

Ncl Inds. Ltd. and Cc. Vs. Cc. and Ncl Inds. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-24-2005

Reported in : (2005)(189)ELT193Tri(Mum.)bai

Judge : J Balasundarm, Vice, K Kumar, A M Moheb, S T Gowri, G Srinivasan

Appellant : Ncl Inds. Ltd. and Cc.

Respondent : Cc. and Ncl Inds. Ltd.

Judgement :

1. Heard both sides. The issue involved is "addition in the assessable value on account of payment of design, engineering, consultancy etc.

and technical know-how fees." The matter has come to me as a 3rd Member. The Member (J) in his Order dated 28/8/2000 has held that the above charges are to be included in the assessable value. Whereas the Member (T) in differing order has recorded that these charges are not includible in the assessable value.

2. The Id. Counsel appearing for the assessee-appellant referred to the 2 agreements dated 8/3/1999 and 21/2/1988. The agreement dated 8/3/1999 relates to collaboration whereas the agreement dated 21/2/1988 relates to technical know-how, engineering services, training and start-up. The Id. Counsel for the appellant submitted that the collaboration agreement between the appellant and the supplier is for provision of technical know-how, supply critical equipment, engineering services, training, start-up assistance, production and development

assistance.

Article 2 of the said agreement provides for technical assistance to be rendered by the licensor i.e. the supplier, Article 4 provides for training of the licensee's personnel and Article 8 provides for consideration for the aforesaid services. The agreement dated 8/3/1989 is between the supplier and the buyer for supply of equipment. He submitted that each agreement is an independent agreement. The Id.Counsel relied on the following decisions to support his contention that the consideration paid for the above items is not includible in the assessable value: -
(i) Polar Marmo Agglomerates Ltd. - 2003 (155) ELT 283 (Tri.- LB), Fee for know-how, transfer of licence, cost of assembly and start up of plant payable in lump sum - collaboration agreement not having clause that such transfer of know-how and licence was a condition for purchase of plant or to make it functional -HELD : The lump sum was not includible in the assessable value of the imported plant and machinery.

(ii) Panalfa Dongwon India Ltd. - 2003 (155) ELT 287 (Tri-LB).

Royalty in lump sum for training of personnel, furnishing of technical information, utilisation of intellectual property and royalty on net selling of each licenced product sold are all payable in connection with manufacturing process and not with import of the goods - HELD : Such amount was not includible in invoice value, especially when importer was not bound to purchase goods only from foreign collaborator.

(iii) S.D. Technical Service - 2003 (155) ELT 274 (Tri.LB), technical know-how fees not includible in the assessable value of importer goods.

(iv) Birla Tyres - 2001 (45) RLT 582 (CEGAT-Kol.), machinery - know-how and basic design documents - relating to the activities of manufacture of the goods (tyres) - their value is not to be added to the value of the machinery.

(v) Ferodo India (P) Ltd. - 2002 (50) RLT 751 (CEGAT-Del.), royalty and licence fee - paid to foreign supplier who is a related person, for using his brand name and technical know how for manufacture of goods in India - not relatable to the goods

imported by appellants - foreign supplier only assisted in identification and procurement of the goods and made available invoices of original supplier which showed full value had been charged - royalty and licence fee not to be added as there is also no indirect payment.

(vi) The Id. Counsel submitted that the Essar Gujarat case relied on by the Id. Commissioner (A) and the Id. Member (J) has been distinguished in the above cases as Essar Gujarat was a case of purchase of second hand plant and the know-how fees etc. were paid by the importer to the person other than supplier, who were not related to the supplier. In the present case, the supplier of the goods is also a collaborator who is directly receiving the fees.

(vii) Hoerbiger India Pvt. Ltd. - 2003 (56) RLT 965 (CEGAT-LB), paid as percentage of selling price of goods manufactured and sold in India - as per financial cum technical collaboration agreement, payment of royalty is not related to the imported goods and is not a condition of their sale - it is in respect of manufacture of the product - not to be added in the assessable value. (viii) Himson Textile Engg. Industries Ltd. - 2004 (64) RLT 91 (CESTAT-Mum.), royalty - Technical know-how fees, licence fees, lump sum amount paid towards royalty, licence fees and technical know-how fees is not to be added to the goods purchased in India - the agreement clearly shows that lump sum amount payable has not influenced the price.

(ix) Neg Micon (India) Pvt Ltd. - 2004 (170) ELT 29 (Tri.Del.), technical know-how fee and service fee paid by appellants relates to manufacture of wind turbine generator (WTG) in India and service thereof and not in respect of parts/components imported by them- Licence fee not payable as a condition of sale of imported goods - Licence fee not satisfy the required conditions under Rule 9(1)(c) for being added to the assessable value of imported goods.

(x) Mando Brake Systems India Ltd. - 2004 (163) ELT 333 (Tri.-Del.), importer entered into Licence and Technical Assistance Agreement (LTAA) with foreign collaborator for manufacture of five items - No provision in the agreement regarding purchase of capital goods, consumable and components and parts imported by appellant - Licence fee not includible to assessable value of goods

imported.

5. The Id. Counsel for the assessee-appellant submitted that the facts of the present case are similar to the cases mentioned above and as such looking to the legal position as given in the aforesaid cases, the order of the Member (T) may be accepted.

6. The Id. JDR appearing for the revenue submitted that the agreements have to be read together without the know-how, plant is of no use.

Relying on the Apex Court decision in Essar Gujarat, he submitted that the importer and provider of services is the same. The ultimate aim is to commission the plant. Therefore, his submission was that the order of the Member (J) should be accepted.

7. After hearing both sides and perusal of the records and the case laws, I find that the reliance of the Id. DR on Ms. Essar Gujarat is misplaced for the simple reason that in that case the second hand plant was imported and the know-how fees etc. were paid by the importer to the person other than supplier who were not related to the supplier.

Whereas in the case in hand the supplier of the goods is also the collaborator who is directly receiving the fees. Therefore, applying the ratio of the decisions-relied on by the Id. Counsel, I am of the opinion that the order passed by the Member (T) deserves to be accepted.

We hold that the technical assistance charges and charges for erection and commissioning of the plant are not includible in the assessable value of imported goods and hence allow the appeal of the importer and dismiss the appeal of the Revenue.

1. These two appeals have been filed by the appellants against the order passed by the Collector of Customs (Appeals), made in Order-in-Appeal No. 189/92 BCH dated 23.4.1992. Appeal No. 1634/92 has been filed by the assessee/appellants challenging the inclusion of DM 2,57,167 in the valuation of the imported item. Appeal No. 1644/92 has been filed by the department against the decision of the

Collector (Appeals) in not including DM 3,01,254 which are charges or consideration paid by the assessee to the supplier in relation to the contract products which would be manufactured by the assessee in India as these are not charges payable by the assessee for production of the imported goods and the same shall not form part of the price.

2. The assessee applied for registration of contract for import of plant and machinery at DM 70,71,007 (FOB) for initial setting up of their cement board plant. Along with the application the assessee declared that they had entered into a collaboration agreement with the supplier of the equipment M/s. Bison Werke Bhare and Greten GmbH & Co., West Germany to whom they were paying fees as per collaboration agreement dated 21.2.1998. On scrutiny of the documents it was found by the department that the assesseees were importing necessary machines and equipment from their collaborators for setting up of the plant. In view of the fact that the assesseees were making certain payment to the supplier of the equipment by way of technical know-how in terms of the provisions of Rule 4(1) and Rule 9 of the Customs Valuation (Determination of the Price) Rules, 1988, the same were to be added to arrive at the transaction value. On 30.10.1990 the department communicated to the assessee that the contract would be registered provisionally with 10.7% extra duty deposit and the assessee was required to execute a bond and furnish 5% of CIF value of the goods as bank guarantee for provisional assessment under Section 8 of the Customs Act. The assessee filed a writ petition in the Bombay High Court being No. 3332/90. The High Court in its order dated 21.11.1990 directed that the goods may be released on personal bond equivalent to 10.7% of the extra duty. In pursuance thereof a show cause notice dated 7.1.1991 was issued and replies were filed and after hearing the parties the Assistant Collector passed an order on 19.8.1991 adding DM 2,57,167 (net of taxes) and DM 3,01,254 (net of taxes) paid by the assessee towards technical assistance and know-how towards the delegation of technical personnel from the supplier. An appeal was filed before the Collector (Appeals) who upheld the order of the Assistant Collector proposing to add DM 2,57,167 but did not uphold the Assistant Collector's order regarding DM 3,01,254 towards technical know how as it would not form part of the assessable value. Hence the present appeals filed by the department as well as the assessee.

3. On 21.2.1988 the assessee entered into a collaboration agreement with M/s. Bison Werke Bahre and Greten GmbH & Co., West Germany, providing for the following payments:- DM 4,39,786 for technical know how and documentation referred to transfer of technology. On 9th March, 1989 a contract was entered into between the same party for the supply of machinery and equipment. A show cause notice dated 7.1.1991 was issued demanding duty of 18.7% of extra duty. It is reflected in the order passed by the Assistant Collector calling upon them to show cause why the payment to be made should not be added to the transaction value of the said goods in terms of Rule 9(1)(b)(iv), 9(1)(c) and 9(1)(e) of the Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988. The appellants under cover of the advocate's letter dated 13th May 1991, filed a reply stating that none of the said clauses of Rule 9 will be applicable inasmuch as the judgment of the Tribunal in the case of Essar Gujarat Ltd. v. Collector of Customs 1991 (56) ELT 221 would be applicable. It was vehemently contended by Shri Nankani that the approach of the Collector that DM 2,57,157 form part of the assessable value is wrong. He stated that the two agreements dated 21.2.1988 and 9.3.1989 are entirely independent. He invited our attention to the various clauses of both the contracts to show that they were independent of each other. He also justified that the finding given by the Collector (Appeals) in the order that payment made to the supplier, viz. DM 3,01,254 were not charges payable by the assessee for production of the imported goods. Both parties invited our attention to the judgment of the Supreme Court in Collector of Custom v. Essar Gujarat Ltd. 1996 (88) ELT 609. Shri Nankani invited our attention to para 3 of the judgment whereas Shri Rao invited our attention to paras 4 & 7 of the judgment, viz.

licence fee payable to Midrex Process of technical service provided under Article 3 in connection with technical services. Both parties also referred to the judgment of the Supreme Court in Union of India v. Mahindra & Mahindra 4. We shall refer to both agreements. Collaboration agreement is dated 21.2.1988. The preamble portion of the same describes that the assessee described to acquire from the foreign collaborator know how technical information and assistance to enable the assessee to manufacture cement boards in conjunction the purchase of necessary machines and equipment from the collaborator. Clause 1.2 of the agreement defines technical information. It is defined as follows:- "The term 'technical

information' means the present and future manufacturing information available with the Licensor relating to Designs, Specifications, Detailed Layouts of Plant & Production methods, Manufacture and testing of Contract Products as well as information relating to materials used in the manufacture thereof, insofar as such information has either been successfully incorporated in or forms part of the manufacturing or engineering technique of the Licensor and is applicable to the contracted transfer of know-how and manufacturing operations of the Licensee, with regard to materials used in the manufacture of Contract Products, "Technical Information" means instructions fully and completely required in quantity, quality and characteristics and on their treatment in the manufacture of the contract products, as well as sources of supply of all raw materials and their substitutes as may be known to the Licensor from time to time during the period of contract." Clause 1.3 mentions documentation which comprises of written technical information and improvements pertaining to designs, drawings and specifications, detailed layouts and plant. Article 2 of the said agreement provides for technical assistance to be rendered by the foreign company. Clauses 2.1.1 and 2.1.2 provide for technical assistance and they define the same, which read as under:- "2.1.1 The Licensor shall be responsible for the plant and machinery including preparation of designs and detailed engineering, technical documentation covering civil, mechanical, electrical, procurement of all equipment and ancillaries as may be needed for the construction, erection of the said plant and machinery and for obtaining production till the commencement of on-line production, the assistance will include information regarding additional machinery and equipment required for the manufacture of contract products. The replacement/modifications in the event of any technical law attributed to the Licensor shall be at the expense of the Licensor/Licensee for the respective supply volumes in Machinery/Drawings. 2.1.2 In : consideration of the above services, the Licensee shall pay to the Licensor a lump sum payment of DM 375,426 subject to applicable Indian taxes, as detailed in Article 8.1 in 3 equal installments." Article 3 deals with training of the licensee's personnel. Article 4.1 deals with delegation of the licensor's personnel and it provides inter alia that subject to the Indian company obtaining prior approval of the Indian Government authorities concerned foreign company shall delegate at cost of DM 6,70,000 for the shortest possible time, suitable specialists who are

required in India in order to train personnel at the Indian company's factory and to provide general technical assistance by active participation in establishing production, quality control and testing of contract product. Article 5 deals with transmission of technical information. Article 6 deals with additional assistance. Article 7 deals with manufacturing and selling rights.

Article 8 deals with consideration. Article 9 deals with improvements and modifications by the licensee to be made by the Indian company.

Article 10 deals with limitation of liability. Article 11 deals with standard of quality and designation of contract product.

5. The supply contract which was entered on 9.3.1989 which has been argued as independent of the collaboration agreement by the assessee in this case. The said contract inter alia provides in Clause 2.2 Sub-clause (3) retention money as performance guarantee in accordance with para 5.3 of this contract and para 8.1(c) of the collaboration agreement signed between seller and buyer on 21.2.1988. Clauses 3.3 and 3.4 read as under:- "3.3 That the plant will be completely assembled and installed at the site as soon as reasonable possible after the date of arrival of the last item of plant at the site; that the seller will send to the site all necessary engineers and technical personnel to expedite such assembly at buyer's cost; 3.4 That when commissioned, the plant will produce boards of the nature and quality and to the specifications and in quantities as more fully set forth in the annexure hereto." From the reading of the above, namely para 2.2 sub-para (3), para 3.3 and 3.4 it will be very clear that collaboration agreement is for the performance of provision of technical know how, supply of equipment, engineering services, training start-up assistance, production and development assistance. This has been mentioned in agreement dated 21.2.1988. The said agreement has been referred to in para 2.2 sub-para (3) regarding retention money and performance guarantee and in para 3.3 and 3.4 the seller, viz. Bison Werke, Bahre and Greten GmbH & Co.

6. If we go through the grounds of appeal of the assessee it states that Article 2.1 did not provide any procurement of plant and machinery and it deals with only technical assistance. It further states the technical assistance is for providing data

for construction of the plant. Therefore, the technical assistance does not cover procurement of the goods. It is therefore argued that the consideration is for technical assistance and form part of the assessable value of the goods. Para 1.10 of the agreement dated 21.2.1988 states that the equipment shall mean all machinery including critical spares, machinery and their auxiliaries, etc. required to be incorporated and form part of the plant. But, however, it has to be stated that the subsequent agreement, viz. supply contract dated 9.3.1989 provides for retention money as performance guarantee in accordance with para 5.3 of contract dated 9.3.1989 and para 8.1(c) of collaboration agreement dated 21.2.1988. This clearly shows that both agreements have to be read together. In para 2.1.1 of contract dated 21.2.1988 it is specifically stated that the licensor shall be responsible for the plant and machinery including preparation of designs and detailed engineering, technical documentation covering civil, mechanical, electrical, procurement of all equipment and ancillaries as may be needed for the construction, erection of the said plant and machinery and for obtaining production till the commencement of on-line production. This means it is the technical assistance to be rendered by the foreign company to the assessee and both the agreements clearly show the nature of relationship which provide, namely in one case it is buyer and seller and in another case it is the technical collaborators for running the machinery.

7. There is a reference to the cases of Mahindra & Mahindra Ltd. 1991 (55) ELT 15 and Maruti Udyog Ltd. 1987 (28) ELT 398. The case of Mahindra & Mahindra., in our view, will not be applicable to the facts of this case inasmuch as that was the case of best of judgment assessment with which division bench of the Bombay High Court was concerned. As far as Maruti Udyog Ltd. case was concerned we have to state that, that also deals with best of judgment. Here it is not the case of the best of judgment. Therefore we cannot agree with the same.

8. It will be useful to refer to paragraphs 8 and 9 of the Assistant Collector's order which read as under:- "8. Rule 9(1) states that "In determining the transaction value there shall be added to the price actually paid or payable for the imported goods and Sub-rule (a) stipulates that "royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a

condition of sale of the goods being valued to the extent that such royalties and licence fees are not calculated for the price actually paid or payable", and Rule 9(1)(e) states that "all other payments actually made or to be made by the condition of the sale of the imported goods by the buyer to the seller to the extent that such payments are not excluded in the price made or being made".

9. The interpretative notes which are specified in the schedule to these Rules under note to Rule (4) it is stated that "the value of the imported goods shall not include the following charges or costs provides that they are adjusting from the price actually paid or payable for the imported goods (a) charges for the construction, erection, assembly, maintenance or technical assistance undertaken after importation or imported goods such as industrial plant, machinery or equipment, and (c) states that duties and taxes in India. From the letter of approval of collaboration agreement it is seen that on payment of DM 4,39,786 and DM 3,75,426 taxes at the rate of 30% + 5% of 30% as surcharge is payable." "12. In view of interpretative notes 4(c) as mentioned in para 9 above it is clear that the payments subject to the taxes in India are to be reduced to the extent the taxes are being paid in India.

From the letter of approval of collaboration agreement it is seen that on payment of DM 4,39,786 and DM 3,75,426 takes at the rate of 30% + 5% of 30% as surcharge is payable. In respect of these two payments (subject to taxes) after deducting applicable taxes in India the net payments that should be made to the supplier are as follows:- (a) DM 3,75,426 less 30% and surcharge at the rate of 5% of 30% = DM 2,57,167 (b) DM 4,39,786 less 30% and surcharge at the rate of 5% of 30% = DM 3,01,254 are being made to the supplier. The first payment of DM 3,75,426 is being made for the payments mentioned in the collaboration agreement. In the preamble it is stated that (i) the importer desires to acquire from the supplier know how technical information and assistance to enable the importer to manufacture cement board in conjunction with the purchase of necessary machines and equipments from the supplier.

(ii) Under Article 1.2 the technical information has been defined as the term "Technical Information" means the present and future manufacturing information

available with the supplier relating to designs, specifications, detailed layouts of plant & production methods, manufacture and testing of contract products as well as information relating to materials used in the manufacture thereof insofar as such information has either been successfully incorporated in or forms part of the manufacturing or engineering technique of the supplier and is applicable to the contracted transfer of know how and manufacturing operations of the importer, with regard to materials used in the manufacture of contract products. "Technical information" means instructions fully and completely required in quantity, quality and characteristics and on their treatment in the manufacture of the contract products, as well as sources of supply of all raw materials and their substitutes as may be known to the supplier from time to time during the period of contract.

(iii) Article 2 : Technical assistance to be rendered by the supplier.

2.1 The scope of technical assistance will cover the following. The supplier shall be responsible for providing the requested data for the construction of the plant and all machinery including preparation of designs.

2.1.1 The supplier shall be responsible for the plant and machinery including preparation of designs and detailed engineering technical documentation covering civil, mechanical, electrical, procurement of all the equipment and ancillaries as may be needed for the construction, erection of the said plant & machinery and for obtaining production till the commencement of on-line production.

The assistance will include information regarding additional machinery & equipment required for the manufacture of contract products. The replacement/modification in the event of any technical flaw attributed to the supplier shall be at the expense of the supplier/importer for the respective supply volumes in machinery/drawings.

2.1.2 in consideration of the above service, the importer shall pay to the supplier a lump sum payment of DM 3,75,426 subject to applicable Indian taxes, as detailed in Article 3.1, in 3 equal installments to the value of the equipment being supplied by the importer.

In view of the above fact that the agreement to acquire know how and technical information has been made in conjunction with the purchase of machinery and fact that the technical information and know how is nothing but the licence fee related to the imported goods that the importer is required to pay directly as a condition of the sale of the imported goods, which is clearly covered under Rule 9(1)(c) & 9(1)(e) of the CVR 1988. Therefore the payment of DM 3,75,426 subject to taxes i.e. net DM 2,57,167 is to be added to the transaction value.

13. Regarding payment of DM 4,39,786 subject to taxes net DM 3,01,254 it has already been discussed in para 11 that the payment of DM 7,12,000 net of taxes is outside the scope of Rule 9 as this relates to delegation of personnel by the supplier after importation of the goods for establishing production etc. However the payment of DM 4,39,786 is being made in terms of Article 3 of the collaboration agreement which states that "during the term of this agreement the supplier shall receive the importer's personnel for training in its plant in West Germany, or at any similar plant of the supplier elsewhere. Such personnel will be trained by the supplier in the functions relating to the design manufacture and testing of contract products and materials used therein and maintenance of plant, and equipment. The training period shall be agreed upon by the parties but altogether for not more than 24 working man-months, inclusive of on site training at the importer's plant in India. The training in West Germany or at any plant indicated by the supplier shall be for a minimum of 6/7 weeks per individual delegated by the importer. The supplier shall endeavour to ensure that the training of the importer's personnel in the above fields will be adequate to impart complete competency respective fields to enable them to undertake eventual independent performance of these functions for the importer. Therefore this payment of DM 4,39,786 subject to taxes is not the charges for giving technical assistance after importation of goods in India but it is for the transfer of technology by way of the training of personnel by the supplier in West Germany. It is clear from the Article 3(1) of the agreement that this payment is a part of transfer of technology by way of imparting training to the personnel of the importer's by way of imparting training to the personnel of the importer's by the supplier abroad. Further in the approval by the Ministry of Industry vide their letter No. FC 001212/87/Comp/SCS dt.3.12.87 it has been mentioned that the payment of DM 4,37,896 (subject to taxes) is for providing technical know-how fee and DM

3,75,426 (subject to taxes) is for payment of design, engineering, consultancy etc. Therefore the payment of DM 4,39,876 is clearly towards technical know-how fee and this technical know-how is being transferred by the supplier by way of imparting training to the personnel of importers' abroad. This is further corroborated from the preamble of the collaboration agreement that supplier is in possession of extensive know-how and technical information concerning the manufacture of such production and as at its disposal skill technical personnel to assist in the transfer of such know-how and technical information to a third party. This payments have been agreed upon in conjunction with the purchase of necessary equipment and machinery from the supplier.

This payment is distinguished from the cost of training being rendered in India by the supplier after importation of the goods in which a separate payment of DM 7,12,000 net of all taxes is being made. Therefore imparting training at the supplier's factory is actually a method of transfer of technology and know-how by the supplier to the importer and it is not related to the post importation activities to be undertaken on imported goods in India.

Therefore this payment falls within the scope of Rule 9(1)(c) and 9(1)(e) of the CVR 1988. Therefore the payment of DM 4,39,786 subject to taxes are net of DM 3,01,254 is also to be added to the invoice value of the equipments being supplied by the collaborator to arrive at the transaction value." 8. As far as the appellate order is concerned in pages 9 and 16 he says Maruti Udyog Ltd. case is not applicable. He refers to pages 11 to 17 and he does not follow it. As far as Essar Gujarat Ltd. case he does not follow it. He comes to the conclusion that in respect of DM 3,75,426 at page 6 of the order charges form part of the price and he held like that. As far as DM 4,39,786 is concerned this is not an amount of purchase of the impugned goods therefore the same being not forming part of the price, he does not include it, held differentially with that of the Assistant Collector. The Collector after calling rules 9(1)(c) and 9(1)(e) of the Valuation Rules held as follows:- "The above two rules refer to payments actually made or to be made as a condition of the sale of the imported goods. Considerations agreed to a collaboration agreement cm account of various functions to be performed by the collaborators Bison Werke Bahre and Greten GmbH & Co. as a condition of sale

then it would also form part of the equipment control. There are certain services which are rendered by the collaborators." 9. We are of the view that the approach of the Collector is wrong. From the reading of the entire two agreements we have come to the conclusion that agreements dated 21.2.1988 and 9.3.1989 have to be read as a single document. In other words both cannot be read independent of each other. If it will be like a single document having two different parts, one deals with the clauses contained in the agreement dated 21.2.1988 and other containing clauses contained in 9.3.1989. In fact in the preamble portion of the collaboration agreement it specifically says that the licensee, i.e. the appellant before us desires to acquire of the licence of the foreign company know-how technical information and assistance to enable the licensee, i.e. the appellant before us to manufacture cement parts in conjunction with purchase of necessary machines and equipment from the licensor. Moreover in para 3 of Clause 2.2 of the agreement for supply dated 9.3.1989 which reads that retention money as performance guarantee in accordance with para 5.3 of this contract and para 8.1(c) the collaboration agreement signed between the seller and buyer on 21.2.1988. This will definitely show the inextricable connection between the collaborator and the appellant.

The parties have agreed that by having plant manufacturing cement boards the assessee will have not only the technical assistance, know-how and technical information from the German company but also is obliged to pay royalties and the entire plant and machinery has to be supplied only by the German company.

10. In this connection, the grounds of appeal of the assessee itself says that the Tribunal's judgment in Essar Gujarat Ltd. 1991 (56) ELT 221 has to be accepted. If that were to be so, the Supreme Court judgment in Essar Gujarati Ltd. 1996 (88) ELT 609 is binding on the assessee where the court held in para 27 as follows:- "Therefore, the payment of DM 10,188,000 was being made for the transfer of technology under the Process Licence Agreement entered into with Midrex. The services mentioned hereinabove are to be part of Licensing Agreement with Midrex. This agreement was a pre-requisite for fertilisation of the contract with TIL to purchase the plant at Emden. The licence is not merely a permission to use the plant, but also to provide technical know-how to make the plant functional and also to improve the capacity of the plant by incorporating Hot Briquetting system. As all

these services were to be rendered under the Process Licence Agreement with Midrex, the amount payable to Midrex as part of the Process Licence fee has to be included in the value of the plant. It has also to be borne in mind that these services were being rendered in order to improve the capacity of the plant by incorporating Hot Briquetting facilities".

11. We are therefore of the view that reading both contracts as a whole the assessee's case cannot be accepted but only the department's case is to be accepted. Hence varying the impugned order, we restore the order of the Assistant Collector.

We are concerned in these two appeals of payments made by the importer to its German collaborators on three counts. These are charges for design, engineering, consultancy etc, charges towards deputation of suitable personnel to train personnel at the importers factory, and charges towards technical knowhow fee. The Assistant Collector has confirmed net charges on this account of DM 25,7167/- towards payment of design, engineering and consultancy and DM 301254 for technical knowhow. He excluded charges of DM 7071007 payable for training of personnel.

2. On appeal by the importer, the Collector (Appeals) held that the amount of DM 301254 was paid in relation to the contract products which would be manufactured in India and that these were not charges payable by the importer for import of the goods. These were therefore not includible in the assessable value. He confirmed the liability to duty of the other amount. The department has appealed the first portion of this order and the importer the second.

3. The sum of DM 301254 is stated to be for technical knowhow fees. The scope of this is explained in the collaboration agreement as being sufficient to enable the manufacture to "complete contract products" by the importer. The contract product is a finished product wall panels, tabletop etc.

4. What we are concerned with is the valuation of the machinery imported by the importer. This machinery of course was for the manufacture of contract order. However, it is not a condition in the contract of sale of such machinery, that know

how for manufacture of contract product must be paid. The agreement for the sale of the capital goods does not stipulate that the sale and purchase of this equipment shall not be concluded unless payment is made for know how relating to use of the particular machine. The importer was at liberty to obtain the knowhow elsewhere. The fact that the contract is to be read as one, on which my colleague has placed emphasise is thus irrelevant. CCE v. Essar Gujarat Ltd. 1996 (88) ET 609 included in the assessable value of the plant imported in India, the licence fee payable to M/s Midrex for the reason that this licence was required before the particular process employed by the machinery could be availed of by the importer and that therefore it was a condition of sale. The reliance by the departmental representative upon this judgment therefore is misplaced.

6. There is nothing in the department's appeal to say that there is a secret understanding contrary to the agreement. If that is the case, it cannot be said that the contract for purchase of the goods is conditional upon supply of knowhow. We have to proceed on the basis that the apparent tenor of the agreement reflects the real state of affairs, as the Supreme Court in Union of India v. Mahindra & Mahindra Ltd. 7. The judgment of the Supreme Court in Maruti Udyog Ltd v. Union of India 1987 (28) ELT 390 confirming the view of the Tribunal that charges payable by Maruti Udyog towards foreign supplier for knowhow related to manufacture of the finished product, motor vehicle were not includible in the value of the capital equipment imported by it will apply. The fact that that judgment was dealt with a situation where the assessment was based on the best of judgment does not appear to me to have any relevance. The principles enunciated therein would apply. They would apply notwithstanding the Maruti Udyog's judgment related to the Valuation Rules, as it stood prior to 1988. We are concerned with the new Valuation Rules which came to the statute book in 1988. The Tribunal had held clearly that the provisions of Section 14(1)(a) of the Act will not apply. It held that the price at which the goods were supplied to Maruti Udyog fulfilled the Section 14 (1)(a) of the Act and resort to Section 14(1) (b) and Rule 8 of the Valuation Rules is uncalled for. It is therefore not correct to say that the valuation was based on best judgment. The Collector (Appeals)' order in this regard here has to be upheld. 8. The other charges that we are concerned with is the charges for setting up of plant in India. These charges are clearly in the nature of post

importation expenses. The Note to Rule 4, which mandates which accept one of transaction value except in the cases specified in mat rule, specifically provides that the value of imported goods shall not include charges for construction, erection, assembly, maintenance or technical assistance undertaken after importation of imported goods such as industrial plant, machinery or equipment. This is subject to the provision that charges arc distinct from the price actually paid or payable for the imported goods. These charges, in the matter before us, are clearly in addition to the price for the imported goods. Therefore, they are not to be included. The Collector (Appeals) has not in fact given any clear reason for including these charges in his order. He only says that "obviously" these charges would form part of the price in terms of Rule 9 (1)(e). This rule 9(1)(e) includes in the assessable value payments made as a condition of sale of imported goods.

9. Going by the pattern tenor of the agreement, it is not a condition of sale of imported goods that have to be erected in to a plant by the supplier of the goods. The agreement does not mandate that this is to be done and leaves it open to the importer to have the erection done without the assistance of the supplier of the goods. Unless this is shown to be fictional and there is material to show that the erection is to be done only by the supplier of the goods, it will follow that these charges were not payable as a condition of sale of the imported goods and therefore the value is not to be included in the assessable value. It is in this context, that the importer has cited the judgment of the Supreme Court in CCE v. Essar Gujarat Ltd., and in my view is correct.

10. In my opinion, therefore, neither of these charges were includible in the assessable value and the importer's appeal is allowed and the Commissioner's appeal is dismissed.

In view of the difference of opinion between the two members, the matter is referred to a third member for answering the following questions: (a) Whether the charges payable as technical assistance towards manufacture of the finished goods by the importer are to be included in the assessable value? (b) Whether the charges for erection and commissioning of the plant were includible in the value? (c) As a consequence of the answers to the preceding questions, whether the

importer's appeal is to be allowed or dismissed and whether the department's appeal is to be allowed or dismissed.

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