2012(1) ECS (161) (Tri-Ban)

CUTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

SOUTH ZONAL BENCH AT BANGALORE

Bench- Division Bench

Court-I

M/s. Mangalore Refinery & Petrochemicals Ltd. & Others

Versus

The Commissioner of Customs, Mangalore

Customs Appeal Nos. 525 of 2007 & 496 of 2007

Date of Hearing : 10.4.12, 11.4.12, 28.6.12

Date of Decision: 8.8.2012

(Arising out of Order-in-Original No. 02/2007 dated 30.3.2007, passed by the Commissioner of Customs, Mangalore)

M/s. Mangalore Refinery & Petrochemicals Ltd. Appellant

Versus

The Commissioner of Customs, Mangalore Respondent/Appellant

Versus

M/s Mangalore Refinery & Petrochemicals Ltd. Respondent

CORAM

Hon'ble Mr. P. G. Chacko, Member (Judicial)

Hon'ble Mr. M. Veeraiyan, Member (Technical)

FINAL ORDER Nos. 536 & 537 / 2012

[Order Per: M. Veeraiyan]

1.1 Appeal No. C/525/2007 is by M/s. Mangalore Refinery and Petrochemical Ltd.(hereinafter referred to as "MRPL" or appellant- assessee) against the order of the Commissioner No. 2/2007 dated 30.03.2007/07.05.2007.

1.2 Appeal NO. C/496/2007 is by the department against the same order seeking enhancement of penalty imposed under Section 114A of the Customs Act equivalent to the "duty demanded plus the corresponding interest accured under Section 28 AB of the said Act" instead of penalty equivalent to the "duty demanded"

1.3 Both these appeals arise out of the same impugned order and involve common facts and legal issues and therefore, are being disposed off by this common order.

1. Heard learned Shri Arvind Dattar, Senior Advocate on behalf of MRPL and Shri P.R.V. Ramanan, Special Counsel on behalf of the revenue. Extensive hearings were held on seven days i.e. on 10.04, 11.04, 19.06, 20.06, 21.06, 27.06 and 28.06.2012. Both sides filed gist of oral submissions which have been taken into account.

3. The relevant facts in brief are as follows:

(a) MRPL, in 1993, commenced setting up a refinery at Mangalore with a capacity to refine 3 million metric tones per annum (MMTPA) of crude oil. The refinery commenced its commercial operation during March 1996.

Subsequently, during 1997-1998, MRPL commenced Phase-II expansion of the refinery to increase the refining capacity from 3 MMTPA to 9 MMTPA. MRPL imported various equipments in this regard under project imports.

As a part of phase-II expansion, MRPL installed a Continuous Catalytic Reforming Unit (hereinafter referred to as CCR2) to produce unleaded high-octane petrol from Baptha. This ws set up as a secondary processing unit.Theunit was having capacity to precess 9400 BPSD (barrels per single day) of naphta. Installing this CCR2 unit was originally not included in the Phase-II expansion plan, but was later initiated as part of the expansion. CCR-2 can " utilize fuel oil in the platform heater in addition to fuel gas " unlike CCR-1 which can use only fuel

gas. As in the case of other imports of Phase-I expansion, MRPL also imported various off-Shore equipments and materials required for the CCR2 unit.

In this connection, they have entered into 3 contracts/agreements, first with UOP Inter-Americana Inc. (hereinafter referred to as UOP-IA), for license to use the process, engineering and design, second-No. 9802.01- with a consortium (Toyo, Mitsui and Mitsubishi) for supply of equipment and machinery and the third-No. 9802.02 which the same consortium but called Foreign Engineering Contractor(hereinafter referred to as FEC), for off-shore design and engineering.

They also procured equipments and materials locally through Local Engineering Contractor (hereinafter referred to as LEC).

(b) The appellant- assessee imported the goods meant for CCR-2 under project import duty benefit scheme and the project was registered with Mangalore Customs based on their application dated 11.0898. The imports took place during the period September 98 to September 1999. The imports were made through the ports of Mumbai, Air Cargo Sahar, JNPT Nava Sheva and Mangalore. The imports were made by filing 66 bills of entry. Out of the total 66 bills of entry , 10 bills of entry were filed at Customs House, Mangalore, 38 bills of entry were filed at Custom House, Mumbai, 16 bills of entry were filed at ACC, Sahar, Mumbai and 2 bills of entry were filed at JNPT, Nhava Sheva, Mumbai. Out of total 66 bills of entry, only 3 bills of entry filed at Custom House, mangalore were assessed finally and the remaining were all provisionally assessed.

(c) On the basis of specific information, officers of DRI commenced investigation which revealed that MRPL which had entered into an agreement with FEC towards supply of goods imported form FEC for the purpose of setting up CCR-2 and paid a sum of 33,700,000 US dollars also had entered into an agreement with M/s. UOP I-A and paid a sum of 3 lakhs US dollars and an agreement with FEC and paid 6,340,000 US dollars and the said payments were in connection with supply of goods imported from FEC for the purpose of setting up CCR-2. They failed to disclose these two payments and thus undervalued the imported consignments.

(d) Accordingly, four show-cause notices were issued by ADG DRI answerable to the Commissioner of Customs (Import) Mumbai, Commissioner of Customs (Air-cargo-Import) Mumbai, Commissioner of Customs Import_JNPT and Commissioner of Customs, Mangalore inter alia proposing enhancement of value of the goods imported and demanding differential customs duties and proposing imposition of penalties.

(e) CBEC vide Notification No. 133/2006-Cus. (N.T.) dated 08.12.2006 appointed the Commissioner of Customs, Mangalore as the common adjudicating authority to adjudicate the four show-cause notices.

(f) After hearing the appellants, the Commissioner decided the four show-cause notices and passed the impugned order dated 30.03.2007. The gist of the order, in respect of each of the show cause notices are reproduced below:

Import through Mangalore

(a) The goods covered under the subject 3 bills of entry (Bs/E No. 596, 599 and 600 all dated 05.03.1999) were held liable for confiscation under Section 111(m) of Customs Act, 1962. Since, the goods were not available for confiscation, a fine of Rs. 10,00,000/- was imposed under Section 125 of the Customs Act 1962.

(b) Penalty of Rs. 1,00,000/- was imposed on M/s. MRPL under Section 112(a) of the Customs Act 1962 and a penalty amount of Rs. 1,05,17,734/- was imposed under Section 114A of the Customs Act, 1962 on M/s. MRPL.

(c) The assessable value in respect of 3 Bills of Entry (Bs/E Nos. 596, 599 and 600 all dated 05.03.1999) was redetermined as Rs. 40,23,89,283/- by including the proportionate costs of the basic design package and extended basic design and engineering i.e. Rs. 6,48,82,230/- and an amount of Rs. 1,05,17,734/- beign the total import duty short paid was demanded under Section 28(1) of the Customs Act 1962. Also the interest chargeable under Section 28AB of the Customs Act 1962 on the total differential duty of Rs. 1,05,17,734/- was ordered to be paid.

The goods covered under 7 Bills of Entry (Nos. 595, 597, 598, 601 all dated 05.03.1999 and 618, 619 and 620 all dated 12.03.99) were held liable for confiscation under section 111(m) of the Customs Act, 1962. Since the goods were not available for confiscation, a fine of Rs. 10,00,000/- was imposed under Section 125 of the Customs Act 1962. He also imposed penalty of Rs. 1,00,000/- on M/s. MRPL under Section 112 (a) of the Customs Act, 1962. The Bills of Entry Nos. 618,619,620 all dated 12.03.99 were finalized under Section 18(2) of the Customs Act 1962 The Bills of Entry Nos. 595, 597, 598 601, all dated 05.03.99 and 618,619 and 620 all dated 12.03.99 were finalized under Section 18 (2) of the Customs act 1962 and accordingly the assessable value in respest of these 7 Bills of Entry was re-determined as Rs. 40,15,29,960/- by including the proportionate costs of the basic design package and extended basis design and engineering i.e. rs. 6,47,43,671/- and the demand of differential duty amount of Rs. 1,04,95,273/- under Section 18(2) of the customs act 1962 was confirmed.

Import through Mumbai

(a) The goods covered under 38 bills of entry were held liable for congfiscation under Section 111(m) and since the goods were not available for confiscation, a fine of Rs. 12,00,000/- was imposed under Section 125 of the Customs Act 1962 and a penalty amount of Rs. 1,00,000/- was imposed on MRPL under Section 112(a) of the Customs Act, 1962.

(b) He directed the proper officer to finalize the 38 Bills of Entry assessed provisionally, by including the proportionate costs of the basic design package and the extended basic design and engineering in terms of Rules 4 read with 9(1) b(iv) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988

(hereinafter referred to as CVR,1988) read with Section 14 of the Customs Act, 1962 and demand duty short paid under Section 18(2) of Customs Act,1962.

Import through Air-Cargo Complex, Sahar, Mumbai

(a) The goods covered under 16 Bills of Entry were held liable for confiscation under Section 111(m) and since the goods were not available for confiscation, a fine of rs. 90,000/- was imposed under Section 125 of the Customs Act 1962 and a penalty of rs. 10,000/- was imposed on MRPL under Section 112(a) of the Act, 1962.

(b) He directed the proper officer to finalize the 16 Bills of Entry assessd provisionally, by including the proportionate costs of the basic design package and the extended basic design and engineering in terms of Rules 4 read with 9(1) (b) (iv) of CVR, 1988 read with Section 14 of the Customs Act, 1962 and demand duty short paid under Section 18(2) of the Customs Act 1962.

Import through Nhava Sheva, Maharastra

(a) The goods covered under 2 Bills of Entry were held liable for confiscation under Section 111(m) and since the goods were not available for confiscation, he imposed a fine of Rs.6,00,000/- under Section 125 of the Customs Act 1962 and he also imposed a penalty of Rs.60000/- on MRPL under Section 112(a) of the Customs Act,1962.

(b) He directed the proper officer to finalize the 2 Bills of Entry assessed provisionally, by re-determining the assessable value by including the proportionate costs of the basic design package and the extended basic design and engineering in terms of Rules 4 read with 9(1)(b)(iv) of CVR, 1988 read with Section 14 of the Customs Act, 1962 and demand duty short paid under Sectiopn 18(2) of the Customs Act 1962.

4.1. The learned senior counsel, at the outset, challenges the impugned order on the ground of lack of jurisdiction with the following submissions:

(a) The 4 show-cause notices have not been issued by the competent authority and were issued without jurisdiction by ADG, DRI and the proceedings should have been dropped on this ground alone. In terms of the decisions of the Supreme court in the case of cc vs. Sayed Ali [2011 (3) SCC 537] and Chandna Impex pvt ltd. Vs. cc [2011 (7) SCC 289], only 'proper officer' as opposed to an 'officer of customs' can issue a show-cause notice under Section 28 of the Customs Act, 1962.The ADG, DRI is not'proper officer' for the issuance of a show-cause notice under Section 28 of the Act.

(b) That in the present facts, the show-cause notices have been issused prior to substitution of new Section 28 w.ef. 08.042011 for the old Section 28. Sub-section (11) of the new section 28 of the Customs Act, 1962, has been inserted vide the Customs (Amendment and Validation) Act, 2011 introduced w.e.f. 16.09.2011 and inter alia provides as follows:

> "Notwithstanding anything to the contrary contained in any judgment, decree or any court of law, tribunal or other authority, all persons appointed as officers of customs under sub-section (1) of Section 4 before the 6th day of july, 2011 shall be deemed to have and always had the power of assessment under Section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."

As the substitution of a provision results in repeal of the old provision and its replacement by the new provision , the new sub-section (11) will apply only to the newly substituted Section 28 and will not apply to show-cause notices issued under the old Section 28 prior to 08.04.2011.

(c) There is no effective validation clause to validate show-cause notices issued under the old Section 28, as (i) the amendment does not remove

the basis of the Supreme Court decion referred to hereinabove; and (ii) there is no clause which deem a demand made under the old law to be a demand made under the newly substituted provision. Therefore the demands made vide show-cause notices issued under the old Section 28 of the Act are without jurisdiction, and, are entirely unsustainable in law.

4.2. The learned senior advocate also assails the order of the Commissioner on other grounds and the gists of his submissions are as follows:

(a) Exhibit G to contract 9802-01 between. MRPL and the Supplier only provides the details of off-shore equipment and materials such as (i) item number; (ii) service/function; (iii) quantities to be surplied; and (iv) whether the sourcing is to be from imported sources or domestic sources.

(b) The imported equipment could not have been manufactured only on the basis of the details set out in Exhibit 'G' to contract 9802-01, and, the finding that "it is obvious that the equipment and supplies of CCR-2 were manufactured/procured outside India" on the basis of the basic engineering package is without any factual basis.

(c) The finding(s) in the impugned order are also entirely contrary to the letter from Toyo Engineering Corporation ('Supplier') dated 20th March, 2007 which specifically states that the cost of detailed engineering design related to specific equipment (s) was included in the cost of the equipment supplied under the contract for off-shore supply of equipment for the Continuos Catalytic Reforming (CCR) Unit.

(d) The position adopted by the Customs Department is contrary to the international understanding and commentary by authors on the interpretation of Rule 8 (1) (b) (iv) of the GATT Customs Valuation Rules (which is the analogous provision to Rule 9(1)(b)(iv) of the erstwhile Customs Valuation Rules 1988).

(e) In the present case, the documents on record show that there are three different stages involved:

(i) Basic Design Package by UOP;
(ii) Extended Basic Design Package by Toyo, Mitsui etc.;

And

(iii) Detailed design vy the supplier loke Kobelco which is necessary for the manufacture of the equipment and is included in the cost of the equipment.

(f) The Basic Design Package (BDP) and the Extended Basic Design Package (EBDP) contain only the basic specifications of the nature of the equipment to be supplied. They are only in the nature of "buyer's assist" and relanting to the CCR-2 as awhole as opposed to imported equipments above. The BDP and EDBP are only in the nature of buyer's assist and relate to the CCR-2 Unit as whole as opposed to the imported equipment alone. About 26.5% of the equipment and materials component comprises of domestically manufactured/procured items, the specification for which are also contained in the BDP/EBDP. The BDP and EBDP, in the addition of the equipment, also relate to various other aspects such as plot plan including basic plant layout, civil work, buildings etc, which are not in any manner co-related to the manufacture of the imported goods.

(g) The finding that MRPL has not come up with any reasons as to why the payment of USD 300,000 was made to M/s. UOP and USD 63,40,000 was paid to M/s. FEC the Basic Design Package and the Extended Basic Design Pacage carried outside India is without any factual basis and contrary to the submissions of the appellant which have also been referred to in para(s) 23 to 23.4 of the impugned order itself.

(h) It is settled by various judicial decisions that the Basic Design for engineering package includes details such as the layout, the position of equipment, the specification of equipment in terms of volume, diameter etc., and, the provisions of Rule 9(1) (b)(iv) of the erstwhile CVR, 1988 cannot apply to such basic design as they have only a remote connection with the engineering drawing and designs which are necessary for production of the imported equipment. Only the detailed design which is necessary for the manufacture of equipment, if at all, can be included in terms of Rule 9(1) (b) (iv) of the CVR, 1988 in the assessable value of the imported equipment, if the same is already not specifically included in the cost of the imported equipment sold.

(i) The mere fact that the agreements (s) were entered into on the same day and that the parties were common cannot lead to any adverse inference especially when the contents of the clarification dated 20th March, 2007 have not been disproved nor has any evidence to the contrary been led by the department.

(j) As the second contract was a contract for services only, the assessee was of the bona fide view that there was no requirement to disclose the same

especially when no such issue was raised in relation to imports for the CCR-1 unit, which was a similar unit.

(k) On a specific query from the Bench, as to whether, in the event of the charges relating to basic Engineering Design and Extended Basic Engineering Design Being held includible, apportionment is permissible based on the value of locally procured material and value of material procured off-shore, the learned Sr.advocate was of the view that such a break-up is not permissible.

4.3. He relies on the following decisions in support of his submissions:

(i) G.E. Plastics India Ltd. vs. Commissioner of Customs, Mumbai-I [2004 (169) E.L.T. 46 (Tri.Del)]

(ii) SRF Ltd. Vs. Commissioner of Customs, Mumbai [2003 (161) E.L.T> 721 (Tri-Del.)]

(iii) TATA iron & Steel co. Ltd vs. Commissioner of Central Excise & Customs, Bhubaneswar [2000(116) E.L.T. 422 (S.C.)]

(iv) Birla Perucchini Ltd vs. Commissioner of Customs, Mumbai [2008(221) E.L.T. 436 (Tri-Mumbai)]

(v) Collector of Customs vs. Visakhapatnam Steel Project [1992(62) E.L.T. 833]

(vi) Reliance Industries Ltd. Commissioner of Customs[2007(207) E.L.T. 412 (Tri-Mumbai)]

(vii) Jaiprakash Industries Ltd vs. Commissioner of Customs,ACC,Mumbai [2002 (147) E.L.T.1148 (Tri.-Mumbai)]

(viii) SNS Detergent Pvt. Ltd. Vs Commissioner Of Customs, Chennai [2011-TIOL-217-CESTAT-MAD]

(ix) Indo Gulf Corporation Ltd. Vs. Commissioner of Customs Mumbai [2005 (182) E.L.T. 77 (Tri.- Mumbai)]

(x) Commissioner vs. Indo Gulf Corporation Ltd. [2005 (186)E.L.T A114 (S.C.)]

(xi) Indo Gulf Corporation Ltd. Vs Commissioner Of Customs (Import), Mumbai [2009(234) E.L.T. 312 (Tri.-Mumbai)]

(xii) Commissioner of Customs (Import), Mumbai vs. Jaypee Bela Cement [2008(227) E.L.T. 292 (Tri.- Mumbai)]

(xiii) Commissioner of Customs (Port), kolkata vs. J.K. Corporation Ltd. [2007 (208) E.L.T 485 (S.C.)]

(xiv) Commissioner of Customs (Port), Chennai vs. Toyota Kirloskar Motors Pvt Ltd [2007 (213) E.L.T. 4 (S.C.)]

(xv) Commissioner of Customs vs. Ferodo India Ltd.[2008(224) E.L.T. 23 (S.C.)]

(xvi) Rashtriya Ispat Nigam Ltd. Vs Commissioner of Customs, Visakhapatnam [2006(197)E.L.T. 276 (Tri.-Bang)]

5.1 The learned special counsel, Shri P.R.V ramanan contested the challenge to jurisdiction relying on the decision of the Tribunal in the case of Sundaram Finance vs. Commissioner of Customs reported in2012 (279) E.L.T. 220 (Tri.-Chennai) and the decision of the in the case of M/s Bharti Airtel Ltd. & Others vs. Commissioner of Customs, Bangalore, vide Final order Nos. 365-373/2012 dated 7.6.12, reported in 2012-Tiol-746-CESTAT-BANG.

5.2 The learned special counsel, Shri P.R.V. Ramanan supported the order of the Commissioner with the Following submissions:

(a) The value attributable to (i) Basic Engineering Design Package (BEDP) supplied by the Process Licensor – UOP-IA and (ii) Extended Basic Engineering (EBE) and 'Detailed Design Engineering (DDE) provided by the supplier (i.e. the

Japanese consortium) to itself requires to be added to the 'value' declared by MRPL in the Bs/E relating to various imported goods.

(b) The requirement of BEDP is governed by the Engg. Agreement between MRPL and UOP-IA. This agreement has to be read with the licence Agreement (1993) and the Engg. Agreement (1993) entered into at the time of the setting up of the CCR-1 Plant.

(c) Aconjoint reading of the three Agreements Clearly shows that BEDP is not a more collection of 'process flow charts'. BEDP provided process floe data, design of all critical equipments and instruments, piping layout and piping materials, specifications on process parameters, metallurgy etc. Thus, BEDP provided all the necessary engineering and design as also specifications for the CCR-2 plant.

(d) The Engg. Agreement (1998) enjoined on UOP-IA to design/redesign all the heaters for dual firing and seberal other downstream components of the CCR-2 plant for improved performance.

(e) UOP-IA provided the basic engineering design and drawings and also flow diagrams, without which the fabrication work of offshore equipments could not have been taken up and completd.Besides, all the design/drawings/specifications carried out by the Supplier as well as the vendors of the Suppliee were subject to the review approval of UOP-IA.

(f) The Licence Agreement could not have been given effect to eithout the Engg. Agreement between UOP-IA and MRPL. Thus the BEDP flowing from the Engg. Agreement was like the ignition Key to an automobile.

(g) The Design and Supply contracts between MRPl and the Supplier also indicated that the Ebe and DDE for the plant have been made by the supplier'based on and relying upon' the BEDP of UOP-IA. Art.6, referring to changes on and relying upon' the BEDP of UOP-IA.Art.6, referring to changes in BDEP impacting the scope of supply of equipment/material and Art.8 on Delivery guarantee also point to the close linkage between BEDP and the equipment/materials for CCR-2.

(h) EBE and DDE are governed by the off-shore Design contract-9802.02, the contract price being USD 6,340,000.

(i) Change in BEDP had a bearing on changes in EBE and DDE [Art.6]. The scope of EBE and DDE include not only standards as per NIT given by MRPL but also specification and drawings that are needed for obtaining proper equipments and materials and construction and erection of the unit. Exhibits A and B being

common to the contracts 9802.01 and 9802.02 is yet another factor that links the two activities of design and supply.

On provisions of law

(j) A conjoint reading of Rules 4 and 9 of CVR, 1988 shows that 'transaction value' must include all elements that normally form part of the price actually paid or payable. Even after addtions under Rule 9, the determination of value is under the Transaction value method. In the instant case, only the Transaction value method has been adopted. There was, thus, no need to invoke Rule 10A of CVR.

(k) The rationale for inclusion of 'cost of goods and service' under Rule 9 is to place the 'vertically Integrated' operation on par with 'split operation'. Parity is ensured so that the transaction value does not get skewed on account of different practices/arrangements.

(l) Rule 9 envisages addition of the value of goods and services supplied for use in connection with the production and sale for export of imported goods to the price actuaaly paid or payable for such imported goods. The expression 'in connection with' is of wide import. This does not imply only immediate nexus to vendors' costs and prices as argued in the case.

(m) The expression 'Engineering' appearing in Rule 9 (l) (b) (iv) is, again, of wide import.

(n) The expression 'necessary' appearing in the said Rule cannot be interpreted so as to include only design costs incurred by the vendors as argued in the present case. A reference to Law Lexicon at pages 13-14 would show that the expression 'necessary' would mean what is indispensable, needful or essential. In the instant case, there is no dispute that the BEDP, EBE and DDE were in actual fact supplied for use and actually used in connection with the production of imported goods.

(o) Case Study 8.1 of WCO Technical Committee on valuation may be cited to support the argument that, in a case as the present one where the provider of EBE and DDE and the supplier of the equipments are one and the same, the costs represented EBE and DDE ought to have been part of the price actually paid or payable under Rule 4 (1).

(p) Interpretative note 5 to rule 9 (I) (b) (iv) explain the concept of apportionment of costs in different situations. Such apportionment can be done even when the total design costs considered as overheads are not specifically allocated to the imported products, by adopting proportionate apportionment over total production benefiting from such design costs. Here again one-to-one correlation is not contemplated.

(q) On a specific query from the Bench as to whether, in the event of the charges relating to Basic Engineering Design and Extended Basic Engineering Design being held includible. Apportionment is permissible based on the value of locally procured material and value of material procured off-shore, the learned special counsel was also of the view that such a break-up is not permissible.

On Limitation

5.3 Declarations at the time of registration of contracts under PIR clearly indicates that there was deliberate non-disclosure of the agreements on the part of MRPL, leading to the invoking of the longer period of limitation as also the penal provisions. Declarations on there Bs/E that there were no other documents of factors having a bearing on the value of the goods in question were not true declarations.

5.4 He strongly relies on the decision of the Tribunal in the case of Andhra Petrochemicals ltd. (APL) [1997 (91) ELT 349 (t)], which decision has been affirmed by the apex court [1997 (90) E.L.T. 275 (S.C.)] He submits that the facts of this case are the closest to the present case or MRPL. The only difference is that, in the APL case, the licensor himself undertook to supply the equipments/materials apart from providing the design and engineering specification. The arguments taken by APL were the same as those which are now taken by MRPL. He also submits that the ratio of the judgment rendered bye the Hon'ble Tribunal in the case of Collector vs Intercom Engineers pvt. Ltd. reported in 1987 (28) ELT 458, though related to Central Excise matter, applies squarely to the instant case inasmuch as the issue is related to inclusion of costs of design and engineering in the machinery value.

6. The learned Sr. advocate for the appellant-assessee made the following submissions in his rejoinder:

(a) MRPL had submitted an Off-shore Supply Contract bearing No. 9802-01 as required under Regulation 5 of the PIR . This refers to the Extended Basic Design (EBD) and the Basic Engineering Design (BED). When there is import nof goods through the project import mechanism, there is no statutory requirement on the importer to submit separate and independent contracts with regard to basic design and Extended basic design.

(b) The patent of UOP is a process patent not a product patent.

(c) The word "engineering" has been used only in the context of "engineering and design specification. In none of the contracts, schedules or exhibits thereof is there any reference to any design or drawing necessary for production of compressors, preheaters etc. that were eventually imported.

(d) Contracts have to be read as a whole and sentences or clauses cannot be read in isolation. This is made clear in para 76 of the Supreme Court's decision in Ishikawajma – Harima Heavy Industries Ltd. vs. Directors of Income Tax, (2007) 3 SCC 481,

(e) If the proper officer desires to reject the transaction value, he has to follow the mandatory procedure under Rule 10A of the CVR, 1988. Without making any inquiry, it was concluded that the amounts paid by UPO and FEC have to be added which is not permissible in law.

(f) The provisional assessment undertaken in terms of section 18 of the Customs Act, 1962 was only in the context of granting benefits under Notification No. 11/97-Cus, which related to benefits under the projects import scheme. The issue was also conclude in favour of the appellant in the earlier order of CESTAT dated 14.2.2005.

7. We have carefully considered he submission from both sides and perused the records. The following main issues arise for consideration:

(a) Whether Adg, DRI was competent to issue the impugned show-cause notices? If the ADG DRI had no jurisdiction, during the relevant time, to issue the show-cause notice under Section 28 of the Customs Act, whether the retrospective amendments dated 16.9.2011 to section 28 of the Customs Act validates the shows-cause notice and the proceedings thereafter?

(b) Whether the 'basic design package' from the licensor i.e Uop I-e and the extended basic design and engineering of CCR-2 from FEC are necessary for the production of imported goods?

(c) Whether the cost of Usd 300,00 incurred for obtaining 'basic design package' from the licensor i.e UOP I-A and USD 6,340,000 incurred for obtaining the extended basic design and engineering of CCR-2 from FEC are also costs incurred for the procurement of equipments of CCR-2 which were imported?

(d) Whether it is a case of rejection of a transaction value or a case of adjustment under Rule 9?

(e) Whether the fact of the above payments made by MRPL was deliberately suppressed to customs justifying invocation of extended time limit for demand of duty and for imposing penalties?

(f) Whether fine can be imposed under Section 125 when the goods were held not available for confiscation?

(g) Whether penalties under Section 114A should be imposed equivalents to the "duty demanded plus the corresponding interest accrued under Section 28AB of the said Act" instead of penalties equivalent to the "duty demanded"?

On the issue of jurisdiction of ADG, DRI to issue the show-cause notices.

8. Coming to the preliminary issue as to whether the ADG, DRI had the jurisdiction to issue show-cause notice prior to amendment dated 16.9.2011, we find that the same stands decided by this Bench in the case of Bharti Airtel Ltd. & Others [2012-TIOL-746-CESTAT-BANG] and the relevant portion of the findings are as follows:

"11. We hold that the ADG DRI was competent to issue the impugned show-cause notices for the following reasons.

(a) We find that ADG DRI has been appointed as Collector by Notification No. 19/90-Cus (NT) dated 26.4.90. We also note that he ADG DRI has been specifically empowered by the Board vide Circular No. 4/99-cus dated 15.2.1999 to issue show-cause notices in respect of cases investigated by them. This circular has not been shown to have been rescinded. Further, subsequently, by Notification No 44/2011-cus (NT) dated 6-7-2011 issued in exercise of powers conferred by Section 2(34), DRI officers including ADG DRI were appointed as "proper officers" for the purposes of Selection 17 and Section28.In other words, as far as ADG DRI is concerned, there is both appointment as Collector/Commissioner and special authorization by the Board to issue show-cause notices in respect of cases investigated by DRI. This position is valid even for the period prior to 08.04.2

(b) We also note that ADG DRI only issued the show-cause notices which merely proposed confiscation of goods, demand of differential duty, and imposition of penalties. The adjudication as such was not undertaken by the ADG DRI. Only in the adjudication proceedings, the determination of duty as proposed in the show-cause notices arise. Only when the work of

determination is undertaken, the need for exercising the powers under Section 17 arises.

(c) The Hon'ble Supreme Court dated 18.2.2011 in the case of Syed Ali dealt with two appeals, one against thje order of the Tribunal in the case of Syed Ali reported as [2003(159)ELT 235 (TRI.-Mum,.)] and the other against the decision of the Tribunal in the case of kripa Shankar Srivastava dated 4/1/2005 reported as [2005 (184) ELT 198 (Tri.-Mum.)].

In the first case, the Asst. Collector of Customs (Prev.), Mumbai issued show-cause notice alleging violation of provisions of Section 111 (d) of the Act and adjudicated the said show-cause notice dated 3/2/93 confirming the demand raised in the show-cause notice. The Collector of Customs (Appeals) set aside the order and granted liberty to the department to re-adjudicate the case by issuing a proper showcause notice. Thereafter, Collector of Customs (Prev.) issued the show-cause notice dated 16.4.94 proposing confiscation of the goods and demanding Customs duty in terms of Section 28 (1) of the Act. The Collector confirmed the demand of duty under Section 28 (1) of the Act. He also ordered confiscation of the goods and imposed redemption fine. The Collector while adjudicating overruled the objection questioning his jurisdiction. On appeal by the party, the Tribunal vide the order dated 4-1-2005…. Allowed the appeal holding as follows:

" It is very clear that the Commissioner of Customs (Preventive) does not have jurisdiction to issue the impugned show-cause notice and in view thereof he could not have the jurisdiction to adjudicate the matter when imports have taken place at Bombay Customs House."

In the Kripa Shankar case, the show-cause notice was issued by the Commissioner of Customs (Prev.) but the adjudicating was done bye the Commissioner of Customs. The tribunal held that the show cause notice was issued by a proper officer under Section 28 of the Customs Act.

The Hon'ble Supreme Court in the combined decision dated 18.02.2011 in the case of Syed Ali and kripa Shankar has held that merely appointing a persons as an officer of Customs is not sufficient for issuance of notice under Section 28. The said decision did not deal with any show-cause notice issued by ADG DRI.

(d). In a matter involving issue of show-cause notice by ADG DRI, the decision of the Mumbai bench of the Tribunal in the case of Chandna

Impex Pvt. Ltd. was challenged before the Hon'ble Supreme court . The Hon'ble Supreme court vide order dated 06.07.2011 remitted the matter to the Tribunal for fresh consideration of the issue relating to jurisdiction in the light of decision of the Hon'ble Supreme Court in the case of Syed Ali. Obviously, the issue pertaining to jurisdiction of ADG DRI to issue notice was left open to be decided by the Tribunal.

(e) Section 28 of the Customs Act was amended first on 08.04.2011 and then again on 16.09.2011. As per relevant notes on clauses relating to amendment dated 08.04.2011,

"Section 28 is being substituted so as to make the provision more coherent and clear-as also to harmonize the demand period in normal cases to one year".

Section 28 has been merely recast by eliminating provisos and bringing about greater coherence in the provisions. The explanation (2) of Section 28 reads as under:

"For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill receives the assent of the President shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received."

This explanation was necessitated to ensure that the rights of category of assessees in cases where the normal time limit of six months was applicable prior to amendment dated 08.04.2011 was protected, so that demand invoking higher time limit of one year was not issued in those cases.

On the other hand, as per the statement of objects and reasons,appended to the Customs (Amendment and Validation) Bill, 2011, intention underlying the insertion of sub-section (11) of section 28 was to "clarify the true legislative intent that show-cause notices issued by Customs Officers, i.e. officers of the Commissionerates of Customs (Preventive), Directorate-General of Revenue Intelligence (DRI) Directorate-General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. It is therefore proposed to amend retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the Act at

all material times irrespective of the fact that any specific assignment as proper officer was issued or not. It is therefore proposed to amend retrospectively and to validate anything done or any action taken under the said Act in pursuance of the Provisions of the Act at all material times Irrespective of issuance of any specific assignment on 6th July, 2011."

Further, the amendment to Section 28 was by way of inserting sub section (11) which reads under:

"Notwithstanding anything to the contrary contained in any judgment, decree, or order of any court of law, Tribunal or other authority, all persons appointed as officer of Customs under sub-section (1) of Section 4 before yhe 6th day of July, 2011 shall be deemed to have and always had the power or assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."

9.1. The core dispute relates to interpretation of Rule 9 of Customs Valuation Rules. At this juncture, it would be appropriate to reproduce the relevant provisions of the Customs Act and the CVR, 1988, which are reproduced below:

Section 2 (41)

"value", in relation to any goods, means the value thereof determined in accordance with the prvisions of sub – section (1) or sub – section (2) of section 4.

Section 14 of the Customs Act :

"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 ordinaily sold, or offered for sale, for delivery at the time and place of importance or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each 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 o 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 br, is presented under section 50;

…… …… …… …….. ……. …….. …….. …….. …

(i) the circumstances in which the buyer and the seller shall be deemed to be related;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:

Provided also 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 inder section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) **…….**

Explanation.- ……

Rule 2 (1) (g) of CVR 88

"Transaction value" means the value referred to in sub-section (1) of section 14 of the Customs Act, 1962."

Rule 4 of cvr, 1988

"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 accordanceb with the provisions of Rule 9 of these rules."

… ….. ….. …… …… ….. ….. …. . ……

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 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."

Rule 9 of CVR, 1988

"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 that 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 purpose 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 or 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 plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods ;

(c) 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;

(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) of section 14 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 place of importation;

(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 par cent 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 percent of the free on 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 basis 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.

Interpretative Notes under Rule 9 (1) (b) (iv)

"1. Additions for the elements specified in rule 9 (1)(b)(iv) should be based on objective and quantifiable data. In order to minimize the burden for both the importer and proper officer of customs in determining the values to be added, data readily available in the buyer's commercial record system should be used in so far as possible.

2. For those elements supplied by the buyer which were purchased or leased by the buyer, the addition would be the cost of the purchase or the lease. No addition shall be made for those elements available in the public domain, other than the cost of obtaining copies of them.

3. The case with which it may be possible to calculate the values to be added will depend on a particular firm's structure and management practice, as well as its accounting methods.

4. For example , it is possible that a firm which imports a variety of products from several countries maintains the records of its design centre outside the country of importation in such a way as to show accurately the costs attributable to a given product. In such cases, a direct adjustment may appropriately be made under the provisions of rule 9.

5. In another case, a firm may carry the cost of the design centre outside the country of importation as a general overhead expense without allocation to specific products.In this instance, an appropriate adjustment could be made under the provisions of rule 9 with respect to the imported goods by apportioning total design centre and adding such apportioned cost on a unit basis to imports.

6. Variations in the above circumstances will, of course, require different factors to be considered in determining the proper method of allocation.

6. In cases where the production of the element in question involves a number of countries and over a period of time, the adjustment should be limited to the value actually added to that element outside the country of importation."

9.2. On a close reading of the above legal provision, it can be seen that the "transaction value" to be determined under Rule 4 of the Customs Valuation Rules envisages adjustments to be made in accordance with the provisions of Rule 9 of the said Rules. For example, as "the cost of transport to the place of importation" is includable to determine the transaction value, in case where the invoice refers to FOB value, the cost of transport as above requires to be added in terms of Rule 9(2). The value arrived at after adjustments in accordance with the said Rule, continues to be transaction value.

9.3. When a person buys a product available, off-the-shelf, he need not be concerned with the Engineering Design and services which have gone into the manufacture of such product. He has to merely order by giving the specifications. If a person wants to buy an Air Conditioner, he may specify whether it should be window type or split type and also specify the tonnage besides the brand name. He may consult a specialist to identify such requirements. These specifications are in the nature of "buyers' assist" and the cost incurred for getting such specifications cannot become part of value of the goods in the hands of the supplier.

9.4 When a Sophisticated technology is involved in the manufacture of any products and the process involved in the manufacture is a patented one, the equipments required have to be compatible with the patented process and assistance may be required before ordering such equipments. In such a case\, the Engineering service utilized for preparing tender document will be in the nature of "buyers' assist" and the same cannot be treated as necessary in the hands of the manufacturer of the equipments for the purpose of manufacture of such equipments.

9.5. We shall revert back to the scope of Rule 9, particularly Rule 9 (1) (b) (iv) later.

10. At this stage it would be appropriated to consider the decisions relied upon by both sides on the applicability of Rule 9 CVR, 1988.

The gists of the important decisions are discussed below.

(a) The Hon'ble Supreme Court in the case of Collector vs. Essar Gujrat Ltd. [1996 (88) E.L.T. 609 (S.C.)] dealt with the issue of inclusion of the license fee paid to the supplier of plant & machinery in terms of Rule 9 (1) (c) and held as under:

> "12. Reading all these agreements together, it is not possible to uphold the contention of Mr. Salve that the pre-condition of obtaining a licence from Midrex was not a condition of sale, but a clause inserted to project EGL. **Without a licence from Midrex, the plant would be of no use to EGL. That is why this overriding clause was inserted. The overriding clause was clearly a condition of sale.** It was essential for EGL to have this licence from Midrex to operate this plant and use Midrex technology for producing sponge iron in India. Therefore, in our view, obtaining a licence from Midrex was a pre-condition of sale. In fact, as was recorded in the agreement, the sale of the plant had not taken place even at the time when the contract with Midrex was being signed on 4-12-1987, although the agreement with TIL for purchase of the plant was executed on 24th March, 1987. Therefore, we are of the view that the Tribunal was in error in holding that the payment to be made to Midrex by way of licence fees could not be added to the price actually paid to TIL for purchase of the plant."
>
> [Emphasis supplied]

(b) The Supreme Court's decision dated **16.2.2000** in the case of the Tata Iron & Steel held as under:

> "14. A bare reading of Rule 9(1)(b) shows that it refers to the value of the four specified goods and services supplied by the buyer free of charge or at a reduced cost for use in connection with the production and sale of imported goods to the seller and to the extent that such value has not been include in the price actually paid or payable. To illustrate, the seller may have manufactured equipments of a design, drawings whereof were made available by the buyer say by engaging an independent expert agency in the country of the seller. Although the seller has not incurred any expenditure on the technical/engineering design on the equipment manufactured by it yet the price paid for securing the engineering designs and drawings will be a component of the value of the equipment manufactured. In spite of the price for the service rendered by the expert agency having been paid by the buyer, the value thereof is liable to be added to the value of the imported goods for determining the transaction value. In the case and hand it is nobody's case that the buyer had supplied any goods or services free of charge or at reduced cost for use in connection with the production and sale for export of imported goods. All the exercise done by the Tribunal in scrutinizing the documents forming subject matter of contract DM 301 so as to classify them into three categories stated earlier in this judgment was therefore uncalled for. SNP had

purchased the entire steel plant equipment from an Italian supplier more than six years before the transaction in this question had taken place with the appellant. Such documents must have accompanied the equipments and materials made available to SNP by the Italian supplier of SNP. It cannot be comprehended and certainly it is not the case of the Revenue that the technical documents were supplied or made available by the Italian supplier to SNP either free of charge at the instance of the appellant or cost thereof was incurred wholly or partially by the appellant."

(c) The Tribunal in the decision dated **4.7.2003** in the case of SRF Ltd. considered the scope of Rule 9 (1) (b) (iv) of CVR, 1988 and held as under:

"6.The impugned order has been passed purportedly relying on the decision of the Apex Court in the case of Essar Gujarat Ltd. That order related to a case where an operating licence was required to be obtaining for making an imported plant operational. In the absence of that licence, the plant could not be put to production at all. The Apex Court accordingly, held that the licence fee is an integral part of the cost of the plant and the same was required to form part of the value of the plant. In the present case, there is no relationship between the licence and know-how fee and the imported goods. There is no condition that the individual machinery under import cannot operate without obtaining a license. **The individual machinery import are not subject to any know-how license. The know-how supplied by M/s. Atochem is a manufacturing know-how for the manufacture of chloromethane and not know-how for the production of the imported machines. There is also no requirement for any license to operate the imported machinery.** In these circumstances, we are of the view that the decision of the Apex Court in the case of M/s. Essar Gujarat has no application to the present case and the license and know-how fee of 8.1 million FF are not required to be added to the value of imported machinery for their assessment. This position is also clear from the decision of this Tribunal under the orders relied upon by the learned Counsel for the appellants."

7. With regard to the inclusion of engineering drawing the relevant legal provision is contained in Rule 9(1)(b)(iv). That rule reads as covers:-

> "Engineering, development, art work. Design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;"

8. A perusal of this rule makes it clear that for adding "engineering……. Design work etc.", It is a condition that the work in question should be undertaken elsewhere than in India and should be necessary for the production of the imported goods. **In the present case no evidence has been brought on records by the Revenue that the engineering designs were undertaken elsewhere than in India i.e. by M/s. Atochem and was necessary and used for the production of the imported goods.** In fact , in terms of the collaboration agreement, M/s. Atochem was to supply only basic

engineering design package for the plant. The details of the engineering design package are listed in Annexure 2 to the agreement. The items listed in this annexure are description of process, process flowsheet, material balance list of equipment, equipment specification sheets etc. and not the items mentioned in the rule. The detailed drawings were made in India by M/s. Dalal Consultants and Engineering Ltd. Therefore, the engineering fee of 6.3 million F.F. was also not required to form part of the assessable value of the imported machinery, as it was not "undertaken elsewhere than in India".

[Emphasis supplied]

(d) The Tribunal in the decision dated **10.5.2004** in the case of G. E. Plastics considered the scope of Rule 9 (1) (b) (iv) of CVR, 1988 and held as under:

"6. It is the Revenue's case that the process diagram and equipment specification supplied by M/s. GE Plastic India Pvt Ltd. BV Netherlands were vital for the preparation of detailed engineering drawing for the manufacture of the imported equipment and that is sufficient to attract the provisions of the Rule. The Commissioner (Appeals) has noted that the enquiry documents were prepared on the basis of Basis Engineering Package. This Reasoning of the Commissioner is not Supported by the Rule. Rule does not take in such remote connection. The Rule permits inclusion of only engineering drawings, designs etc. "necessary for the production of the imported goods". That is to say, the material in question should be directly necessary for the production of the imported goods. **The gap between Basic Engineering Drawings and detailed drawing is vast. The one provides all the detailed inputs for undertaking manufacture.The other merely indicates the lay out,relative size etc. From the size specifications alone construction of engineering equipment is not feasible.** From a perusal of the process chart, it is clear that it only indicated the layout and volume specifications of individual equipment. It is merely a sketch representation of the plant. It was not possible to manufacture equipment based on this. Further, if it were to be so, the appellant would not engage another engineering firm, namely, Davy Power Gas India Pvt. Ltd. for developing the detailed design/engineering drawing. The second requirement under the Rule is that **the design work, drawing etc. should have been "undertaken elsewhere than in India".** We have already noted that what is attracted by the Rule are the detailed design work, drawing etc. undertaken by Davy Power Gas India Pvt. Ltd That work was undertaken in India. And work undertaken in India is not attracted by the Rule."

[Emphasis supplied]

The Tribunal, in the facts of the said case came to the conclusion that Basic Engineering package supplied by the joint venture partner was not what was "necessary" for the manufacture of the equipment and what was necessary was "undertaken in India".

(e) The Tribunal in the case of Andhra Petrochemicals Ltd. considered the scope of Rule 4 read with Rule 9 (1) (b) (iv) of CVR, 1988 and held as under:

"2. APL had entered into agreements with M/s. Davy Mekee (London) Ltd., UK (heriernafter referred to as 'DML'), for supply of equipment and materials, for technical know-how and for servicing of the plant proposed to be erected by them Vizag in Andhra Pradesh, for the manufacture of Oxo-alchols.

…. …… ……..

8. DML had developed design and engineering and got the capital equipment manufactured by other manufacturers. DML developed design and engineering and they were not the manufacturer. **The manufacturers based in UK, Italy and West Germany manufactured the equipment as per the design/engineering developed by DML, and they sent the finished products to DML, who in turn invoiced them to APL.** In these invoices the manufacturing costs and the profit margin of the manufacturers and the procurement/handling charges of DML were included.

9. The invoice price did not, however, include the design and engineering charges paid separately apart from the contract price.

10. towards design and engineering charges developed by DML, payment of Pound 11,50,000 was made.

……. …… ……..

16. It was observed that **DML's patented Devy process involved confidential technical information, and without supply of the design and engineering of the equipment for such a patented process by DML, no unconnected manufacturer having no access to such confidential design and engineering of the equipment of the equipment, could produce them.**

17. The DML had admitted that they had given specifications to the sub-vendors. The Additional Collector observed that "what is said as specifications in the letter dated 27-1-1992 of DML can be inferred to be more in the nature of design and engineering specifications, as unconnected manufacturer cannot produce equipment for DML's patented process without such details."

…….. …….. ……..

47. The appellants have contended that the DML had not taken up on themselves any responsibility for providing designs etc., necessary for the production of the imported goods, and that the responsibility of DML was confined to providing know-how anmd front end engineering package for the plant at Vizag.

……. …….

55. Thus, the supply of equipment had direct nexus with the payment towards design and engineering charged as agreed at the time of entering in to collaboration agreement. It is immaterial that the supply of the equipment commenced only after the payments towards design and engineering charges have been made.

56. It has been admitted by the appellants that "since DML had to prepare the basic engineering package for the plant as a whole which included foreign equipment, they had to prepare purchase specifications etc."

57. **It is also pertinent to note that the whole transaction between APL and DML was package, a deal, a unified and integrated agreement for sophisticated and highly developed technology.** Thus, the agreements in such a case could not be read just between the lines.

…….. ……..

61. It also could not be said that DML's know-how was different from and unrelated to the equipment through which alone the know-how could be used for the production of goods.

62. The provisions in the agreement with regard to plant thus covered drawings, designs, etc. necessary for the manufacture if imported equipment."

[Emphasis supplied]

(f) The Tribunal in the decision dated **31.12.2004** in the case of Indo-Gulf Corporation Ltd. considered the issue of inclusion of licence fees and basic engineering fees paid by the assessee to the overseas suppler in terms of Rule 9 (1) (c) and help as under:

"6.10 Rule 9(1)(c) can be invoked only when both the condition are satisfied cumulatively and simultaneously as

(a) Reading of Rule 9(1)(c) of Customs Valuation Rules, 1988 reveal that Rule 9(1)(c) can be invoked only if the following conditions are satisfied cumulatively and simultaneously:

(i) licence fees is relatable to the imported goods; and

(ii) licence fees is a condition of the sale of the imported goods.

Even if any of the above conditions is not fulfilled, then Rule 9(I) (c) cannot be invoked. Consequently, the licence fees paid by the importer-buyer cannot be included in the value of the capital goods. The Capital goods as imported from Outokumpu, as listed herein above are standard goods, otherwise available as off-the-shelf capital goods. They are not proved to or alleged to be otherwise. These capital goods, are offered for sale by others. Therefore, Licence Fees in the case do not relate to imported capital goods.

(b) As, in the present case, the licence Fees paid to Outokumpu by the appellants was for manufacture of copper matte from the copper concentrate. The fees paid were not for the manufacture of capital goods imported by the appellants.

(c) The manufacture of copper is carried out by the appellants in the plant set up in India by installing and erection capital goods imported not only from Outokumpu but from others also."

....

6.17. In the present case, no such case as made out in case of Andhra Petrichemical [1997 (90) E.L.T. 275 (S.C.)] is made out by the department. It Is not The case of the department that either the appellants or Outokumpu supplied the engineering work necessary for the production of the capital goods, imported, from various vendors including the goods imported from Outokumpu. On the other hand, the equipment supply contract entered with Outokumpu clearly states that the price

of the proprietary equipments include the design cost also. Hence, on facts, the judgment of the Supreme Court in Andhra Petrochemicals is not applicable to the present case."

The Tribunal, in the facts of the case, came to the finding that the capital goods were "standard goods" available "off-the-shelf" and the licencee fees did not relate to the imported capital goods and the same were not paid as condition of sale.

The Tribunal in the decision dated 6.5.2008 in the case of Indo-Gulf Corporation Ltd. considered the issue of loading of 2.03% towards licence fees and basic engineering fees in terms of Rule 9 (i) (c) and held the same could not be included following the Tribunal's decision dated 31.12.2004 in the assessee's own case

(f) The Tribunal's decision dated 6.9.2006 in the case of Reliance Industries Ltd. dealing with the scope of Rule 9 (1) (b)

(iv) held as under:

"The Department raised certain issues with respect to the Front End Engineering Package (FEEP) and sought to be included in the assessable value of the imported articles by invoking Rule 9(1) (b) (iv). It was submitted on behalf of RIL that the FEEP relates to setting up of the Plant in India. The design and engineering with respect to each component of the Plant which is imported would be undertaken, done and implemented by the supplier of each such component or equipment and the cost of such engineering is necessarily factored into price/value of each component. The FEEP has nothing to do with the design or engineering of the individual component. Similarly, since the licence fee brought about the right to use the process in India and gave technical information in the form of Feep, by itself was not the basis on which the goods were manufactured as they provided only a base for which a further engineering was to be carried out. Therefore the provisions of Rule 9(1) (b) (iv) will not apply in relation to the licence fee in question as they are not related to the goods. As to the issue whether or not the value of the information in the FEEP should be included in the assessable value of the imported equipment under Rule 9(1)(b)(iv), reference was drawn to the lucid elucidation in the Commentary on the GATT Customs Valuation Code by Sherman & Glashoff edition as under:

"Detailed specifications, Including various dimensions noted on a drawing of the machine, are included in the buyer's order, so as to advise the

exporter/manufacture of what the buyer needs. The cost of engineering and drawing are not part of customs value, even if under taken outside the country to which the machine is shipped, to the extent that they are an appropriate way of ordering the machine that is, of telling the manufacture the specifications of what is being ordered. **Only if the engineering or drawing goes further should it be deemed to be a part of the production process.** Upto that point, each specification and instructions is more appropriately regarded as an added requirement or burden imposed upon the manufacturer, rather than a form of assistance. Otherwise expressed, these are buying costs, not costs of the seller from which he is being relived by the buyer."

In our opinion, this would succinctly put the issue in its proper perspective. According, the FEEP cannot be said to be engineering sketches etc. needed for the production of the equipment. As a result Rule 9(1) (b) (IV) is not applicable.''

[Emphasis supllieed]

(h) Hon'ble Supreme Court in decision dated 2.2.2007 in the case of J.K. Corparation Ltd. Dealt with the issue of inclusion of payment made towards license, know-how and technology in respect of supply of plant and machinery for manufacture of polyester oriented yarn in terms of Rule 9 (1) (C). The Hon'ble Supreme Court rejected the Revenue's appeal with the following findings:

7. The Central Government, in exercise of its powers conferred upon it under Section 156 of the Act, made the said Rules. The transaction value determined in terms of the said Rule was to be value of the imported goods. What would be a transaction value is stated in Rule 4 i.e. the price actually paid or payable on the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of the 'Rules'. Rule 9, inter alia, provide for determination of transaction value in terms whereof the4 actually paid or payable on the imported goods, the factor enumerated therein shall be added, clause (e) whereof reads as under:

''(e) all other payment 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.''

''9. The basic principle of levy of customs duty, in view of the aforementioned provisions, is that the value of the imported goods has to be determined at the time and place of importation. The value to be determined for the imported goods would be the payments required to be made as a condition of sale. Assessment of customs duty must have a direct nexus with the value of goods which was payable at the time of importation. If any amount is to be paid after the importation of the goods is complete, inter alia by way of transfer of license or technical Knowhow for the purpose of setting up of a plant from the machinery imported or running thereof, the same would not be computed for the aid purpose. Any amount paid for post importation service or activity, would not, thereof, come within the preview of determination of assessable value of the imported goods so as to enable the authorities to levy customs duty or otherwise. The Rule have been framed for the purpose of carrying out the provisions of the Act. The

wordings of the Sections 14 and 14 (1A) are clear and explicit. The Rules and the Act, therefore, must be construed, having regards to the basic principle of interpretation in mind.

13. No part of the Knowhow fee was to be incurred by the respondent herein either for the purpose of fabrication of the plant and machinery or for any design in respect whereof M/s. Samsung held the patent right.

21. We cannot, thereof accept the contention of Mr. RadhaKrishnan. More over, no case has been made out that the sale price of the imported plant and machinery had been under-stated.''

(i) The Supreme Court in the decision dated 17.5.2007 in the case of Commissioner of Customs (Port) vs. Toyota Kriloskar Motor P. Ltd. Dealt with the issue relating to royalty and know-how fees paid to the supplier of capital goods and Scope of Rule 9 (1) (C) of CVR, 1988 and held as under:

''29. thereof, low laid down in Essar Gujarat Limited (supra) and J.K. Corporation Limited (supra) are absolutely clear and explicit. Apart from the fact that Essar Gujarat Limited (supra) was determined on the peculiar facts obtaining therein and furthermore having regards to the fact that the entire plant on ''as is where is'' basis was transferred subject to transfer of patent as also services and technical Know-how increase in the capacity service charges were not to be taken into consideration for determining the transactional value.

30. The observation made by this Court Essar Gujarat Limited 9supra) in Paragraph 18 must be understood in the factual matrix involved therein. The ratio of a decision, as is well-Known, must be culled out from the facts involved in a given case. A decision, as is well-Known, is an authority for what it decided and not what can logically be deduced there from. Even in Essar Gujarat Limited 9Ssupra0, a clear distinction has been made between the charges required to be made for pre-importation and post-importation. All charges levied before the capital goods were imported were held to be considered for the purpose of computation of transaction value and not the post-importation one. The said decision, therefore, in our opinion, is not an authority for the proposition that Irrespective of nature of the contract, license fee and charges paid for technical Know-how, although the same would have nothing to do with the charges at the same pre-importation stage, would have to be taken into consideration towards computation of transaction value in terms of Rule 9(1) (C) of the Rules.

31. The transactional value must be relatable to import of goods which a fortiori would mean that the amounts must be payable as a condition of import. A distinction, therefore, clearly exist between an amount payable as a condition of import and an amount payable in respect of the matters governing the manufacturing activities, which may not have anything to do with the import of the capital goods.

32. Article 4 provided for additional assistance in respect of the matters specifially laid down therein. Technical assistance fees have a direct nexus with the post-import activities and not with importation of goods.''

(J) The Tribunal's decision dated 26.10.2007 in the case of Birla Precucchini Ltd. Considered the addition of value towards technical know-how in terms of rule 9 (1) (b) (iv) and Rule 9 (1) (e) held as under:

''5. The adjudicating authority has relied upon clause 2.2 (i) of the argument to hold that the supplier had undertaken detailed engineering and design of equipment supplied and thus the costs and consideration payable to the supplier under the agreement is relatable to the capital goods imported by the appellant from the related supplier. The Commissioner (Appeals) however, held that plant and machinery, spares etc. could be sold to the appellant only after accepting the purchase of technical Know-how without which the factory of the appellant could neither be erected nor functional qualitatively. Therefore, the technical Know-how in relation to the imported goods and is also pre-condition for the sale of the impugned capital goods. However, going by all the above clauses, we are of the view that the technical Know-How agreement entered into with the over-seas supplier was for supply of technical Know-how for the manufacture of precision castings of the appellants in India and no relation with the capital goods being imported. Clause 2.1.1 of the Technical Collaboration Agreement Provides that the foreign supplier will provide to the appellants the lay out of the plant & machinery and equipment for the foundry and specification and design on the basis of which plant & machinery and equipment etc. will be installed. In other words the design to be supplied by KINGLOR are for the installation of the Plant & machinery and equipment in the factory of the appellants in Aurangabad, and this clause cannot be interpreted to mean that the design for the imported capital goods will be provided by the foreign supplier. Further, the although technical Know-how is necessary for the setting up of the factory in India, technical Know how fee cannot be added to the assessable value of imported capital goods under the provisions of Rule 9(I) (b) (iv) of the customs Valuation Rules as the Know-how is not in relation to production of the imported capital goods, in the light of Apex Court decision in the case of Commissioner of Customs (Port), Kolkata V. J.K. Corporation Ltd.- 2007 (2008) E.L.T 485 (S.C0 as well as the decision of the Tribunal in Jay Ushin Ltd, V. CC (Import), Chennai – 2005 (181) E.L.T 120 (Tri – Del.), Following the Larger Bench decision in S.D Technical Service V. Commissioner – 2003 (155) E.L.T 274 (Tri – LB.) and Commissioner of Customs (Port), Chennai V. Toyata Kriloskar Motor P. Ltd. – 2007 (213) E.L.T 4 (S.C) in which the earlier Apex Court decision in Collector V. Esssar Gujarat Ltd. – 1996 (88) E.L.T 609 (S.C) relied upon by the Commissioner (Appeals) in the present impugned order has been distinguished.''

6. The contention of the appellants that provisions of Rule 9(1) (e) for inclusion of all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller are not attracted, is also required to the accepted for the reasons that it is clear from clause 4.2.1 of the technical collaboration agreement that are foreign supplier would arrange to supply plant & machinery and equipment only if the appellants required, which would mean that the appellants were free to procure capital goods required for setting up of its plant in India from any other supplier either in India or abroad. The contention of the Id. SDR that payments of fee was a condition of sale of the

imported capital goods for the reason that the foreign supplier ensured that the precession casting is to be produced in India would be of internationally acceptable quality and the appellants therefore, could not have purchased the capital goods from any other supplier cannot be accepted in the light of clause 4.2.1 of the agreement. The decision of the Tribunal in Otto India Pvt Ltd. V. CC, Kolkata – 2002 (149) E.L.T 477 (Tri – Kolkata), upheld by the Apex Court in 2003 (158) E.L.T. A331 (S.C), (Citied by id. SDR) wherein it was held that the equipment was imported from the foreign collaborator to obtain performance guarantee in absence of which the importer would not get the contract from their buyers or the importer (cited by the id. SDR) is distinguishable on facts as Otto India Pvt. Ltd. Was obliged to purchase plant & machinery and equipment from their German Collaborator while in the present case, the appellants could purchase either from KINGLOR or from any other either Indian or foreigner.''

(K) The Tribunal in decision dated 23.1.2008 in the case of Commissioner of Customs, Mumbai Vs. Jaypee Beal Cement considered the issue as to whether lumpsum paymet as consideration for consultancy and engineering service in the areas of plant design, production and manufacture techniques attracted Rule 9 (1) (b) (iv) of CVR and held that the same service did not relates to manufacture of imported equipment and rejected the Revenue's appeal for including the said value in the imported gods with the following findings:

''10. the reliance placed by the SDR in the case of Andhra petro Chemicals Ltd, - 1997 (91) E.L.T 349 (Tri.) is incorrect as factually in the present case, the case is consultancy service rendered by HMC, who are a consultant and it is not on the basis of the services rendered by this company that the imported equipment are specially manufactured on the basis of their consultancy and that the technical specification, drawing and design are provided by the foreign supplier directly to the importer and there is no third party in this case. They neither designed the imported equipment nor supplied the engineering drawing for the manufactured of the imported equipments. The Indian company, Holtec were also not equipment designers. Such equipment designs were entirely left to the machinery suppliers and the technical Know-how and engineering services as referred to in the agreement of HMC and JBC are not related to the equipment designs but are for the purpose of preparation of tender document and for recommendation for selecting the equipments. The consultancy for JBC was rendered jointly and in close collaboration between HMC and Holtec with Holtec to perform the lead role and ensure that a complete integrated technical consultancy is provided to JBC. As per the ''Scope of services'', Holtec were to approve drawings submitted by the suppliers both Indian and foreign but excluding drawings pertainaing to equipment designs supplied by the suppliers. Thus HMC did not contribute in any manner towards design of the imported machinery from the suppliers. Hence the Ratio of the case law is clearly distinguishable both on facts as well as on law.''

[Emphasis supplied]

(I) Hon'ble Supreme Court in their decision dated 21.02.2008 in the case of Commissioner of Customs Vs. Ferodo India Pvt. Ltd. Dealt with the issue of invocation of Rule 9 (1) (C) and Rule 9 (1) (e) and held as under:

(II) ''6. At the outset, it may be started that, this is not the case of rejection of transaction value, though it is held to be a related party transaction. In this matter we are concerned with adjustment/addition to the price of the imported goods under Rule 9(1) (C) or in the alternative under Rule 9(1) (e).

Role of Interpretative Notes to CVR, 1988

13. At the outset. It may be stated that rule 9(1) (c) has to be read with the Interpretative Notes and when so read it authorises the customs to add the royalties/license fees to the assessable value only in certain conditions, namely, when the royalties/license fees are relate to imported goods; that, when the buyer is required to pay to the seller, directly or indirectly, as the condition of the sale of the goods being valued, such royalties and license fees are not included in the transaction value.

14. One more significance of the Interpretative Notes is that it has placed the burden on the importer/buyer to prove the correctness of the price of the imported goods in terms of the means prescribed in Rule 4(3) (a) and Rule 4(3) (b). In other words, the CVR mandates the hierarchy of valuation methods to be applied in the event of the transfer price being rejected.

Analysis of Rule 9(1) (C)

15. Rule 9(1) (C) extends the quantum of levy under Rule. Rule 9(4) mandated that there can be addition to the transaction value except as provided in Rule 9(1) and (2). Hence, addition for cost can only be made in situations corning under Rule 9(1) and (2). Rule 9(1) and (2) is based on the Principle of attribution. Under Customs law. Valuation is done on pricing whereas in the case of transfer pricing under Income-tax Act, 1961, valuation is profit based. The principle of the attribution of certain costs of certain costs (including royalty and license fee Payment) to the price id the imported goods is provided for in Rule 9 Under situation mentioned in Rule 9(1) and (2. in transfer pricing, the arm's length proce is inferred from various methods to avoid profit shift from one jurisdiction to another and it is here that principle of allocation of profits comes n (i.e in the case of transfer pricing)

16. Under rule 9(1)(c), the cost of technical know-how and payment of royalty is includible in the price of the imported goods if the said payment constitutes a condition pre-requisite for the supply of the imported goods by the foreign supplier. If such a condition exists then the payment made towards technical know-how and royalties has to be included in the price of the imported goods. On the hand, if such payment has no

nexus with the wording of the imported goods then such payment was not includible in the price of the imported goods."

11. A close analysis of the legal provisions extracted in Para 9.1 above and the decision relied upon by both sides, the following important guidelines/principle emerge:

(a) As already noted, the transaction value to be determined under Rule 4 of the Customs Valuation Rules envisages adjustment to be made in accordance with the provision of Rule 9 of the said rules. This is evident from the observation contained in the decision dated 21.2.2008 of the Hon'ble Supreme Court in the case of Commissioner of Custom vs. Ferodo India Pvt. Ltd.

(b) The value of certain goods and Services meant "for use in connection with the production and sale for export of imported goods" requires to be added to arrive at the transaction value as per Rule 9(1) (b). in particular, the value of "engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods" requires to be added.

(C) The Rule permits inclusion of only engineering drawing design etc. "necessary for the production of the imported goods". Rule does not envisage remote connection between "engineering drawling, design etc" and the " the imported goods". The gap between Basic Engineering Drawings and detailed drawing is vast. The one provides all the detailed inputs for undertaking manufacture. The other merely indicates the lay out, relative size etc. from the size specification alone construction of engineering equipment is not feasible. "Telling the manufactures, the specification of what is being ordered' is only in the nature of buyers' assist. Cost incurred towards buyers' cannot be included in the value of imported goods.

(d) When the technical know-how and engineering services are not related to the equipment designs but are for the purpose of preparation of tender document and for recommending for selection of the equipment the cost of the same cannot be included in the value of imported goods.

(e) When a plant imported required a licence without which the plant would be of no use to the importer, payment towards the said licence was clearly held to be a condition of sale and included in the assessable vale of imported goods.

Although technical know – how may be necessary for the setting up of a factory in India, the fees paid for such technical know – how cannot be added to the assessable value of the imported capital goods.

(f) The know-how for manufacturing a machine is different from the know-how to manufacture the final products using the machine. The Fees paid for such technical know-how for manufacturing the final product in India cannot be added to the assessable value of the imported capital goods.

(g) The post-importation service charges such as fees for technical assistance having direct nexus with the post importation activities are not to be taken into consideration for determining the transaction value.

(h) Only when the engineering designs are undertaken elsewhere than in India and when the said engineering designs are necessary and used for the production of the imported goods payment towards the said activities is includable in the assessable vale of imported goods.

12.1 Having analyzed the legal provision and the case law, for applying the same, it would be appropriate to recapitulate the relevant facts of the present case, which are as follows:

(a) The refinery of 3 MMPTA capacity commenced production in March 1996 using the process patent of UOP-IA in terms of two Agreements with them, one referred to as “License Agreement” and the other referred to as “Engineering Agreement”. The License Agreement could not have been given effect to without the engineering Agreement between UOP-IA and MRPL.

(b) They undertook expansion of the refining capacity from 3 MMTPA to 9 MMTPA per annum. In this connection, the License Agreement entered into in 1993 for initial setting up of the refinery was modified permitting continued use of technology relating to the process for the CCR-2 and a new Engineering Agreement with the said UOP-IA was entered into on 25th September 1997.

(c) In connection with setting up of CCR-2 plant, the appellants earlier issued “Notice Inviting Tender dated 25-6-97”.

(d) Thereafter, the appellant have entered into 3 contracts/agreement. The first contract was with UOP-IA, for licence to use the process, engineering and design. The second agreement – No. 9802.01 was with a consortium of industries (TOYO, MITSUI and MITSHUBHI) REFERRED TO AS "Supplier" for supply of equipment and machinery. The third agreement- No 9802.02 was with the same consortium but called FEC, for offshore design and engineering.

(e) The overall value of the contract for supply of equipment and machinery remained fixed but the value of individual equipment / machinery was flexible.

(f) The appellant-assessee imported the goods meant for CCR-2 Though different ports under project import duty benefit scheme which was registered with the Mangalore Customs. The imports took place during the period September 98 to September 1999. Out of the total 66 bills of entry, only 3 bills of entry filed at Custom House, Mangalore were assessed finally and the remaining were all provisionally assessed.

12.2. The relevant facts, which emerge from a careful reading of the agreement, are as follows:

(a) As per the Agreement UOP-IA provided the basic engineering, design and drawling and also the flow diagrams.

(B) The consortium of companies namely, "TOYO", "MITSUI" an "MITSUBISHI", have undertaken multiple roles such as off-shore, designer, supplier of offshore equipment and coordinator as the entire relating to setting up of the CCR-2 unit.

(C) The role of FEC as designer did not relate only to equipment / material procured from offshore but also in respect of material procured within India and in preparing detailed design for the CCR-2 plant site.

(d) The design necessary for the manufacture of the equipment were done in three stages which are as follows:

(i) Basic Design Package by UOP;
(ii) Extended Basic Design Package by the consortium of three companies; and
(iii) Detailed design by the supplier like Kobelco.

(e) The Basic Design package prepared by the licecsor did not cover all areas /all equipment but only the following major areas/ major equipment.

(1) “Process Flow Diagrams showing schematic flow and control for the Continuous Catalyst Regeneration Section,,,,, and showing composition and quantity of process streams at battery limits for the rest of the Plat forming Process unit.
(2) Piping and Instrument Diagrams
(3) Generic Plot Plan and guidelines for layout
(4) Project Specifications; (a) to (j) …….
(5) Reactor-Heater Section Piping layout Sketch.
(6) Advance Process Control (APC) Functional Design Phase Document:
    (a) to (d) ……..

(f) FEC was required to “perform extended basic engineering services outside India by developing the basic design packaging”. This was not an independent design work. In other words, the designing services rendered by FEC was “based on and relying upon” BDP. This development was done in close co-ordination with the licensor with the licensor. The Extended basic design related not only to major equipment but all equipment including locally manufactured/procured equipment meant for CCR-2 Unit.

(g) At the third stage, detailed design has to be undertaken by the actual manufacture of equipment. In respect of locally manufactured /procured units, the detailed design and engineering is required to be undertaken be local engineering contractor (lLEC) who is required to be selected with the approval of FEC.

(h) Besides all the design/drawling/specifications carried out be the Supplier as well as the vendors of the Supplier were subject to review and approval of UOP-IA, who is the licensor.

(i) Three different stages involved in preparing the design for the manufacture of the equipment are closely integrated and are necessary for the manufacture of the equipment.

(j) The three fabrication work of off-shore equipment could not have been taken up and completed without relying on the first two stages of design work.

13.1. According to the Department,

(a) The rationale for inclusion of 'cost of goods and services' under Rule 9 is to place the 'vertically integrated operation on par with 'split operations'. Parity is ensured so that the transaction value does not get skewed on account of different practices/arrangement.

(b) The expression 'in connection with is of wide import and there is no need for immediate nexus to vendors' costs and prices.

(c) The expression 'Engineering' appearing in Rule 9 (I) (b) (iv) is also of wide import.

(d) The expression 'necessary' would mean what is indispensable, needful or essential.

13.2 According to the assessee, the Basic Design Package (BDP) and the Extended Basic Design Package (EBDP) contain only the basic specification of the nature of the equipment to be supplied. They are only in the nature of buyers' assist and relating to the CCR-2 as a whole as opposed to imported equipment above.

14.1 The claim that the BED and EBD only relate to buyers assist and are not directly linked to manufacture of the equipment imported cannot be accepted. The agreement for supply of design and supply of equipments have been entered into on 16.21998. These agreement referred to 'Notice Inviting Tender" dated 25.6.1997. Obviously, the appellant should have finalized the specifications before inviting the said tender. Agreement 9802.01 specifically states that the supply of equipment –

"Shall conform to the applicable standards and regulation as mentioned I Exhibit 3.2 of Notice Inviting Tender dated 25.6.97 including ASTM,

ASME and India Boiler Act Regulation. Rotating Equipment shall conform to the requirement of the Basic Design Package and applicable international standards, namely APVANSI."

14.2 The supply agreement assigns responsibility to the suppliers for conducting tests and inspection at the premises of vendors during fabrication in the following terms:

"Off –shore Equipment and Material shall be tested and inspected be

SUPPLIER at SUPPLIER'S cost, at the vendor's works during fabrication and before the shipment thereof, in accordance with normal customary practices and the procedures of inspection and test manually agreed in that behalf. In this connection, OWNER may at its cost attend such inspection and test pursuant to Paragraph e.2 below"

14.3 BDP given by the Licensor is owned by MRPL. However, the supplier is entitled to use the same for the purpose of meeting the obligation of the supplier in respect of supply of the equipments.

14.4. As per Agreements, the contractor (engaged by MRPL for the purpose of developing EDP and supply of equipment) are required to execute agreement with the Licensor to maintain secrecy/confidentiality of know-how. Such an Agreement may not be necessary if BDP merely contained specifications to enable procurement of the required equipments. Obviously, the BDP cannot be considered merely as specification of the equipment and buyers' assist as claimed on behalf of the appellant.

14.5 The value of supply of equipments is 33.7 million US $. The amount of 6.64 million US $ is abnormally high (being about 19.7% of the value of supply of equipment) to be considered as buyers' assist as claimed by the appellant.

14.6 It is also pertinent to note that the whole transaction was a package, a deal, a unfied and integrated agreement for sophisticated and highly developed technology.

UOP – IA's patented process involved confidential technical information, and without supply of the design and engineering of the equipment for such a patented process by UOP – IA, no unconnected manufacture having no access to such confidential design and engineering of the equipment, could produce them.

The various vendors manufactured the equipments as per the design engineering developed by FEC, and they sent the finished products to FEC, who is turn invoiced them to MRPL.

Whether fine can be imposed under Section 125 when the goods were held not available for confiscation?

15.1 When the offending goods can be confiscated and when fine can be imposed have been considered by this Bench in detail in the case of Bharti Airtel Ltd. & Others and it has been held as under:

> "19.4 Section 110 of the Customs Act deals with seizure of offending goods both on the import and export side; Section 111 of the Customs Act deals with confiscation of the offending goods on the import side after issue of show cause notice under Section 124 of the Customs Act, Section 125 of the Customs Act provides for grant of option of redemption of the confiscated goods. At this juncture, it would be appropriate to

reproduce the relevant portions of Sections 110,111,124 and 125 of the Customs Act:

……. …….. ……..

19.5 A close reading of the above provisions of law indicates that seizure in effect is taking possession of the goods pending confiscation and the confiscation involves taing over the ownership of the goods. It is not necessary that every case of takeover of the ownership should be preceded by takeover of possession as taking possession is by way of precaution to avoid disposal of the goods.

19.6 There could be different situations as follows:

(a) The whereabouts of the goods imported is not known having changed more than one hand and, therefore, investigators have not found and seized the offending goods. In such a situation, the question of confiscating the said goods does not arise as the provision for grant of option of redemption under Section 125 will be rendered meaningless.

(b) The offending goods are in the safe custody of agencies like Port Trust, Airport Authority of India or like custodians and such goods shall not be allowed clearance even in the normal course without grant of "out of charge" by the customs authorities. In such a situation, the offending goods can be confiscated without effecting seizure but after issuing show – cause notice under Section 124.

(c) The offending goods are seized and provisionally released on execution of bond with security like bank guarantee, etc. In respect of goods which were seized and provisionally released in the said manner to the owner before adjudication, the owner of the goods liable to return the goods at the time of adjudication in terms of the undertaking and, in the event of failure to produce the same, fine in lieu of confiscation can be imposed as settled by the Hon'ble Supreme Court in the case Weston Components Ltd. Vs. Commissioner of Customs, New Delhi [2000 (115) E L T 278 (S C)].

(d) The offending goods may be outside the jurisdiction of Indian Customs authorities as in the case of goods which have been illegally exported. Insuch a situation, the authorities may not be able to pass an order of confiscation as the same is not practicable and further the decision may not be legally enforceable. This is in line with the decision of the Tribunal in the case of Chinku Exports vs. Commissioner [1999 (112) ELT 400] which was upheld by the Hon'ble Supreme Court's decision reported as Commissioner vs. Chinku Exports [2005 (184) E L T A 36 (S C)].

19.7 In the present case, the goods are offending in nature and they are liable to confiscation. The whereabouts of the goods are clearly known and they are within the jurisdication of the adjudicating authority.

Therefore, the order of confiscation of the entire goods including goods not seized is valid.

19.8 It is not out of place to note that Section 110 of the Customs Act envisages that, when the proper officer has reason to believe that any goods are liable to confiscation, "he may seize such goods". On the other hand, the provisions related to confiscation of illegally imported goods (Section 111) are to the effect that the offending goods brought from a place out of India "shall be liable to confiscation". In other words, the seizure is discretionary and in some cases it may not be necessary as mentioned earlier.

19.9 The decision of the Hon'ble Supreme Court in the case of Harbans Lal vs. Collector of Central Excise as reported in [AIR 1993 SC 2487], the decision of the Hon'ble High Court of Gujarat in the case of J.K. Bardolia Mills vs. M.L. Khunger, Dy. Collector of Customs as reoirted ub [(1975) 16 GLR 119]; and the decision of the Hon'ble High Court of Bombay in the case of Mohanlal Devdanbhai Choksey and Others vs. M. P. Mondkar and Others reported in [1988 (37) ELT 528 (Bom.)] relied upon by the department make it clear (a) that confiscation under Section 111 applies to any goods in respect of which offences have been established and not necessarily to all goods which have been seized; (b) that there is no restriction under Section 124 to issue show – cause notice proposing confiscation of only the seized goods; and (c) that the provisions of Sections 110 and 124 are independent, distinct and exclusive of each other."

15.2 Coming to the facts of the present case, the Commissioner has given clear finding that the imported goods, though are liable to confiscation and said goods are not available for confiscation. In such a situation, the question of confiscating the said goods does not arise as the provision for grant of option of redemption under Section 125 will be rendered meaningless.

On Limitation & Penalties

16. The appellants had entered into 3 contracts which all had bearing on the value of the goods imported by them. At the time of filing declaration for the purpose of claming the benefit of project import regulation scheme, they had mentioned only about the supply Agreement and not about the other Agreements relating to Basic Enginerring Design undertaken by the licensor and Extended Basic Enginerring Design undertaken by FEC who were also the suppliers. It is not the case of the appellant – assessee that the department knew the fact of the appellant having made payments under the other two Agreements. There was not justification for the appellant to entertain a belief that the payments under the two Agreements with the Licensor and FEC were towards buyers'assist. As already noted, the notice inviting tender was dated 25.6.97 and the spedification for procuring equipments must have been known before inviting tender. Even otherwise we have held that the amounts paid under these two agreements are two high to be considered as towards buyers' assist. The fact that no such issue was raised in respect of CCR – 1 is of no consequence in the context of

determining the obligation of the assessee to disclose the contracts involving payments which were integrally connected to the procurement of off-shore equipments. Further, we note that all the Bills of Entry except three were provisionally assessed as required under Project Import Regulations and the same were finalized / directed to be finalized by the impugned order. In view of the above, we hold that the invocation of extended period of limitation and imposition of penalties of the appellant – assessee are justified.

Whether penalty under Section 114 A should be imposed equivalent to the "duty demanded plus the corresponding interest accrued under Section 28 AB of the said Act" instead of penalties equivalent to the "duty demanded"?

17. The above issue as to whether penalty under Section 114 A should be imposed equivalent to the "duty demanded plus the corresponding interest accrued under Section 28 AB of the said Act" instead of penaltyequivalent to the "duty demanded" stand decided by this Bench in the case of Bharti Airtel & Others. The relevant findings are reproduced below :

> "21.2. At this stage, the appeals by the department on the quantum of penalties imposed on the appellant – assessees can be considered. In the said appeals, the prayer is for imposition of penalties equivalent to the "duty demanded plus the corresponding interest accrued under Section 28 AB of the said Act" instead of restricting the penalties equivalent to the "duty demanded". Section 114 A reads as under:
>
> > "SECTION 114A. Penalty for short – levy or non – levy of duty in certain cases. – Where the duty has not been levied or has been short – levied or the interest has not been charged or paid or has [xxx] been part paid or the duty or interest has been erroneously refunded by reason of cloousion or any willful mis – statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under [sub – section (8) of section 28] shall aso be liable to pay a penalty equal to the duty or interest so determined:
> >
> > ……
>
> Section 114 A of the Customs Act envisages that the penalty thereunder should be "equal to the duty or interest so determined". Section 28 requires the proper officer **to "determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice".** It is it be noticed that the demand of duty to be confirmed has to be either below or equal to the duty demanded in the show – cause notices. Section 114 A refers to cases where " the person who is liable to pay the duty or interest, as the case may be, as determined ……" It appears that Section 114 A deals with penalty on the person who is liable to pay duty or the person who is liable to pay interest.
>
> 21.3 We find that the show – cause notices specifically indicated only amounts of duty proposed ot be demanded but did not (and could not)

indicate the quantum of interest proposed to be demanded. Apparently, the duty demand itself was to be determined subject to the outer limit of amounts mentioned in the show – cause notices. The interest payable depends not only on the duty so determined but also the actual date of payment of the duty so determined. Only then, the actual interest payable will be ascertainable. Obviously, in the present cases, the Commissioner at the time of adjudication of the case could not have determined the actual amounts of interest to be included in penalties under Section 114 A. Further Section 114 A envisages penalty "on the person who is liable to pay the duty or interest, as the case may be, as determined under sub – section 8 of Section 28". The Commissioner was not in a position to determine the interest amount at the time of passing the impugned order. Therefore, his imposing penalties equal to the duty determined is in order."

18. In view of the above, the issues framed in paragraph 7 are answered as follows:

(a). ADG DRI had jurisdiction to issue the show - cause notices and the same have been validly issued.

(b) The Agreements between MRPL and UOP – IA and the Agreements between MRPL and consortium of three companies are closely interlinked. The whole transactions covered by the Agreements are in the nature of a package, a deal for supply of sophisticated technology along with the equipments required for adopting the said technology. In the context of manufacture of the equipments, certain confidential information and data are required to be furnished by the Licensor to the actual manufacturer of equipments through the consortium of companies. In view of the above, the consortium of companies is required to ensure secrecy of the information/data received by them. Since the tender inviting documents is dated 25.6.97, whatever engineering services, designs are required for ordering the equipments have to precede the said date. Therefore, the engineering services and design envisaged in the agreements with UOP-IA and FEC cannot be treated as providing mere specifications for the purpose of ordering the equipments. Further, the detailed design which is undertaken by the vendors (who may be any of the three FEC Companies or third parties) also requires review and approval by the Licensor, showing the integrated nature of the design carried out in three stages. The LEC contractors who supply indigeneous equipments are also required to undertake design compatible with designs of equipments supplied by FEC. In view of the above, the basic design package and the extended basic design and engineering are not in the nature of buyers' assists but are essential for the manufacture of equipments whether manufactured by FEC or procured from other vendors by FEC and supplied to MRPL.

(c) Therefore, the costs towards Basic Engineering Design and Extended Basic Engineering Design require to be added to the value of equipments supplied by FEC in terms of Rule 9 (1) (b) (iv).

(d) The Basic Engineering Design and Extended Basic Engineering Design undertaken by the Licensor and FEC are includible to arrive at transaction value 4 by the adjustments as provided under Rule 9 of CVR 1988. Such an adjustment made in terms

of Rule 9 does not invoices rejection of transaction value declared by the assessee warranting invocation of procure prescribed under Rule 10A of CVR 1988.

(e) There is deliberate suppression of the fact payments made in connection with the procurement of the goods justifying invocation of the extended time limit for demand of duty and imposition of penalties

(f) Since misdeclaration of the value imported goods has been upheld, the goods are held liable for confiscation. However, in view of the clear finding of the Commissioner that the said goods are not available for confiscation, imposition of fine under Section 125 is not justified.

(g) There is no justification for enhancement of penalty imposed under Section114A as sought for by the department.

19. In view of the above, the appeal by MRPL is disposed of as follows:

(a) We uphold the enhancement of assessable value.

(b) We uphold the confirmation of the demand of differential duty in respect of import made through Mangalore Customs along with interest, as ordered by the Commissioner.

(c) We uphold the direction for finalization of assessments by enhancing the assessable value, as ordered by the Commissioner in respect of imports made through the ports of Mumbai (Seaport), air Cargo Complex, Mumbai and Nava Sheva.

(d) We set aside the redemption fines imposed under Section 125 of the Customs Act.

(e) We uphold the penalties imposed under Section 114A and Section 112 (a)

20. The appeal by the department seeking enhancement of penalty under Section 114A is rejected.

(Pronounced in the court on 08/08/2012)