CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>MUMBAI</u>

REGIONAL BENCH - COURT NO. 01

Customs Cross Objection No.85410 of 2018

In

Customs Appeal No. 87851 of 2017

(Arising out of Order-in-Original No. CAO No.11/2017-18/CAC/CCE/BSN/GR.VII dated 28.04.2017passed by Commissioner of Customs (Export-II), Mumbai)

Commissioner of Customs Mumbai (Export Promotion) .....**Appellant**
New Custom House, Ballard Estate,
Mumbai

VERSUS

M/s Jindal Vijaynagar Steel Ltd. .....**Respondent**
Jindal Mansion, 5-A, G. Deshmukh Marg,
Mumbai-400002.

<u>Appearance:</u>

Shri Ramesh Kumar, Authorized Representative for the Appellant
Shri Vipin Jain, Advocate for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87416/2021

Date of Hearing:19/01/2021
Date of Decision:19/01/2021

PER : S.K. MOHANTY

Brief facts of the case, leading to this appeal are summarised herein below:

1.1 The Respondent herein, M/s. Jindal Vijayanagar Steel Ltd., during the disputed period, was in the process of setting-up a 3 Million Metric Tons Per Annum (MMTPA) integrated steel plant for manufacture of Hot Rolled Coils and for conversion of pellets into molten iron (hot metal) at Toranagallu, in the district of Billary, Karnataka. For setting up of the said plant facilities, the respondent had imported the capital goods at concessional rate of duty under the Export Promotion Capital Goods Scheme (for short, EPCG).The respondent had imported the "Corex (R) Plant C-2000" and their parts and equipments from M/s. Voest Alpine Industrieanlagenbau, GmbH Linz/Austria (for short, 'VAI').The said plant was imported and cleared through the port of import under 19 nos. of Bills of Entry.

1.2 An intelligence was gathered by the Customs department that the appellant had mis-declared the value of imported goods by withholding the information regarding various payments made to the supplier against various agreements/contracts entered into between them and the overseas supplier. On detailed investigation into the matter, the Customs department had concluded that over and above the invoice value for supply of plant and equipments, the appellant had paid for the extra amount to the overseas supplier M/s VAI as per the other contracts/agreements viz., operation license contract, engineering contract and service contract entered with them. In other words, according to the department, payments made/to be made by the appellant to M/s VAI under various contracts are '*a condition precedent to sale of the equipments*' and as such, those additional payments made are includible in the assessable value of the goods cleared from the Customs in terms of Section 14 of the Customs Act, 1962 read with the Customs Valuation Rules, 1988.

1.3 On the above backdrop of the issue, the department initiated show cause proceedings against the appellant under Section 28 *ibid*, seeking for payment of differential duty along with interest and for imposition of penalties under Section 112 and/or 114(A) *ibid*. The SCN dated 09.09.1998 issued to the appellant was adjudicated vide the impugned order dated 28.04.2017, wherein the Learned Commissioner of Customs, Mumbai has dropped the proposals made in the SCN dated 09.09.1998. The learned adjudicating authority has held that the services rendered to the respondent by M/s. VAI under the Service Contract, Operation License Agreement and Engineering Contract (the said three contracts are collectively referred to as "the service contracts") were not required to be included in the assessable value, since such services were not a condition of sale to the supply of goods under the supply contract and also the services rendered/to be rendered under the services contract had nothing to do with the goods being imported and were to be availed off for the purpose of post import activities such as, setting up of the plant, commencement of commercial production and the ultimate sale of the goods, which were to be manufactured from the said plant.

1.4 Feeling aggrieved with the impugned order dated 28.04.2017, Revenue has preferred this appeal before the Tribunal. Revenue has assailed the impugned order on the following grounds:

(i) That the service contracts were a condition precedent to the sale of the goods under the supply contract and this fact is evident from Article 14 of the agreement, which stipulates that a separate Operation Licence Agreement would be entered into and that the same was required to be concluded before the effectiveness of the Supply Contract;

(ii) that the 'patents' as well as 'technical know-how' did not remain the sole prerogative of the foreign supplier/consultant, but the rights of usage were actually granted to the Licencee/Noticee for the term of this agreement. The case laws, therefore, relied upon by the adjudicating authority were inapplicable to the question of law involved herein and are distinguishable from the instant matter for the very reason that there was no transfer of know-how or patents and that co-ordination and advice from the foreign supplier are in context with pre-importation activities undertaken for the subject goods. Accordingly, it has been contended that since the technical know-how and patents are not relatable to the post importation activities, the case of the appellant is at variance with those discussed in the case of CC v. Essar Steel Ltd., 2015 (319) ELT 202 (SC);

(iii) that as per the clauses of the agreement extracted in Para 8 and 9 of the Notice, it was evident that entering into the said service agreements were a pre-condition of sale and thus, the payments made in terms of these contracts warrants inclusion in the assessable value in terms of Rule 9(1)(c) of the CVR;

(iv) that the circumstances in the case of CC v. Hindalco Industries, 2015 (320) ELT 202 (SC) are at variance, since the Hon'ble Apex Court had held that neither fees paid under the agreements related to the import nor it was a condition of sale. Whereas, the contents of the agreements in the instant matter clearly reveal that the conditions laid down in the agreements are interlinked and without their implementation, the entire operations of the importer would be futile. Therefore, this constitutes precedent to the sale of impugned imported goods;

(v) Finally it was contended by Revenue that the adjudicating authority appears to have erred in his findings in para 36(ii)(a), (b) and (c) in the subject impugned order to arrive at a conclusion that none of the contracts relate to pre-importation and cannot be construed as a condition of sale as provided under Rule 9 of the CVR, 1988.

2. Heard Shri Ramesh Kumar, Learned A.R. for Revenue and Shri Vipin Jain, Learned Advocate for Respondent and perused the case records, including the Written Note of Submissions filed by both sides.

3. At the outset, Shri Vipin Jain, Learned Advocate for the Respondent has raised the preliminary objection that the present appeal filed by Revenue before the Tribunal is not maintainable,as there is no valid order of review passed under Section 129D(1) *ibid*. He submitted that since the two Chief Commissioners constituting the 'Committee of Chief Commissioners' had differed in their opinion as to the legality and propriety of the impugned order, the matter was referred to the Board for a decision as required in the proviso to Section 129D(1) *ibid*. In this context, by referring to the letter of OSD (Judicial Cell) dated 19.09.2017 and re-validation order dated 02.01.2020 of the Judicial Review Cell of CBIC (submitted by the Learned A.R. for Revenue), Learned Advocate contended that the above communications by the Department cannot be regarded as an

"order" of the Board as contemplated in the proviso to Section 129D(1) *ibid*. Learned Advocate further contended that as per the statutory mandates, the Board has neither directed any Commissioner to file an appeal before the Tribunal, nor specified any points arising out of the decision or order, to be determined by the Appellate Tribunal. Thus, Learned Advocate prayed for dismissing the appeal on the sole ground of maintainability.

3.1 On merits, Learned Advocate for the Respondent has adopted to the observations recorded by the Learned adjudicating authority in the impugned order in supportof the stand of dropping the proposals made in the show cause notice. He further submitted that inclusion of the value of Operation Licence Agreement in the value of the supply contract in terms of Rule 9(1)(c) *ibid* was not sustainable inasmuch as the department has not adduced any evidence that the said fee was paid/ payable in respect of the goods supplied under the Supply Contract.Similarly, with regard to addition of value of the service contract and engineering contract in the value of supply contract, Learned Advocate submitted that the provisions of Rule 9(1)(e) *ibid* and Rule 9(1)(b)(iv) *ibid* are not attracted in the case of the respondent inasmuch as entering into those contracts were not the condition for the supply of goods under the supply contract.To strengthen the case of the respondent that the proposed impugned demands cannot be sustained judicial scrutiny, Learned Advocate has relied upon the following judgments delivered by the judicial forums :-

a. *CC (Imports), Mumbai vs. Hindalco Industries Ltd. 2015 (320) ELT 42 (SC):*
b. *CC (Port), Kolkata vs. J.K. Corporation Ltd. 2007 (208) ELT 485 (SC):*
c. *CC, Chennai vs. Denso Kirloskar Industries Pvt. Ltd. 2015 (324) ELT 431:*
d. *CC (Port), Chennai vs. Toyota Kirloskar Motor P. Ltd. 2007 (213) ELT 4 (SC):*
e. *Polar Marmo Agglomerates Ltd. vs. Commr. of Cus., New Delhi, 2003 (155) ELT 283 (Tri- LB),*

f. *PanalfaDongwon India Ltd. vs. CC, Mumbai 2003 (155) ELT 287 (Tri-LB):*
g. *CC, Ahmedabad vs. Essar Steel Ltd., 2015 (319) ELT 202 (SC):*
h. *Commissioner of Customs v. Ferodo India (P) Ltd. - 2008 (224) E.L.T. 23 (S.C.)*
i. *CCE v. ITC Ltd., 2006 (203) ELT 532 (SC)*
j. *TISCO Ltd. v. CC, 2000 (116) ELT 422 (SC)*

3.2 The respondent has filed cross objection with reference to the appeal filed by Revenue.

4. By countering the arguments advanced by the respondent on maintainability of appeal, Shri Ramesh Kumar, Learned AR for Revenue contended that the communication dated 06.12.2019 of the OSD (Judicial Cell) is the confirmation of the Board's Order dated 19.09.2017. Further, he also submitted that pursuant to the directions of the Bench order dated 09.12.2019, the CBIC vide order dated 02.01.2020 has revalidated the earlier order dated 19.09.2017 as per the approval of Member (Legal), CBIC. Accordingly, he submitted that the requirements of Section 129D (1) ibid have been duly complied with and that since there is no ambiguity on interpretation of the statutory provisions vis-a-vis the issue involved in the case, filing of appeal by Revenue before the Tribunal is legal and proper. With regard to the merits of the case, Learned AR has reiterated the grounds of appeal urged by Revenue in the appeal filed before the Tribunal. Further, he also contended that the contents of different agreements entered into between the parties clearly demonstrate that sale of plant and equipments are a pre-condition and thus, the payments made in terms of the agreements warrants inclusion in the assessable value of the impugned goods, in terms of Rule 9 of the CVR, 1988.

5. We find that the impugned order dated 28.04.2017 passed by the Learned Commissioner of Customs, Mumbai in dropping the show cause proceedings initiated against the respondent was reviewed by

the Committee of Chief Commissioners under sub-section (1) of Section 129D *ibid*. Upon examination of the case records vis-a-vis the impugned order, the members in the Committee had differed in their opinion inasmuch as, the Chief Commissioner , Mumbai Zone – I had opined that the impugned order is not sustainable since, the service agreements were entered exclusively in context with execution of the supply agreement of the plant and equipments and therefore, the value as per those service agreements are required to be included in the assessable value under the provisions of Rule 9 of the CVR, 1988. On the contrary, the Chief Commissioner, Mumbai Zone – II had opined that no cogent reasons have been adduced about how the charges in question in the SCN form a condition of sale of the imported goods and accordingly, concur the views of the adjudicating authority that the service agreements relate to the operation of the plant, its installation, use of COREX process etc., which are purely post importation activities and not a condition of sale of the imported goods.

5.1 In view of the above difference of opinion, the matter was placed before the Central Board of Indirect Taxes (CBIC) in terms of the *proviso* to sub-section (1) of Section 129D *ibid* for passing of necessary orders. The said statutory provision is extracted below:

> *"129D. Powers of Committee of Principal Chief Commissioner of Customs or Chief Commissioner of Customs or Principal Commissioner of Customs or Commissioner of Customs to pass certain orders:*
>
> *(1) The Committee of Principal Chief Commissioner of Customs or Chief Commissioner of Customs may, of its own motion, call for and examine the record of any proceeding in which a Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other*

Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Committee of Principal Chief Commissioners of Customs or Chief Commissioners of Customs in its order.

Provided that where the Committee of Principal Chief Commissioners of Customs or Chief Commissioner of Customs differs in its opinion as to the legality or propriety of the decision or order of the Principal Commissioner of Customs or Commissioner of Customs, it shall state the point or points on which it differs and make a reference to the Board which, after considering the facts of the decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs, if is of the opinion that the decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs is not legal or proper, ***may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order, as may be specified in its order.***

……..

(3) Every order under sub-section (1) or sub-section (2), as the case may be, shall be ***made within a period of three months from the date of communication of the decision or order of the adjudicating authority.*** *Provided that the Board may, on sufficient cause being shown, extend the said period by another thirty days."*

(Emphasis Supplied)

5.2 From a plain reading of the above provisions, it is evident that in the event of a difference of opinion between two Chief Commissioners of Customs, the Committee of Chief Commissioners must first state the point or points on which a difference has arisen between them, and then make a reference to the Board for resolution of the same. It is further being clarified that the Board may, after considering the facts and circumstances of the case, and if it is of the opinion that the decision or order is not legal and proper, may, by order direct the Commissioner or any other Commissioner to make an application to the Appellate Tribunal for the determination of issues arising out of such an order.

5.3 It is thus clear that an order passed by the Board in terms of the proviso toSection 129D(1) *ibid* must satisfy, in the least, two requirements:

a) It must contain a clear direction to the Commissioner of Customs, orsome other Commissioner of Customs to make an application to theAppellate Tribunal, for determination of such points arising outof the said decision or order, **and**

b) It must contain the specific points, for which determination is sought from the Appellate Tribunal.

5.4 Learned AR appearing for Revenue has strongly objected to the prayer made by the appellant regarding maintainability of the appeal before the Tribunal. In this context, he submitted the letter dated 19.09.2017addressed by the OSD (Judicial Cell) in the CBIC to the Chief Commissioner of Customs, Mumbai and the order dated 02.01.2020 issued with the approval of Member (Legal), CBIC before the Bench during the course of hearing of the appeal. By referring to those communications, the Learned AR pleaded that the statutory requirements have been duly complied with and as such, the appeal filed against the impugned order is maintainable before the Tribunal. The said communications referred to by the Learned AR are extracted herein below:

"F. No./390/Review/85/17-JC
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs
(Judicial Cell)

4th Floor, HudcoVishala Building,
BhikajiCama Place,
New Delhi, Dated 19.09.2017

To,
The Chief Commissioner of Customs
Mumbai Zone-1,
New Customs House Ballard Estate, Mumbai

Sub.: Reference to the Board with regards the difference of opinion between theCommittee of Chief Commissioner in respect of Order in Original relating to M/sJindalVijaynagar Steels Ltd. - Reg.

Sir,

Kindly refer to your letter F.No. S/V-15(01)55/2017 CCO-I (Unit IV) dated 06/09/2017 on the above-mentioned subject.

In this regard, have been directed to inform you that the Board concurs with theviews of the Chief Commissioner, Customs, Mumbai Zone-1, for filling of appeal against the said Order in Original.

Accordingly, you are requested take the further necessary action.

Yours faithfully Sd-

(Aman Garg)
OSD (Judicial Cell)"

"F. No./390/Review/85/2017-JC
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect taxes & Customs
(Judicial & Review Cell)

4thFloor, HUDCO Vishala Building,
BhikajiCama Place,
New Delhi,
Dated. 2nd January 2020

ORDER

Subject: Reference to the Board with regard to Difference of Opinion between the Committee of Chief Commissioners in respect of Order in Original No. 10/2017- 18/CAC/CCE/BSN/Group VIII dated 28/04/2017 passed by Commissioner of Customs Export Mumbai Zone I relating to M/s Jindal Vijaynagar Steel Ltd. - Reg.

Reference: 1) Office of Chief Commissioner Customs Mumbai Zone I letter F. No. S/V-15(01) 55/2017 CCO-I (Unit IV) dated 07/09/2017

2) Board Letter F. No. 390/ dated 19/09/2017

In exercise of the powers vested under Section 129D of Customs Act 1962 and with the approval of the competent authority, it is ordered that:-

The reasoning adopted by Chief Commissioner Customs Mumbai Zone I is legaland proper and further appeal be filed against the said Order in Original.

This is in revalidation of Board's Order conveyed earlier vide F. No. 390/Review/85/17-JC dated 19/09/2017 and is issued with the approval of Member (Legal), CBIC.

Sd-
(Mrinal Mishra)
OSD (Judicial Cell)

To,

COMMISSIONER OF CUSTOMS EXPORT, MUMBAI ZONE I NEW CUSTOM HOUSE, BALLARD ESTATE, MUMBAI 400 001.

Copy To:

PRINCIPAL CHIEF COMMISSIONER OF CUSTOMS MUMBAI ZONE I NEW CUSTOM HOUSE, BALLARD ESTATE, MUMBAI 400 001. For kind information.

Sd-

(Mrinal Mishra)
OSD (Judicial Cell)"

5.5 On perusal of the letter of OSD (Judicial) dated 19.09.2017, we find that the same does not meet any of the aforesaid requirements contained in Section 129D *ibid*. Inasmuch as, it is neither an order passed by the CBIC, nor does it direct any particular Commissioner to apply to the Appellate Tribunal. In fact, the present appeal has been filed by the Assistant Commissioner of Customs (EPCG Monitoring Cell), New Customs House, Mumbai-l; whereas there is no order authorizing the said person to file an appeal before this Tribunal. We also find that the letter of OSD (Judicial Cell) dated 19.09.2017 does not specify any points arising out of the decision/order, for which an application for determination of issues must be made to the Tribunal.

5.6 With regard to the above order dated 02.01.2020, which seeks to revalidate Board's Order conveyed earlier vide Board's letter dated 19.09.2017,we are of the view that such order is also not a valid order under Section 129D *ibid*, for the following reasons:

A. The order dated 02.01.2020 also does not satisfy any of the abovementioned essential requirements of an 'order' under Section 129D *ibid*. The said order neither directs a particular Commissioner to apply to the Tribunal nor does it specify the points arising out of the decision/order, which needs to be determined by the Tribunal.

B. Also, this order dated 02.01.2020 is clearly barred by limitation of time in view of Section 129D(3)*ibid*, which mandates that an order under Section 129D(1) *ibid*shall be made within a period of three months from the date of communication of the order/decision of the adjudicating authority. Since the impugned order of the Commissioner of Customs was passed on 28.04.2017 and was communicated to the Office of the Chief Commissioner on 25.05.2017, an order of review ought to have been passed by 25.08.2017. The order dated 02.01.2020, which has now been produced by the Learned AR for the Revenue has been passed almost two-and-a-half years after receipt of the impugned order. Insofar as the provision for extension of period for passing of the order by CBIC is concerned, the *proviso* clause appended to sub-section (3) of Section 129D *ibid*has extended period by another thirty days, beyond the normal period of three months. Thus, it transpires that beyond the period of four months from receipt of the order of Adjudicating Authority, the CBIC is not empowered to pass the order, directing the field formation for filing the appeal before Tribunal. Further, the statute has also not empowered the Tribunal to condone the delay, if the order is passed by the Board beyond the time frame.

5.7 The Learned AR for Revenue has argued that it was a practice for the Board, in all such similar cases, to pass orders of review in the manner in which it has done in the present case. However, no evidence of this practice, as claimed by the learned AR has been brought on record. As such, the assertion as to the existence of such a practice remains unfounded. That apart, assuming that such a wrong practice existed, it can never be a valid ground for by-passing a statutory requirement, which is mandatory in effect.

5.8 It has also been argued by the Learned AR for Revenue that if such orders are declared to be null and void, then all proceedings initiated on such orders of the Board in the last three-to-four decades, which have already culminated in orders of Tribunals,Hon’ble High Courts and the Hon’ble Supreme Court and pursuant to which recoveries have been made, would also be deemed to be null and void. We made it clear that the apprehensions of "disastrous consequences" as expressed by the Learned AR are entirely imaginary and unfounded. Firstly, the *proviso* to Section 129D(1) *ibid* itself being only 12 years old (the said *proviso* was introduced in 2008 by the Finance Act, 2008), there is no question of there being any impact on decisions dating back three-to-four decades as claimed by the Learned AR.Secondly, even if the Board has been passing such ordersin the past, a decision in the present case with respect to the interpretation of the *proviso* to Section 129D (1) *ibid* would not ipso facto result in the annulment of decisions and judgments already passed, unless and until the very same contention has been urged by respondents in those cases. A decision of this Tribunal is a decision which will be applicable only to an inter party dispute in the present case and will not straightaway nullify orders passed in the past pursuant to which recoveries have been made. As such, the apprehension expressed by the Learned AR for the Revenue as to the disastrous consequences that would follow if the Respondent's contentions were accepted is totally unfounded.

5.9 In view of the foregoing discussions, we are of the considered opinion that Revenue's appeal is not maintainable as there is no valid order of review passed under Section 129D(1) *ibid* by the CBIC.

6. It has also been urged by the Learned AR for the Revenue at the time of hearing that the stakes in the present appeal should be a factor that this Tribunal must consider when arriving at its decision on the maintainability of this appeal. We are of the considered view that this contention of the Revenue is totally untenable as amounts involved in an appeal can have no bearing whatsoever on issues of interpretation, which this Tribunal is called upon to decide. The appeal filed by the Revenue in the present case has no revenue implications in the absence of any challenge to the Commissioner's findings in Paragraph 37 of the impugned order to the effect that the respondent was eligible for duty exemption under the zero duty EPCG Scheme. As such, even if the findings of the Commissioner on the issue of valuation of capital goods imported by the Respondent, were set aside as prayed for in the Revenue's appeal, the Respondent would not have become liable to pay any differential duty liability, since it was entitled to the benefit of exemption under Notification No. 111/95-Cus., dated

05.06.1995 which was issued by the Central Government to give effect to theZero Duty EPCG Scheme. The Commissioner's findings in this regard, at Paragraph 37 of the impugned order, have been reproduced below:

> *"37. I also find force in the submissions made by the Noticee that the exemption has to be linked with the CIF Value as Rule 9 of the CVR is relevant only for arriving at the assessable value, under Section 14 of the Customs Act, 1962. In any case, I find that Notification No. 111/95-Cus dated 05.06.1995 grants complete exemption from payment of Customs Duty to goods which are covered by an EPCG license in description, quantity and value. Hence, I find that there is no dispute that the goods by description and in quantity were covered by the license. Insofar as the value is concerned, I find that it is the CIF value which is required to be debited to the license as held in the case of Union of India v. Glaxo Laboratories (India) Ltd. [1984 (17) ELT 284 (Bom)] and Manjushree Minerals Ltd. v. CC (1993 (68) ELT 273]"*

6.1 It is observed from the case records that neither the opinion of the two Chief Commissioners nor the order of the Board nor the grounds of appeal filed by the Revenue contain any challenge to the above referred findings of the Learned Commissioner. The points and issues on which determination has been sought from this Tribunal are only those relating to valuation of capital goods and do not extend to the Respondent's eligibility to exemption. Since any amount of value multiplied by zero is equal to zero, the grounds of appeal in the Revenue's appeal are rendered purely academic and have no revenue implications.

7. In the Grounds of Appeal at para 1.2, the Department has urged that the subject service contracts were a condition precedent to the sale of the goods under the supply contract, which fact has flown from Article 14 of the agreement, providing that all details stipulated in the Operation Licence Agreement was to be concluded by and between the buyer and seller separately, before the supply contract is given effect to. As per the this stipulation, the Department has believed that the equipment supply contract would not have been effective had the respondent not entered into the Operation Licence Agreement, Engineering Contract and Services Contract and that the termination of either of these contracts would automatically result in the termination of the supply contract.

7.1 On reading of the contents in the relevant contract, we observe that the Department has misunderstood Article 14 of the Supply Contract, merely because it makes a reference to the Operation Licence Agreement and provides that the obligations under the said agreement have to be concluded by and between the respondent and seller separately before the effectiveness of the Supply contract. The Supply Contract executed in this case, contains a stipulation to this effect only so that the setting up of the project is well co-ordinated. Even otherwise, both the Supply Contract and the Operation Licence Agreement were executed on the same day, i.e. 15th July, 1994.

7.2 The mere fact that the supply of equipment contract and the contract for provision of technical know-how for the plant to be set up in India, the service contract for erection, commissioning and other services qua the plant being setup in India are entered into as a part of one composite contract or as separate individual contract under an umbrella contract or as in the instant case, four individual contracts with cross reference to each other, i.e. the engineering contract refers to the supply contract as also the Operational Licence Agreement and to the services contract. Such a cross referencing of the contract or an umbrella contract or a single composite contract by itself is not determinative of whether or not the value attributable to the various service contracts can be included in the value of the supply contract. In this context, the Hon'ble Supreme Court in the case of *TISCO Ltd. v. CC, 2000 (116) ELT 422 (S.C.)* have held that an umbrella contract by itself is not sufficient to hold that the value of the service contract is to be included in the value of the supply contract or that the service contract was the condition of sale of the supply contract.

7.3 Even otherwise, the obligations of the supplier under the Operation Licence Agreement are in the nature of post-import services and the same has been dealt with, in detail, by the adjudicating authority in Para 36(ii) of the impugned order. The adjudicating authority has rightly held that the licence under the Operation Licence Agreement was not only towards the use of the COREX process but the same also extended to operating the Corex plant, which would enable the respondent to produce and manufacture the resultant final product which would be used and sold worldwide, which were post-importation obligations and consequently, were not required to be added to the assessable value. Thus, it becomes clear that the supply contract was unaffected by the obligations under the Operation Licence Agreement and that the Supply Contract would have still been effective had the respondent not entered into the Operation Licence Agreement.

7.4 Further, on a perusal of Article 25 of the Supply Contract, it would be clear that in case the Supply Contract is terminated, the party entitled to terminate shall have the option to terminate also the Engineering Contract and the Services Contract as well as the Operation Licence Agreement. In other words, in case of termination of Supply Contract, the party entitled to terminate has only the option to terminate the other contracts. The party entitled to terminate the Supply Contract is not required to necessarily terminate the other contracts. This shows that the contract for supply of equipments was independent of the obligations under the other three contracts.

7.5 In view of the above, it becomes clear that there was no condition of sale in the facts and circumstances of the present case so as to include the values of the said contracts (service contracts) in the assessable value of the supply contract.

7.6 The Department has also taken the stand in the Grounds of Appeal that the 'patents' as well as 'technical know-how' did not remain the sole prerogative of the foreign supplier/consultant, but the rights of usage were actually granted to the Licencee/Noticee for the term of this agreement; therefore, the case laws relied upon by the adjudicating authority were inapplicable to the question of law involved herein and are distinguishable from the instant matter for the very reason that there was no transfer of know-how or patents and that co-ordination and advice from the foreign supplier took place post-importation in the case of *CC v. Essar Steel Ltd.(supra).*

7.7 We are of the view that the Department has misunderstood the terms of the contract/agreement entered into between the Respondent and the foreign supplier inasmuch as the 'patents' as also the 'technical know-how' remained the sole prerogative of the foreign supplier/consultant since the Respondent was given only the right to use the said intellectual property and there was no transfer of such right to use the same. Since there was no transfer of right to use the intellectual property, the same remained the sole prerogative of the foreign supplier. The Department has, in its appeal, completely glossed over the preamble to the Operation Licence Agreement which clearly states that the foreign supplier along with its subsidiary are joint owners of patents and confidential information relating to Corex process and design, engineering, manufacture, construction, operation and maintenance of the Corex plants. In other words, the ownership in the patents and know-how always vested with the foreign supplier and was never transferred to the Respondent. In view of the above back ground of the case, we are convinced that the adjudicating authority has correctly relied upon the decision of *CC v. Essar Steel Ltd. (supra)* and the said judgment is squarely applicable to the facts of the present case.

7.8 The Department has also contended in this appeal that the circumstances in the case of *CC v. Hindalco Industries, 2015 (320) ELT 202 (SC)* are at variance, since the Hon'ble Apex Court had held that neither fees paid under the agreements related to the import nor it was a condition of sale. Whereas, the contents of the agreements in the instant matter clearly reveal that the conditions laid down in the agreements are interlinked and without its implementation, the entire operations of the importer would be futile. Therefore, this constitutes precedent to the sale of impugned imported goods.

7.9 It is a settled principle of law that mere interlinking of one contract/agreement with the other does not determine whether the same is a condition of sale for the purpose of determining the assessable value. Even otherwise, the fees paid to the supplier related to obligations/services of the supplier which were required to be provided post import of the equipments. The fees paid to the foreign supplier paid under the agreements related to post import activities and the same was, therefore, not a condition of sale. The adjudicating authority has rightly placed reliance upon the judgment in the case of *CC v. Hindalco Industries (supra).*

7.10 In view of the discussions made in the foregoing paragraphs, we are of the considered opinion that the adjudicating authority has correctly recorded his findings in para 36(ii)(a), (b) and (c) of the subject impugned order to arrive at a conclusion that all the contracts related to post-importation activities and the same could be construed as a condition of sale under Rule 9 of the CVR, 1988.

8. In view of the foregoing discussions and analysis, we are in complete agreement that there is no infirmity in the impugned order passed by the Learned adjudicating authority. Therefore, the appeal filed by Revenue is dismissed both on the ground of maintainability as well on merits.

9. Cross Objection filed by the respondent is disposed of.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

Sm