IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Customs Appeal No. 52921 of 2015

[Arising out of Order-In-Appeal No. CC(A)/ CUS/1099 /2014 dated 31.12.2014 passed by Commissioner of Customs (Appeals), New Delhi]

M/s. Thyssenkrupp Elevator (India) Pvt. Ltd.	**Appellant**

Vs.

The Asstt. Commissioner of Customs (Import &General) New Delhi	**Respondent**

Appearance:

Shri Tarun Gulati, Shri Nikhil Gupta, & Shri Ankit Sachdeva, Advocates for the Appellants
Shri Govind Dixit, AR for the Respondent

CORAM:

Hon'ble Ms Archana Wadhwa, Member (Judicial)
Hon'ble Mr. V Padmanabhan, Member (Technical)

Date of Hearing: 14.03.2017
Date of Decision: 31.03.2017

FINAL ORDER NO . 52659/2017

Per V Padmanabhan:

The present appeal is against the order passed by Commissioner (Appeals) New Delhi, No. 1099/2014 dated 31.12.2014. The appellant is engaged in supply, installation, testing, commissioning, repair and maintenance of elevator, escalator and walk ways. They are importing the goods from their related foreign suppliers. The valuation of goods imported by the appellants from their related foreign suppliers was looked into by the Special Valuation Branch, Delhi Customs. In the order in original dated 13.10.06, the declared invoice value in respect of goods imported by appellant from their related foreign supplier was accepted. In the subsequent renewal proceedings which culminated in order dated 14.1.10 also, the SVB decided to accept the declared invoice value. However, when the issue was considered once again in further renewal proceedings, order in original dated 3.1.2014 was passed by the Assistant Commissioner SVB in which it was decided to load the invoice value as follows:

- In terms of the royalty agreement during the period 2010 to 2013, the Appellant is not free to buy goods from any other source and is obliged to buy goods from related foreign party only. Thus, it should be included in the price of the imported goods.

- The declared value of the imported goods shall be assessed after loading Management fees paid as per the Financial Statements during the period 2010 to 2013.

2. When this issue was challenged by the appellant before Commissioner (Appeals), the loading of invoice value was upheld by

the Commissioner (Appeals) vide present impugned order. Aggrieved by the impugned order, the present appeal has been filed.

3. With the above background, we heard Shri Tarun Gulati, Shri Nikhil Gupta, & Shri Ankit Sachdeva, learned Advocates appearing for the Appellants and Shri Govind Dixit, learned AR for the Revenue.

4. The main grounds of appeal are summarized below:-

(i) There is no justification for loading the invoice values, for the royalty paid by the appellants to the foreign suppliers since such payments of royalty has not been paid as part consideration for the imported goods. The lower authorities have confirmed the loading for royalty on the basis of decision of Hon'ble Supreme Court in the case of ***Matsushita Television & Audio (India) Ltd. vs. CC, Delhi [2007 (211) ELT 200 SC]***. However, the said decision stand distinguished by the Hon'ble Supreme Court in the case of ***Commissioner of Customs vs. Ferodo India P Ltd. [2008 (224) ELT 23 (SC)]***. Consequently, there is no decision for loading the royalty payments on the invoice value.

(ii) The declared invoices value have also been loaded with the management fee paid by the appellants in connection with various services rendered by the related company based in Hong Kong. However, there is no justification to load the invoice values for such management fees since this pertain to services separately availed by the appellant and are in no way connected with the goods imported by the appellant from the foreign suppliers.

5. Learned advocates appearing for the appellants have also placed reliance in this regard on the case of ***Expert Industries Pvt. Ltd. vs. CC Bangalore [2010 (261) ELT 607 (Tri-Bang)***].

6. On behalf of the Revenue, the learned DR reiterated the impugned orders. He submitted that the impugned order had been passed on the basis of Hon'ble Supreme Court decision in the case of ***Matsushita Television & Audio (India) Ltd. (supra)*** and hence the same may be upheld.

7. The invoice value have been loaded with the royalty payment on the basis of Rule 10 of the Customs Valuation Rules, 2007. The relevant sub rule reads as follows:

> "***10. Cost and services.*** *— (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, —*
>
> *(a) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-*
>
> *(i) commissions and brokerage, except buying commissions;*
>
> *(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;*

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

(b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely :-

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

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

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

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

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

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

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of

the seller to the extent that such payments are not included in the price actually paid or payable.

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

8. It is to be noted that only those royalty license fees are required to be added to the invoices wherein the payments are made as a condition of the sale of goods being imported and also subject to the condition that such royalty is included in the price actually paid or payable.

9. We have gone through the relevant agreement for payment of royalty. In terms of Article 2 of the agreement, the appellant is required to pay the license fee of 0.5 % of the appellant’s sale revenue from products.

“**Art.2 Granting of the license**

Subject to a fee, LICENSOR hereby grants LICENSEE for the duration and in the scope of Art.3 of this Agreement a global, non-exclusive right to use the Central Signs in the framework of the obuject of the company as company signs including company name componenmts for this purpose of highlighting its affiliation to the THYSSENKRUPP GROUP and to identify as well as sell and/ or perform its goods and/or services using the LICENSED RIGHTS.

For the granting of the license, LICENSEE shall pay LICENSOR a license fee of 0.5 percent (0.5%) of LICENSEE'S sales revenue from products it manufactures and processes itself and from the performance of services. Sales of goods purchased for resale are not subject to license fee."

From a perusal of the relevant article of the agreement, we find that the license fee is applicable only on the products manufactured by the appellants which has got no relevance or connection with the goods being imported by the appellant from its principal abroad. In terms of Rule 10(1)(C) of the Valuation Rules, royalty amount is required to be loaded on the invoices value only in respect of amounts paid as a condition of sale of goods. Since such condition is clearly not satisfied, we find absolutely no justification for such loading of invoice value by the royalty amount.

10. In the impugned order, Commissioner (Appeals) has cited the decision of the Hon'ble Supreme Court in the case of ***Matsushita Television & Audio (India) Ltd.*** (supra) to load the invoice value (page 31) . However, we find that the Hon'ble Supreme Court in the case of ***Ferodo India P Ltd.*** . (supra) has distinguished the case of ***Matsushita Television & Audio (India) Ltd.*** (supra) as follows:-

"In the case of Matsushita Television (supra) the pricing arrangement was not produced before the Department. In our view, the Consideration Clause in such circumstances is of relevance. As stated above, pricing arrangement and TAA are both to be seen by the Department. 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. Therefore, it cannot be said that the Consideration Clause in TAA is not relevant. Ultimately, the test of close approximation of values require all circumstances to be taken into account. It is keeping in mind the Consideration Clause along with other surrounding circumstances that the Tribunal in the case of Matsushita Television (supra) had taken the view that royalty payment had to be added to the price of the imported goods."

In the light of apex court decision in the case of ***Ferodo India P Ltd.***, we are of the view that the earlier decision of Apex Court stand distinguished. Accordingly, we have no hesitation in setting aside the finding of the Commissioner (Appeals) to load the invoice value with royalty amount.

11. The Commissioner (Appeals) in the impugned order has also held that invoice value also has to be loaded with the amounts paid by the appellants to their principal in Hong Kong for various corporate

services rendered to them. Such loading has been ordered in the light of Rule 10(1)(e) which is reproduced below:

> "*(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."*

12. The view taken is that service agreement dated 21.12.2011 is provided by the appellants' principal to all group companies and the appellant is under obligation to avail such services. Consequently, it has been held that payments for the services is to be made as a condition of sale of the imported goods.

13. On a perusal of the relevant service agreement dated 21.12.2011, we observe that the appellant is required to pay the principal in Hong Kong for various corporate services, such as coordination, support accounting, consultancy, marketing and sale support etc. It emerges on perusal of the agreement that the services are completely independent of the import of goods by the appellant. Consequently, there is no justification for such loading of the invoice value. Similar views has been expressed by the Tribunal in several other cases including the case law cited by the appellant in the case of ***Expert Industries (Supra).*** In this case, Tribunal held that product consultancy charge which has got nothing to do with the imported

goods and is covered by the separate contract cannot be included in the assessable value.

By following the above decision, we hold that the consultancy charges are not to be included to the invoice values for import of the goods.

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

(pronounced in the open court on 31/3/17)

(Archana Wadhwa)
Member(Judicial)

(V. Padmanabhan)
Member(Technical)

ss