is related to the import of goods and is payable as a condition of sale, the same is required to be added to the transaction value. The agreement establishes that the payment of license fee is not a condition of sale between the parties.

11. It is submitted by the Ld. Counsel that the decision of the Tribunal, Delhi in the respondent's case has attained finality and has been accepted by the Department. Further, in the respondent's own case vide OIA No.173/2014 dated 21.11.2014, the Commissioner (Appeals) has upheld the order passed by the original authority wherein it was held that licence fee is not required to be included in the transaction value. Id. Counsel prayed that the Revenue appeal may be dismissed.

12. Heard both sides.

13. The issue that arises for consideration is whether the licence fee has to be added to the transaction value for discharge of customs duty.

14. The arguments put forward by the department are two fold. Firstly, an Explanation has been added to Rule 10 (1) (c) of CVR 2007 and therefore there is a change in the provisions of law. Secondly, that new licence agreement has been executed in 2007 and for these reasons, there is change of circumstances. The relevant part of the License agreement has been already noticed. It shows that the payment of licence fee is for each WTG commissioned. Thus, it cannot be said that the licence fee is a condition of sale of the parts and components imported by appellant. The Explanation of Rule 10 (1) (c) was considered by the Tribunal in the case of *Brembo Brake India Pvt. Ltd. Vs Commissioner of Customs (Imports), Mumbai - 2014 (302) ELT 551 (Tri.-Mumbai)* . Relevant part reads as under :

"7. We have carefully considered the submissions and perused the records. The department has sought to load royalty relating to the technical know-how as per Rule 10(l)(c). Undisputedly the appellants have imported components for the manufacture of Dis Brake Systems for two wheelers. The department has sought to load the assessable value as per Rule 10(l)(c) which is reproduced for convenience of the reference :-

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;

The following explanation has been added to Rule 10(l)(c).

"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 good, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods".

From the above it is clear that the royalty and the other charges can be included :

- (i) In case of imported goods
- (ii) As condition sale of goods

And the explanation only added that such royalty would be includable' in the case even if the imported goods have undergone the said process after importation of such goods. The department could not show that the royalty and other charges were for the imported goods and they were as a condition of sale of such imported goods. Undisputedly the royalty on technical know-how was paid only for the manufacture sub-assembly of Dis Brake Systems. Therefore the royalty and other charges are not includible and the impugned order is not sustainable and is set aside. The appeal is allowed."

15. It can be seen that Rule 10 (1) (c) uses the words 'as a condition of sale'. The Explanation only states that if the licence fee paid as a condition of sale, such licence fee is includable in transaction value even if the goods have undergone some process. There is no evidence to establish that the licence fee paid is a condition of sale of the goods.

16. Ld. Counsel has relied upon the order passed by the Commissioner (Appeals) OIA 173/2014 d. 21.11.2014 in their own case wherein an appeal was filed by the department against the order passed by Deputy Commissioner, SVB who held that the licence fee is not to be included in the transaction value. Commissioner (Appeals) after taking note of the new licence agreement as well as the amendment brought forth by adding Explanation to Rule 10, held as under :

“ Notwithstanding the above, it requires to be seen whether the technical licence fee is addable to the invoice value in terms of Rule 10 (1) © of the above said Rules even if there is no waiver for payment

Further in respect of import of V 82 WTG model, the question of addition of royalty was examined at the original stage, 1st appeal stage and 2nd appeal stage. The Hon'ble CESTAT, New Delhi vide its Order No.425 04 NB (A) dated 13.5.2004 held that Licence Fee is not addable in terms of the then Rule 9 (1) (c) of the Customs Valuation Rules, 1988. It is seen that the Board vide its Communication No. F.No.383/96/04 JC dated 4.8.2004 has accepted the above said order of the Hon'ble Tribunal, New Delhi.

The perusal of the licence Agreement dated 20.7.2010 reveals that it is related to V 100 WTG Model. There is no scope in the Agreement to infer any condition of purchase of raw materials / components from the provider of the Technology. In fact, the Agreement does not mention anything about the supply of raw materials / components required for the assembly / manufacture of V 100 WTG model. Further, the departmental appeal has not specified the quantum of import by the respondents from the provider of technical know how, the details of their import from third party suppliers, the quantum of indigenous procurement, etc. In the circumstances, the decision of the LAA not to add the Licence fee in terms of Rule 10 (1) (c) of Valuation Rules, 2007 is upheld.

In view of the above discussions, the impugned order is upheld. Departmental appeal fails.”

17. The very same issue was considered by the Tribunal in the case of *CC Vs Remy Electricals Ltd. Ltd.* 2017 (6) TMI 32-CESTAT CHENNAI wherein the Tribunal observed as under :-

“7. We are, however, unable to find out any condition precedent in the license agreement which ties the import of the impugned goods to the payment of the technical know-how and license fees. The imports are therefore definitely not conditional to payment by importer of additional technical know-how fees or royalty. There is no inseparable umbilical cord linking the impugned imports and the technical know-how/royalty fees. On the other hand, what we find is that these fees are directly, conspicuously and separately relatable to the manufacture and sale of products under license. It is also not the case of the department that capital goods or machinery for manufacture of the license product are involved in the current import. There is no dispute that the goods imported are nothing but automotive components.

.. . . .

10. In view of the aforesaid discussions and respectfully following the ratio laid down by the Hon’ble Apex Court in the case of *Ferodo India (supra)*, we do not find any infirmity in the impugned order passed by Commissioner (Appeals) and consequently the appeal of the department will require to be dismissed, which we hereby do. The appeal is dismissed.”

18. Ld. A.R has relied upon the decision in the case of *Essar Gujarat Ltd. (supra)*. The Hon’ble Apex Court in the case of *Feroda India Pvt. Ltd. 2008 (2240 ELT 23 (SC)* had occasion to analyse the very same issue and has held that the decision in *Essar Gujarat Ltd.* is not applicable. The Tribunal in the case of *Remy Electricals India Ltd. (supra)* has followed the decision of Hon’ble Apex Court in *Feroda India Pvt. Ltd. (supra)* to hold

that the licence fee cannot be included to the transaction value when the same is not a condition of sale.

18. After appreciating the facts and applying the ratio in the case of *Remy Electricals India Ltd.* (supra) we are of the considered view that the order passed by the Commissioner (Appeals) does not require any interference. The appeal filed by Department is dismissed.

(Pronounced in court on 11.07.2023)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI C.S.)
Member (Judicial)

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