REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3042 OF 2004

COMMISSIONER OF CUSTOMS,
AHMEDABAD …APPELLANT

VERSUS

M/S. ESSAR STEEL LTD. ...RESPONDENT

J U D G M E N T

R.F. Nariman, J.

1. In this appeal we are concerned with the addition in the value for assessment to customs duty of charges paid by the respondent to Met Chem Canada Inc. for supply of technical services required for setting up and commissioning a plant for the manufacture of Hot Rolled Steel Coils in India. An agreement dated 13.4.1991 was entered into between the respondent and Met Chem Canada Inc. to associate Met Chem Canada Inc. as a technical consultant to render technical

services in relation to implementation of a project to set up a plant in India for production of Hot Rolled Steel Coils and Strips. Under clause 1.1.6 `plant' is defined as:

> "1.1.6. "Plant" shall mean the integrated steel plant having an estimated annual capacity of Eight Hundred Thousand Tonnes (800,000 M.T.) of hot rolled steel coils and strips or such other enhanced capacity as may be agreed between the parties, to be located at Hazira, Gujarat, India and as described in Annexure 1 "PLANT UNITS' attached hereto and made thereof;"

Project is defined as:

> "1.1.8. "Project" shall mean the design, procurement, construction, erection and start-up of the plant."

The most material clause of the agreement relates to the scope of supply which is contained in clause 2, which reads as under:-

> "2.0. <u>SCOPE OF SUPPLY</u>:
>
> 2.1. Technical consultant shall render following engineering and other technical Services from outside India;
>
> 2.1.1. Project Engineering Services:

Technical Consultant shall act as technical coordinator for the successful setting up, commissioning of all the facilities and achieving established operations of the Plant. Technical Consultant shall coordinate all technical matters such as, but not limited to studying various alternative specifications and processes for the Plant and for manufacturing of Products; making recommendation for the most suitable and economic process, final detailed specifications and processes for the selected route, advising as required regarding technical proposals from various suppliers, and Contractors for the supply of the Plant and equipment, and the erection thereof at the Site, including civil engineering, designs, construction and installation of project utilities necessary for the successful setting up of the plant; carrying out the detailed project engineering including giving approvals for the various construction and Project implementation activities, engineering drawings, methods of construction, etc.

2.1.2. Supervision and Monitoring of the Project:

Technical Consultant shall provide advice regarding the activities in connection with the setting up of the plant from the technology, costs and time schedule angle.

2.1.3. Arrangement for Training of ESSAR's Employees-outside India. Technical Consultant shall be responsible for arranging for up to two hundred (200) man months of training of (operating, maintenance and management) ESSAR employees at Steel Plant with proven technical capabilities in appropriate fields, outside India. Specific subjects, duration of training for each subject and numbers of trainees in each group shall be mutually agreed upon in writing. All travelling, living and miscellaneous expenses of ESSAR employees in relation thereto shall be for ESSAR's account.

2.1.4. Assistance in transfer of technology: Technical consultant shall select appropriate subcontractor/contractors depending on the source of technologies and organize transfer to ESSAR of technology necessary for successful operation and maintenance of the Plant.

2.1.5. Procurement support services:

Technical Consultant shall provide procurement support Services for procurement of Equipment in India such as assistance in finalization of lists, specifications and sizes and configuration of equipment to be purchased, listing of suitable vendors, floating of inquiries, scrutiny of quotation received, assistance in negotiations with the Suppliers and in finalisation of order, pre-dispatch inspection and witnessing of tests, etc."

As a consideration for the above scope of supply to be provided, the technical consultant was to be paid a fee of DM 78,950,000 (Seventy Eight Million Nine Hundred Fifty Thousand Deutsche Marks). Since a large part of the arguments turned on clause 9, it is set out in full hereinbelow:

"9.0. PATENTS.

9.1. The Technical Consultant make no representation or warranty that any process, equipment or facilities which may be recommended by the Technical Consultant in respect to the Project can be employed, operated in India or otherwise used without infringing any patent, trademark, or other industrial property right of any third party in respect of the same. ESSAR acknowledges that

the Technical Consultant shall not be liable in the event of claims against ESSAR by any other party for such infringement and shall indemnify the Technical Consultant against such liability. The Technical Consultant shall intimate, if however, it knows or becomes aware that any process, equipment or facilities recommended by the Technical Consultant is/are the subject of patents, trademarks, or other industrial property right of any other company, individual or association.

9.2. The Copy right in all documents (including, but not limited to computer data, specifications, drawing and plan supplied by ESSAR, shall remain with ESSAR if originally owned by ESSAR.

9.3. The Technical Consultant may own and possess patents, know-how, copyrights, and other intellectual property rights with respect to the Plant and its operation and maintenance and/or the Products, which will be disclosed by the Technical Consultant to ESSAR, to the extent required as per the Scope of Services for the purpose of this Project, while rendering Services to ESSAR under this Agreement. ESSAR may disclose such information to other parties concerned for the Project only to the minimum extent necessary for implementation secrecy acceptable to all parties concerned prior to disclosure of information. Ownership of any and all the patents, know-how, copyrights and other intellectual property rights shall remain vested in the Technical Consultant or its subcontractors, as applicable, and ESSAR shall secure and otherwise protect such patents, know-how, copyrights and other intellectual properties and keep them secret and confidential.

9.4. Nothing contained in the Agreement shall be construed to mean that such patents, know-how, copyrights and other intellectual properties (referred to as the “Technical Information” in the Agreement)

will be granted or transferred to ESSAR, unless otherwise specified in the Agreements.

9.5. ESSAR shall take all reasonable measure to avoid disclosures of the Technical Information to any third party and shall disclose the said Technical Information to third parties only to the extent mentioned in Clause 9.3 above. ESSAR shall use the Technical information only for the purpose of the execution of the Project and similar projects owned by ESSAR and its associate companies in India. For the purpose of this clause, an associate company will mean a company which holds more than 30% of the equity capital of ESSAR or a company in which ESSAR holds more than 30% of the equity capital.

9.6. ESSAR shall be the owner of that portion of all documents, drawings, plans, and specifications originally created by the Technical consultant specifically pursuant to this Agreement. The Technical Consultant may keep copies of all documents, drawings, plans and specifications and use them."

By a supplementary agreement, the main agreement of 13.4.1991 was added to, the main difference being that the plant would now be having an estimated capacity of 16,00,000 tonnes instead of 8,00,000 tonnes. Further, the lump sum fee payable was increased by DM 15,0050 Million making the total lump sum fee an amount of DM 94 Million.

2. The services agreement is separate from the main agreement for setting up the said plant in India. The main agreement is contained in a purchase order dated 21.6.1991. The material clauses of the said purchase order are that for a plant of a capacity of 8,00,000 tonnes capacity per year, the total CIF price payable would be US$ 163,000,000. A liquidated damages clause contained in clause 13 of the purchase order provides liquidated damages for delay and/or failure to achieve performance. This purchase order was amended by a purchase order dated 28.7.1992 by which the CIF price of the said steel plant was revised to US$ 169,700,000. This was in view of the fact that the plant capacity as stated earlier had been doubled, and a sponge iron manufacturing plant of a capacity of one million tonnes which was originally to be sold was now deleted.

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3. *Vide* a show cause notice dated 20.7.1993, Revenue demanded the sum of DM 78.95 Million being technical know-how charges which ought to be added to the sum of US$169,700,000. In their reply to the show cause notice, the

respondent stated that none of the provisions of Rule 9 of the Customs Valuation (Determination of Price of Imported Goods) Rules of 1988 would apply as no payment is made for technical services as a condition of sale of imported goods. In any event, the agreement for technical services is to be performed in India post-importation and, therefore, would have to be excluded from the value to be taken into account at the time of import.

4. The Commissioner of Customs by an order dated 31.1.2002 added a sum of DM 78 Million on the following basis:

> "31. Since, the contract for technical consultancy was signed before the purchase order placed, it is evident that the payment made on account of the technical consultancy agreement is a condition of sale of imported goods. Even though, this aspect has not been covered in the agreement for technical consultancy as at the time of signing this agreement the purchase order was not placed to M/s. Metchem Inc. Canada. However, such an high amount of DM 78 million has to be necessarily linked with the value of the purchase order which was US$ 169 million placed subsequently. At the time of signing of agreement both the parties fully understood that they will be signing another agreement on subsequent date relating to the sale of plant and machinery. Nobody is going to pay DM 78 million in vacuum if the other agreement does not materialize. Thus, I find that these two payments were not independent to each other but the buyer has no

option but to buy machinery once they have made commitment for technical services. Therefore, I have no doubt in my mind that the payment made as per the technical consultancy agreement is a condition of sale of imported goods."

5. An appeal by the respondent to CEGAT succeeded, and CEGAT by its judgment dated 24.6.2003 set aside the order of the Commissioner holding that the plant could have been set up and could run without the supply of technical knowledge. Secondly, the fact that the technical supply agreement was signed prior to the agreement for supply of machinery would not be relevant. The judgment of this Court in **Collector of Customs (Preventive) v. Essar Gujarat Ltd.,** (1997) 9 SCC 738, was distinguished on facts in reaching the aforesaid conclusion.

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6. Shri Neeraj Kaul, learned Additional Solicitor General argued before us that the case is, on facts, covered by the judgment in **Essar Gujarat's** case (supra). According to him, on a conjoint reading of the purchase order for supply of the plant and the agreement for technical services it is clear that

payments are made under the technical services agreement as a condition for the sale of the imported plant which cannot be set up without the technical services to be provided. In reply, Shri Bagaria, learned senior advocate appearing on behalf of the respondent, took us through the said agreements and contended that it was clear that payments made under the technical services agreement were not as a condition of sale of the plant. Further, the Essar Gujarat judgment turned on its own facts which are distinguishable, and several other judgments of this Court in fact conclude the matter in his favour.

7. We have heard learned counsel for the parties. Section 14 of the Customs Act, 1962 as it stood at the relevant time is as follows:

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

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

(*b*) one of them has no interest in the business of the other,

and the price is the sole consideration for the sale or offer for sale:

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under Section 50.

(1-A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

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

(3) For the purposes of this section—

(*a*) 'rate of exchange' means the rate of exchange—

(*i*) determined by the Board, or

(*ii*) ascertained in such manner as the Board may direct,

for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(*b*) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in

clause (m) and clause (*q*) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)."

A cursory reading of the Section makes it clear that customs duty is chargeable on goods by reference to their value at a price at which such goods or like goods are ordinarily sold or offered for sale at the time and place of importation in the course of international trade. This would mean that any amount that is referable to the imported goods post-importation has necessarily to be excluded. It is with this basic principle in mind that the rules made under sub-clause 1(A) have been framed and have to be interpreted.

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8. Under the Customs Valuation (Determination of Price of Imported Goods) Rules of 1988, Rule 2(f) defines "transaction value" as the value determined in accordance with Rule 4 of these Rules. Rule 4(1) in turn states that the transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance

with the provisions of Rule 9 of these Rules. Rule 9 of the Rules is set out hereinbelow:-

> "9. Cost and services. – (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -
>
> (a) The following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-
>
> (i) Commissions and brokerage, except buying commissions;
>
> (ii) The cost of containers which are treated as being one for customs purposes with the goods in question;
>
> (iii) The cost of packing whether for labour or materials;
>
> (b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid 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) (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 s 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.

9(2) xx xxx

9(3) Additions to the price actually paid or payable shall be made under this on the basis of objective and quantifiable data.

9(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."

A reading of Rule 4 and Rule 9 makes it clear that only those costs and services that are actually paid or payable for imported goods pre-import are to be added for the purpose of determining the value of the imported goods. In the present appeal, arguments have veered around the applicability of Rule

9(1)(e). In this appeal, we are concerned only with the first part of Rule 9(1)(e). The narrow question that arises before us is whether the payment made for the technical services agreement is to be added to the value of the plant that is imported inasmuch as such payment has been made as a condition of sale of the imported plant.

9. On an analysis of the technical services agreement dated 13.4.1991, it is clear that the respondent has only associated Met Chem Canada Inc. as a technical consultant. There is no transfer of know-how or patents, trademarks or copyright. What is clear is that technical services to be provided by Met Chem Canada Inc. is basically to coordinate and advise the respondent so that the respondent can successfully set up, commission and operate the plant in India. It will be noticed that coordination and advice is to take place post-importation in order that the plant be set up and commissioned in India. In fact, all the clauses of this agreement make it clear that such services are only post-importation. Clause 9 on which a large part of the agreements ranged again makes it clear that

ownership of patents, know-how, copyright and other intellectual property rights shall remain vested in the technical consultant and none of these will be transferred to the respondent. The respondent becomes owner of that portion of documents, drawings, plans and specifications originally created by the technical consultant pursuant to the agreement. This again refers only to documents, drawings etc. of setting up, commissioning and operating the plant, all of which are post-importation of the plant into India.

10. In fact, clause 13 of the purchase order dated 21.6.1991 is important in that liquidated damages are only payable for delay in commissioning the plant and for failure to achieve the stipulated performance, both of which are post-importation activities.

11. Another thing to be noticed is that a conjoint reading of the technical services agreement and the purchase order do not lead to the conclusion that the technical services agreement is in any way a pre-condition for the sale of the plant itself. On

the contrary, as has been pointed out above, the technical services agreement read as a whole is really only to successfully set up, commission and operate the plant after it has been imported into India. It is clear, therefore, that clause 9(1)(e) would not be attracted on the facts of this case and consequently the consideration for the technical services to be provided by Met Chem Canada Inc. cannot be added to the value of the equipment imported to set up the plant in India.

12. And now to the case law. **Collector of Customs (Preventive) v. Essar Gujarat Ltd.,** (1997) 9 SCC 738, was strongly relied upon by Shri Neeraj Kaul. The said judgment related to the question whether licence fees payable should be added to the invoice value of a plant that was imported into India on an as is where is basis. The agreement in that case was expressly subject to two conditions, the second of which was the obtaining of a transfer of the operation licence of the plant from M/s. Midrex of the United States. The judgment states:

> "These facts go to show that it was essential for EGL to have a licence from Midrex for working of the plant. Mr. Salve has argued that it may have

been essential for the EGL to have this licence in order to make the plant fully and effectively operational but it was not a condition of sale of the plant. It was quite an independent contract. From a plain reading of the agreement with TIL, it appears that the overriding clause may have been inserted to protect EGL but nonetheless it was a condition of sale. If this condition was not fulfilled, the sale would have fallen through. Moreover, it appears that the plant without Midrex licence would have been of no value at all. EGL had purchased the plant on "as is where is" basis. But in order to operate the plant, it was essential to have a licence from Midrex." (page 742)

A chart setting out the services to be provided outside India is supplied at page 744 of the judgment as follows:

"SERVICES TO BE PROVIDED OUTSIDE INDIA:

10.1.1	Process licence and allied technical services	DM (German Marks)
10.1.1.1	Process licence fee payable to MIDREX Corporation for the right to use the Midrex process and patents	DM 20,00,000 lump sum
10.1.1.2	Cost of technical services provided under Article 3 in connection with Midrex process	DM 1,01,00,000 lump sum
Technical Services		
10.1.2.1	Payment for engineering and consultancy fee as specified under this agreement	DM 2,31,00,000 lump sum
10.1.2.2.	Payment for theoretical and practical training outside India	DM 22,00,000 lump sum

Total	DM 3,74,00,000 lump sum

The Court held that the amount of 20 Lakh Deutsche Marks and 101 Lakh Deutsche Marks were both payable for the right to use Midrex process and patents. In short, these amounts were payable for the transfer of technology under a process licence agreement entered into with Midrex. The judgment states that without such licence the plant could not be operated at all by the importer without the technical know-how from Midrex. In any case, the plant could not be operated or be made functional. This being the case, since these amounts had to be paid before the plant could at all be set up, these amounts would be added to the value of the imported plant.

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13. However, so far as the sum of 231 Lakh Deutsche Marks is concerned, since this was payment for engineering and technical consultancy to set up and commission the plant in India, this amount would have to be excluded. This Court held that 10% of this amount only should be added to the value of

the plant as the plant had been sold abroad on an as is where is basis and needed to be dismantled abroad before it was ready for delivery in India. Obviously, therefore this 10% is attributable to a pre-import stage. Further, the amount of 22 Lakh Deutsche Marks payable for theoretical and practical training of personnel outside India again could not be added as this amount would presumably be attributable to trained personnel who would be used in the commissioning and operation of the plant, which would, therefore, be attributable to a post-importation event. Thus, properly read, the judgment in Essar Gujarat's case actually supports the respondent in that the payment for engineering and technical consultancy services in India cannot be added to the value of the imported plant. Also, in the present case, there is no transfer of technology under a license. Therefore, no question arises as to whether without such license the plant to be set up in India could be operated at all. The judgment also concludes in favour of the respondent the fact that all amounts payable for training of personnel outside India cannot be added to the value of the plant.

14. In **Tata Iron & Steel Co. Ltd. v. Commissioner of Central Excise & Customs, Bhubaneswar, Orissa**, (2000) 3 SCC 472, a protocol had been signed between the seller and the Indian purchaser which stated that the total price will be the price for the imported equipment plus the price for "engineering".

The Tribunal in the said case added the amount of "engineering" to arrive at the value of the imported goods. This Court reversed the Tribunal by relying upon Rule 12 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 which reads as follows:

> "12. Interpretative Notes. – the interpretative notes specified in the Schedule to these rules shall apply for the interpretation of these rules."

The relevant interpretative note which was relied upon is important and reads as follows:

> "**Note to Rule 4**
>
> <u>**Price actually paid or payable**</u>

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The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.

Activities undertaken by the buyer on his own account, other than those for which an adjustment is provided in Rule 9, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the value of imported goods.

The value of imported goods shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods;

(a) Charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;

(b) The cost of transport after importation;

(c) Duties and taxes in India.

The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods are not part of the customs value."

Rule 9(1)(e) was not attracted on facts. This Court held:

“15. Clause (*e*) of sub-rule (1) of Rule 9 is attracted when the following conditions are satisfied:

(*i*) there is a *payment actually* made or to be made as *a condition of sale of the imported goods* by the buyer to the seller or to a third party;

(*ii*) such payment, if made to a third party, has been made or has to be made *to satisfy an obligation of the seller*; and

(*iii*) such payments are not included in the price actually paid or payable.

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

17. So far as the Interpretative Note to Rule 4 is concerned it is no doubt true that the Interpretative Notes are part of the Rules and hence statutory. However, the question is one of their applicability. The part of the Interpretative Note to Rule 4 relied on by the Tribunal has been couched in a negative form and is accompanied by a proviso. It means that the charges or costs described in clauses (*a*), (*b*) and (*c*) are not to be included in the value of imported goods subject to satisfying the requirement of the proviso that the charges were distinguishable from the price actually paid or payable for the imported goods. This part of the Interpretative Note cannot be so read as to mean that those charges which are not covered in clauses

(*a*) to (*c*) are available to be included in the value of the imported goods. To illustrate, if the seller has undertaken to erect or assemble the machinery after its importation into India and levied certain charges for rendering such service the price paid therefor shall not be liable to be included in the value of the goods if it has been paid separately and is clearly distinguishable from the price actually paid or payable for the imported goods. Obviously, this Interpretative Note cannot be pressed into service for calculating the price of any drawings or technical documents though separately paid by including them in the price of imported equipments. Clause (*a*) in the third para of the Note to Rule 4 is suggestive of charges for services rendered by the seller in connection with construction, erection etc. of imported goods. The value of documents and drawings etc. cannot be "charges for construction, erection, assembly etc." of imported goods. Alternatively, even on the view as taken by the Tribunal on this Note, the drawings and documents having been supplied to the buyer-importer for use during construction, erection, assembly, maintenance etc. of imported goods, they were relatable to post-import activity to be undertaken by the appellant. Such charges were covered by a separate contract, i.e. contract MD 301. They could not have been included in the value of imported goods merely because the value of documents referable to imported equipments and materials was mixed up with the value of those documents which were referable to equipment which was yet to be procured or imported or manufactured by the appellant; the value of the latter category of documents also being neither dutiable nor clubbable with the value of imported goods. The Tribunal has not doubted the genuineness of the contracts entered into between the appellant and SNP. Rather it has observed vide para 10.2 of its order that entering into two contracts (MD 301 and MD

> 302) was a legal necessity. The Tribunal has also stated that it was not recording any finding of "skewed split-up". Shri Ashok Desai, the learned Senior Counsel for the appellant has pointed out that under Chapter Heading 49.06 of the Customs Tariff Act, 1975 plans and drawings for engineering and industrial purposes being originals drawn by hand as also their photographic reproductions on sensitised papers and carbon copies thereof are declared free from payment of customs duty. Sub-rules (3) and (4) of Rule 9 clearly provide that additions to the price actually paid or payable are permissible under the Rules if based on objective and quantifiable data and no addition except as provided for by Rule 9 is permissible."

15. In **Commissioner of Customs (Port), Kolkata** v. **J.K. Corporation Limited,** (2007) 9 SCC 401, on facts the agreement there was itself in two parts, part (a) providing for licence, know-how and technology while part (b) provided for supply of equipment. This Court distinguished the judgment in the Essar Gujarat case and applied the judgment in TISCO (supra) as follows:

> "16. Reliance has been placed by Mr. Radhakrishnan on a decision of this Court in *Essar Gujarat Ltd.* [(1997) 9 SCC 738 : (1996) 88 ELT 609] In that case, the licence fee was paid to the supplier of the plant and machinery for a licence to operate the plant, which was in reality nothing but was held to be an additional price payable for the plant itself and was, therefore, held to be includible

in its assessable value. It is in the aforementioned fact situation, this Court held: (SCC pp. 745-46, para 13)

> "*13*[*12*]. Reading all these agreements together, it is not possible to uphold the contention of Mr. Salve that the precondition of obtaining a licence from Midrex was not a condition of sale, but a clause inserted to protect EGL. Without a licence from Midrex, the plant would be of no use to EGL. That is why this overriding clause was inserted. This 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 precondition 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 24-3-1987. Therefore, we are of the view that the tribunal was in error in holding that the payments 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."

17. The Court noticed several curious aspects of the agreement stating that it started with the recital that "the purchaser and the seller have today respectively purchased and sold a direct reduction iron plant, on the following terms and conditions", which, according to this Court, indicated that the purchase and sale of the plant had taken place on 24-3-1987, but in clause (2) it was stated that the purchaser would purchase the property from the seller at the stated price. Upon construing the terms

of the conditions, it was opined: (SCC p. 749, para 24)

> "*24*. Therefore, the process licence fees of DM 20,00,000 was rightly added to the purchase price by the Collector of Customs. The order of CEGAT on this question is set aside."

19. However, in *TISCO* [(2000) 3 SCC 472] this Court took note of Interpretative Note to Rule 4 and held: (SCC p. 482, para 17)

> "The part of the Interpretative Note to Rule 4 relied on by the Tribunal has been couched in a negative form and is accompanied by a proviso. It means that the charges or costs described in clauses (*a*), (*b*) and (*c*) are not to be included in the value of imported goods subject to satisfying the requirement of the proviso that the charges were distinguishable from the price actually paid or payable for the imported goods. This part of the Interpretative Note cannot be so read as to mean that those charges which are not covered in clauses (*a*) to (*c*) are available to be included in the value of the imported goods."

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In an instructive passage on principle, this Court also laid down:

> "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 payment 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 licence or technical know-how for the purpose of setting up of a plant from the machinery imported or running thereof, the same would not be computed for the said purpose. Any amount paid for post-importation service or activity, would not, therefore, come within the purview of determination of assessable value of the imported goods so as to enable the authorities to levy customs duty or otherwise. The Rules have been framed for the purpose of carrying out the provisions of the Act. The wordings of Sections 14 and 14(1-A) are clear and explicit. The Rules and the Act, therefore, must be construed, having regard to the basic principles of interpretation in mind.

11. What would, therefore, be excluded for computing the assessable value for the purpose of levy of customs duty, inter alia, has clearly been stated therein, namely, any amount paid for post-importation activities. The said provision, in particular, also applies to any amount paid for post-importation technical assistance. What is necessary, therefore, is a separate identifiable amount charged for the same. "

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16. Similarly, in **Commissioner of Customs v. Ferodo India (P) Ltd.**, (2008) 4 SCC 563, this Court dealt with Rule 9(1)(e) and the Essar Gujarat judgment as follows:

"22. In the alternate, it has invoked Rule 9(1)(*e*). This Rule 9(1)(*e*) cannot stand alone. It is a corollary to Rule 4. There is no finding in the present case that what was termed as royalty/licence fee was in fact not such royalty/licence fee but some other payment

made or to be made as a condition prerequisite to the sale of the imported goods. It is important to bear in mind that Rule 9 refers to cost and services. Under Rule 9(1), the price for the imported goods had to be enhanced/loaded by adding certain costs, royalties and licence fees and values mentioned in Rules 9(1)(*a*) to 9(1)(*d*). It refers to "all other payments actually made or to be made as a condition of sale of the imported goods". In the present case, the Department invoked Rule 9(1)(*c*) on the ground that royalty was related to the imported goods, having failed it cannot fall back upon Rule 9(1)(*e*) because essentially we are concerned with the addition of royalty, etc. to the price of the imported goods. Further, in the present case, the Department has accepted the transaction value of the imported goods.

23. In *Essar Gujarat Ltd.* [From Final Order No. 91 of 2002 dated 12-2-2002 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No. C/573/2001-A : See (2002) 142 ELT 343 (Tri); (2003) 156 ELT 62 (Tri); (2006) 195 ELT 206 (Tri) and (2006) 205 ELT 208 (Tri)] the buyer had entered into a contract with TIL for purchase of direct reduction iron plant ("the plant"). The entire agreement was for import of the plant. The agreement was subject to two conditions—(*a*) approval of GOI and (*b*) obtaining transfer of licence from M/s Midrex, USA. Without the licence from Midrex, the imported plant was of no use to the buyer. Therefore, it was essential to have the licence from Midrex to operate the plant. Therefore, it was held by this Court that procurement of licence from Midrex was a precondition of sale *which was specifically recorded in the agreement itself*. In view of specific terms and conditions to that effect in the agreement, this Court held that payments made to Midrex by way of licence fees had to be added to the price paid to TIL for purchase of the plant. There

is no such stipulations in TAA in the present case. Therefore, in our view, the adjudicating authority erred in placing reliance on the judgment of this Court in *Essar Gujarat Ltd.* [From Final Order No. 91 of 2002 dated 12-2-2002 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No. C/573/2001-A : See (2002) 142 ELT 343 (Tri); (2003) 156 ELT 62 (Tri); (2006) 195 ELT 206 (Tri) and (2006) 205 ELT 208 (Tri)]"

17. Essar Gujarat has also been distinguished in **Commissioner of Customs (Port), Chennai v. Toyota Kirloskar Motor (P) Ltd.,** (2007) 5 SCC 371, as follows:-

"36. Therefore, law laid down in *Essar Gujarat Ltd.* [(1997) 9 SCC 738] and *J.K. Corpn. Ltd.* [(2007) 9 SCC 401 : (2007) 2 Scale 459] is absolutely clear and explicit. Apart from the fact that *Essar Gujarat Ltd.* [(1997) 9 SCC 738] was determined on the peculiar facts obtaining therein and furthermore having regard 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 needed for increase in the capacity of the plant, this Court clearly held that the post-importation service charges were not to be taken into consideration for determining the transaction value.

37. The observations made by this Court in *Essar Gujarat Ltd.* [(1997) 9 SCC 738] in para 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 decides and not what can logically be deduced

therefrom. Even in *Essar Gujarat Ltd.* [(1997) 9 SCC 738] 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, licence fee and charges paid for technical know-how, although the same would have nothing to do with the charges at the 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.

38. The transaction 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 exists 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.

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

40. It is also a matter of some significance that technical assistance and know-how were required to be given not as a condition precedent, but as and when the respondent makes a request therefor and not otherwise. Appendix C of the agreement relates to manufacture of local parts which evidently has nothing to do with the import of the capital goods. Appendix D again is attributable to construction of plant, production preparation, and pilot production

and production model, wherewith the import of capital goods did not have any nexus."

18. On a reading of all the authorities hereinabove, it is clear that the facts of the present case do not attract Rule 9(1)(e). We, therefore, dismiss the appeal of Revenue. There shall be no order as to costs.

SUPREME COURT OF INDIA

……………………J.

(A.K. Sikri)

……………………J.

(R.F. Nariman)

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New Delhi;

April 13, 2015.