

Bharat Explosives Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-13-1999

Reported in : (1999)(85)LC615Tri(Mum.)bai

Judge : G B Deva, N T C.N.B.

Appellant : Bharat Explosives Ltd.

Respondent : Cce

Judgement :

1. The Appellants M/s. Bharat Explosives Ltd. formerly known as M/s.

Narendra Explosive Ltd. have entered into an agreement with M/s. Biazzi of Switzerland on 15.12.1997 for setting up a plant for manufacture of explosives in India. As per Clause (1) of the contract M/s. Biazzi had to provide the basic engineering documents, drawing and information to develop it into detailed design engineering and drawings in India and all other services as detailed in Clause (5) of the agreement subject to the terms and conditions of the agreement. In consideration of the above M/s. Narendra Explosive Ltd. had to pay Swiss Fanes 5 lakh towards technical know-how and basic engineering fees. M/s. Biazzi also hold 23% equity in the Company. Since NEL could not execute the project the same was handed over to the appellants by the finance companies.

The project was commissioned in October, 1992. The Indian Co. had imported capital goods, spare parts from M/s. Biazzi of Switzerland prior to 1988 and after

1988 also.

2. The Assistant Collector who adjudicated the proceeding on considering the submissions made by the party held that the payment to be made by the appellants under the agreement dated 15.12.1977 to M/s.

Biazzi were not related to the imported goods and ordered acceptance of the invoice price as the value of the imported goods.

3. After having examined the records of the case, the Commissioner of Customs took the view that the order passed by the Assistant Collector is not legal and proper for the following reasons: The party has paid Basic Engineering fees of Swiss Francs 4 lacs, for the supply of Basic Engineering, drawing, documents and information to develop into detailed design engineering, drawing in India and also for supply of layout for the erection of plant and machinery. The party had also imported plant and machinery and the collaborator supervised the erection and setting up of plant and machinery.

As per the judgment of CEGAT in Andhra Petrochemical in Order No. 394/93-A dated 30.7.1993, basic engineering fees paid for technical know-how, licence, manufacturing process, design, data, drawing specifications procedure, flow sheets, construction and operation technology is addable to the import of plant and machinery for the purpose of assessable value. The said order of CEGAT is at present pending for final decision in Supreme Court of India.

In view of the above in this case also the Basic Engineering fees are addable to the value of the plant and machinery imported by the party for the purpose of assessment.

4. Accordingly, Commissioner of Customs directed the Assistant Collector of Customs to apply to the Commissioner of Customs (Appeals) for the correct determination of the following points: (a) Whether after taking into consideration the facts and the reasons stated above, the order of the Assistant Collector is legal and proper.

(b) Whether by an order passed under Section 128A(3) of the Customs Act, 1962 the Commissioner (Appeals) should set aside the order of the Assistant Collector and to direct to add engineering fees to the assessable value of plant and machinery imported by the party or pass such order as may be deemed necessary under the law.

5. On an appeal filed by the Department in terms of the review order, the Commissioner of Customs (Appeals) Bombay has passed the impugned order observing that technical know-how fee and the basic engineering fees payable to M/s. Biazzi have to be added to the price of the equipments imported whether, from Biazzi or through Biazzi or directly by the party or SCIL to arrive at the assessable value in terms of Section 14 of the Customs Act read with the Customs Valuation Rules.

However, he observed that whole of the basic engineering fee may not be addable to the value of imported equipments, being a part of the sale may be attributed to the indigenous equipment. With these observations he has - remanded the matter to the Assistant Commissioner for deciding the issue afresh and to enable the party to provide complete break-up of procurement costs of all the equipments, machinery etc. procured indigneously and imported for the plant so that department may apportion the value relatable to the imported equipments and make additions to the invoice value under Section 14 read with Customs Valuation Rules. Not being satisfied with the order passed by the Commissioner of Customs (Appeals) the party has come before us by way of this appeal.

6. Arguing for the appellants, Shri V. Lakshmi Kumaran, learned Advocate contended that the technical knowledge and basic engineering charges are not connected with imports, as the same was paid for supply of technical details to the Indian Consultant for fabrication of utilities, locally and for erection and layout of the site plant. There was no provision for royalty payment as it was rightly observed by the Assistant Commissioner. He said that basic engineering charges was attributable for developing the basic engineering and to supply the indigenous equipments to ultimately culminate in the complete erection of plant and did not have a nexus with the goods imported. He stated that there was no reason to

discard the invoice value in this case and Rule 9(l)(b)IV of the Valuation Rules will not be applicable in arriving at the transaction value in terms of Section 14 of the Customs Act.

7. He emphatically argued that review order of the Commissioner was to the extent of inclusion of the basic engineering charges of Swiss Franc 4 lac but not of technical know-how fees of Swiss Franc 1 lac, but the discussions, observations findings/decision was with reference to both the issues as can be seen from the order of the Commissioner (Appeals), the impugned order was beyond the review order and appeal memo filed before him. He said that though there was reference to 5 lac in para 22 of the Review order in the facts of the case since ground taken in para 3.1 was only of basic engineering charges of Swiss Franc 4 lacs, and accordingly the Commissioner (Appeals) should have confined to the point referred to him and not beyond. He also relied upon the decision of the Tribunal in the case of Collector of Central Excise v. Sunitha Textiles Ltd. 8. Shri Prabhat Kumar, learned SDR countering the arguments submitted that import of plant and machinery cannot be equated with consumer goods while determining the assessable value and in case the imported goods were of highly sophisticated and technical same would not have been of any use, in the absence of instructions, technical know-how and tools, and accordingly cost of such technical know-how and basic engineering fee are required to be added. He said that once the invoice value does not represent true and correct value and intrinsic value is more than the invoice value, transaction value was to be determined under Section 14 of the Act as envisaged under Rule 9(1)(b)4 of the Valuation Rules. He stated that this was precisely done in the case of Andhra Pradesh Petrochemicals Ltd. as reported in 1994 (51) ECR 96 and the decision of the Tribunal was upheld by the Supreme Court as appeared in . Further, the decision of the Supreme Court in the case of Essar Gujarat Ltd. is directly on the point involved herein and this supports the Revenue in adding the cost thereof. Referring to the agreement between the parties he explained the scope of contract, terms and conditions, particularly with reference to Clause 5 of the agreement wherein it is provided for the support of basic engineering documents drawings and information on cost. On the issue of jurisdiction of Commissioner in dealing the issue of technical know-how, he submitted that entire review order/Appeal Memo including prayer has to be looked

into while deciding the issue and not parawise comments.

9. We have carefully considered the matter. We are not convinced with the arguments advanced on behalf of the assessee that Commissioner (Appeals) has gone beyond the review order/appeal memo in deciding the issue with reference to technical know-how fees. In the instant case technical know-how fees and Basic Engineering are interconnected and price is a composite one consisting of these two items. In fact the order of the Assistant Collector was reviewed by the Commissioner based upon the judgment of CEGAT in Andhra Petrochemical which was with reference to basic engineering fees paid for technical know-how ...and accordingly in this case technical know-how fees cannot be bifurcated.

Furthermore, entire order of the Assistant Collector was reviewed including basic engineering charges. There is force in the argument of DR that entire review order/Appeal memo including prayer is to be taken into consideration while deciding the issue. In the case of Sumitha Textiles (supra) referred to by the assessee it was held that neither point was referred to in the review order nor considered by the Collector (Appeals) and accordingly that point could not be agitated for the first time before the Tribunal in terms of Section 35E(1) and (2) of the Central Excise and Salt Act, 1944. That is not the situation herein. Not only the point arises out of the order but it was referred to the Commissioner (Appeals) for determination. Accordingly, the case law relied upon is not of much help. Thus, the appellants fails on this issue.

10. Next question for our consideration in this case is whether Commissioner (Appeals) was right in holding that the technical know-how fee and. the basic engineering fee payable to M/s. Biazzi will have to be added to the price of the equipments imported. On this issue also we are not convinced with the contention of the party that decision of the Tribunal in the case of Andhra Pradesh Petrochemicals and of the Supreme Court in Essar Gujarat Ltd. are not applicable. The ratio of the decisions is squarely applicable. While confirming the decision of the Tribunal in the case of Andhra Pradesh Petrochemicals, the Apex Court held that "We are of the opinion that the Tribunal was right in holding that the agreement relating to purchase of equipment cannot be dissociated from the other

agreements...." Therefore, in the circumstances of the present case, in this case too, the agreements/orders for purchase of the equipments cannot be dissociated from the other agreements". This was the view of the Apex Court even in the case of Essar Gujarat Ltd. wherein it was held that Process licence fees and cost of technical services for transfer of technology paid to third party includible in the price of the plant since plant cannot be made operational without them. In this context some clauses of the agreement are relevant and they are as under: (a) In consideration of payments to be made to Biazzi by NEL as hereinafter mentioned, Biazzi shall duly provide the basic engineering documents to enable SCIL to develop the same into detailed design engineering and drawings in India and all other services as detailed hereinafter as per Clause 5 of this Agreement as specified in the Technical Specification attached hereto, subject to and in accordance with the terms and conditions of the Agreement.

(a) Biazzi's price for the work specified in Sub-clause 1(a) of this Agreement, subject to the conditions stipulated herein, is (b) The price specified in Sub-clause (a) of this clause is made up as follows: - Technical know-how fees Sfr. 1 00'000.-- - Basic Engineering fees Sfr. 400'000.- Note: ...

(i) 1/3rd on signing of this Agreement and transfer of technical know-how documentation.

(ii) 1/3rd on installation, erection and commissioning of the plant, (iii) 1/3rd after three months of satisfactory commercial production.

(a) Necessary basic engineering documents, drawings and information to enable SCIL to develop it into detailed design engineering and drawings in India and also to arrange supply of the indigenous equipment and to complete the erection of the Plant.

(b) Necessary information on the manufacturing process and testing procedures for raw materials and finished products.

11. On going through the facts particularly the above clauses in the agreement with reference to the case law we do not find any infirmity in the observation of the

Commissioner (Appeals) in adding technical know-how fees and basic engineering charges to the imported equipments.

To what extent it is to be added is a question. Technical know-how and basic engineering charges not entirely addable to the price of the imported plant because of the fact that part of the same may be attributable to the indigenous equipments, as it was rightly held by the Commissioner (Appeals) in the impugned order. Hence, it is for the party to substantiate what is attributable to the indigenous equipments and to the imported plant. Accordingly, the jurisdictional Assistant Commissioner is directed to readjudicate the matter afresh in the light of our observations and case law and to pass an appropriate order in accordance with law after providing an opportunity to the appellants.

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