SUPREME COURT OF INDIA

Commissioner of Customs (Port) Kolkata

Vs.

Steel Authority of India Ltd.

C.A.No.6398 of 2009

(Deepak Gupta and Aniruddha Bose,JJ.,)

27.04.2020

JUDGMENT

Aniruddha Bose,J.,

1. The dispute in this appeal relates to valuation under the Customs Act, 1962 of import of certain items made by the respondent Steel Authority of India Ltd. (SAIL) under two contracts, bearing nos. PUR/PC/MOD/0 8.01/Pt.II dated 31.10.1989 and PUR/PC/MOD /08.01/Pt-I dated 29th March 1990. These imports were made in connection with modernisation, expansion and modification for their plant at Durgapur in West Bengal. For this purpose, SAIL had floated seven Global Tender Contract Packages. The two contracts were part of these Tender Contract Packages. They were registered with the customs authorities for the purpose of project import benefits in terms of the 1962 Act. The first contract involved in this appeal was with a consortium consisting of a German Company, Hoestemberghe & Kluisch, GMBH and H & K Rolling Mills Engineering Private Limited, an Indian Corporate entity. The second contract was also with a German Company, Siempelkamp Pressen Systeme and the Indian entity was Escon Consultants Private Ltd, with whom the consortium was formed. Both these contracts were in connection with modernisation of SAIL's rolling mills at the aforesaid plant.

2. Schedule 3 of the first contract (bearing no.544-9/91A SVB) specified scope of supplies and service along with the price particulars. Extracts from that schedule appears from the order of the Commissioner of Customs being the authority of first instance, dated 3rd January 2001. This order related to the first contract. We shall refer to this order in greater detail later in this judgment. Relevant part of that Schedule is reproduced below:-

Schedule No.	Description	Millions [I][
3.5.1A [II]	Basic design and Engineering	2.230
3.5.2A	Plant & Equipment including commissioning spares	2.512
3.5.3A	Spares for two years operations and maintenance, insurance spares, special tools and tackles.	0.537
3.5.4A	Foreign Supervision charges during manufacture of Indian equipment as well as for erection, commissioning and performance guarantee tests.	0.675

(quoted from the order in verbatim).

3. The basic wording of the two contracts are more or less similar, Clause (c) thereof stipulates :-

> "The Contractor has agreed to undertake basic and detail design and engineering, layout engineering, training services, procurement, manufacturing, shop testing, supply and delivery of the complete Plant and Equipment, materials both imported and indigenous at site and carry out installation/construction of all civil works, supervision, erection, testing and successful commissioning of the PROJECT and demonstrate the Performance Guarantees etc. for the Project under the Terms and Conditions mentioned hereinafter. The CONTRACTOR has also agreed to render the services for insurance, port clearance including stevedoring, transportation, safe custody, handling, unloading, loading, transportation to site and any other services required to complete the PROJECT under this contract."

4. As would be evident from the subject heads contained in the above-referred extracts from the third schedule to each of these contracts, the consortia were to supply plant, equipments and spares as also certain basic designs and supervisory services at site. SAIL wanted import duty to be charged on the plant and equipments alone. SAIL's stand is that the price for the plants and equipments included all design and engineering for their manufacture. But designs and drawings specified in the schedule were all post-importation project related and project implementation activities. The customs authorities on the other hand added the basic design and engineering fee of DM 2.23 million and supervision charges during manufacture of Indian equipments and for erection, commissioning and performance guarantee tests of 0.675 million to the invoice value. In respect of the second contract, direction was made for addition of basic design and engineering fee of DM 6.65 million, as built drawings of DM 0.1 million and supervision charges during manufacture

of Indian equipments and for erection, commissioning and performance guarantee tests of DM 2.842 million to the invoice value. The dispute had reached the Commissioner of Customs for Special Valuation Branch, the authority of first instance, after a questionnaire was sent to SAIL, which was responded to. The authority of first instance heard the representative of SAIL. In the final orders, the authority of the first instance directed the aforesaid additions. The said authority observed that the contractor was entrusted with the work on a turnkey basis, where the entire supplies and services were dependant on each other. On this premise, the provisions of Rule 4 and Rule 9 (1) (e) of the Customs Valuation (Determination of Price of Imported Goods Valuation Rules, 1988 (hereinafter referred as the "1988 Rules") was invoked to sustain such additions to the invoice value in respect of both the contracts. The underlying reasoning for the said orders of the authority of first instance was that the commercial arrangements constituted turnkey contracts and package deal, which made it conditional for the purchaser to buy the equipments which complied with the technical specifications of SAIL. As a consequence, sale of the equipments was conditional as the different aspects of the schedules of supply and service were interrelated. The transaction value of the imported goods was directed to include the price paid for the basic design and engineering, drawings, supervision of erection, commissioning, performance guarantee and technical services under Rule 4 read with Rule 9(1)(e) of the 1988 Rules.

5. Appeals by SAIL against both these orders were rejected by the Commissioner of Customs (Appeals) by two separate orders passed on 11th July, 2001 and 7th September 2001. We find from the orders of the Appellate authority that the case of *TISCO vs. Commissioner of Central Excise Customs reported in*[1] was cited before it by SAIL. This decision was distinguished by the Appellate authority and the findings of the authority of first instance was sustained on the basis of Rule 9(1)(e) of the 1988 Rules.

6. Further appeals of SAIL however, was decided in their favour by Customs, Excise and Service Tax, Appellate Tribunal, Kolkata (CESTAT) by a common order passed on 22nd May, 2006. These appeals were registered before the CESTAT as C/V-537/2001 and C-01/2002. The CESTAT formulated the points for determination in the following terms:-

> "[i] whether the basic design and engineering fee of DM 2.230 million and foreign supervision charges of DM 0.675 million are liable to be added to the invoice values of imported equipments under Rule 9 of the Valuation Rules? [Appeal No. C/V- 537/2001]
>
> [ii]whether the charges towards basic design and engineering fee of DM 6.650 million, fee for as built drawings of DM 0.100 million and also supervision charges of DM 2.842 million are liable to be added to the invoice values of the imported equipments under Rule 4 of the Valuation Rules read with Section 14 of the said Act? [Appeal No. C-1/2002]"

7. The Tribunal held that the drawings and technical documents related to post importation activities for assembly, construction, erection, operation and maintenance of the plant and

those items could not be included in the value of imported goods. Referring to Rules 9 (1)(b) (iv) and 9(1) (e) of the Valuation Rules 1988, the Tribunal held:-

> "Similarly reliance upon the decision of the Supreme Court in Collector of Customs (Preventive), Ahmedabad Vs. Essar Gujarat Ltd., 1996(88) ELT 609 (SC) is also completely misplaced. From the judgment of the Supreme Court it would be seen that what has been held to be added therein under Rule 9(1) (e) of the Valuation Rules and process license fee, the payment for transfer of technology under the process license agreement and whatever expenditure was needed to be incurred for dismantling the plant which was sold on "as in where is basis" in the foreign country and making it ready for delivery on board the vessel to be exported to India. The Supreme Court specifically held that apart from this all other services rendered under the Engineering and Consultancy fees cannot be added. The said decision of the Supreme Court, contrary to the findings of the Deputy Commissioner and Commissioner (Appeals), supports the appellant's case. The perusal of the orders-in-original reveals that there is no dispute whatsoever with the services as shown when the designs and drawings and engineering/technical services were small enabled to locate plant direction and overall project implementation for manufacturing iron and steel projects to be commissioned in India and the costs and charges were collected when the design and drawings and engineering services in relation to the components to be imported and/or imported. In such circumstances, it is to be held that the lower authorities have heard improportionate to hold that the said charges are to be added to the assessable value as assessed relying upon the case of TISCO reported in 2000 (37) RLT 239 (S.C.). Para 8, 11 and 15 to 17 thereof refer. We do not find any reason to uphold the reasoning of the Deputy Commissioner in this regard. In view of the clear cut decision in the case of Tata Iron & Steel Co. Ltd. case (supra), we find that the issue is very settled by series of decisions of this Tribunal and heard the case referred into Indo *Gulf Corpn. Ltd. v. Commr. of Customs*[2], Neither in Section 14 of the said Act nor in the Valuation Rules is there any provision which provides that the cost of drawings and technical documents required for procurement or manufacture of goods in India by the importer or which relates to post importation activities for assembly, construction, erection, operation and maintenance of the plant are to be included in the price of equipments for determining their transaction value and consequently their assessable value for the purpose of levy of customs duty under the said Act. On the contrary the "Interpretative Notes" to Rule 4 of the Valuation Rules, 1988 makes it explicitly clear that value of imported goods shall not include, inter alia, the charges for construction, erection, assembly maintenance of technical assistance undertaken after importation of the imported goods such as 3 of the Contract in the instant case in determining the assessable value of the imported equipments imported by the appellant is wholly erroneous, ultra vires the said Act and/or the Customs Valuation Rules, 1988. This also the Deputy Commissioner and the Commissioner (Appeals) failed to appreciate and/or take into consideration and thereby arrived at patently erroneous finding. In terms of Rule 9 [1] [b] [iv] of the Valuation Rules, 1988, in determining the transaction value the value apportioned

as appropriate of, inter alia, engineering, design and plans and sketches undertaken elsewhere than in India and "necessary for the production of the imported goods" which were supplied directly or indirectly by the buyer free of charge or at a reduced cost to the supplier or imported goods for use in producing the imported goods being value are to be included. This is because such supply of free of charge or at a reduced cost would result in a lower price for the imported goods than the price that the supplier would have charged if such goods/services were to be paid for in full. This rule is also inapplicable in the instant case as there has been no supply or any engineering's or drawings by the appellant to the foreign seller. Moreover, there was no supply free of charge or at reduced cost. Hence this rule also has no applicability whatsoever in the present case."

(quoted verbatim)

8. It is against this order the revenue is in appeal before us. Before we examine the arguments advanced by Mr. Agarwal, Senior Counsel for the appellant and Mr. Bagaria, Senior Counsel for the assessee, we shall advert to the statutory provisions which are applicable in the facts of this case. These are Sections 12, 14 (as it stood at the time of importation) of the Customs Act, Rules 4 and 9 of the 1988 Rules. These provisions stipulate:-

Sections 12 and 14 of the Customs Act 1962

"12. Dutiable goods.— (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.
[(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.]

14.Valuation of goods for purposes of assessment—(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be— the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where—

(a) the seller and the buyer have no interest in the business of each other; or

(b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or offer for sale: Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill or bill of export, as the case may be, is presented under section 50; (1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods

shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1) or sub-section (1A) if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

(3) For the purposes of this section—

(a) "rate of exchange" means the rate of exchange—

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)."

Rule 4 and Rule 9 of the 1988 Rules

4.Transaction value.

(1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.

(2) The transaction value of imported goods under sub-rule (1) above shall be accepted:

Provided that-

a. The sale is in the ordinary course of trade under fully competitive conditions;

b. The sale does not involve any abnormal discount or reduction from the ordinary competitive price;

c. The sale does not involve special discounts limited to exclusive agents; or

d. Objective and quantifiable data exist with regard to the adjustments required to be made, under the provisions of rule 9, to the transaction value;

e. There are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which-

(i) are imposed or required by law or by the public authorities in India; or

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

f. the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;

g. no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and

h. the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.

(3)(a) Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.
(b) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time-

(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;

(ii) the deductive value for identical goods or similar goods;

(iii) the computed value for identical goods or similar goods. Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of Rule 9 of these rules and cost incurred by the seller in sales in which he and the buyer are not related;

(c) substitute value shall not be established under the provisions of clause (b) of this sub-rule.

9. Cost and services. -

(1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods,-

(a) the following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-

(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;

(iii) the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid of payable, namely :-

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, art work, design work, and and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) royalties and license 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.

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

(2)For the purposes of sub-section (1) and sub section (1A) of Section14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation

and shall include-

(a) the cost of transport of the imported goods to the place of importation;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the cost of insurance: Provided that-

(i) Where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty percent of the free on board value of the goods;

(ii) The charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c);

(iii)Where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods; Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125 % of the free on board value of the goods plus cost of transport for clause (iii) above].

(3) Additions to the price actually paid or payable shall be made under this rule on the bases of objective and quantifiable data.

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule."

9. The main case of the appellant is that these two cases involved importation of turnkey projects and the entire contract value have to be treated as the transaction value for the purpose of charging customs duty. Mr. Agarwal has submitted that the design and the other items, which were the subject of dispute, were integrally linked with the equipments and supply of the services were conditions for importation of the equipments. It has also been argued on behalf of the revenue that the contracts were integrated from basic planning and designing till implementation at site and what was imported was a project and not merely equipments. On this count, our attention was drawn to Rule 9(1)(e) of the 1988 Rules, which we have quoted earlier in this judgment.

10. The Tribunal did not accept this plea of revenue. The Tribunal in the impugned order accepted SAIL's plea for segregating the value of equipments and the other fees on

services covered by the same contracts, the latter charges meant for post-importation phase of the arrangement between the contracting parties. It found that the designs and drawings and engineering/technical services were for plant direction and overall project implementation for manufacturing iron and steel to be commissioned in India and charges were collected by the consortium when the design and drawings and engineering services in relation to the components were to be imported. It is also not the revenue's case before us that these designs and drawings and the services were in relation to the imported equipments and goods.

11. Major part of the argument on behalf of the revenue advanced before us, however, was anchored to Rule 9(1)(e) of the 1988 Rules. The revenue's contention on this point, which formed the basis of the orders of the authority of the first instance as also the first appellate authority has been that these were turnkey contracts and hence import of designs and drawings etc. even for post-importation activities should be treated as condition of import of the equipments. Mr. Agarwal has relied on the decision of this Court in the case of *Mukund Limited vs. Commissioner of Customs reported*[3] *in* confirming an order of the Tribunal in addition to the value of design and engineering, imported into this country the supervision charges in India during design, erection and performance guarantee test. This Court, in its order passed on 8th December 1999, held:-

> "1. This is a contract that contemplates the supply of basic design and engineering drawings and the supervision of erection, testing and commissioning based thereon. One is as much a part and a condition of the contract as the other.
>
> 2.We find, therefore, no merit in the appeal. It is dismissed with costs."

12. The case of Mukund Limited (supra) dealt with setting up of a cleaning plant as part of basic oxygen furnace shop of SAIL (coincidentally the same respondent), for their Rourkela Steel Plant. For this purpose their contractor, Mukund Limited had entered into an agreement with an overseas Company, Davy Mckee (Stockton) Limited. In pursuance of that contract, Davy were to provide basic design and drawing and also supervise the detailed engineering erection and commissioning of the gas cleaning plant in India apart from training of personnel abroad. The fabrication, manufacture etc. however was to be done in India with indigenous goods based on designs supplied by Davy. The contract amount was £20,00,000 and charges for design and engineering, supervision in India during design, erection, commissioning and performance guarantee test valued at £6,57,900 and training charges of £82,600 were to be paid separately. Relying on a decision of this Court in CC (Prev.), *Ahmedabad vs. Essar Gujarat reported in*[4], the Tribunal found in the order reported in 1999 (112) ELT 479(T):-

> "6. The payment of $ (sic) 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."

(quoted verbatim)

This was a case where Tribunal reached finding on fact that the two sets of items were to be added to reach the assessable value as the plant could be set up as per the basic design only and the second set of designs, drawings and activities intricately interlinked. This case did not involve importation of any equipment.

13. Another judgment of this Court in the case of *Andhra Petrochemicals vs. Collector of Customs, Madras reported in*[5] was cited before us by Mr. Agarwal. But ratio of that authority would not be applicable in the facts of this case, as the disputed amount involved payment made by the importer to their overseas associate towards engineering, design work, plant, sketches etc. which were necessary for production of imported goods. This was a case attracting Rule 9(1)(b)(iv) of the 1988 Rules. Factually, this authority is distinguishable. The other authority on which Mr. Agarwal has placed reliance is a decision of this Court in the case of *Commissioner, Delhi Value Added Tax vs. ABB Limited reported in*[6]. In this case the controversy was as to whether a contract for supply, installation, testing and commissioning of traction electrification power supply and power distribution for the Dwarka Section of Delhi Metro Rail Corporation Limited could be subjected to Delhi value added tax or not. But this case dealt with the issues of works contract and movement of goods by inter-state trade for computing value added tax. The transaction in that case was held to be movement of goods by way of imports or by way of inter-state trade and hence covered by the Central Sales Tax Act. The only factual similarity in both these cases is that the case of ABB Limited (supra) also related to turnkey project. But "import" under that statute and the charging section in the Customs Act for imposing duty (under Section 12) are not the same. The mechanism for arriving at transaction value or assessable value under the two statutes are different and distinct. This authority can have no impact on the subject-controversy.

14. The appellant's case in substance is that on a composite reading of Section 14 of the Act, Rules 4 and 9(1)(e) of the 1988 Rules, the price of drawings, design etc., should be added to the invoice value of the imported equipments, as those intangible items formed an integral part of the arrangement agreed upon between the two consortia and SAIL. The revenue described such arrangement as turnkey contracts. It has been specifically argued that such intangible items constituted conditions of sale within the meaning of Rule 9(1)(e)

of the 1988 Rules and these are not post importation charges.

15. Stand of the respondent, on the other hand is that those items related to post importation activities of SAIL in India for implementation of their project. Their case is that only imported equipments could be subjected to duty. Referring to the charging provision for levy of duty, being Section 12 as also Section 14 of the Act, it was argued that to reach the assessable value, Rule 9 of the 1988 Rules was the only mode. So far as subject-dispute is concerned, Rule 9(1) (e) read with the interpretative note did not permit addition of value of post-importation items. Spares and other specifications concerning such equipments were already included in the price of the equipments. In support of his argument for exclusion of post importation services which may be obtained from a foreign consortium, Mr. Bagaria referred to the aforesaid Note, which reads as:-

> "Note to Rule 4 Price actually paid or payable The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller. Activities undertaken by the buyer on his own account, other than those for which an adjustment is provided in Rule 9, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the value of imported goods:
>
> The value of imported goods shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods:
>
> (a) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;
>
> (b) the cost of transport after importation;
>
> (c) duties and taxes in India. The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods are not part of the customs value."

16. Learned counsel for the respondent relied on the following authorities in support of his submissions:

> *"1. Commissioner of Customs Vs. Essar Steel*[7]
> *2. M/s Tata Iron & Steel Co. Ltd. Vs. CCE*[8]

3. Commissioner of Customs Vs. J.K. Corp. Ltd.[9]
4. Commissioner of Customs Vs. Hindalco Industries[10]
5. Commissioner, mCustoms Vs. Denso Kirloskar Industries[11]
6. Commissioner of Customs Vs. Toyota Kirloskar[12]
7. Commissioner of Customs Vs. Ferodo India (P) Ltd[13].

17. In the case of Essar Steel Limited (supra), there were two contracts with the overseas exporter. One was a purchase order for setting up of a plant. The other was between Met Chem Canada Inc. with Essar Ltd. to associate the former as a technical consultant to render technical services in relation to implementation of a project to set up a plant in India for manufacture of hot rolled steel coils in India. The technical service agreement was in relation to implementation of the project. The revenue had taken the stand that customs duty was to be imposed was on both the goods and the intangible items as these were not independent of each other and the contract for design engineering and technical services constituted condition of sale for the contract of supply of goods. This is a stand similar to that taken by revenue in this case as well. This Court, referring to various authorities held that it was not permissible on the part of the revenue to include in the assessable value the value or charges for items which were to be used or utilized for post importation activities. In paragraph 14 of the said report, it has been observed and held:-

> "14. Another thing to be noticed is that a conjoint reading of the technical services agreement and the purchase order do not lead to the conclusion that the technical services agreement is in any way a pre- condition for the sale of the plant itself. On the contrary, as has been pointed out above, the technical services agreement read as a whole is really only to successfully set up, commission and operate the plant after it has been imported into India. It is clear, therefore, that clause 9(1)(e) would not be attracted on the facts of this case and consequently the consideration for the technical services to be provided by Met Chem Canada Inc. cannot be added to the value of the equipment imported to set up the plant in India."

18. This Court, while dealing with the case of Essar Steel Limited (supra) had referred to the case of Tata Iron and Steel Company Ltd. (supra). The latter authority related to importation made under an umbrella contract, which branched into two. One related to agreement for supply of technical documentation (MD 301) and the other for sale of equipments and materials pertaining to a blast furnace and three torpedo ladle cars (MD 302). The value of MD 301 was 12.5 million DM and MD 302 was 13.5 million DMs. The consignment under MD 301 was cleared by the customs authorities having nil duty component as importer claimed the same to be classified under sub-heading no.4906.00 of the Customs Tariff Act, 1985. But while scrutinising the consignment under MD 302, the customs authorities initiated action for including the value of MD 301 for determining the assessable value. The dispute reached the Tribunal. In paragraph 7 of the said report comprising of the judgment of this Court, the finding of the Tribunal has been summarised:-

> "7. The appellant and other notices preferred appeals before the Customs, Excise

and Gold (Control) Appellate Tribunal, Calcutta which have been disposed of by a common order. The Tribunal has held that the three contracts entered into between the seller, i.e., SNP and the appellant were in fact parts of one package, that is, the three constituted one composite agreement. The technical documentation supplied to the appellant could be divided into three parts: (i) those pertaining to the imported equipment, (ii) those pertaining to the equipment which has yet to be procured or manufactured by the appellant, and (iii) those relatable to post¬import activities undertaken by the appellant for assembly, construction, erection, operation and maintenance of the imported equipment. The value of the contract to the extent of (i) above was liable to be included in the value of equipments and materials imported by the appellant though the value of the technical documents covered by (ii) and (iii) above could have been excluded for payment of customs duty by reference to the Interpretative Note to Rule 4 of the Customs Valuation Rules, 1988 (hereinafter "the Rules", for short). However, since separate values have not been shown, the benefit of the Interpretative Note to Rule 4 abovesaid was not available to the appellant and the entire value of the two contracts was liable to be clubbed together for the purpose of levying customs duty."

19. It was held and observed by this Court in the case of Tata Iron and Steel Company Ltd. (supra):-

"16. It is nobody's case that the seller had an obligation towards a third party which was required to be satisfied by it and the buyer (i.e. the appellant) had made any payment to the seller or to a third party in order to satisfy such an obligation. The price paid by the appellant for drawings and technical documents forming the subject-matter of contract MD 301 can by no stretch of imagination fall within the meaning of "an obligation of the seller" to a third party. There was also no payment made as a condition of sale of imported goods as such. Rule 9(1)(e) also, therefore, has no applicability.

17. So far as the Interpretative Note to Rule 4 is concerned it is no doubt true that the Interpretative Notes are part of the Rules and hence statutory. However, the question is one of their applicability. The part of the Interpretative Note to Rule 4 relied on by the Tribunal has been couched in a negative form and is accompanied by a proviso. It means that the charges or costs described in clauses (a), (b) and (c) are not to be included in the value of imported goods subject to satisfying the requirement of the proviso that the charges were distinguishable from the price actually paid or payable for the imported goods. This part of the Interpretative Note cannot be so read as to mean that those charges which are not covered in clauses (a) to (c) are available to be included in the value of the imported goods. To illustrate, if the seller has undertaken to erect or assemble the machinery after its importation into India and levied certain charges for rendering such service the price paid therefor shall not be liable to be included in the value of the goods if it has been paid separately and is clearly distinguishable from the price actually paid or payable for the imported goods. Obviously, this Interpretative Note cannot be pressed into

service for calculating the price of any drawings or technical documents though separately paid by including them in the price of imported equipments. Clause (a) in the third para of the Note to Rule 4 is suggestive of charges for services rendered by the seller in connection with construction, erection etc. of imported goods. The value of documents and drawings etc. cannot be "charges for construction, erection, assembly etc." of imported goods. Alternatively, even on the view as taken by the Tribunal on this Note, the drawings and documents having been supplied to the buyer-importer for use during construction, erection, assembly, maintenance etc. of imported goods, they were relatable to post-import activity to be undertaken by the appellant. Such charges were covered by a separate contract, i.e. contract MD 301. They could not have been included in the value of imported goods merely because the value of documents referable to imported equipments and materials was mixed up with the value of those documents which were referable to equipment which was yet to be procured or imported or manufactured by the appellant; the value of the latter category of documents also being neither dutiable nor clubbable with the value of imported goods. The Tribunal has not doubted the genuineness of the contracts entered into between the appellant and SNP. Rather it has observed vide para 10.2 of its order that entering into two contracts (MD 301 and MD 302) was a legal necessity. The Tribunal has also stated that it was not recording any finding of "skewed split- up". Shri Ashok Desai, the learned Senior Counsel for the appellant has pointed out that under Chapter Heading 49.06 of the Customs Tariff Act, 1975 plans and drawings for engineering and industrial purposes being originals drawn by hand as also their photographic reproductions on sensitised papers and carbon copies thereof are declared free from payment of customs duty. Sub-rules (3) and (4) of Rule 9 clearly provide that additions to the price actually paid or payable are permissible under the Rules if based on objective and quantifiable data and no addition except as provided for by Rule 9 is permissible."

20. Revenue laid stress on the decision of this Court in the case of Essar Gujarat (supra). We have earlier referred to this authority in this judgment. This case involved importation of a plant, which was originally installed in Germany. The Indian importer, Essar Gujrat, had entered into an agreement with the overseas owner of that plant in Germany. That owner was Teviot Investments Limited. The agreement Essar Gujarat had with Teviot for purchase of the plant, however, was subject to Essar obtaining transfer of operational license from another corporation, Midrex International BV. Question arose as to whether the license fees paid to Midrex should be included to the value of the plant or not. The revenue case was that the stipulation of obtaining the license from Midrex was a condition for sale. If this condition was not fulfilled, the sale would have had fallen through. Thus, to give effect to the plant sale agreement, there was an element of necessity or compulsion to enter into the licensing agreement with Midrex.

21. SAIL had taken specific stand before the authority of the first instance that it was not a condition for them to take design and engineering, which related to post importation activities from the supplier only. In terms of the schedule of the agreement, the purchaser (that is SAIL) had right to change the goods to be supplied by the supplier at any time.

22. An importer of equipments of a plant could always choose to obtain drawings and designs for undertaking post importation activities from an overseas consortium supplying the equipments. This may confer on such arrangements attributes of a turnkey contract, but that fact by itself would not automatically attract the "condition" clause contained in Rule 9(1) (e) of the Valuation Rules. In the cases of Essar Steel Ltd.(supra) and Tata Iron and Steel Co. Ltd.(supra), the contracts had certain elements of "turnkey" features. The case of Essar Gujarat (supra) is distinguishable, as the subject of import there carried a condition for entering into a licensing agreement with a third party.

23. This decision was considered by this Court in Essar Steel (supra) and Essar Gujarat (supra). It was explained by this Court in the case of Essar Steel (supra) in paragraphs 17 and 18 of the report:

> "17. The Court held that the amount of 20 lakh Deutsche Marks and 101 lakh Deutsche Marks were both payable for the right to use Midrex process and patents. In short, these amounts were payable for the transfer of technology under a process licence agreement entered into with Midrex. The judgment states that without such licence the plant could not be operated at all by the importer without the technical know-how from Midrex. In any case, the plant could not be operated or be made functional. This being the case, since these amounts had to be paid before the plant could at all be set up, these amounts would be added to the value of the imported plant.
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> 18. However, so far as the sum of 231 Lakh Deutsche Marks is concerned, since this was payment for engineering and technical consultancy to set up and commission the plant in India, this amount would have to be excluded. This Court held that 10% of this amount only should be added to the value of the plant as the plant had been sold abroad on an as is where is basis and needed to be dismantled abroad before it was ready for delivery in India. Obviously, therefore this 10% is attributable to a pre-import stage. Further, the amount of 22 Lakh Deutsche Marks payable for theoretical and practical training of personnel outside India again could not be added as this amount would presumably be attributable to trained personnel who would be used in the commissioning and operation of the plant, which would, therefore, be attributable to a post-importation event. Thus, properly read, the judgment in Essar Gujarat case actually supports the respondent in that the payment for engineering and technical consultancy services in India cannot be added to the value of the imported plant. Also, in the present case, there is no transfer of technology under a license. Therefore, no question arises as to whether without such license the plant to be set up in India could be operated at all. The judgment also concludes in favour of the respondent the fact that all amounts payable for training of personnel outside India cannot be added to the value of the plant."

24. We have already summarised the respondent's case that the disputed items on which the customs authorities intended to impose duty all related to post importation activities and could not be included in the assessable value. It has been urged on behalf of the

respondent that neither clause 9 (1) b (iv), nor 9 (1) (e) could be made applicable so far as the subject items are concerned. The imported items according to the respondent are the equipments and the engineering drawings etc. forming part of the contract were not necessary for production of the imported goods. It has also been urged that the customs authority had wrongly contended that the subject drawings etc. were purchased as the condition that the sale of the imported goods and this excluded application of clause 9 (1) (e) of the 1988 Rules. In this regard interpretative note to Rule 4 was relied upon. Reference was made, in particular, to clause (a) of that Note.

25. Revenue has not made out a case that the disputed items of contract do not relate to post-importation activities. The statutory provision relied upon by the Revenue to bring the subject-items within the duty net is Rule 9 (1) (e) of the 1988 Rules.

26.The expression "condition", simply put, conveys the idea that something could be done only if another thing was also done. In the given context, it would imply that import of equipments could be allowed by the other party provided the design features for post-importation activities were also obtained from the same supplier or from a firm as per the overseas supplier's direction. But there is no material before us to suggest that import of equipments was effected with simultaneous obligation of SAIL that the designs relating to post-importation activities should also be obtained from the same entity. The revenue has proceeded with the understanding that since both were obtained from the same vendor, condition of obtaining designs etc., for post-importation activities was implicit in the contract. The Revenue has sought to emphasise their case on the basis that as it was a turnkey project, importation of equipments and post-importation project implementation exercise were mutually dependant. In our opinion, reading such implied condition into the contracts would be impermissible in the absence of any other material to demonstrate subsistence of such condition. No part of the contract has been shown to us from which such condition could be inferred. Necessity of subsistence such condition has been laid down in the case of Ferodo India (P) Ltd. for invoking rule 9 (1) (e). In our opinion, the provisions of Rule 9 (1) (e) cannot be automatically applied to every import which has surface features of a turnkey contract. Just because different components of a contract or multiple contracts give the shape of turnkey project to the imported items, without specific finding on existence of "condition" as contemplated in clause 9 (1) (e), value of all these components could not be added to arrive at the assessable value. Such an exercise would go against the provisions of Interpretative Note to Rule 4, which is part of the Valuation Rules in view of the provisions of Rule 12 thereof.

27. Similar were the revenue's contentions in Essar Steel (supra) and Tata Iron & Steel Co. Ltd. (supra), except that in the factual context of those two cases, there were different sets of agreements. But that difference is more of form than of content. If a single agreement involves importation of dutiable equipments and also services for post¬importation activities, and these two sets of items are segregable, it would be open to the importer to claim duty-exclusion in respect of items directly relatable to post importation activities in cases where Rule 9 of the Valuation Rules are applicable. The cases of J.K. Corp. Ltd. (supra), Hindalco Industries, Denso Kirloskar (supra), Toyota Kirloskar (supra) all deal

with exclusion of value of post-import activities.

28. In the present appeal, involving two import consignments, the authorities of First Instance and the Appellate Authority proceeded on the basis that since all the scheduled items formed part of the same contract and were linked with activities at post-import stage with the imported equipments, the provisions of Section 9 (1) (e) could be invoked. Such reasoning infers subsistence of conditions for awarding post-importation work to the overseas consortia or makes import of both sets of items otherwise interdependent. We find from the orders in original that the stand of SAIL was consistent that the subject drawings and specifications did not relate to the equipments imported and was meant for post importation activities and there was no condition laid down that the import of the equipments were to be supplemented by post-importation work.

29. In such circumstances, we do not find any reason to interfere with the order of the Tribunal. The appeal is dismissed.

30. There shall be no order as to costs. All connected applications shall stand disposed of.

Judgment Referred.

[1]*(2000) 3 SCC 0472*
[2]*(2005)(182) ELT 77(T)*
[3]*(2000) (120) ELT 0030*
[4]*(1997) 9 SCC 0738*
[5]*(1988) 9 SCC 0109*
[6]*(2016) 6 SCC 0791*
[7]*(2015) 8 SCC 0175*
[8]*(2000) 3 SCC 0472*
[9]*(2007) 9 SCC 0401*
[10]*(2015) 14 SCC 0750*
[11]*(2015) 16 SCC 0506*
[12]*(2007) 5 SCC 0371*
[13]*(2008) 4 SCC 0563*