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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-20-1997

Reported in : (1998)(75)LC886Tri(Mum.)bai

Judge : V T K.S., J S Murthy

Appellant : Mukund Ltd.

Respondent : Cc

Judgement :

1. The appellants as contractors of Steel Authority of India Ltd; Rourkela Steel Plant in Orissa, have been entrusted with the setting up of gas cleaning plant as part of Basic Oxygen Furnace shop. For this purpose the appellants entered into an agreement and signed a contract on 27.2.1993 with M/s. Davy Mckee (Stockton) Ltd. by which M/s. Davy were to provide basic design and drawing and also supervise the detailed engineering, erection and commissioning of the gas cleaning plant in India and were also to undertake training of personnel abroad.

They were also to render technical services and undertake guarantee test for the efficient functioning of the gas cleaning plant. The fabrication, manufacture etc. are to be done in India with indigenous goods based on the designs supplied by M/s. Davy.

2. In pursuance of the agreement a consignment of Design and Engineering Drawings were imported at Mumbai Customs, Air Cargo Complex for which Bill of

Entry was filed on 20.8.1996. The Asstt. Commissioner of Customs found that as per para 2.3 of the annexure I of the contract besides the amount of 20,00,000/- for design and engineering, the supervision charges in India during design, erection, commissioning and performance guarantee test 6,57,900 as well training charges as 82,600 were to be paid separately. The Asstt. Commissioner held that these charges should also be included in the assessable value of Drawings for design and engineering for the gas cleaning plant imported by the appellants. The Asstt. Commissioner concluded that supervision charges and training charges are part of design and engineering costs i.e. part of transaction value as per Section 14 of Customs Act read with Rule 9(1)(c) of Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988. The Asstt. Commissioner passed an Order in Assessment accordingly on 11.10.1996 which, on being challenged, was upheld by the Commissioner of Customs (Appeals) Airport Mumbai. Hence the present appeal.

3. We have heard Shri K.G. Krishnan, Id. consultant for the appellants and Shri S.V. Singh, the Id. D.R.4. The submissions made by both the parties have been carefully considered. The question is whether the lower authorities were right in determining the assessable value in this case by adding to it supervision charges and training charges paid by the appellants to Davy Mckee (Stockton).

5. The payments are in terms of the Agreement between the parties dated 27.2.1993. Annexure-I to the Agreement is summary price schedule according to which the following are the payments: Design and Engineering 20,00,000 Foreign supervision charges in India during design, erection, 6,57,900 Training charges 82,600 As per the contract Davy Mckee agreed to undertake the basic design and engineering, layout engineering, co-ordination, training services, supervision of detail engineering and drawing, and supervision of erection, testing and successful commissioning of gas cleaning plant, and demonstrate the performance guarantees. The Agreement also indicates at para 1.3.1: The design and engineering services of the Contractor shall generally include amongst others the following: Therefore, providing of basic design and drawing of the gas cleaning plant and supervision of detail engineering and drawing form an inseparable item as per the contract to be performed by Davy Mckee.

"Supervision" in the Agreement has been defined to mean the control and directions given by Davy Mckee during the execution of contract work. The various responsibilities cast on Davy Mckee as part of supervision are to ensure correctness of detail design drawings. To advise the erection work of-all plant and equipment to ensure that the erection work is in accordance with engineering standards, to supervise the performance guarantee tests and establish and demonstrate the performance guarantee as per the contract.

6. The payment of 6,57,900 noted above in the price schedule is towards the services indicated above in the Agreement and which is a necessary concomitant to the supply of Design and Engineering drawings for the gas cleaning plant made by Davy Mckee and imported by the appellants. The appellants have been entrusted with the setting up of gas cleaning plant, and this could only be achieved not only by purchasing the basic design and engineering drawings imported from Davy Mckee but also the whole engineering package of supervision of detail drawing, erection, commissioning and performance guarantee test. The payment made in foreign exchange towards supervision charges during design, erection and commissioning will necessarily have to form part of the assessable value of the imported goods and the value thereof will include not only the price paid for design and engineering but also for supervision charges. This will follow from Rule 9 of the Valuation Rules which provides for addition of certain costs and services to the transaction value. Rule 9(1)(e) covers all other payments actually made or to be made as a condition of sale of imported goods by the buyer to the seller.

7. In coming to the above conclusion we find support from a 3-Judges Bench of Supreme Court judgement in the case of CC (Prev.) Ahmedabad v.Essar Gujarat 1997 (68) ECR 386. The Supreme Court held that payment for technical services and for know-how have to form a part of assessable value of imported goods in terms of Section 14 of Customs Act and Rule 9(1)(e) of Valuation Rules considered in that case. This judgement is rendered subsequent to the judgement in the case of UOI v.Mahindra & Mahindra relied upon by the appellants and followed by the Tribunal in IFGL Refractories v. Commissioner also cited and relied upon by the appellants. The argument of the appellants that Rule 9(1) of Valuation Rules cannot be applied in this case as no goods have been imported is

unacceptable as appellants have filed Bill of Entry for the design and engineering drawings imported and cleared them on payment of duty assessed under heading 49.06 CTA 1975. The other contention of the appellants, that inclusion of supervision charges in assessable value will amount to double taxation, as they have already paid income tax on the amount earned by the foreigners, does not have much force because the question is to determine the assessable value of the imported goods in terms of Section 14 of the Customs Act and Valuation Rules, having no nexus with provisions of Income Tax Act.

8. It is further held, following the Supreme Court judgement in the case of Essar Gujarat (supra), that payment towards training charges cannot be added to the assessable value in any way. In that case also there was payment towards theoretical and practical training outside India and the Supreme Court, as noted above, held that it is not includible in the assessable value.

9. Therefore, the appeal is disposed of by holding that the addition of supervision charges 6,57,900 to the assessable value is sustainable and is upheld.

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