

Amc Cookware (P) Ltd. Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-25-2004

Reported in : (2004)(96)ECC533

Judge : K Usha, N T C.N.B.

Appellant : Amc Cookware (P) Ltd.

Respondent : Cc

Judgement :

1. The issue raised in this appeal at the instance of the importer is whether the Commissioner (Appeals) was justified in holding that the technical licence fee payable by the appellant is related to the imported goods and whether the technical licence fee which has not yet been paid is addable to the transaction value under rule 9(1)(c) of the Customs Valuation Rules 1988 in respect of import made by the appellant during the period august 2000 to February 2001.

2. The appellant is a joint venture company and 51% of its shares were held by Alpha BETEILIGUNGSELSCHAFT Gmbh (hereinafter referred to as Alpha) and the remaining 49% of the shares are held by Ceejay Cookware Investments Ltd., Mauritius (hereinafter referred to as Ceejay). Ceejay had made application in January 2000 to Foreign Investment Promotion Board (FIPB) seeking clearance for investment in the appellant company.

In the above application, it was indicated that the appellant company would be located at Bangalore, Karnataka and would be manufacturing a multi-cooking system, a unique product that allows cooking without addition of water and oil. It was also indicated that lump sum payment in the form of 'technical know how fees' of DM 2 million would be made in addition to the payment of drawing and design of net cost and engineering services fee of Euro 200 per day per person plus expenses.

When approval was granted on 31.1.2000 the above payments were also indicated therein. The appellant was incorporated on 24.4.2000. On 18.4.2000, FIPB granted approval for transfer from Ceejay to the appellant.

3. M/s. Classic Cookware (P) Ltd. which was originally formed in July 1995 with Cookware investment, Mauritius holding 100% shares had set up a manufacturing unit at Bangalore in 1998 and commenced production of special type of steel cookware in June 1999. The semi-finished/unpolished steel cookware components were imported and they were polished and assembled at their unit at Bangalore. The appellant company on being set up purchased the raw materials, work in progress, semi finished goods from M/s Classic Cookware Pvt. Ltd. The fixed assets including various machineries employed in the manufacture of the goods were purchased at FOB value. The employees of Classic Cookware were transferred to the appellant company and the place of business was also handed over to the appellant. The manufacturing operation undertaken by the appellant was the same as was being done by Classic Cookware on and from June 1999. The appellant was importing unpolished cookware components and subjecting them to various processes at the unit at Bangalore and the finished goods were thereafter sold in India through the direct marketing route.

4. In the meanwhile the appellant entered into consultancy agreement with AMC International Alfa Metal Craft Corporation AG, Switzerland (Provider). As per the agreement dated 11.6.2001 the provider owns or otherwise has the right to provide training of technology to others, and to grant licences for Trade Marks which relate to cookware and the provider was willing to make available the assets for use by recipient in the territory, on the terms and conditions of the said

agreement.

The nature of technology consultancy to be provided to the appellant by AMC Switzerland is detailed in para 6 of the agreement as follows:- 6.1 Provider shall make available to recipient all such specifications, drawings, data and other information in its possession and necessary for the purposes of implementing, completing and operating the Project.

6.2 Without limiting the generality of the provisions of clause 6.1 above Provider shall make available to Recipient all such technicians and other skilled personnel employed by Provider as required for the Proper fulfilment of this Agreement, it being recorded and agreed that any technicians and other personnel so made available shall (without derogating from the remaining provisions of this Agreement) be furnished with suitable working facilities, proper equipment and materials, and all such other facilities to enable them to properly and efficiently perform their duties in terms hereof. In particular, Provider shall 6.2.1 train at the Manufacturing Plant or at the premises of Provider in Europe (as stipulated by the Parties) so many of the employees of Recipient as may Recipient reasonably require; 6.2.2 assist and advise Recipient with regard to the design, planning and construction, and operation of the Manufacturing Plant; 6.2.3 assist and advise Recipient with regard to the procurement and purchase to the Equipment; 6.2.4 generally make available to Recipient all such advice, information, data and expertise reasonably required for the purposes of the completion and operation of the Project in terms hereof." 5. The project referred to in the above paragraph has been defined in paragraph 1.1 of the agreement as under:- " 'Project' means the construction of the Manufacturing Plant and the completion of the Manufacturing process including the transfer of the required know-how and technical documentation for the deep drawing, Polishing, assembly and packaging of the Products." Terms regarding payment of licence fee are contained in paragraph 9.1 of the agreement which reads as follows:- "9.1 In consideration of the Trade Mark and Know-how licence hereby granted to Recipient, and subject to the obtaining of all relevant governmental approvals, Recipient shall pay to the Provider at its principal office following licence fee: a) a lumpsum payment of DEM 2,000,000 (or the equivalent EURO amount) in ten (10) instalments b) a royalty payment of 4%

(four per cent) of the Net Sales Value accrued on domestic sales and 6 & (six per cent) of the Net Sales Value accrued on export sales for a period of ten (10) years.

6. Though the technical consultancy agreement was drawn as above, the construction of the plant and manufacturing process by deep drawing method etc. was not all taken up and the appellant continued to follow the method acquired from Classic Cookware that is manufacturing out of semi-finished goods imported. They continued to import only unpolished stainless steel components, plastic parts of cookware and consumables.

The appellant could localize certain components like lid, handle etc.

by procuring them for local vendors. The only capital goods that were imported were testing equipment, which was used to test the thickness of the SS component imported. Such import of capital goods had nothing to do with the project envisaged in the agreement. Since the project did not take off as mentioned above, the lump sum amount has not become payable.

7. While so, it was proposed to add the know how fee of DM 2 million and designing and drawing fee to the transaction value of the goods imported by the appellant. In spite of the appellant explaining the facts that the import has nothing to do with the project, the adjudicating authority passed an order on 28.2.2001 holding that the appellant and supplier are related and that the technical know how fee etc. are to be added to the transaction value as per Rule 9(1) (c) of the Customs Valuation Rules, 8. Being aggrieved with the above order, the appellant filed appeal before the commissioner (Appeals) who by order dated 27.2.01 accepted the contention raised by the appellant and dropped the proceedings. On appeal by the Revenue the South Regional Bench Tribunal, Chennai remanded the matter for de novo consideration by the Commissioner (Appeals). Pursuant thereto the Commissioner (Appeals) passed the impugned order holding that the technical know how fee is addable to the declared value. The above finding is under challenge before us in this appeal.

9. It is contended on behalf of the appellant that the import in issue has no connection whatsoever with the project which has not yet started and in respect of which no licence fee has become payable. What are being imported are the components of similar finished goods, which the appellant was importing, ever since it acquired the factory of Classic Cookware. The appellant, therefore, placed reliance on the ratio of the decision of this Tribunal in Collector of Customs, Bombay Vs. Maruti Udyog Limited. Gurgaon 1987(28) ELT 390 affirmed by the Supreme Court in 1989 (41) ELT A 61. Reliance was also placed on the larger Bench decisions of this Tribunal in S.D. Technical Service Vs. CC New Delhi 2003 (155) ELT 274 (Tri.-LB) and Panalfa Dongwon India Ltd. Vs. CC Mumbai 2003 (155) ELT 287 = (2003-TIOL-17-CESTAT-DEL-LB). Reliance was also placed on the decision of this Tribunal in Ferodo India (P) Vs.

2002 (142) ELT 343.

10. The learned DR would submit that the Commissioner (Appeals) was correct in adding the fee for technical know how etc. for arriving at the transaction value of the goods imported. Reliance was placed on the decisions of this Tribunal in TDT Copper Ltd. Vs. CC New Delhi 2000(120) ELT 265(T), Binara Udyog Pvt. Ltd. Vs. CC, New Delhi 2000(118) ELT 603 and Otto India Pvt. Ltd, Vs. CC, Kolkata 2002 (48) RLT 194, appeal against which was dismissed by the Supreme Court in 2004(60) RLT F1 11. Under the order dated 28.2.2001 the adjudicating authority took the view that the transaction value has to be rejected by applying the provisions contained under Rule 4(2) (c) of the Customs Valuation Rules 1988. He then held that the technical know fee has to be added for determining the value of the imported goods and that the engineering service fee is not liable to be added. After rejection of the transaction value, he proceeded under Rule 9 (1)(c). Pending provisional assessment was finalized for the period August 2000 to February 2001 by loading the technical know how fee and design and drawing fee. On appeal by the party, the Commissioner (Appeals) by his order dated 17.9.2001 took the view that going by the terms of the agreement, it is clear that the payment under the agreement has nothing to do with the imported goods. The fee has relation only to the goods that are to be manufactured pursuant to the agreement. The Commissioner (Appeals), therefore, took the view that loading of the technical

know how fee of DM 2 million and design and drawing fee was without any basis.

12. In the remand order the Tribunal has not gone into the merits of the contentions raised by both sides. The Commissioner (Appeals) on remand took the view that irrespective of the relationship between the parties, technical know fee has to be added by applying Rule 8(1)(c).

On merits, the learned Commissioner (Appeals) took the view that the technical information in the form of drawing, manufacturing information etc. as per the licence and consultancy agreement is very much related to imports and the basis of the generation of the licence on the imported components. Therefore, the lump sum of DM 2 million paid towards technical information is addable to the declared value under Rule 9(1) (c).

13. In the light of the above finding in the order impugned, the only issue that comes up for consideration before us is whether the technical licence fee payable under the agreement related to the imported goods. From the facts it is seen that after acquiring the manufacturing unit from M/s. Classic Cook ware Pvt. Ltd., the appellant was continuing the same manufacturing process and for that purpose they were importing unpolished cookware components and subjecting them to various processes at unit at Bangalore Such import was being made from April 2000 onwards. The proceeding before us relates to finalization of provisional assessment for the period from August 2000 to February 2001. From the documents available before us, it is seen that Ministry's approval was granted in communication dated 31.2.2000 on the application for foreign collaboration. In the above communication there is a direction to M/s. Ceejay Cookware Investments Ltd. for finalizing the agreement. The approval was to be valid for a period of two years from the date of issue and within that period they were to file the collaboration agreement with the Reserve Bank of India/Authorized Foreign Exchange Dealer. They were also directed to furnish copies of the agreement to the Administrative Ministry, Secretariat for industrial Assistance (Foreign Collaboration II Section) and Department of Scientific and Industrial Research, Technology. It is further seen that the technical know how agreement was entered into only on 11.6.2001 much after the period of import in issue. A reading of the

order of the adjudicating authority would show that even at the time of hearing before him in February 2001 copy of the agreement was not made available. Therefore, the adjudicating authority proceeded to finalize the assessment without examining the terms of the agreement. It has now come out that the agreement itself was not in existence at the time when the adjudicating authority passed the original order.

14. It is the contention of the appellant that the technical know how agreement has not yet come into force. On going through the agreement, copy of which is made available to us, we find that the project envisaged under the agreement in respect of which technical know how had been provided was as follows:- "the construction of the Manufacturing Plant the completion of the Manufacturing Process including the transfer of the required know-how and technical documentation for the deep drawing, polishing, assembly and packaging of the Products." The appellant asserts that the project as mentioned above, has not yet started. The manufacturing plant, as contemplated therein, has not been constructed, nor manufacturing process for deep drawing, polishing, assembly and packaging of the products had come into effect. On the other hand the appellant is still continuing the process, which was carried on by M/s. Classic Cookware Pvt. Ltd. from June 1999 onwards.

The appellant acquired the plant, machinery etc. from Classic Cookware and they were continuing the old method of manufacturing out of the semi-finished goods imported. The Revenue has no case before us that as a matter of fact the project as contemplated under the agreement has come into effect either in full or in part. The learned DR referring to clause 6.1 and 6.2.4 submits that once specifications, drawings, data and other informations are made available and required advice, information and data are also given, it will naturally help in the production of the final product. Reliance is also placed by the learned DR on clause 10.6 which reads as follows:- "In order to guarantee quality in strict compliance with Provider's standards, production of the products or parts thereof if not procured through Provider or his related companies shall be carried out in a plant of Recipient in India. Any procurement of products or parts thereof by Recipient through third parties or dislocation of production plant outside India requires prior consent of

Provider." It is submitted that the import by the appellant has to be treated as subject to the above condition.

15. We find no merit in the view taken by the Commissioner (Appeals).

On going through the list of the items imported during the relevant period we are not able to identify them as related to the project. The appellant has explained that the testing equipment which is imported is used for processing unit at bangalore which was acquired from Classic Cookware. On examining the terms of the agreement in detail we come to the conclusion that the payment made under the agreement has nothing to do with the imported goods. According to us, it is the ratio of the decisions of this Tribunal in Ferodo India (P) Ltd., S.D. Technical Service and Panalfa Dongwon India Ltd. that has to be applied in the facts of this case and not that of Benara Udyog Pvt. Ltd. and Otto India Pvt. Ltd. In Benara Udyog Pvt. Ltd. the goods imported had direct connection with the drawings and technical know how agreement. In Otto India Pvt. Ltd. the facts were different. In that case, equipments were imported to obtain performance guarantee which was part of the agreement 16. Rule 9(1) (c) provides that there shall be added to the price actually paid or payable for the imported goods, royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such 'royalties and fees are not included in the price actually paid or payable'. In S.D. Technical Service a technical know how fee had to be paid by the appellant to the foreign collaborator in lieu of the right to manufacture and assemble in India licensed equipment for use in railway locomotives and rolling stock with the technical know how supplied by the foreign collaborator. The appellant imported air brake distributors in CKD condition, spring, rubber, circlips and delring components etc. which could be assembled in India. Tribunal took the view that such assembly will not come within the term of manufacture of the licensed equipment in respect of which technical know how had been granted. In Panalfa Dongwon India Ltd. royalty in limp sum was payable for training of personnel, furnishing of technical information, utilisation of intellectual property and royalty on net selling of each licensed product. It was held that such licence fee is payable in connection with the manufacturing process and not with the import of goods

especially when importer was not bound to purchase goods only from foreign collaborator.

17. In the present case, the facts would clearly show that the import made by the appellant was not in relation to the project which is the subject matter of the agreement. If that be so, there is no reason to apply the provisions contained under rule 9(1) (c) and load the declared value by adding the know how fee. We, therefore, set aside the order impugned and allow the appeal.

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