

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH,
COURT NO. IV

CUSTOMS EARLY HEARING APPLICATION NO. 50565 OF 2022
(ON BEHALF OF THE APPELLANT)
IN

CUSTOMS APPEAL NO. 449 OF 2001

[Arising out of the Order-in-Original No. ACU/VS/5/2001 dated 26/07/2001
passed by The Commissioner, Customs, Air Cargo, New Delhi.]

M/s Panacea Biotec Ltd.,
B-1 Ext./A-27, M.C.I.E., Mathura Road,
New Delhi – 110 044.

...Appellant

Versus

Commissioner of Customs,
Air Cargo, New Customs House, IGI Airport,
New Delhi.

...Respondent

APPEARANCE:

Shri T.R. Rustagi, Advocate for the appellant.
Shri Rakesh Kumar, Authorized Representative for the
Department

CORAM:

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE DR. MS. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER NO. 51028/2022

DATE OF HEARING : 03.10.2022
DATE OF DECISION: 28.10.2022

P.V. SUBBA RAO

This appeal was filed assailing order-in-original¹ dated
07.08.2001 passed by the Commissioner of Customs, Air Cargo,
New Delhi and it was disposed of by this tribunal by final order

¹ **Impugned order**

dated 08.11.2002 in which the valuation of the goods was decided against the appellant but the remaining aspects, such as, confiscation, imposition of redemption fine and penalty were decided in favour of the appellant. Aggrieved, the appellant filed Civil Appeal No. 222/2003, which was decided by the Supreme Court on 06.08.2008, remanding the matter to this tribunal with respect to the determination of the value. Insofar as the confiscation and penalty are concerned, these issues attained finality as there was no appeal against the order of this Tribunal by the Revenue. Paragraph 3 of the judgment of the Supreme Court is reproduced below :-

"3. The only point which survives for consideration is regarding the includability of charges paid for importation of design engineering and site run in the assessable value of the fermenters. The show cause notice was based on the invokability of Rule 9 (1) (b) and Rule 9 (1) (e) readwith Rule 4. The Tribunal has not referred to either of these rules while deciding the question of includability of the charges for importation of design engineering and site run in the assessable value of the fermenters. Another point raised by the assessee was that design engineering and site run had already been assessed separately under chapter 49. The Tribunal has not decided as to what is the effect of exigibility of the design engineering and site run under Chapter 49. Since the Tribunal has failed to record a finding regarding applicability or otherwise of Rule 4, Rule 9 (1) (b), Rule 9 (1) (e) and the assessment already made of design engineering and site run under Chapter 49, we set aside the finding recorded by the Tribunal and remit the case to the Tribunal to re-decide the issue regarding includability of charges paid for importation of design engineering and site run in the assessable value of the fermenters afresh in the light of Rule 4, Rule 9 (1) (b), Rule 9 (1) (e) and the assessment already framed under Chapter 49 of design engineering and site run".

2. The facts of the case are that M/s Panacea Biotec Ltd.² manufactures vaccines and had imported Fermenters and Control Panel Assembly and also 'design engineering and site run' under

² **appellant**

the same airway bill number. It filed two bills of entry. Bill of entry No. 107278 dated 13.02.2001 was filed to clear the Fermenter and control panel assembly classifying it under Customs Tariff Heading 841989 and valued at DM 10,20,000/- (CIF) equivalent to Rs. 2,27,46,000/- and claimed the benefit of Notification No. 16/2000 dated 01.03.2000. Bill of entry No. 107394 dated 13.02.2001 was filed to clear the design engineering and site run valued at DM 3,30,000/- (equivalent to Rs. 73,59,000/-) (CIF), under Customs Tariff Heading 49191 at nil rate of duty. It needs to be pointed out that Customs Tariff Heading 491191 refers to printed material which was assessable to nil rate of duty during the relevant period.

3. The bill of entry No. 107394 for 'design engineering and site run' was assessed by the Appraising Officer as per the claim of the appellant. Both bills of entry were presented in the Air Cargo for examination of the goods. On examination, the examining officer found that the design engineering and site run were not separate goods but pertain to the Fermenters and control panel assembly imported by the appellant.

4. The purchase order and related proforma invoices were called for from the appellant by the officer and it was found that two items were imported under one master airway bill but separate Bills of Entry were filed for the two items and they were assessed separately by the different appraising groups. The examining officer found that the two were related to each other.

A show cause notice³ was issued to the appellant seeking to add the value of the design engineering and site run to the value of the Fermenters along with control panel assembly as per Rule 9(1) (b) and 9(1) (e) read with Rule 4 of the Customs Valuation Rules, 1988⁴. The importer was required to show cause as to why the value of the design engineering and site run for Fermenter systems should not be added to the value of the machine (Fermenters) under Rule 9 read with Rule 4 of the Valuation Rules and why differential duty should not be recovered from it. Further, it was also proposed to confiscate the imported goods under Section 111 (m) of the Customs Act and penalty was proposed to be imposed under Section 112 of the Customs Act.

5. After following due process, the Commissioner has passed the impugned order including the value of the design engineering and site run to the Fermenter and ordered to recover the duty accordingly. He also confiscated the goods under Section 111 (m) and allowed them to be redeemed under Section 125 on payment of the redemption fine of Rs. 50,00,000/-. He also imposed a penalty of Rs. 25,00,000/- upon the appellant under Section 112 (a) of the Act.

6. Aggrieved, the appellant filed this appeal and the order to confiscate the goods, impose fine and penalty have been set aside by the final order of this Tribunal dated 08.11.2002 and it has not been appealed against by the Revenue. Therefore, these

³ SCN

⁴ Rules

issues have attained finality. Further, in the final order, this Tribunal has held that the appellant is eligible for Notification No. 16/2002 which has also not been appealed against by the Revenue and hence that issue has also attained finality. Regarding the proposal to include the value of the design engineering and site run in the value of the Fermenter system, the matter had been remanded by the Hon'ble Supreme Court to this Tribunal for the following reasons:-

- (i) The show cause notice was based on invocability of Rule 9 (1) (b) and Rule 9 (1) (e) read with Rule 4 and this Tribunal had not referred to either of these rules while deciding the question of includability of the charges for importation of design engineering and site run in the assessable value of the Fermenter ;
- (ii) The point raised by the assessee that the design engineering and site run had already been assessed separately under Chapter 49 was not decided by the Tribunal. The Tribunal has not decided as to what is effect of exigibility of the design engineering and site run under Chapter 49.

7. We have heard learned Counsel Shri T.R. Rustogi and learned Authorized Representative for the Revenue Shri Rakesh Kumar on both these issues and perused the records.

8. According to the learned Counsel for the appellant, the design engineering and site run were allowed clearance on nil

rate of duty under Heading 491191. He refers to page 55 of the appeal book, which is part of the show cause notice issued to the appellant. In the third paragraph, it is recorded as follows:

"Similarly in bill of entry No. 107394 dated 13.02.2001 the items under import were design engineering and site run for Fermenter system 15 LT and 600 LT valued at Rs. 73,59,000/- The same were classified under CTH 491191 at nil rate of duty; they were as such assessed and marked for examination to the air cargo shed. Both the bills of entry were presented in the air cargo shed for examination of goods. Examination of goods of bill of entry No. 107394 dated 13.02.2001 revealed that the technical drawings were for the Fermenter system imported vide bill of entry No. 107278 dated 13.02.2001. It was observed the technical drawings were part of the entire project. The purchase order and related imported documents were called for from the importer".

9. According to learned Counsel the design engineering and site run were allowed clearance at nil rate of duty under Heading 491191 and hence there cannot be another assessment of these goods including their value in the value of the fermenter.

10. Learned counsel submits that Rule 4 of the Valuation Rules provides for acceptance of the transaction value with some adjustments as per Rule 9. Of the various clauses of this Rule, 9(1) (b) (iv) and 9(1) (e) have been invoked in the SCN and the impugned order to add the value of the design engineering and site run to the value of the fermenters. Rule 9(1) (b) deals with those cases where something was supplied free of cost by the importer to the overseas supplier and requires the value of such supplies to be included in the assessable value. Sub-clause (iv) deals with the drawings and designs without which the production of the imported goods would have not been possible. Rule 9(1)(b) (iv) does not apply to their case. Firstly, there is no allegation let alone evidence that anything was supplied free of

cost by the importer to the overseas supplier. The design engineering and site run are supplied by the overseas supplier to the importer. Secondly, there was no free supply because the design engineering and site run were supplied for DM330,000. Lastly, these are not required for production of the imported goods viz., the fermenters but are required to use the imported goods in a manner so as to produce vaccines as per WHO GMP.

11. As far as Rule 9(1) (e) is concerned, learned counsel submits that this provides for inclusion of value of anything which is a condition for sale. In this case, although they purchased both the fermenter and the design engineering and site run through the same contract and under the same invoice and had also imported through the same Airway Bill, purchase of the design engineering and site run was not a condition for sale of the fermenter. The fermenter could have been bought alone and used to produce vaccines. However, if the fermenter has to be used to produce vaccines which meet the WHO GMP, the design engineering and site run are also required. He relies on the letter from the supplier which clarifies that the fermenter was also available without the design engineering and site run. Nothing has been brought on record by the Revenue to establish that the purchase of design engineering and site run was a condition for sale of the fermenters. Therefore, they had filed two separate Bills of Entry with the respective appraising groups. He prays that the impugned order insofar as it includes the value of the design engineering and site run in the value of the fermenters

and confirms the demand of duty may be set aside and the appeal may be allowed. He relies on the case of **Steel Authority of India Ltd.**⁵ in which the Supreme Court was examining a case where the appellant had given a turnkey contract to the overseas supplier to import and set up the plant and it was held that the value of various goods imported under the same contract and in the same invoice cannot be combined. He submits that the appellant in this case is in a much better position as there is no turnkey contract and only two goods were imported under the same invoice and through the same airway bill.

12. Learned authorised representative for the Revenue made the following submissions:

- (a) The appellant filed two bills of entry on 13.2.2001 – one for the Fermenter with related items and the other for design engineering & site run for the Fermenter system supplied by the same overseas supplier under the same Master Airway Bill. The classification claimed for the Fermenter with related items in Bill of Entry No. 107278 was Customs Tariff Heading 841989 and the benefit of Customs notification No. 16/2000 dated 1.3.2000 was claimed. This classification was changed to Customs Tariff Heading 847989 and the benefit of the exemption notification was denied and this re-classification and denial of the benefit of the notification are not in dispute in the present appeal. The only

⁵ 2020 (372) E.L.T. 478 (S.C.)

dispute is whether the value of the technical drawings can be included in the value of the fermenter or they should be assessed separately.

- (b) There was a common price summary which includes commercial conditions with respect to prices, validity of offer, terms of payment, country of origin, scope of supply, guarantee, delivery conditions, etc. as recorded in page 90 of the paper book.
- (c) The design engineering and site run are not mere paper but cost about 30% of the value of the fermenter itself. They are an integral part of the project for sale of goods.
- (d) It is undisputed that the appellant has accepted in its reply to the SCN dated 24.5.2001 (as recorded in paragraph 7 of the OIO) that the manufacture of vaccines by them has to be in conformity with the requirements of the WHO. This was also certified by the overseas supplier of the goods in their letter dated 22.5.2001 in which it is stated *"It is certified that in addition we charged DM 330,000 towards design, engineering and site run for the above system. The design, engineering and site run involve specialised testing and supply of the following documents.*
It is certified that the above tests and documents are not ordinarily performed/made available. IQ, OQ and PQ tests are conducted only where strict requirements

according to WHO guide to good manufacturing program (GMP) requirements are specified by the buyer.

- (e) The importer and the supplier agreed to the sale of the goods along with the design engineering, and site run to meet the requirement of the WHO guidelines to GMP. Therefore, as per Rule 9(1) (b) and 9(1) (e) of the Valuation Rules read with Section 14 of the Customs Act, the value of the drawings and designs must be included in the assessable value.
- (f) The Valuation Rules draw strength from Section 14(1A) and therefore, there is very little scope for the court to interpret.
- (g) The agreement between the supplier and the appellant was for supply of goods which would enable the appellant to manufacture goods as per WHO's GMP which would not be possible without the design engineering & site run. Accordingly, the order was placed, the pricing was done. Therefore, it cannot be said that sale of these is not a condition for sale of the fermenter. Therefore, their value must be included in the assessable value of the fermenter. They cannot be assessed separately.
- (h) The case of **Steel Authority of India Ltd.** was on a different footing inasmuch as the drawings and

specifications did not relate to the equipment and were meant for post importation activities.

- (i) This case is similar to the case of **Mukund Limited vs Commissioner of Customs**⁶ in which the Hon'ble Supreme Court held upheld the decision of the Tribunal including the value of design, engineering, etc. as the supply was part and condition of the same contract.
- (j) He also relied on the case of **Collector of Customs (Prev) Ahmedabad vs Essar Gujarat Ltd.**⁷ and **Star Entertainment Pvt. Ltd. vs Commissioner of Customs(Adjudication) Mumbai**⁸.

13. We have considered the submissions on both sides. This matter was remanded by the Supreme Court to this Tribunal with a direction to re-decide the issue regarding includability of the charges paid for importation of design engineering and site run in the assessable value of the fermenters afresh because in the Final Order passed this Tribunal had not discussed Rule 9(1)(b) and 9(1) (e) read with Rule 4 and had also not examined the effect of the exigibility of the design engineering and site run which were assessed separately under Chapter 49. Paragraphs 3 & 4 of the judgment of the Supreme Court are reproduced below:

3. The only point which survives for consideration is regarding the includability of charges paid for importation of design engineering and site run in the assessable value of the fermenters. The show cause notice was based on the invocability of Rule 9(1)(b) and Rule 9(1)(e) read with Rule

⁶ **2000(120)ELT 30**

⁷ **1996(88) ELT 609 (SC)**

⁸ **2015(327)ELT 238(Tri-Mum)**

4. The Tribunal has not referred to either of these rules while deciding the question of includability of the charges for importation of design engineering and site run in the assessable value of the fermenters. **Another point raised by the assessee was that design engineering and site run had already been assessed separately under Chapter 49. The Tribunal has not decided as to what is the effect of exigibility of the design engineering and site run under Chapter 49.** Since the Tribunal has failed to record a finding regarding applicability or otherwise of Rule 4, Rule 9(1)(b), Rule 9(1)(e) and the assessment already made of design engineering and site run under Chapter 49, we set aside the finding recorded by the Tribunal and remit the case to the Tribunal to re-decide the issue regarding includability of charges paid for importation of design engineering and site run in the assessable value of the fermenters afresh in the light of Rule 4, Rule 9(1)(b), Rule 9(1)(e) and the assessment already framed under Chapter 49 of design engineering and site run.

4. The appeal stands disposed of in the above terms. No costs.

14. We now proceed to decide if the assessment of the design engineering and site run was completed under Chapter 49 and if so, what is the effect of such assessment. It has been represented by the appellant before the Supreme Court that **design engineering and site run had already been assessed separately under Chapter 49.** In the synopsis presented by the learned counsel before us, it has been submitted that "*the technical documents had already been allowed assessment under Chapter 49 at Nil rate of duty. Therefore, once their assessment has been finalized independently, the value of the same cannot be included in the value of the fermenters*". **To answer this question, we proceed to examine the process of assessment under the Customs Act and when it will come to an end and what remedies available against an assessment.**

15. Assessment was defined in Section 2 (2) of the Customs Act as applicable during the period as follows:

"assessment" includes provisional assessment , reassessment and any order of assessment in which the duty assessed is nil;'

This has since been substituted by a more comprehensive definition from 29-3-2018 and it now reads as follows:

"assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to-

- (a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;
- (b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;
- (c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;
- (d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;
- (e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;
- (f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil ;

16. Thus, the old definition only stated what also get included in the definition of assessment, the new definition actually clarified what assessment means. A plain meaning of assessment is determining the duty/tax payable. Since the charge of duty of customs is on the goods imported into or the goods to be exported out of India, it is important to check what goods are imported or attempted to be exported. There are two components to this checking process - from the documents and by physically examining the goods. Physical examination of the

goods is important because the duty of Customs is on the goods imported and NOT on the goods said to be imported. For instance, if one declares in the Bill of Entry and related documents that 1000 kg of a good is being imported and actually 1100 kg of good is imported, duty has to be charged on 1100 kg and not on 1000 kg. Conversely, if there is short landing of the goods, the importer has to pay duty on the goods actually landed. It often happens in petroleum products and other liquids, that some quantity is declared in the Bill of Lading and other documents and after it is pumped into the shore tanks, lesser quantity than declared is found. Duty has to be paid on the shore tank quantity which has actually been imported.

17. Similarly, if the declaration in the documents is of iron and actually some other metal was found to have been imported, the duty has to be paid on the metal actually imported and not on the iron indicated in the documents. However, it is cumbersome to the importer if goods are checked the goods in each and every case before assessing the duty because the importer will have to make extra trips between the import shed of the port where the goods are physically present and the Custom house where the duty is assessed. Therefore, this process of first examining the goods and then assessing the duty (commonly known as first appraisal or first check) is rarely followed and usually the procedure of second appraisal or second check is followed in which the duty is assessed based on the documents presented and thereafter the goods are examined. In vast majority of the

cases the documents reflect the goods which are actually imported and therefore, this process of second check works well. If the goods are found to be different or some other discrepancy is found by the examining officer, he writes his examination report and sends the papers back to the Appraising Group to re-assess the duty. In a few rare cases, this back and forth between the Appraising Group and the examining shed may take place a few times. Assessment is a quasi-judicial function performed by the Assistant Commissioner/Deputy Commissioner or the Appraiser (in some cases) and the assessment, once completed, is appealable to the Commissioner (Appeals). The examining officer and others assist the assessing officer (Assistant Commissioner, etc.) in this assessment by physically examining the goods and writing their reports. Thus, in cases where the goods were assessed based on the documents and examination of the goods shows that a change is required, this process will be a re-assessment which is also part of the assessment itself. This process of assessment and re-assessment ends when the proper officer gives an order for clearance of goods for home consumption under section 47 of the Act. Section 17 of the Act which deals with assessment as was applicable during the relevant period reads as follows:

17. Assessment of duty.-(1) After an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 the imported goods or the export goods, as the case maybe, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.

(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in section 85 be assessed.

(3) For the purpose of assessing duty under sub-section(2), the proper officer may require the importer , exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods as the case maybe, can be ascertained and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such documents and furnish such information.

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

(5) where any assessment done under sub-section 2 is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification, therefore, under this Act, in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment in writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.

18. Section 47 under which the proper officer gives an order permitting clearance of goods for home consumption reads as follows:

Section 47. Clearance of goods for home consumption. -

(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

19. The effect of the order of the proper officer under section 47 can be seen by referring to Sections 2(14), 2(25) and 2(26) which read as follows:

(14) **"dutiable goods"** means any **goods which are chargeable to duty and on which duty has not been paid;**

(25) **"imported goods"** means any goods brought into India from a place outside India but **does not include goods which have been cleared for home consumption;**

(26) **"importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption,** includes or any person holding himself out to be the importer;

20. Once an order permitting clearance of goods for home consumption is issued by the proper officer, they cease to be imported goods and the person who imported them ceases to be an importer. Since the duty, if applicable, has to be paid before the order for clearance of goods for home consumption can be issued, such goods also cease to be dutiable goods. No duty can be assessed under section 17 of the Act on such goods because duty can be charged on the goods imported into India as per Section 12 (the charging section) and once the goods are no longer imported goods, no duty can be charged.

21. Thereafter, if aggrieved by the assessment, the remedy available to the aggrieved party (Revenue or the assessee) is an appeal to the Commissioner (Appeals) within sixty days under Section 128. Revenue has an additional remedy in the form of Show Cause Notice under section 28 but the scope of this notice is limited by WHO, WHEN and WHY. A notice under section 28 can be issued by **'the proper officer', within the period of limitation** (normal period or extended period of limitation of five years, as the case may be) **to recover the duty not levied, not paid, short levied, short paid or erroneously refunded.** The

'relevant date' for issuing a notice under section 28 is given in its explanation which reads as follows:

Explanation 1 . - For the purposes of this section, "**relevant date**" means,-

(a) in a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charged, **the date on which the proper officer makes an order for the clearance of goods;**

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest.

22. Thus, when the officer issues an order permitting clearance of goods for home consumption under section 47, the assessment ends and the clock starts ticking for limitation under section 28. Similarly, when the importer receives the order of the officer permitting clearance of goods for home consumption, the clock starts ticking for filing the appeal. Before such an order is issued, the assessment is still open and the Bill of Entry can be re-assessed by the proper officer.

23. Though not directly relevant for this case, we proceed to examine two other aspects of the assessment for the sake of completeness. In 2011, Section 17 has been amended replacing the 'assessment by the proper officer' with 'self assessment' by the importer giving powers to the proper officer to re-assess the duty so self assessed. Thus, both the self-assessment by the importer and the re-assessment by the proper officer are assessments. If the officer re-assesses the duty to a higher

amount, then he shall, unless the importer accepts in writing such re-assessment, pass a speaking order. The Risk Management System (RMS) of the Customs Electronic Data Interchange System (EDI) selects some bills of entry for re-assessment by the officer and/or examination of goods by the officer and allows some to be cleared without such re-assessment/examination. At times, the importer, after self-assessing the goods in the system, finds that he has made a mistake in, say, not claiming an exemption notification. In such cases, the importer or his Customs broker requests the officer to recall the Bill of Entry from the system and re-assess by reckoning the exemption notification. Needless to say, once an order permitting clearance of goods for home consumption is issued either based on the self assessment by the importer or based on re-assessment by the officer, the process of assessment under section 17 comes to an end and the only remedies are an appeal before the Commissioner (Appeals) against the assessment or a notice under section 28. Before the order permitting clearance of goods for home consumption is given, the assessment is still open and changes can be made.

24. Another type of cases are of provisional assessment of duty under section 18 which becomes necessary when final assessment is not possible because a test report or some other documents required to complete assessment are not available. Nevertheless, based on the available documents, the duty is assessed provisionally and the goods are cleared for home

consumption under section 47. When the required documents become available, the assessment is finalized. In such cases, the clearance of goods for home consumption is done on the basis of provisional assessment but the assessment gets completed when it is finalized. Thus, unlike in other cases, where a provisional assessment is made, the order permitting clearance of goods for home consumption does not complete the assessment but it is the order finalizing the assessment which completes the process of assessment. Any changes required can be made during finalization of assessment.

25. To sum up, the process of assessment, whether the assessment is done by the officer (as in this case) or it is a process of self-assessment is completed with the order permitting clearance of goods for home consumption except in cases of provisional assessment where the assessment is completed with the order finalizing the assessment.

26. In this appeal, in respect of design engineering and site run a Bill of Entry was filed under Chapter 49 and it was assessed based on the documents by the Appraising Group and thereafter, during examination it was found that these goods were relatable to the fermenter which was also imported and not separate goods. Therefore, a Show Cause Notice was issued proposing to include the value of these goods in the Bill of Entry filed for the fermenter itself. Thus, the process of assessment was not

completed as the examination necessitated re-assessment for which purpose a Show Cause Notice was issued. Thus, the Bill of Entry was filed under Chapter 49 and only the first step in completing the assessment was taken by the appraising group and no order permitting their clearance for home consumption was issued. Therefore, the assessment under Section 17 as discussed in the above paragraphs was still open. Therefore, the submission of the appellant before the Supreme Court **that design engineering and site run had already been assessed separately under Chapter 49** and the submission in the synopsis submitted before us that **the technical documents had already been allowed assessment under Chapter 49 at Nil rate of duty and therefore, once their assessment has been finalized independently, the value of the same cannot be included in the value of the fermenters** are contrary to facts and are, in fact, half-truths. While the Bill of Entry was assessed by the appraising group based on the documents submitted, the process was not complete because, the second half of the assessment viz., examination of the goods had to be completed. During examination, the alleged discrepancy was noticed. Clearly, there is nothing on record to show that an order permitting clearance of the design engineering and site run for home consumption under section 47 of the Act was passed. **Therefore, the assessment of the design engineering and site run under Chapter 49 had begun but not completed and during examination, the officers felt that the value of**

these must be included in the assessable value of the fermenters. Hence, initiation of the process of assessment of these under Chapter 49 will have no effect on the present case.

27. We now proceed to examine if the value of the design engineering and site run can be included in the assessable value of the fermenters as per Rule 9(1)(b) and Rule 9(1)(e) read with Rule 4 of the Valuation Rules. Rule 4 requires the valuation to be done as per transaction value adjusted in accordance with the provisions of Rule 9. The question in this case is whether such adjustment as per Rule 9 is required in this case or otherwise.

28. The undisputed facts are that the appellant placed an order for the fermenter along with the design engineering and site run to use to manufacture vaccines as per the GMP of the World Health Organisation and without the design engineering and site run, the fermenter can still manufacture vaccines and such vaccines can be sold but they would not meet the WHO GMP. According to the overseas supplier, it also sells the fermenter without the design engineering and site run.

29. The submission of the learned authorized representative of the Revenue is that since the appellant wanted to manufacture vaccines as per the WHO GMP which is not possible without the design engineering and site run, it placed an order for and imported the fermenter along with the design engineering and site run. The mere fact that the fermenter could have been

imported without the design engineering and site run is irrelevant because duty has to be charged on what is actually imported and NOT what could have been imported. Without these, the fermenter could not have produced vaccines which meet the WHO GMP which was the purpose of the appellant in importing the goods.

30. Further, according to the learned Authorized Representative, they were imported as per a common purchase order, under a single invoice and were imported through the same airway bill. Simply because the invoice indicates the cost of the fermenter and the cost of design engineering and site run separately, the design engineering and site run do not become separate goods which are to be assessed separately. They are part of the same goods and must be assessed together. It is his submission that in terms of Rule 9(1)(b) and Rule 9(1) (e) of the Valuation Rules, the cost of the design engineering and site run must be included in the value of the fermenters.

31. According to the learned counsel for the appellant, the cost of the design engineering and site run cannot be included in the value of the fermenters because the sale of the former was not a condition for sale of the latter and therefore, in terms of Rule 9(1) (e), the value cannot be included. Further, according to learned counsel for the appellant, as per Rule 9(1) (b) (iv) also, the value cannot be included.

32. We find that the relevant Valuation Rules read as follows:

Rule 4 – 9. 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. *****
 - 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. *****
 - d. *****
 - 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.

33. We find that in Rule 9(1) (b) deals with those cases, where the **buyer supplies some goods free of charge to the overseas seller**. Sub-clause (iv) of Rule 9(1) (b) deals with engineering, development, design work, plans, etc. undertaken outside India necessary for the production of the imported goods. This Rule deals with cases where the importer in India pays an additional consideration for the sale of the imported goods by supplying certain things free of charge to the overseas supplier and requires such additional consideration to be included in the assessable value. Sub-clause (iv) deals with designs necessary for the production of the imported goods. In the present case, there is no allegation, let alone evidence, that the appellant importer had supplied anything including the designs to the

overseas exporter free of charge. In fact, the undisputed fact is that the designs in the form of design engineering and site run were provided by the overseas supplier to the appellant and not the other way round. Secondly, the supply was for a consideration and not free of charge. Thirdly, the design engineering and site run were not necessary for production of the imported goods (fermenters) at all. They are required if the imported goods (fermenters) are to be used in India after their import in a manner so as to meet the requirements of WHO GMP. Thus, we find that Rule 9(1) (b) of the Valuation Rules does not apply to this case at all.

34. Rule 9(1) (e) deals with any other payments made by the buyer to the seller as a condition of sale of the imported goods. According to the Revenue, the payment made for design engineering and site run was a condition for sale of the fermenters because they are sold together as per a single contract and were imported together in the same airway bill and are meant to be used together. The importer wanted to manufacture vaccines as per WHO GMP which will not be possible without the design engineering and site run and hence their import. The mere fact that the fermenter could have been imported without the design engineering and site run is irrelevant and what is relevant is what has actually been imported.

35. We agree that what must be considered is what has actually been imported and not what could have been imported.

However, it is immaterial whether the goods were purchased under the same contract or not and whether they were imported under the same Airway bill or not. None of these factors should have a bearing on the way the goods are assessed. For instance, if an importer enters into a turnkey contract to import all the plant and machinery required to set up a factory or plant, there will be a single contract. However, each of the imported goods has to be classified, valued and charged to duty as applicable. If the imported goods are classifiable under different headings of the Customs Tariff and are chargeable to different rates of duty and are eligible for various exemption notifications, they should be assessed individually as such. Merely because one of the goods, say, a boiler, is chargeable to certain rate of duty or is exempt from duty, the same cannot be applied to the other goods, say, air conditioners, imported under the same contract. There are few exceptions to this legal position that goods must be classified, valued and assessed to duty individually. All goods imported under the Project Import Regulations are to be classified under a single Customs Tariff heading 98.01 and charged to duty accordingly. When goods are imported as baggage by a passenger, they are classified under Customs Tariff heading 98.03 regardless of what the individual items of baggage are. Similarly, imports for personal use and import of stores in ships and aircrafts are classified under a single heading. The present import is not covered under any of these exceptions and therefore, it is immaterial whether the goods are imported under

the same contract or not. Similarly, it is immaterial if the goods are imported into the country under the same Airway Bill or not. Goods must be assessed individually on merits.

36. The last question to be answered is whether in this case, the sale of the design engineering and site run was a condition for the sale of the fermenters. According to the overseas supplier, it is not. It also sells fermenters without the former. We do not find anything in the records to show that there was any condition in the agreements or invoices that unless the importer buys the design engineering and site run, it will not be sold the fermenters. Merely because more than one goods are bought by the buyer from the seller under the same agreement and under the same invoice, the sale of one good does not become the condition of sale for another. This is also true even if the goods so bought are related in terms of their use. For instance, one may buy a car and also buy some accessories of the car. Unless there is a condition in the sale contract that if the accessories are not bought, the car will not be sold at all or will not be sold at that price, the purchase of the accessories does not become a condition for sale of the car. It does not matter if the accessories will be used with the car to improve its appearance or have some additional conveniences in the car. Unless the purchase of the accessories is a condition for the sale of the car as per the contract, it is merely a case of purchase of the car and purchase of one or more accessories as per the same written or oral

agreement and invoiced together. In this case, we do not find anything to say that the purchase of the design engineering and site run was a condition for sale of the fermenters and therefore, the value of the design engineering and site run cannot be added to the value of the fermenter even though both were purchased as per the same contract and invoice and were imported under the same Airway bill. Therefore, Rule 9(1)(e) of the Valuation Rules does not apply to this case and the value of the design engineering and site run cannot be included in the assessable value of the fermenters.

37. For the above reasons, we find that the impugned order cannot be sustained and accordingly we allow the appeal and set aside the impugned order insofar as the valuation is concerned with consequential benefits, if any, to the appellant. Early hearing application also stands disposed of.

(Order pronounced in open court on 28/10/2022.)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)