

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,  
KOLKATA**

REGIONAL BENCH – COURT NO.1

**Customs Appeal No. 242 of 2007**

(Arising out of Order-in-Appeal No. KOL/CUS/CKP/282-283/2007 dated: 06.08.2007 passed by Commissioner of Customs (Appeals), Kolkata.)

**M/s. Indian Oil Corporation Ltd.**

(Indian Oil Bhavan, Central Wing, No. 2, Gariahat Road (South),  
Kolkata-700 068.)

**...Appellant**

*VERSUS*

**Commissioner of Customs, Kolkata**

(Customs House, 15/1 Strand Road Kolkata-1.)

**...Respondent**

**APPEARANCE :**

Present for the Appellant: Shri Saurabh Bagaria, Advocate

Present for the Respondent : Shri S. Debnath, Authorized Representative

**CORAM:**

**HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL)**

**HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)**

**FINAL ORDER No...77567/2023**

DATE OF HEARING: 21.11.2023

DATE OF PRONOUNCEMENT:01.12.2023

**PER: RAJEEV TANDON**

M/s. Indian Oil Corporation Ltd. have filed the present appeal assailing the order in appeal passed by the learned Commissioner (Appeals), vide

Order in Appeal No. KOL/CUS/CKP/282–283/2007 dated 06.08.2007. The question in the present appeal, revolves around enhancement of transaction/assessable value, at the time of finalization of provisional assessment by inclusion of lumpsum payments under know how agreement, as being related to the imports made, as a condition of sale of equipments, imported under the supply agreement and whether the license fee and designing charges were a part thereof and whether charges of knowhow agreement were required to be added to the assessable value of the imported goods in terms of Customs Valuation Rules, 1988 – Rule 9(1)(c) and Rule 9(1)(e).

**2.** The facts of the case are that the appellant entered into a contract with M/s. Merichem Company, USA for supply of equipments for FCC, LPG and FCC Gasoline Treater unit required for establishing a treating unit at Haldia and Barauni, for treating LPG and gasoline at their refineries. For the purpose the appellant had essentially entered into the following three agreements with their buyers:

1. Confidentiality Agreement 99013 dated 31.03.1999
2. Know-How, Process Package and other Services Agreement
3. Equipment Supply Agreement

**3.** For ready reference, the aforesaid three agreements are scanned hereunder:

## ANNEX B - Confidentiality Agreement 99013


**MERICHEM COMPANY**
**Process Technology Division**

 5450 OLD SPANISH TRAIL • HOUSTON, TEXAS 77023  
 (713) 428-5100 • FAX (713) 921-4654 OR (713) 921-4624

March 31, 1999

**INDIAN OIL CORPORATION LIMITED**  
 Scope Complex, Core-2  
 7, Institutional Area, Lodhi Road  
 New Delhi 110 003, India

Gentlemen:

Re: Confidentiality Agreement

Merichem Company (hereinafter referred to as MERICHEM) possesses technical information relating to FIBER-FILM™ Contactor technology and other technology useful in petroleum refining and/or chemical operations (hereinafter collectively referred to as "Confidential Information"). Your company (hereinafter referred to as IOCL) will receive Confidential Information from time to time from MERICHEM or on behalf of MERICHEM for the purpose of design, engineering, procurement of equipment, and construction of LPG/Gasoline treating units for use at Haldia and Barauni Refinery.

MERICHEM is willing to make available to IOCL Confidential Information which in MERICHEM's opinion would be useful to IOCL for the aforesaid purpose on the following basis:

1. Subject to the exceptions set forth below, IOCL agrees to hold in confidence all Confidential Information disclosed to IOCL hereunder. IOCL will not be obligated to keep confidential any such information to the extent that and from such time as IOCL can show, by reasonable proof, that the information:
  - a. was known to the public at the time of its receipt by IOCL under this Agreement; or
  - b. was already known to IOCL at the time of its receipt by IOCL under this Agreement and was not acquired by IOCL under an obligation of confidence, directly or indirectly, from MERICHEM; or
  - c. becomes generally known to the public through no fault of IOCL following its receipt by IOCL under this Agreement; or
  - d. is disclosed to IOCL, following its receipt by IOCL under this Agreement, by a third party who did not acquire it, directly or indirectly, from MERICHEM under an obligation of confidence.

For purposes of this Paragraph 1, a disclosure made to IOCL under this Agreement, which is specific, shall not be deemed to be within the foregoing exceptions merely because it is embraced by general disclosures in the public domain or in IOCL's possession. In

99013C.DOC

Technology for Industry

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Raw

Contd.

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Agreement between  
Indian Oil Corporation Limited and  
Merichem Company

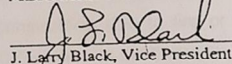
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(Emb.)

addition, any combination of features shall not be deemed to be within the foregoing exceptions merely because individual features are in the public domain or in IOCL's possession, but only if the combination itself and its principle of operation are in the public domain or in IOCL's possession.

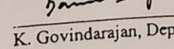
2. IOCL agrees that it will not, without the written permission of MERICHEM, use the Confidential Information to be held in confidence by IOCL under Paragraph 1 hereof for any purpose other than the purpose for which the disclosure is intended. Confidential Information received from MERICHEM is to be used for a specific project and is not to be duplicated or used to design or construct any facility other than the project for which the original disclosure was made, without the express written permission of MERICHEM.
3. Except as otherwise provided in any other Agreement entered into between MERICHEM and IOCL, all documents, drawings and writings of any kind provided to IOCL by MERICHEM or on MERICHEM's behalf pursuant to this Agreement and all copies thereof shall be returned promptly to MERICHEM upon request by MERICHEM except for one record copy.
4. IOCL agrees to abide by any restrictions or conditions respecting the export or re-export of any of MERICHEM's technical information or the direct product thereof, now or hereafter imposed by the United States Government. "Direct product" shall for this purpose mean MERICHEM's proprietary equipment and its associated operations and maintenance manual and shall not include IOCL's hydrocarbon product.
5. If, at any time, IOCL is required by an Indian governmental authority, Court, Tribunal or Parliamentary authority to disclose any of MERICHEM's Confidential Information, IOCL agrees to notify MERICHEM prior to any such disclosure. IOCL will furnish only that Confidential Information which is legally required and will exercise reasonable efforts to obtain reliable assurance that confidential treatment will be accorded the Confidential Information which is disclosed.
6. The validity and interpretation of this Agreement and the legal relations of the parties to it shall be governed by the laws of the State of Texas, U.S.A., without conflict of law provisions. The courts of New Delhi, India, shall have exclusive jurisdiction.

If the above agreement is acceptable to your company, please have both duplicate originals executed by a duly authorized officer in the space provided below and return both copies to us. After execution on behalf of MERICHEM, we will return a fully executed copy for your files.

MERICHEM COMPANY

  
J. Larry Black, Vice President

AGREED TO AND ACCEPTED:  
INDIAN OIL CORPORATION LIMITED

  
K. Govindarajan, Deputy General Manager (Projects)

RAC



Agreement between  
Indian Oil Corporation Limited and  
Merichem Company

#### AGREEMENT

This Agreement between Merichem Company, established under the laws of Delaware, U.S.A., having its registered place of business 5450 Old Spanish Trail, Houston, Texas, U.S.A. (hereinafter referred to as "LICENSOR" which expression shall include its successors and assigns), and Indian Oil Corporation Limited, established under the laws of India, having its registered office at G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai - 400051, India (hereinafter referred to as "LICENSEE" which expression shall include its successors and assigns);

#### RECITALS:

WHEREAS, LICENSOR has done considerable research and possesses proprietary technical information and patent rights on a process for contacting a hydrocarbon chargestock with an immiscible treating reagent for the purpose of effecting mass transfer therebetween;

WHEREAS, LICENSOR has adapted this technology to treat liquid and gaseous chargestocks to effect extraction of hydrogen sulfide, carbon dioxide and carbonyl sulfide compounds, which process technology is licensed by LICENSOR under the name AMINEX<sup>SM</sup>;

WHEREAS, LICENSOR has also adapted this technology to provide several process technologies for the treatment of various petroleum distillate chargestocks for extraction and/or oxidation of mercaptan and other sulfur compounds, and the regeneration of the alkaline solutions employed therein, which process technologies are referred to under the names THIOLEX<sup>SM</sup> and REGEN<sup>SM</sup>; and,

WHEREAS, LICENSOR has further adapted this technology to employ an alkaline solution containing an oxidation catalyst to effect oxidation of mercaptan sulfur compounds in petroleum distillate chargestocks, which process technology is licensed by LICENSOR under the name MERICAT<sup>SM</sup>;

WHEREAS, LICENSEE desires to acquire a license to use LICENSOR's Licensed Processes for the purpose of installing, operating, maintaining and repairing and/or reconstructing due to fire or any other like event of Force Majeure the Contract Plant for treating FCC LPG and FCC Gasoline at LICENSEE's Haldia Refinery and to receive from LICENSOR or on behalf of LICENSOR, basic engineering services, including technical assistance and supervision services and guarantees with respect to the Licensed Unit(s); and

✓ WHEREAS, LICENSOR is willing to grant certain right and license to LICENSEE with respect to its Licensed Processes for its AMINEX<sup>SM</sup>/THIOLEX<sup>SM</sup>/REGEN<sup>SM</sup> and MERICAT<sup>SM</sup> technologies and to render engineering services, technical assistance, supervision services and to give such guarantees as hereinafter set forth;

NOW, THEREFORE, the parties hereby agree as follows:

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## ARTICLE 6 - GUARANTEES AND LIABILITIES

### 6.1 ENGINEERING GUARANTEE

6.1.1 LICENSOR guarantees and undertakes full responsibility for the correctness and completeness of the BDEP. The said guarantees shall apply irrespective of the source of supply thereof and irrespective of whether the services for the development of the BDEP have been performed by others.

6.1.2 LICENSOR also guarantees and undertakes that the engineering shall contain no faults, mistakes and omissions, and that the Licensed Unit(s) shall perform to the specifications and shall be suitable for the purposes defined therein, and this guarantee and undertaking shall apply notwithstanding LICENSEE's approval of the BDEP or the LICENSEE witnessing and/or approving factory acceptance tests with respect thereto

✓ 6.1.3 If after successful Acceptance Test Run of the Contract Plant, within 12 months after start up or 36 months after delivery of the Contract Plant, whichever occurs first, it is demonstrated that the engineering documents are in anyway defective and LICENSEE, as soon as reasonably practicable, gives to LICENSOR notice in writing of such giving particulars of the alleged defects, LICENSOR shall without undue delay and at its own cost, as the sole remedy for breach of the engineering guarantee, correct such defects in BDEP.

### 6.2

- a) The validity of the Contract Plant to meet the Performance Guarantees shall be determined by an Acceptance Test Run to be conducted by the LICENSEE at LICENSEE's expense for 72 consecutive hours of operation at conditions as defined in the BDEP with the LICENSEE's approval.
- b) As soon as practical after start-up and after periods of operation as LICENSOR may deem necessary for adjustment of the Contract Plant have been completed but not later than one hundred and eighty (180) days after start-up, LICENSEE shall settle with LICENSOR in writing the actual date of start of the Acceptance Test Run and conduct a Acceptance Test Run.
- c) Stabilized operation is required prior to conducting a Acceptance Test Run and confirmation of Stabilized Operation will be determined by the LICENSOR. The Acceptance Test Run period shall be five (5) consecutive operating days. Data from three consecutive days selected by LICENSOR will be averaged to establish whether the Performance Guarantees have been met.
- d) LICENSEE shall provide to LICENSOR the Acceptance Test Run and Operating Data and all analytical results within fifteen (15) days after completion of the said Acceptance Test Run. Based on the mutually agreed and jointly collected measurements during the Acceptance Test Run the LICENSOR and LICENSEE shall evaluate the Acceptance Test Run to determine conformance with the Performance Guarantees.
- e) LICENSEE shall supply LICENSEE's operators and analysts and all materials necessary to conduct the Acceptance Test Run with LICENSOR's assistance for such tests. LICENSOR's personnel are



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not required to be present at the refinery for the Acceptance Test Run. LICENSOR will be present at LICENSEE's expense if requested by LICENSEE.

- f) Should the Acceptance Test Run not be achieved within 180 days after start up or 36 months after delivery of Contract Plant whichever occurs later, unless otherwise mutually agreed in writing, for reasons not attributable to LICENSOR, the Acceptance Test Run shall be deemed to have successfully completed by that date.

✓ 6.3

#### PERFORMANCE GUARANTEES

The LICENSOR guarantees and undertakes that the Licensed Unit(s) shall, during a Acceptance Test Run, operate to meet the following Performance Guarantees:

#### 130,000 Metric Tons/Year FCC LPG AMINEX<sup>SM</sup>/THIOLEX<sup>SM</sup>/REGEN<sup>SM</sup>

| Chargestock                                                        | FCC LPG                                            | Analytical Method |
|--------------------------------------------------------------------|----------------------------------------------------|-------------------|
| Flow Rate, metric tons/year                                        |                                                    |                   |
| Design                                                             | 130,000 (390 MT/day)                               |                   |
| Minimum                                                            | 65,000 (195 MT/day)                                |                   |
| Specific Gravity @ 15°C                                            | 0.54-0.56                                          | ASTM D-1657*      |
| Inlet Impurities, ppm (wt.), max.                                  |                                                    |                   |
| Hydrogen Sulfide                                                   | 10,164                                             | Chromatograph*    |
| Carbonyl Sulfide as Sulfur                                         | 250                                                | Chromatograph*    |
| Mercaptans as Sulfur                                               | 600                                                | Chromatograph*    |
| SO <sub>2</sub> as Compound                                        | 360                                                |                   |
| Total Sulfur as S                                                  | 11,194                                             | ASTM D-2704*      |
| <b>Treating Reagents</b>                                           |                                                    |                   |
| Solvent Type                                                       | Treated Kerosene*                                  |                   |
| Specific Gravity @ 15°C                                            | 0.789                                              | ASTM D-1298*      |
| Distillation Range, °C                                             |                                                    | ASTM D-86*        |
| IBP                                                                | 150                                                |                   |
| 10                                                                 | 166                                                |                   |
| 30                                                                 | 182                                                |                   |
| 50                                                                 | 197                                                |                   |
| 70                                                                 | 214                                                |                   |
| 90                                                                 | 238                                                |                   |
| 95                                                                 | 247                                                |                   |
| EP                                                                 | 265                                                |                   |
| Sodium carryover in outgoing solvent stream                        | 5 ppm (wt.) max                                    |                   |
| Fresh Caustic Soda, %wt                                            | 20                                                 | Hydrometer*       |
| Oxidation Catalyst                                                 | ARI-100L                                           |                   |
| Oxidation Air Pressure, kg/cm <sup>2</sup> G                       | 5.5                                                |                   |
| <b>Treated Product Specifications, ppm (wt.), max.</b>             |                                                    |                   |
| H <sub>2</sub> S, ppm wt                                           | Nil                                                | Chromatograph*    |
| Ethyl Mercaptan, ppm wt                                            | 25                                                 | Chromatograph*    |
| Total Volatile Sulfur, ppm wt                                      | 50                                                 | ASTM D-2784*      |
| Doctor Test                                                        | Negative                                           | PTD-23*           |
| Copper Strip Corrosion (1 Hr. @ 38°C)                              | Not worse than No. 1                               | ASTM D-1838*      |
| Water Content                                                      | No visible entrained water at operating conditions | Visual*           |
| Sodium carryover, Na <sup>+</sup> , ppm wt                         | 1                                                  | PTD-6c*           |
| Sodium carryover in outgoing solvent/DSO, Na <sup>+</sup> , ppm wt | 5 max                                              | PTD-1b            |
| Dry Sodium Hydroxide                                               | 74,400 kg/yr                                       |                   |
| Oxidation Air                                                      | 76.8 NM <sup>3</sup> /hr                           |                   |
| Oxidation Catalyst                                                 | 106 kg/yr                                          |                   |
| LP Stream                                                          | 146.4 kg/hr                                        |                   |
| Electricity                                                        | 86,719.2 KWH/yr                                    |                   |

\* Or equivalent LICENSEE Analytical Method subject to review and mutually agreed between LICENSOR and LICENSEE.

Note: Design and operating pressure and temperature will be per the BDEP

❖ Or any other equivalent solvent recommended by LICENSOR

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### 200,000 Metric Tons/Year FCC Gasoline MERICAT<sup>SM</sup>

| Chargestock                                            | FCC Gasoline             | Analytical Method      |
|--------------------------------------------------------|--------------------------|------------------------|
| Flow Rate, metric tons/year                            |                          |                        |
| Design                                                 | 200,000 (600 MT/day)     |                        |
| Minimum                                                | 100,000 (300 MT/day)     |                        |
| Specific Gravity @ 15°C                                | 0.67-0.70                | ASTM D-1298*           |
| IBP, °C                                                | 35                       | ASTM D-86*             |
| EP, °C                                                 | 119                      | ASTM D-86*             |
| Inlet Impurities, ppm wt                               |                          |                        |
| Hydrogen Sulfide                                       | Nil                      | ASTM D-3227 or PTD-22* |
| Mercaptan Sulfur as S                                  | 1,000                    | ASTM D-3227*           |
| Caustic Carryover as Na <sup>+</sup> , max.            | Nil                      | PTD-1b*                |
| Total Sulfur, max.                                     | 2,500                    | ASTM D-1266*           |
| Water                                                  | Saturated                | ASTM D-1744*           |
| <u>Treating Reagents</u>                               |                          |                        |
| Caustic Soda, %wt                                      | 20                       |                        |
| Process Air, kg/cm <sup>2</sup> G                      | 5.5                      |                        |
| Catalyst Type                                          | ARI-100L                 |                        |
| <u>Treated Product Specifications, ppm (wt.), max.</u> |                          |                        |
| Hydrogen Sulfide                                       | Nil                      | ASTM D-3227            |
| Doctor Test                                            | Negative                 | ASTM 4952              |
| Caustic Carryover as Na <sup>+</sup>                   | 1                        | PTD-1b*                |
| Total Sulfur as S                                      | 2,500                    | ASTM D-1266*           |
| Copper Strip Corrosion (3 Hrs @ 50°C)                  | Not more than 1          | ASTM D-130*            |
| Oxidation Air                                          | 43.2 NM <sup>3</sup> /hr |                        |
| Catalyst                                               | 54.6 kg/yr               |                        |
| Electricity                                            | 113,400 KWH/yr           |                        |

\* Or equivalent LICENSEE Analytical Method subject to review and mutually agreed between LICENSOR and LICENSEE.  
Note: Design and operating pressure and temperature will be per the BDEP

The performance guarantees are contingent on:

- Provision of feed, catalyst, chemical and utilities as per the Basis of Design. In case, the actual feed stock is substantially different from the one specified above, the LICENSOR shall establish, after consultation and mutual agreement with LICENSEE, a new set of guarantees equivalent to guarantees mentioned above.
- Plant operation on full load, normal and minimum operating conditions.
- Catalyst loading.
- Operation of the unit in accordance with LICENSOR's operating instructions.
- Analytical methods are as set forth in Annex E attached or as otherwise agreed in writing between the parties.

#### 6.4 PROCESS LIABILITIES

In the event that during Acceptance Test Run, the Contract Plant fails to meet the process guarantees set forth in 6.3, LICENSOR provides the following exclusive remedies, subject to the provisions set out in Articles 6.7 & 6.12 below:

- 6.4.1 If, for reasons attributable to LICENSOR, the Contract Plant fails to meet the Performance Guarantees set forth in 6.3, LICENSOR shall forthwith at its own expense in all respects do and undertake in consultation with the LICENSEE all such corrective engineering and supplies for and/or modifications to the Contract Plant as shall in LICENSOR'S opinion be necessary to meet the Performance Guarantees. LICENSEE shall thereafter as expeditiously as is reasonably feasible taking into account production schedule of the Refinery, conduct a fresh Acceptance Test Run to determine after the corrective



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**ARTICLE 8 - CONFIDENTIALITY AND USE OF TECHNICAL  
INFORMATION**

- 8.1 IOCL agrees that the terms of Confidentiality Agreement 99013 dated March 31, 1999, executed by IOCL and MERICHEM shall govern the use of MERICHEM's Confidential Information during the term of this Agreement. IOCL also agrees that it will restrict access to PROCESS TECHNOLOGY to such of its employees who are bound to hold confidential all information which becomes available to them in connection with the performance of their duties and to such suppliers of Contract Plant who have undertaken to hold in confidence the PROCESS TECHNOLOGY disclosed to them. IOCL may also disclose the PROCESS TECHNOLOGY to any Government Agency or a Court, Quasi-judicial or Regulatory Body which under any legal process requires the IOCL to disclose any confidential information. IOCL shall before disclosure in the second case promptly notify MERICHEM of the requirement to enable MERICHEM to contest the disclosure requirement. Unless the requirement is timely quashed, limited or extended, IOCL will furnish only that confidential information which is legally required and will exercise reasonable efforts to obtain reliable assurance that confidential treatment will be accorded the information which is disclosed.
- 8.2 PROCESS TECHNOLOGY, including but not limited to, data, plans, specifications, flow sheets and drawings furnished directly or indirectly, in writing or otherwise, to IOCL by MERICHEM under this Agreement are and shall remain MERICHEM's property and shall be used only for the design, construction, operation, maintenance, repair, and/or reconstruction due to fire or any other like event of Force Majeure of TREATER PACKAGE.
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#### ARTICLE 9 - CONFIDENTIALITY AND USE OF PROCESS TECHNOLOGY

- 9.1 LICENSEE agrees that the terms of Confidentiality Agreement 99013 dated March 31, 1999, executed by LICENSEE and LICENSOR, attached as Annex B shall govern design, engineering, procurement, and construction of the Licensed Unit(s). Upon Startup of the Licensed Unit(s), the provisions of confidentiality in this Agreement shall govern. The provisions for the disclosure and use of Confidential Information under the terms of the Confidentiality Agreement and the provisions for the disclosure and use of Confidential Technical Information under this Agreement shall survive any termination or cancellation of this Agreement.
- ✓ 9.2 LICENSEE agrees to maintain LICENSOR's Confidential Technical Information (including data, plans, specifications, flowsheets, designs and drawings) in confidence and to prevent the disclosure thereof to others, except that LICENSEE to the extent necessary for the installation, operation, maintenance, repair and/or reconstruction (due to fire or any other like event of Force Majeure) of Licensed Unit hereunder, may disclose LICENSOR's Confidential Technical Information to contractors and/or equipment manufacturers who shall have entered into an appropriate agreement with terms no less restrictive than those set forth in Confidentiality Agreement 99013 dated March 31, 1999 executed by LICENSEE and LICENSOR.
- 9.3 The LICENSEE may also disclose the Process Technology to any Government Agency, Court, Quasi-judicial or Regulatory Body that under any legal process requires the LICENSEE to disclose any Confidential Information. The LICENSEE shall before disclosure to any Government Agency, Court, Quasi-judicial, or Regulatory Body promptly notify the LICENSOR of the requirement to enable the LICENSOR to contest the disclosure requirement. Unless the requirement is timely quashed, limited or extended, the LICENSEE will furnish only that Confidential Information which is legally required and will exercise reasonable efforts to obtain reliable assurance that confidential treatment will be accorded the information which is disclosed.
- 9.4 LICENSOR agrees to maintain LICENSEE's Confidential Technical Information (including data, plans, specifications, flowsheets, designs, and drawings) in confidence and to prevent the disclosure thereof to others, except that LICENSOR may disclose LICENSEE's Confidential Technical Information to others who are entitled to receive LICENSOR's Confidential Information; provided that said others shall have agreed to maintain LICENSEE's Confidential Information in confidence to the same extent LICENSOR is obligated to maintain in confidence LICENSEE's Confidential Technical Information.
- 9.5 Process Technology, including but not limited to, data, plans, specifications, flow sheets and drawings furnished directly or indirectly, in writing or otherwise, to LICENSEE by LICENSOR under this Agreement are and shall remain LICENSOR's property and shall be used only for the design, construction, operation, maintenance, repair and/or reconstruction due to fire or any other like event of Force Majeure of Contract Plant.



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### ANNEX A - Process Engineering Package

The following items will be provided:

#### I. Design Basis

1. Capacity of the Unit – BPSD, TPA
2. On stream days/year
3. Feed characteristics – sp.gr. °, API, boiling range, sulfur content wppm, H<sub>2</sub>S wppm, mercaptans wppm, RVP, saybolt color, ASTM distillation, viscosity, flash point, etc.
4. Products and their desired characteristics.
5. Battery limit conditions of feed and products.
6. Catalyst initial cycle length and catalyst life.
7. Turn down ratio of the Unit.
8. Other special requirements.

#### II. Basic Engineering Design Data

1. General information about Unit location, applicable codes, system of measurements, etc.
2. Utility information – B/L conditions, qualities and other specifications for steam, power, water, air, N<sub>2</sub>, BFW.
3. Equipment design information – specification/preferences, size limitations, sparing philosophy, etc., for all equipment.
4. Design information regarding instruments, type, blowdown facilities, site information, climate data, seismic data, soil conditions, fire proofing, climate requirements, winterizing philosophy, etc.

#### III. Process Description

1. Process description for normal operation.
2. Process flow diagram showing major process lines, equipment, major control loops. Diagram shall be flagged to show flow rates of all major process streams, operating temperature and pressure of major equipment, thermal duties, composition of various streams.
3. Material balance – section wise.
4. Heat balance – section wise.
5. Piping and instrument diagrams – section wise showing all the process equipment and their sizes, process piping, line sizes, vessel sizes, full instrumentation, steam tracing/insulation requirements of lines/vessels, flare loads estimation, PSV/TSV sizes, control valves, vent, drain, sample points, locations, special requirements with respect to location/gradients of piping/type of valves, etc. Each piping should be tagged indicating line number, size of pipe, metallurgy, pressure rating, etc., as per procedure to be mutually agreed.

#### IV. Utilities, Chemicals, Catalysts & Effluents

1. Utility summary equipment wise.
2. Chemicals specifications - initial charges, and consumption rates.
3. Catalysts specifications, requirements, recommended supplier, packing arrangements.
4. Effluents from the unit – quantity, quality for normal operation and during regeneration, treatment recommended, if any.
5. Requirement of Nitrogen (if any) – quality, quantity required during startup/shutdown/catalyst regeneration.

#### V. Equipment Specifications – Equipment list and detailed specifications as given below:

##### A. Reactor

1. Complete process design – consisting of flows, physical properties variation with temperature. Reactants at inlet, outlet conditions during normal operation, start-up, shutdown, emergency situations which control the mechanical design of the reactor. Full details which are necessary for mechanical design of the reactor. Dimensions, materials of construction, insulation



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- requirements, nozzle sizes/orientation, locations, thickness, catalyst, bed lengths, etc.
2. Temperature Profile across the reactor.
3. Complete mechanical design with necessary drawings.
- Full details of reactor Chamber internals with sketches and drawings.

Specifications should be adequate to solicit inquiries from vendors straightway without any further engineering.

B. Vessels

Specification along with sketches, showing the various dimensions, indicative thickness, design temperature, pressure conditions, corrosion allowances, insulation, lining details of internals, materials of constructions, nozzle sizes/orientation, locations, etc.

C. Columns

Specifications along with sketches with all necessary dimensions, indicative thickness, design temperature/pressures, corrosion allowances, skirt height, tray design, tower packings, packings/past material of construction, concrete lining if any; nozzle sizes orientations, indicative plate thickness, insulation required.

D. Heat Exchangers/Coolers/Air Coolers -

Duty specifications, physical properties of fluids at terminal conditions, inlet/outlet conditions, fouling factor, design temperature/pressures, exchange area, codes applicable, metallurgy of tubes, tubesheet, shell, heat release curves, dimensions and indicative thickness.

E. Pumps -

Data sheets giving physical properties of fluids handled, normal/rated capacity, duty specifications, metallurgy, drive type, NPSH availability, inlet/outlet conditions desired, design temperature/pressure and other preliminary mechanical design specifications and materials of construction. Equipment vendor shall recommend the quality/quantity of the first filling of oils and lubricants required for one year continuous operation.

F. Miscellaneous Equipment

Project specifications for auxiliary/miscellaneous equipment such as power recovery turbines, if any, strainers, filters, ejectors, coalescers, chemical handling equipment, catalyst loading equipment, ignition systems etc., adequate to invite inquiries from vendors. Special check valves, expansion joints/slide valve/cyclone specifications shall also be included.

VI. Instruments

Specifications for all types of instruments involved in measurement, indicating and controlling of flows, temperature, levels, pressures, etc., to include process data such as fluid handled, operating temperature/pressure material specifications, indication of location, allowable pressure drop, valve action, etc.

Basic schematics of process interlocks, including automatic trips and alarms, etc.

On line instruments, corrosion monitoring instruments and control board specifications.

VII. Piping

Complete set of relevant pipe classes, specifications, line list to include metallurgy, pipe thickness, flange facings, ratings, gasket types, valve ratings, reinforcing requirements, safety valve sizes, settings, locations, tabulation of relieving capacities inputs used in arriving at these relieving capacities.

VIII. Electrical - General Specifications



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IX. Suggested Plot Plan

Indicating location of various equipment and accesses necessary based on safety standards and plot area requirements.

X. Recommended Vendors – For critical equipment/catalyst

Note:

1. In case the process package contains any reference to any specification or code of practice, other than those which are published, copies of such documents shall be included in the process package and copy of the same shall be furnished at the time of design basis conference (kick-off meeting).
2. Process Engineering Package shall be complete with all necessary information to enable a competent engineering contractor to undertake the detailed engineering, prepare proposal documents for equipment, procure materials and equipment, and construct the unit.
3. LICENSOR performs undocumented internal Hazop review and incorporates all comments into the design to be collaborated in the BDEP.

Operating Manual

The following items will be provided:

- Introduction
- Basis of Design
- Feed and product specifications
- Principles of operation
- Process Description
- Preparation for initial start-up including catalyst loading
- Operating Variables
- Description of Instrumentation
- List of alarms and trips
- Start-up procedure
- Normal operation procedure
- Normal shut-down procedure
- Catalyst/impregnation procedure
- Emergency Handling Procedures under following cases:
  - Fire due to serious leaks
  - Feed failure
  - Instrument air failure
  - Power failure
  - Steam failure
  - Cooling water failure
  - Other trouble shooting problems and their remedies
  - Critical pump failure
- Safety recommendations
- Analytical Control/Test methods/Frequency of Quality Control test/Special equipment if any along with vendor test
- Drawings and diagrams



Agreement between  
Indian Oil Corporation Limited and  
Merichem Company

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### AGREEMENT

This Agreement made by and between

INDIAN OIL CORPORATION LIMITED, having its registered office at G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai – 400 051, India (hereinafter referred to as IOCL, which expression shall include its successors and permitted assignees), of the one part

and

Merichem Company having its registered office at 5450, Old Spanish Trail, Houston, Texas 77023, U.S.A., (hereinafter referred to as MERICHEM, which expression shall include its successors and permitted assignees), of the other part.

WHEREAS IOCL is in the process of establishing a Treating Unit (hereinafter referred to as "UNIT") at Haldia to treat LPG and Gasoline at Haldia Refinery;

WHEREAS IOCL desires to obtain from MERICHEM for and as part of the Treating Unit the supply of equipment, to be installed by IOCL for treating FCC LPG and FCC Gasoline which will be delivered to IOCL; and

WHEREAS MERICHEM has the right and is willing to supply the TREATER PACKAGE to IOCL; and

WHEREAS IOCL acknowledges that the commercial rights (operation of the TREATER PACKAGE) for practice of the licensed process(es) are granted under a separate Know How Agreement executed between IOCL and MERICHEM. Any improvements by either IOCL or MERICHEM will be handled in accordance with the terms of the Know How Agreement;

NOW, this Agreement witnesseth and it is hereby agreed as follows:

Agreement between  
Indian Oil Corporation Limited and  
Merichem Company

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## APPENDIX I – IMPORTED SUPPLY AND INDIGENOUS SUPPLY

### A) IMPORTED SUPPLY

390 MT/day FCC LPG Caustic Treating System

(Per Final P&ID's and Specifications in basic engineering design package.)

- Four (4) FIBER-FILM™ Contactors
- Four (4) Hydrocarbon Basket Strainers
- Two (2) Amine Basket Strainers
- One (1) Coalescing Pad
- One (1) Aqueous Basket Strainer
- One (1) Catalyst Addition Pipe
- One (1) Oxidation Air Distributor; and
- One (1) Oxidizer Chimney Tray

600 MT/day FCC Gasoline Caustic Treating System

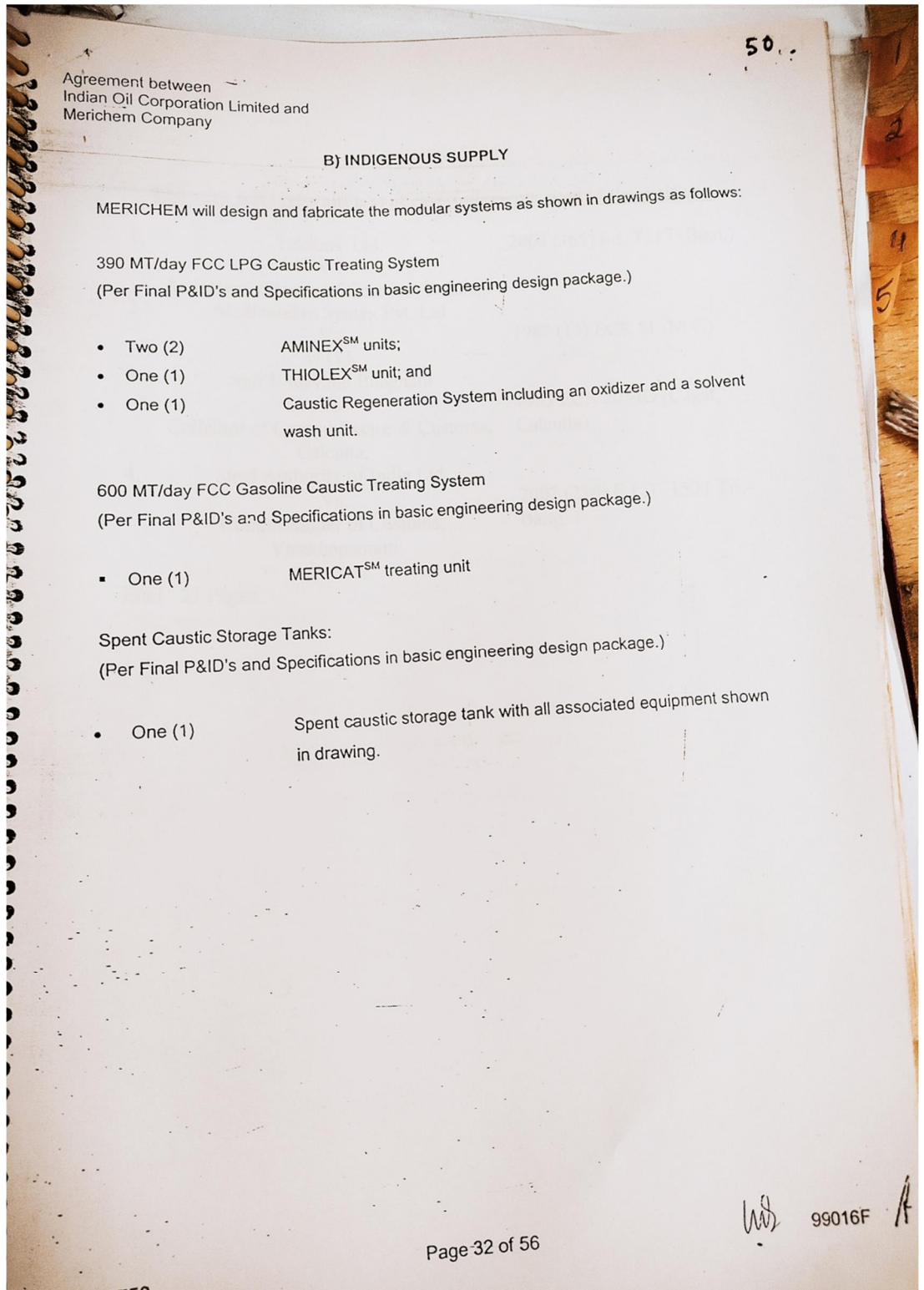
(Per Final P&ID's and Specifications in basic engineering design package.)

- One (1) FIBER-FILM™ Contactor
- Two (2) Hydrocarbon Basket Strainers
- One (1) Aqueous Basket Strainer
- One (1) Air Sparger
- One (1) Catalyst Addition Pipe; and
- One (1) Coalescing Pad

Commissioning Spares:

- Six (6) gaskets per FIBER-FILM™ Contactor
- Two (2) gaskets for each basket strainer
- Two (2) gaskets for catalyst addition pipe
- One (1) Basket strainer for each set of strainers





4. The appellant had got the contract registered with the department under Project Import Scheme, whereby the Department forwarded the matter to the Special Valuation Branch to examine the feasibility of the inclusion of design and engineering charges, technical knowhow fee and other charges in the invoice value of the imported goods, under the supply agreement for redetermination of transaction value of the imported goods under Section 14 of the Customs Act 1962, read with Rule 4 and Rule 9 of

the Customs Valuation Rules 1988. During the process of enquiry, the assessee submitted complete details and response to the queries and the questionnaire seeking information as called for by the Special Valuation Branch of the Custom House. It is informed that the appellant had got the approval of the Secretary of Industrial Assistance (SIA) dated 14.07.1999, whereby the government approved the technology collaboration between the importer and M/s. Merichem Company USA- which stipulates that M/s. Merichem Company USA possesses technical information relating to Fiber – Film T.M Technology, Contractor technology and other technology, useful in petroleum, refining and chemical operations (confidential information) and IOCL will receive the confidential information from time to time from M/s. Merichem, USA or on behalf of M/s. Merichem, USA for the purpose of design engineering, procurement of equipment and construction of LPG/Gasoline Treating Units for use at Haldia and Barauni refinery of IOCL.

**5.** It's a fact on record that the confidentiality agreement was signed well before the signing of the other two agreement, perhaps indicative of the fact that the process licensor wanted to ensure that the technology supplied will be kept secret and confidential at the hands of the importer. The adjudicating authority in its order has observed that the confidentiality agreement (for the purpose of design, engineering, procurement of equipment and construction of LPG/Gasoline, treating unit at Haldia/Barauni was a prerequisite for the supply of knowhow, process engineering package and other services for installation, operation, maintenance and repairing of the contracted plants. The adjudicating authority has further held that the agreement for supply of equipment which is Part B of the broad agreement is also closely linked to the other two agreements, that all the agreements are linked to one another and at the same time are independent. The Treater Package cannot be complete without the process package and



technical Knowhow. He has further held that they exist as inseparable link or nexus among all the agreements related to the impugned projects.

6. We have heard the rival submissions of the two sides at considerable length and perused the contracts entered into and placed on record.

7. We find the order of the learned Commissioner (Appeals), to be quite cryptic and brief in the matter. Essentially, his findings are recorded in para 17 and 18 of the impugned order and are reproduced hereunder:

*"17. It is evident from the impugned that the Special Valuation Branch has made detailed study of the relevant agreements and investigated specially in respect of feasibility of inclusion or adjustment of different costs and services under Rule 9 of CVR'88. The adjudicating authority has observed that the three agreements are parts of one umbrella agreement. All the agreements are linked with one another and at the same time inter-dependent. There are inseparable links among all agreements related to the instant project. There are observation of the adjudicating authority that Treater Package was imported at invoice value of USD 891878.00 after addition of freight and insurance which shows that lumpsum price for both the parts of Article 3.1. 1(b) of Supply Agreement were covered in the invoice value. These charges could not be apportioned towards indigenous supply. The Supply Agreement is inseparable from Know-how Agreement.*

*18. It is observed that the services under BDEP are to be rendered by the Supplier of the equipments and therefore, it is clear that it is compulsory for the importer to purchase suitable equipments for the patented process form the supplier only. It is also observed that the technical know-how fee and basic*

*engineering fees are includible in the value of the imported equipments. There is a ratio of 40:60 between the imported and indigenous equipments supplied for the contracted plant and the Department has considered this aspect and reasonably apportioned 40% of total payment made towards know-how and design and drawing in the know-how Agreement towards the value of equipments."*

**8.** It is the contention of the appellant that the job had been awarded to M/s. Merichem Company Houston, Texas. U.S.A. under two separate agreements; viz. **(a) One Agreement for "Know-How, Process Package and Other Services"** against a consolidated Lump-Sum payment of – US \$ 262,552.00 comprised of (i) \$ 148,000.00 under the head of "Basic Design and Engineering Package" (Referred to as BDEP) both for the FCC, LPG and FCC Gasoline and (ii) \$ 114,55.00 {which includes \$ 57,452.00 for production of FCC, LPG and \$ 57,100.00 for production of FCC Gasoline.} under the head of "Know-How/Engineering of Unit" and **(b) The other Agreement was for "Supply of equipments and Other Services"**. The payment released against this agreement were – Lump-Sum \$ 580,100.00 for "Equipments" and \$ 311,778.00 for the "Services" to be rendered by them against this agreement, so that the total came to US \$ 891,878.00 and for this total amount, the Invoice was drawn and accounted for in the making of the Bill of Entry placed for assessment but assessed provisionally with 1% extra duty as cash security for the provisional duty bond and now, ordered for final assessment with addition of extra amount to the declared value.

**9.** We note that the appellant IOCL entered into an agreement dated 15.09.1999 with M/s. Merichem Company, USA for supply of the equipments for the FCC, LPG and FCC gasoline Treater Unit at the refinery of IOCL,



located at Haldia and Barauni, wherein the total value of imported good supplied under the contract was US \$ 891878. For the purpose the appellant entered into a separate technical knowhow agreement dated 15.09.1999 for transfer of commercial rights and license in favour of IOCL, for utilising licensed processes and to render engineering services, technical assistance, supervision etc. with a total financial implication of US \$ 262552. The department finalized the assessment of the bills of entry by adding the value of basic design and engineering package and license fee for technology. Technology transfer in proportion to the value of imported and indigenous goods in the total supply contract being in the ratio of 40 to 60, thereby adding US dollar 105021 to the total contractual supply value of US \$ 891878. The appellant therefore submitted that the department imputes the supply of equipment as dependent upon "Knowhow, Process Package and Other Services", as if this agreement imposed a condition for the supply of agreement. They emphasized that in actuality the three agreements were separate and did not have any inter-dependency. The confidentially agreement entered into between the parties was exclusively for the security of patented technology of the licensor. Payment of design and drawings neither had any contribution in the manufacture of imported equipments nor this agreement imposed any compulsion for the purchase of equipment from the supplier of Knowhow, Process Package and Other Services. They further submitted that well before the import of materials was completed they were required to be put to use as commissioning of production was possible only after more than a year of import when the setting up of the unit could be completed and production commissioned. Therefore, the charges apportioned towards the Knowhow, Process Package factually bear the character of post importation charges.

**9.1.** The appellant added that there was no material evidence with the department that the supply price of imported equipments is under-valued and not decided at arms length price between the buyer and seller. They categorically stated that the apprehension of the department was without any market analysis study. Moreover, in case of rejection of transaction value onus in law was on the department to prove that the declared price did not reflect the true transaction value and whereby the Department could not adduce any evidence that identical or similar goods imported by other importers were at a higher price.

**9.2.** Drawing attention to the Interpretative Notes to Rule 4 of the Customs Valuation Rules 1988, they pointed out that the value of imported goods shall not include the following charges or costs provided they are distinguished from the price paid or payable for the imported goods:

- Charges for construction, erection, assembly, Maintenance or technical assistance undertaken after importation on imported goods such as industrial plant, machinery or equipment;
- Cost of transport after importation;
- Duties and taxes in India

The price paid or payable refers to the price of imported goods. Thus the flow of dividends or other payments from the buyer to the seller do not relate to the imported goods and are not part of the customs value. Therefore, payment on account of design and drawings or licence fee for technology transfer cannot be by any stretch of imagination be considered as an obligation of the buyer, to the seller for sale of imported goods.

**9.3.** For ease of understanding the relevant provision of Customs Valuation Rules 1988 are extracted hereunder:



**"Rule 9. Cost and Services.**-(1) *In determining the transaction value, there shall added to the price actually paid or payable for the imported goods,-*

*(a) the following cost and services, 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 vices where supplied directly or indirectly by the buyer fee of .... Or at reduced cost for use in connection with the production and for export of imported goods, to the extent that such value has no .... Included in the price actually paid or payable, namely:-*

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

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

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

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

*(c) royalties and licence fees related to the imported goods that the buyers required to pay, directly or indirectly, as a condition of the sale of goods being valued, to the extent that such royalties and fees are included in the price actually paid or payable.*

*(d) the value of any part of the proceeds of any subsequent resale, ..... or use of the imported goods that accrues, directly or indirectly, in seller;*

*(e) all other payments actually made or to be made as a condition of sale 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 a payments are not included in the price actually paid or payable."*

**10.** It has been pointed out that in case of international transaction of purchase of patented technology, it is a standard international practice that the vendor always ensures proper safeguard for patented right on use of such technology and binds the purchaser by an agreement for maintaining confidentiality as well as for use of the technology for the purpose. As for Basic Design aspects it was submitted that they relate to the respective parts of the unit and do not speak of anything relating to the structural design of any of the required equipment. The Basic Engineering data provided is actually with regard to the equipments and instruments. Regarding process description, they were said to be relating to the unit for achieving the underlying objective and had nothing specifically therein relating to the proprietary of the required equipments. As per standard industrial practice, any expert Process Technologist, for the purpose of manufacture of final product, has to provide engineering drawing of the plant, including the layout with reference to the functions intended to be rendered at an optimal for achieving the final process performance of the plant. Thus, in the instant Know-how Technology Agreement such mechanical aids had been stated and accordingly, the equipments were purchased by the appellant. The language and situation as contained in clear words in the Rule 9(1)(c) and 9(1)(e), were not met with in the instant case, so as to order the addition of the licence fees in respect of Know-how with

the assessable value of the equipments. The appellant categorically stated that it was not obligatory for them to purchase the equipments only from the said vendor as was clearly apparent from the preamble of the Agreement for Supply of Equipments. Further, in the Know-how Agreement, there is no condition that the equipment imported by the appellant are only to be used or to be imported from M/s. Merichem Company, USA, rather they only have suggested some equipments required for the designed unit.

**11.** From the documents placed on record, we note that the importer M/s. Indian Oil Company Limited (IOCL) entered into three separate agreements viz. (i) **Confidentiality Agreement dated 31.03.99 with M/s. Merichem Company, Houston, Texas, U.S.A.** (ii) **Agreement dated 15.09.99 for Supply of Equipment** for FCC LPG AMINEX/THIOLEX Treater with REGEN (Caustic Regeneration) and FCC Gasoline MERICAT Treater Systems for use at Haldia Refinery and (iii) **Agreement dated 15.09.99 for Supply of Know-How, Process Package** and other Services for FCC LPG AMINEX/THIOLEX Treater with REGEN (Caustic Regeneration) and FCC Gasoline MERICAT Treater Systems for use at Haldia Refinery. The Confidentiality agreement signed on 31.03.99 in fact curtailed the Know-How Agreement vide Article 9 Section 9.2 thereof, whereas the Equipment Supply Agreement was incorporated vide Article 8, Section 8.2 thereof. All the three agreements were alleged to be a part of an umbrella agreement- **Agreement on LPG/Gasoline Treatment Units At Haldia Refinery Between Indian Oil Corporation Limited And Merichem Company, USA.** Further, there is nothing on record to suggest that the importer is related to the overseas contractor-supplier under Rule 2(2) of CVR'88. To this effect even the adjudicating authority has recorded an unambiguous finding.



**12.** As for the nexus between the agreements concluded with Merichem Company, for the project, the Confidentiality Agreement was signed much before (nearly six months) the signing of the other two agreements. This clearly shows that the Process Licensor wanted to ensure that their technology was kept secret and confidential in the hands of the importer. As stipulated in the Confidentiality Agreement, technical information relating to BIBER-FILD TM Contractor technology and other technology useful in petroleum refining and/or chemical operations (Confidential Information) possessed by Merichem would be received by IOCL for or on behalf of Merichem for the purpose of design, engineering, procurement of equipment, and construction of LPG/Gasoline treating units for use at Haldia/Barauni Refinery. M/s. IOCL also got the Technology Collaboration Agreement with Merichem, having provisions for supply of licence and Design/Drawings, approved from Secretary of Industrial Assistance (SIA) vide approval letter No. 67(99)/319(99)/PAB dated 14.07.99. It is quite clear that the activities referred herein supra were all post import related and had no bearing as a condition of sale of the imported goods,-being unconnected with imports.

**13.** Further, Supply of know-how, process package and other services wherein Merichem has been referred as Licensor and M/s. IOCL as the Licensee, it is stated that Merichem, in possession of proprietary technical information and patent rights on a process for contacting a hydrocarbon chargestock with an immiscible treating reagent to treat liquid and gaseous chargestocks to effect extraction of hydrogen sulfide, carbon dioxide, and carbonyl sulfide compounds (AMINEXsm); and to provide process technologies for the treatment of various petroleum distillate chargestocks for extraction and/or oxidation of mercaptan and other sulfur compounds, and the regeneration of the alkaline solutions employed therein, (THOLEX

sm and REGEN sm) and also to employ an alkaline solution containing an oxidation catalyst to effect oxidation of mercaptan sulfur compounds in petroleum distillate chargestocks, (MERICATsm). It is therefore evident that to derive optimal benefit, the treating unit would be required to be preferably constructed on the basis of Merichem's P & IDs i.e. Process and Instrumentation Diagrams. The licensed processes as mentioned above were required for installation, operation, and maintenance and repairing of the Plant at the Refinery and to get basic engineering services, including technical assistance and supervision services and guarantees with respect to the licensed unit.

**14.** The Hon'ble Apex Court in the case of **Commissioner of Customs Port, Kolkata Vs. Steel Authority of India Ltd.**<sup>1</sup>, with regard to the inclusion of the cost of drawings and designs had categorically held in para 22 of its order as under:

*"22. An importer of equipments of a plant could always choose to obtain drawings and designs for undertaking post-importation activities from an overseas consortium supplying the equipments. This may confer on such arrangements attributes of a turnkey contract, but that fact by itself would not automatically attract the "condition" clause contained in Rule 9(1)(e) of the Valuation Rules. In the cases of **Essar Steel Ltd.** (supra) and **Tata Iron and Steel Co. Ltd.** (supra), the contracts had certain elements of "turnkey" features. The case of **Essar Gujarat** (supra) is distinguishable, as the subject of import there carried a condition for entering into a licensing agreement with a third party."*

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**1. 2020 (372) ELT 478 SC**

**15.** We find that there is nothing in the contract to show that the payment of royalty charges was a mandatory condition of sale of the imported goods. Thus as held by the Tribunal in the case of **Steel Authority of India Ltd. Vs. Commissioner of Customs, Vishakhapatnam<sup>2</sup>**,

*"8. There is yet another contract entered between the appellants and the Indian firm, M/s. Otto Indian Pvt. Ltd., Calcutta which is subsidiary of the foreign firm. This contract for the supply of design, engineering, supply of indigenous plant and equipment, supply of engineering work, erection, testing and commissioning of PBCC Plant in respect of contract dated 12.02.1988. The lower authorities had already given benefit. The issue before us is only in respect of the Royalty charges and also the duty on income tax paid by the appellants on behalf of the foreign company. The appellants have pointed out that even though the show cause notice was dated 12.08.1991, the Corrigendum was issued after 8 years to include the income tax also for the purpose of duty. The appellants have strongly contended that the notice is barred by limitation. Therefore, at the outset, we shall examine the question of limitation. In the case of **ESPI Industries Chemiccal Vs. Commissioner of Central Excise, Hyderabad<sup>3</sup>**, it has been held that Revised notice issued for enlarging the scope of first notice and taking an altogether different stand than in original show cause notice is illegal. In the case of **S.T.L. Exports Ltd. Vs. Commissioner of Customs, Indore<sup>4</sup>**, it has been held that demand of transformation*

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**2. 2007 (210) ELT 150 Tribunal, Bangalore**

**3. 2000 (115) E.L.T. 81 T**

**4. 2004 (168) E.L.T. 272 (Tri.-Del),**



from Excise to Customs duty belatedly after more than two years of original notice is not permissible by issue of Corrigendum. In the case of **Bhagsons Paint Industries (India) Vs. CCE, New Delhi**<sup>5</sup>, it has been held that Absence of statutory laid down time limit does not mean that there is no time limit at all for completion of adjudication. Accordingly, the adjudication order passed nearly nine years after the issue of show cause notice is set aside. In the present case, for inclusion of the income-tax paid by the appellants on behalf of the foreign currency, the Corrigendum to the show cause notice has been issued after eight years. Following ratio of the cases cited supra, we are of the view that the issue of this Corrigendum is bad in law. Moreover, there is nothing on record to show that the assessment was provisional. In these circumstances, the demand of duty on account of inclusion of income-tax paid is not sustainable and the demand to that extent is not liable to pay by the appellants. After going through the scope of the three contracts, we find that the contract dated 07.03.1988 only covers the price for the imported equipments. The Royalty contract is only for the activities carried out after the goods have been imported. This issue is clearly covered by the decision of the Hon'ble Supreme Court in the case of **commissioner of Customs, New Delhi Vs. Prodelin India (P) Ltd.**<sup>6</sup>, wherein it has been held that the technical know-how fee charged in respect of post importation activities is not includible in the assessable value of imported goods.

From the scope of the contract for payment of Royalty charges, we do

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5. 1996 (88) E.L.T. 400 (Tribunal),

6. 2006 (202) E.L.T. 13 (S.C.)

*not find that the payment of Royalty is a condition of sale of the imported goods. Therefore, Rule 9(1)(c) of the Customs Valuation Rules will not be applicable. Hence the demand of duty on account of the inclusion of Royalty charges will not be sustainable. Summing up, we hold that the demand on account of inclusion of income tax paid by the appellants on behalf of the foreign currency is barred by limitation of time. The Royalty charges paid in the present case has nothing to do with the imported goods and it is mainly for the post importation activities. In view of the above, the demand is not sustainable. Hence we set aside the impugned order and allow the appeal with consequential relief, if any."*

The Civil Appeal filed by the department against the said order was dismissed by the **Hon'ble Apex Court**<sup>7</sup> on merits. It is more than clear that any charge paid towards any post import related activity cannot constitute to be a valuation factor for inclusion in the assessable value of import goods. We there, do not find any merit in the orders of the lower authority on this score.

**16.** In the case of **Commissioner of Custom Port, Kolkata Vs. J.K Corporation**<sup>8</sup>, the Hon'ble apex court had held as under:

*"8. The sole question which, therefore, arises for consideration in this appeal, is as to whether customs duty would be payable on the purchase price of the goods by adding the value of licence and technical knowhow, etc. to the value of the imported goods.*

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**7. 2008 (225) ELT A130 SC**

**8. 2007 (208) ELT 485 DA**

9. The basic principle of levy of customs duty, in view of the aforementioned provisions, is that the value of the imported goods has to be determined at the time and place of importation. The value to be determined for the imported goods would be the payment required to be made as a condition of sale. Assessment of customs duty must have a direct nexus with the value of goods which was payable at the time of importation. If any amount is to be paid after the importation of the goods is complete, inter alia by way of transfer of licence or technical knowhow for the purpose of settling up of a plant from the machinery imported or running thereof, the same would not be computed for the said purpose. Any amount paid for post-importation service or activity, would not, therefore, come within the purview of determination of assessable value of the imported goods so as to enable the authorities to levy customs duty or otherwise. The Rules have been framed for the purpose of carrying out the provisions of the Act. The wordings of Sections 14 and 14 (1A) are clear and explicit. The Rules and the Act, therefore, must be construed, having regard to the basic principles of interpretation in mind.

10. Rule 12 of the Rules provides that the interpretative notes specified in the Schedule appended thereto would apply for construction thereof. They are statutory in nature being integral part of the Rules themselves. The relevant portion of Interpretative Note to Rule 4 reads as under:

"The value of imported goods shall not include the following charges or costs, provided that they are



*distinguished from the price actually paid or payable for the imported goods:*

*(a) Charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;*

*(b) The cost of transport after importation;*

*(c) Duties and takes in India.”*

*11. What would, therefore, be excluded for computing the assessable value for the purpose of levy of customs duty, inter alia, has clearly been stated therein, namely, any amount paid for post-importation activities. The said provision, in particular, also apply to any amount paid for post-importation technical assistance. What is necessary, therefore, is a separate identifiable amount charged for the same. On the Revenue’s own showing, the sum of US \$ 14,00,000.00 was required to be paid by way of remuneration towards services to be offered by the companies in respect of matters specified in Part-A of the said Memorandum of Agreement. The said sum represents amount of licence or amount to be paid by the respondent for the licence for the manufacturing process for production of goods which were covered by the patents held by M/s. Samsung as also for technical knowhow. In the said Memorandum of Agreement, it was provided that;*

*“The SELLER shall provide to the BUYER the TECHNICAL DOCUMENTATION containing, inter alia, the KNOW-HOW and the same shall be delivered by the SELLER to the BUYER in Republic of Korea or such other place or places*

*as may be mutually agreed by the between both the parties thereto."*

12. *The technical documentation comprises of: (1) process, (2) mechanical, (3) electrical, and (4) instrumentation in respect of grant of licence. The Memorandum of Understanding provides:*

*"4.1. The SELLER hereby grants to the BUYER a non-exclusive and non-transferable right and licence including rights to use existing patents of SELLER to manufacture the PRODUCT in the PLANT with the KNOW-HOW including the PROCESS and to sell and market the PRODUCT worldwide. For exports to Republic of Korea and Japan, the first option shall be given to the SELLER.*

*4.2. The BUYER shall be entitled to and shall have the right to use and practice the KNOW-HOW and to manufacture therewith the product in the PLANT."*

13. *No part of the knowhow fee was to be incurred by the respondent herein either for the purpose of fabrication of the plant and machinery or for any design in respect whereof M/s. Samsung held the patent right.*

14. *It may be noticed that the said memorandum of Agreement specifically contemplates that the plant and machinery to be supplied thereunder may be produced from other independent manufactures and suppliers who might not have anything to do with the knowhow or licence provided thereunder by Samsung as would appear from the following stipulation contained in the said agreement.*

*"5.6. The SELLER hereby agrees to provide their cooperation to the BUYER to purchase spares from the*

*SELLER directly from the suppliers notwithstanding the expiry or earlier termination of the AGREEMENT and in case of purchase from the SELLER, the SELLER shall provide such spares at fair market prices within a reasonable period of time.*

*8.1. SELLER shall cause such manufacturers to test and inspect the main items of Equipment at its works and/or the works of its manufacturers, quality, quantity, workmanship, finishing, and packing in accordance with the inspection method deemed as proper and authentic for Equipment."*

*15. Knowhow, being process knowhow, is covered by the patent held by M/s. Samsung. The payment of US \$ 14,00,000.00 also entitles the respondent to sub-licence the knowhow to any other party, subject, of course, to the approval of M/s. Samsung."*

*(Emphasis Supplied)*

**17.** The Hon'ble Apex Court in para 26 of the said order had clearly dwelt upon what could comply as a condition of sale. To elaborate the said para is reproduced hereunder to clarify the meaning of the term.

*"26. The expression "condition", simply put, conveys the idea that something could be done only if another thing was also done. In the given context, it would imply that import of equipments could be allowed by the other party provided the design features for post-importation activities were also obtained from the same supplier or from a firm as per the overseas supplier's direction. But there is no material before us to suggest that import of equipments was effected with simultaneous obligation of SAIL that the designs relating to post-importation*

*activities should also be obtained from the same entity. The revenue has proceeded with the understanding that since both were obtained from the same vendor, condition of obtaining designs etc., for post-importation activities was implicit in the contract. The Revenue has sought to emphasise their case on the basis that as it was a turnkey project, importation of equipments and post-importation project implementation exercise were mutually dependant. In our opinion, reading such implied condition into the contracts would be impermissible in the absence of any other material to demonstrate subsistence of such condition. No part of the contract has been shown to us from which such condition could be inferred. Necessity of subsistence such condition has been laid down in the case of Ferodo India (P) Ltd. for invoking Rule 9(1)(e). In our opinion, the provisions of Rule 9(1)(e) cannot be automatically applied to every import which has surface features of a turnkey contract. Just because different components of a contract or multiple contracts give the shape of turnkey project to the imported items, without specific finding on existence of "condition" as contemplated in clause 9(1)(e), value of all these components could not be added to arrive at the assessable value. Such an exercise would go against the provisions of Interpretative Note to Rule 4, which is part of the Valuation Rules in view of the provisions of Rule 12 thereof."*

**18.** Viewed in the backdrop of the law as propounded by the Hon'ble apex court in the case of JK Corporation, supra, we find that the contract, as entered into by the appellant with their overseas buyers are on identical terms. There was no obligation to bind the appellants to any post import



act/activity and thus render it as a condition of sale for procurement of the imported goods. We also note that there is no technical know-how fees attributable towards post import related/associated acts and activities. Thereby no case arises for scaling up the assessable value with the inclusion of the royalty charges. In fact the preamble clause of the Confidentiality Agreement supra clearly brings to fore its purpose, completely unrelatable to any post import functioning.

**19.** We find that the order of the Tribunal in the case of **TDT Copper Ltd. Vs. Commissioner of Customs, New Delhi<sup>9</sup>**, relied upon by the adjudicating authority, is completely at variance as far as facts of the present case are concerned as Article 10 of the agreement therein provided for inclusion of various fees, charges and cost of technical services and were clearly a condition of sale. In the said case as relied by the learned Adjudicating Authority, the importer was required to pay US dollars 15 lakh towards engineering and servicing charges unlike in the present case where there is no such condition imposed on the appellant importer, by way of any of the above referred contracts entered into. In so far as the case of **Collector of Customs, Gujarat, Preventive Ahmedabad Vs. Essar Gujarat Ltd.<sup>10</sup>**, is concerned, we note that the Hon'ble Apex Court had taken cognizance of the said decision rendered, in its case of **Commissioner of Customs Port, Kolkata Vs. Steel Authority of India<sup>1</sup>**, referred to supra and therefore the said case requires no further elaboration.

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**9. 2000 (120) ELT 265 tribunal**

**10. 1996 (86) ELT 609 Supreme Court**

**20.** For reasons aforesaid and our findings that there is nothing in the contract entered into by the two sides, to impute the additional costs as discussed in earlier paras, towards the sale of imported goods or as a condition of sale, we are of the opinion that the order of the learned Commissioner (Appeals), is without merits and is therefore liable to be quashed. We therefore set aside the order under challenge and allow the appeal filed by the appellant with consequential relief if any in law.

(Pronounced in the open court on...01.12.2023)

Sd/-

**(Ashok Jindal)**  
**Member (Judicial)**

Sd/-

**(Rajeev Tandon)**  
**Member (Technical)**

K.M.