

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEAL NO.C/85362/2013

(Arising out of Order-in-Appeal No.947/MCH/DC/SVB/2012 dated
03.12.2012 passed by the Commissioner of Customs (Appeals),
Mumbai, Zone – I)

M/s. Kostwein (I) Co. Pvt. Ltd. : Appellant
Plot No.170, NIDC,
Industrial Estate, Near Lambha,
Post Narol,
Ahmedabad - 382405

VS

Commissioner of Customs, (Imports) : Respondent
New Customs House, Ballard Estate,
Mumbai 400 001

Appearance

Shri N.D. George Adv for Appellant

Shri Manoj Kumar, AC (A.R) for Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 09.05.2019
Date of decision : 09.05.2019

ORDER NO.

Per : Shri P Anjani Kumar, Member (Technical)

M/s. Kostwein (I) Co. Pvt. Ltd, the Appellants have registered with SVB Mumbai. The revenue asked the Appellants to furnish documents, Written Submissions and questionnaire duly filled in terms of board circular 11/2001 Customs dated 23.02.2001. The Applicant submitted the same. Having regard to the circumstances of the case the original adjudicating authority, vide order in original dated 05.07.2011 concluded, that the Appellants and their supplier M/s.

Kostwein Maschinenbau, GMBH – Austria are related in terms of Rule 2(2) of Customs Valuation Rules 2007 and that the declared invoice value for the goods imported by the Appellants from their supplier shall be accepted under Section 14 of the Customs Act, 1962 read with Rule 3(3) (a) of Customs Valuation Rules 2007. Commissioner of Customs reviewed the said order and filed an appeal before the Commissioner Appeals on the grounds that the Appellants are engaged in local manufacture of the products of the supplier and imported goods are used in such manufacture of such goods which are sold under the trade mark controlled by the supplier; that the supplier also provides technical know-how for which the appellants pay a fee of Euros 3,00,000; the technical know-how is provided for the assembling and manufacturing of packaging modules and packaging machines in India and the same is includable in the assessable value of the goods imported by the Appellant. Commissioner (Appeals) vide order dated 02.11.2011 set aside the OIO and held that the additions sought by the Department are to be considered on the basis of the Balance Sheet of the relevant year after giving reasonable opportunity to the respondent. Hence this appeal.

2. The Learned Counsel for the Appellant submits that only components / parts were imported and no capital goods were imported; the technical know-how agreement was presumptive in nature and the payment is for the role of the supplier in assisting the Appellant in the manufacture of final product; the fee was not related to the trade mark or patent and in no way connected to the import of parts and components. He relied upon the following cases.

- (i) Engelhard Environmental Sys. India Ltd. 2005 (185) E.L.T. 155 (Tri. Chennai)
The said order has been upheld by the Hon'ble Supreme Court.
- (ii) Prodelin India (P) Ltd. 2006 (202) E.L.T. 13 (S.C.)
- (iii) Toyota Kirloskar Motor P. Ltd. 2007 (213) E.L.T.. 4(S.C.)
- (iv) Denso Kirloskar Industries Pvt. Ltd. 2015 (324) E.L.T. 431(S.C.)

3. Learned A.R. for the department reiterated the findings of OIA and relies upon the following cases :

- (i) Commissioner of Customs v/s. Perodo India Pvt. Ltd. No.2008(224) E.L.T. 23 (S.C.)
- (ii) M.G.M. Entertainments Pvt. Ltd. v/s. Commissioner of Customs, Chennai No.2008(228) E.L.T. 120 (Tri – Chennai)

4. Heard both the sides and perused the records of the case. We find that the department is seeking to add technical know- how fees and royalty charges payable or paid by the Appellant to their foreign suppliers. Even the Commissioner (Appeals) was not categorical in finding that this payments are required to be included. Learned Commissioner (Appeals) relied on the Supreme Court's decision in the case of Ferodo India Pvt. Ltd. 2008(224) ELT 23 SC. He holds that the payment made towards royalty and technical know-how are includable in the assessable value of imported goods if such payment is a pre-condition for the supply of imported goods. Learned Commissioner (Appeals) does not come to a conclusion whether such payment are a pre-condition to the supply. Without arriving at a definitive conclusion such addition is not justifiable and to that extent the Commissioner (Appeals) has clearly erred. We find that the original authority has compared the invoice prices with the list prices of the supplier and found that they are in order. He found that the foreign supplier raises invoices Ex-works after adding mark ups. The original authority finds that 15% of marks up are added to cover the expenses and profit margin and therefore the relation has not influenced the prices. The original authority also finds that the technical know-how fees is more relatable to the technology imparted than to the goods imported and that it is not a pre-condition for import of goods. It is also pertinent to note that the Appellant are also procuring 39% of the parts/components required from the domestic market. We find that Commissioner (Appeals) has not gone into the facts of the case and has not given any reasoning for the conclusion drawn therein. We find that Chennai Bench of the Tribunal in the case of Engelhard Environmental Sys. India Ltd. 2005 (185) E.L.T. 155 (Tri. Chennai) held that

5. We have heard rival contentions. In this case the appellants have imported one of the raw materials required for the manufacture of catalyst. In order to manufacture the catalyst

they require many other raw materials. The technical fee in terms of the agreement with the foreign supplier is only for the manufacture of the final product. Hence it is not relatable to the imported goods. There is no clause in the agreement which says that the condition of sale of the imported product payment technical know-how fees. In fact there is no obligation to import the item imported only from the foreign supplier. As regards reference to Appendix A, the precious metal solutions are supplied by the foreign supplier as a part of Engelhard's assistance in the start-up of the facility. From this we cannot infer that payment of technical transfer know-how fee is a condition of sale of the imported goods. The case law cited by Id. Counsel are very much relevant. Moreover, the price of the imported goods are based on London Metal Exchange price. Hence Revenue does not have a good case. The technical know-how fee paid in relation to the manufacture of catalyst cannot be added to the value of the imported goods which are one of the raw materials required for the finished goods. Under these circumstances we allow the appeal of the appellants with consequential relief, if any.

5. We find that the facts of the case are comparable. We find that as far as the relationship has not influenced the pricing pattern there is no justification for inclusion of royalty and technical know-how in the assessable value of the imported products. Therefore, we set aside the impugned order.

(Operative portion of the order pronounced in open court)

(D.M. Misra)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

