

Commissioner of Customs Vs. Himson Textile Engg. Indus. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-20-1997

Reported in : (1997)(93)ELT301Tri(Mum.)bai

Appellant : Commissioner of Customs

Respondent : Himson Textile Engg. Indus. Ltd.

Advocate for Def. : Shri. Rohan Shah

Judgement :

1. M/s. Himson Textiles Engineering Industries Pvt. Ltd. had entered into an agreement with M/s. Reiter-Scragg Ltd. (Scragg) on 1-10-1985 for manufacturing and selling of the Super High Speed Draw Texturising Machine Model SDS 1100 and DCE 1200".

M/s. Scragg grants M/s. Himson rights and powers to manufacture and sell the products, licence to use in India any Patent rights which M/s.

Scragg possess or may come to possess as regards the processor on the machines and all necessary licences under patent rights.

Royalty/lump-sum paid under this agreement shall constitute full compensation for use of patent right. Right to use trade mark was also granted to M/s. Himson Textiles.

The Buyers were to make payment in the form of a lump-sum know-how fees of 60,000 /- Pounds Sterling (net of Taxes) and royalty equal to five per cent of the net invoiced sale price of all Machines and Parts for the machines sold by M/s. Himson in India and 7.5% on export subject to taxes for a period of 5 years.

The Assistant Collector of Customs GATT Valuation Cell has observed that the foreign collaborator was in a position legally or operationally to control various areas such as design, specification, quality control, marketing, sub-licensing or patents etc. That the legal control was to include legal liabilities arising out of the agreement on contracts in respect of payment of lump-sum amount, royalty,, licence fees etc. and therefore, they were held as related persons in terms of Rule 2(2) of the Customs Valuation Rules, 1983. The royalty and lump-sum fees/licence fees were paid in terms of the collaboration agreement as package deal. The break up of consideration paid/payable for . the use of various facilities mentioned in Rule 9(1)(b)(iv) and Rule 9(1)(c) of Customs Valuation Rules out of the total consideration was not made available. They also failed to supply the bifurcated figures as promised by them at the time of Personal Hearing. Therefore, the Assistant Commissioner of Customs, S.V.B.loaded the CIF value at the rate of 4.2% under Rule 14(1)(a) of the Customs Act, 1962 read with Rule 8 of the Customs Valuation Rules, 1988. The Party filed an appeal against this loading. The Commissioner of Customs (Appeals) vide his order dated 18-7-1995 has set aside the order passed by the A.C., S.V.B., following the judgment of the Supreme Court in the case of Mahindra and Mahindra Ltd. and Maruti Udyog Ltd. The Commissioner (Appeals) held that royalty payment will not form a part of the assessable value under Rule 9(1)(b)(iv) unless it is established that the transaction value is not acceptable due to specific infirmities. Here the Commissioner (Appeals) relied upon the Mahindra & Mahindra decision of the Supreme Court that payments made to foreign collaborator for technical know-how are not includible in the assessable value of spares as the agreement is at arms length when there is no obligation on the part of the importers to import the goods from the collaborators.

2. Shri Gurdeep Singh the Ld. JDR contended that the perusal of the various clauses of the agreement would indicate that the collaborator exercises control

over the manufacturing operations of the Respondents.

The Ld. JDR submitted that what the Department seeks to do is to add to the transaction value the Additional elements as required under Rule 9(1) of the Customs Valuation Rules, 1988 which requires that the royalty paid has to be added to the transaction value to arrive at the assessable value. The Ld. JDR also relied upon the Supreme Court decision in the case of Collector of Customs (Prev.), Ahmedabad v. Essar Gujarat Ltd. -1996 (88) E.L.T. 609 (S.C.) to say that at licence fee and technical services fee paid to the collaborator has to be added to the assessable value.

3. Shri Rohan Shah the Ld. Counsel for the Respondents pointed out that their agreement with the collaborators consisted two parts one for manufacturing the machine and the other for transfer of technical know-how. The addition of royalty on the terms of Rule 9(1) of Valuation Rule according to the Ld. Counsel is the royalty which is payable for the goods imported. Since these are not relatable to the goods imported it cannot be added to their assessable value. As regards the contention that there is control exercised by the Collaborators, reference was made to the explanatory rules in the Valuation Rules regarding the nature of the Control as meaning the power to exercise restraint or direction. The Ld. Counsel urged that the ratio of the Supreme Court decision in the case of Union of India v. Mahindra & Mahindra Ltd. -1995 (76) E.L.T. 481 (S.C.) fully applies to the Respondents case because as in that case the Respondents also have the option to obtain the parts of the goods elsewhere and they had no obligation to purchase their requirements only from the collaborators.

The Ld. Counsel cited the case Varma Trafag Instruments Pvt. Ltd. v. Collector of Customs reported in 1993 (67) E.L.T. 861 (Tribunal) in which the Tribunal following the Maruti Udyog Ltd. decision had held that the mere payment of royalty and licensing fees will not amount to control over the manufacture so long as there is no obligation to import components from collaborators. The Ld. Counsel also submitted that the decision of the Supreme Court in Essar Gujarat Ltd. (supra) is factually distinguishable.

4. The submissions made have been carefully considered. The question is whether the lump-sum know-how fees and royalty paid by the respondents to Scragg is includible in the assessable value of parts and components imported. The issue in our view now stands settled by a recent three judge decision of the Supreme Court in the case of Collector v. Essar Gujarat -1996 (88) E.L.T. 609. In fact the Tribunal decision which has now been overruled by the Supreme Court was one of the decisions relied upon by the respondents before both the lower authorities. The licence fee was paid by Essar Gujarat to Minex International for process licence for the operation of the plant to produce sponge iron which Essar had purchased from another party Tourist Investment Ltd. (TIL).

The argument of Essar against the inclusion of the licence fee was that it has no link with the imported goods which was the plant for producing sponge iron. Rule 9(1)(c) of Customs Valuation Rules, 1988 had also been found by the Tribunal in its impugned order not invocable for adding the licence fee as it was not paid with reference to the plant imported. The Supreme Court considered Rule 9 of Valuation Rules and also the Interpretative Notes on that Rule and held, "It is difficult to see how these Interpretative Notes come to the aid of the importer in this case. Midrex has granted licence to EGL not only for the right to produce in the Midrex Direct Reduction Process Plant and Sell the products produced by the plant world wide, but has also given the licensee (EGL) the right to use sell patents, confidential information for the operation of the plant.... Therefore we are of the view that licence fee paid to Midrex will have to be added to the price of the plant to arrive at the transaction value of the plant". The Supreme Court further examined this aspect from a plain reading of Section 14 of the Customs Act for valuation of goods for purposes of assessment, and observed, "The entire purpose of Section 14 is to find out the value of the goods which are being imported. The EGL in this case was purchasing a Midrex Reduction Plant in order to produce sponge iron. In order to produce sponge iron, it was essential to have technical know-how from Midrex. It was also essential to have an operating licence from them. Without these, the plant would be of no value. That is why the precondition of a process licence of Midrex was placed in the agreement with TIL...EGL wanted to buy the plant in working condition. This could only be achieved by paying not only the price of the plant, but also the fees for the licence and the technical know-

how for making the plant operational. Therefore, the value of the plant will comprise of not only the price paid for the plant but also the price payable for the operation licence and the technical know-how, Rule 9 should be construed bearing this in mind".

5. In the present case also applying the ratio of the Supreme Court Judgment the respondents' agreement with Scragg is for manufacture and sale of Draw Texturising Machines under licence from Scragg strictly according to design, specification and technology developed and patented by Scragg with the right to use in India any patent rights which Scragg possesses as regards the processes or the machines. So, in order to produce the machines in India, Respondents have to obtain the production licence rights and technical information from Scragg.

Without the transfer of technical know-how mere import of the parts and components will be of no use to respondents. Without the right to use Scragg's patent rights in India the machines manufactured with Scragg's trade marks cannot be marketed. To achieve their objectives therefore, respondents have to pay not only the price of the goods imported but also the fees for obtaining production licence rights, technical know-how and royalty for manufacturing and marketing Scragg brand draw texturising machines. Provisions of Rule 9 therefore get attracted in such a situation, in the light of the ratio, of Supreme Court Judgment in the case of Essar Gujarat (supra). Accordingly assessable value of the goods imported under Section 14 of Customs Act, in this case should comprise of price of the imported parts and components, as well as the fee for operating licence and know-how, and the amount of royalty paid as per the agreement. It is therefore directed that the Assistant Commissioner concerned should redetermine the value of the goods on the above lines on the basis of actuals to be furnished by the respondents.

6. Commissioner (Appeals) has decided the case by following the Supreme Court decision in the case of Union of India v. Mahindra & Mahindra -1995 (76) E.L.T. 481 which, however, is prior to the three Judge decision of Essar Gujarat (supra), and which was a case of valuation under unamended Section 14 of Customs Act read with Customs Valuation Rules, 1963, whereas the Supreme Court decision in

Essar Gujarat is under the amended Section 14 and Valuation Rules of 1988 incorporating the GATT concept of assessable value being transaction value of imported goods, and hence distinguishable. As noted above, the respondents had cited and relied upon the Tribunal decision in Essar Gujarat before both the lower authorities which has been upset by the Supreme Court Judgment in Essar Gujarat.

7. In the result the impugned order is set aside with the direction that the assessable value be determined in terms set out above in the light of Supreme Court decision in Essar Gujarat case (supra).

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