Tata Iron & Steel Company Ltd vs Commissioner Of Central Excise & ... on 16 February, 2000

Equivalent citations: AIR 2000 SUPREME COURT 1045, 2000 (3) SCC 472, 2000 AIR SCW 572, 2000 CLC 824 (SC), 2000 (4) LRI 163, (2000) 2 JT 155 (SC), 2000 (1) SCALE 591, 2000 (2) JT 155, 2000 (3) SRJ 382, (2000) 116 ELT 422, (2000) 89 ECR 1, (2000) 1 SCALE 591

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Bench: R.C.Lahoti, S.P.Bharucha

CASE NO.:
Appeal (civil) 96 of 1998

PETITIONER:
TATA IRON & STEEL COMPANY LTD.

Vs.

RESPONDENT:
COMMISSIONER OF CENTRAL EXCISE & CUSTOMS, BHUBANESWAR, ORISSA.

DATE OF JUDGMENT: 16/02/2000

BENCH:
R.C.Lahoti, S.P.Bharucha

JUDGMENT:

R.C. Lahoti, J.

L.....I.....T.....T.....T.....T.....T.....T..J The Tata Iron & Steel Company Ltd. (TISCO, for short), the appellant before us, has imported certain equipments and drawings and engineering documents from Siderugia National of Portugal - a Government of Portugal Undertaking. It appears that some time in the year 1981 Italimpianti, Genevo, Italy supplied materials, designs and engineering drawings etc. to Siderugia National Portugal (hereinafter SNP, for short) for setting up rolling mill project in Portugal. The supplies consisted of equipments for blast furnace, LD converter, steel plant bellet castors, wire rod mills, torpedo ladle cars etc.. However, before the equipments could be installed, Portugal decided to join European Economic Community (EEC) consequent whereupon Portugal could not have expanded its steel making capacity. SNP decided to cancel its investment

plan and to sell the equipments and materials which were lying unused from 1981 to 1986. On 14th April, 1988 a protocol was signed between the seller and purchaser companies (i.e. SNP and TISCO) which inter alia stated that the total price will be price for the equipment plus price for the engineering FOB Portugal-Lisbon port. The price for the equipment with suitable sea-worthy packing to be provided by SNP will be 13.5 million Deutsche Marks (DM) and the price for engineering will be 12.5 million Deutsche Marks. The protocol also provided that the equipment was being sold without any operation on performance guarantees and in "as is where is"

> condition. Subsequently on 11th October, 1989 three contracts were entered into between the parties as under:-
>
> 1. Agreement for supply of technical documentation -

called MD 301.

2. Agreement for sale of equipments and materials (part of equipments of a blast furnace and three torpedo ladle cars) - called MD 302.

3. An overall sale contract, being an umbrella contract, covering the abovesaid two agreements for establishing contractual relationship and setting up conditions both for sale of equipment and supply of technical documentation. The over-all sale contract recited an overall price of 26 million DM and its break-up into two, namely, 12.5 million DM for technical documentation and 13.5 million DM for equipments and materials. The earlier two agreements recited the considerations of 12.5 million DM and 13.5 million DM respectively. Thus the prices as recited in the protocol dated 14.4.88 remained unchanged.

The appellant sought for registration of its contract MD 302 under Project Imports Regulations, with the Customs House, Paradeep which was allowed entitling it to avail the benefit of concessional rate of duty for project imports.

The consignment consisting of technical documents, engineerings etc. covered by contract MD 301 arrived at Calcutta and was cleared by Calcutta Customs House in the months of April-May, 1990. The consignment was claimed by the appellant to be classifiable under sub- Heading No.4906.00 of the Customs Tariff Act, 1985 assessable to nil duty.

As against the contract MD 302 the first consignment arrived at Port Paradeep and was cleared under Bill of Entry dated 6.4.90. The value of the goods was shown as D.M. 60,75,000 FOB. The goods were assessed provisionally and allowed clearance on payment of duty on the declared value. The second consignment under this contract also arrived at Paradeep port. Bill of Entry dated 7.7.90 was filed declaring the value to be 6,75,739 D.M.. In between the department had gathered intelligence and formed an opinion that the contract MD 302 registered under the Project Import Regulations was actually a sub-contract of another contract of the same date and the value thereof was 26 MDM. The Assistant Collector of Customs, Paradeep, vide communication dated 7th July, 1990, called upon the appellant to submit all the documents including the correspondence with the

foreign supplier, copy of the import licence etc.. The appellant submitted the required documents including copy of the agreement MD

301. An exchange of correspondence between the Assistant Collector of Customs and the appellant followed. On 16th July, 1990 the Assistant Collector of Customs, Paradeep issued a show cause notice to the appellant calling upon it to show cause why the sum of 12.5 MDM being the value of the goods covered by contract MD 301 should not be included in determining the assessable value of the goods imported under the contract MD 302 followed by other consequences flowing from under-valuation of the goods imported. Vide order dated 10.8.90 the Assistant Collector permitted clearance of the goods upon furnishing of bank guarantees of Rs.7,44,80,300/- and extra duty deposit of Rs.2,82,01,636 as also payment of admitted customs duty.

The appellant filed a writ petition before the Orissa High Court challenging the show cause notice and the demand raised by order dated 10.8.90. On 30.8.1990, the Orissa High Court disposed of the writ petition directing the release of the goods subject to furnishing a bank guarantee of Rs.8 crores and depositing the extra duty reduced by 1 crore than that demanded, accompanied by payment of admitted customs duty. The appellant complied with the order of the High Court and got the goods cleared.

The appellant also filed a reply to the show cause notice. Personal hearing was given by the Assistant Collector. On 23.8.1993 the Commissioner of Customs and Central Excise, Bhubaneswar issued a second show cause notice to the appellant and two of its officers and also to the appellant's engineering consultant. Replies were filed. On 30th April, 1996 the Commissioner of Customs and Central Excise, Bhubaneswar passed an order assessing the levy of customs duty at Rs.15,49,09,060/-.

A penalty of Rs.5 crores was also imposed on the appellant under Section 112 of the Customs Act. Penalties were imposed on other noticees also. The appellant and other noticees preferred appeals before the Customs, Excise and Gold (Control) Appellate Tribunal, Calcutta which have been disposed of by a common order. The Tribunal has held that the three contracts entered into between the seller, i.e., SNP and the appellant were in fact parts of one package, that is, the three constituted one composite agreement. The technical documentation supplied to the appellant could be divided into three parts: (i) those pertaining to the imported equipment, (ii) those pertaining to the equipment which was yet to be procured or manufactured by appellant, and (iii) those relatable to post-import activities undertaken by the appellant for assembly, construction, erection, operation and maintenance of the imported equipment. The value of the contract to the extent of (i) above was liable to be included in the value of equipments and materials imported by the appellant though the value of the technical documents covered by (ii) and (iii) above could have been excluded for payment of customs duty by reference to Interpretative Note to Rule 4 of Customs Valuation Rules, 1988 (hereinafter Rules, for short). However, since separate values have not been shown, the benefit of Interpretative Note to Rule 4 abovesaid was not available to the appellant and the entire value of the two contracts was liable to be clubbed together for the purpose of levying customs duty. It will be useful to extract and reproduce verbatim a few findings from the order of the tribunal as under :-

"It is pertinent to mention, on first appellant's own admission that where an item has been partly supplied and partly not supplied by S.N., technical documents for the latter have been supplied. These technical documents will serve the purpose for the whole items as such, technical documents being common to an item. In this manner, the first appellant has got technical documents for manufacture of substantial number of import items. It is therefore obvious that the technical documents supplied to the appellants pertain both to (i) the imported equipment and

(ii) the equipment which was yet to be procured or manufactured by the appellants. It may also contain (iii) technical documents which are related to post-importation activities undertaken by the appellants for assembly, construction, erection, operation and maintenance of the imported equipment. Value of two categories of documents at

(ii) and (iii) above could be excluded, had these values been separately shown in the contract, MD-301 or invoices.

Since separate values have not been shown, support from Interpretative Note to rule 4 of the Valuation Rule, proposed by the ld. Advocate Dr. Chakraborty cannot be taken. Hence the entire value of 12.5 million DM of technical documentation will have to be included in value (13.5 million DM) of the equipment of B.E. and T.L.Cs." [Para 6.2.II] "Claim of the appellant's Counsel that these are separate contract is not tenable. Article 2 relating to `Price" and Clause 1 thereof makes it abundantly clear that "over-all price of the sale scope of the present contract is fixed and not subject to any revision and amounts to DM-26 million" giving a break-up of the same in 13.5 million and 12.5 million DMS. It is thus the over- all price of 26 million DM which is material in the Contract. Article 3 makes it binding on both the contracting parties that neither of them shall transfer totally or partially its contractual position, either gratuitously or onerously, without previous written consent of the other party. It is thus apparent that the appellants cannot back out of contract for supply of technical documents, even if they wished, without the written consent of the other party i.e. S.N. Portugal. These facts brings out the element of compulsion in purchase of the technical documents of whatever nature alongwith the purchase of equipments and materials. That being the factual position, provisions of rule 9 (1)(e) of the Valuation Rules 1988 come into play. Clause (e) of Sub-rule (1) of Rule 9 envisages addition of "all other payments actually made or to be made as a condition of the sale of the imported goods, by the buyer to the seller.....". Therefore, entire 26 million DM will have to be taken as value of the equipments and materials." [Para 6.3.III] In spite of the findings as abovesaid having been arrived at vide para 10.4, the Tribunal has stated that though in its opinion the value of equipments would be entire contract price of 26 million DM as against 21.2747826086 million DM computed by the adjudicating officer as detailed in Annexure 1 appended to his order, since only TISCO had appealed to it and the Revenue had chosen not to file any appeal, the appellant could not be put in a situation worse than if it had not filed an appeal and therefore duty liability of the appellant shall have to remain confined to the value of the equipment at 21.2747826086 million DM as found by the adjudicating officer. The quantum of penalty imposed on the appellant was reduced by the Tribunal from Rs.5 crores to Rs. 4 crores. The penalties on other noticees were set aside. The appellant has come up to this Court by filing this appeal under

Section 130 E of the Customs Act, 1962.

We have heard Shri Ashok Desai, the learned senior counsel for the appellant and Shri Kirit Raval, the learned Additional Solicitor General for the respondents. We are satisfied that the impugned order of the Tribunal cannot be sustained and therefore has to be set aside followed by a remand so as to assess the value of the goods liable to payment of customs duty and thereupon determine the quantum of duty and penalty, if any, for the reasons stated hereinafter. A perusal of the order of the Tribunal shows that it has mainly proceeded on two sets of reasoning for holding against the appellant. Firstly, the Tribunal has examined the applicability of Rule 9(1)(b)(iv) and formed an opinion that benefit thereof was not available to the appellant. By reference to the Interpretative Note to Rule 4 it has held that to the extent the drawings and technical documents were referable to the manufacture and sale of the imported equipments, their value was liable to be included in the value of the equipments and material imported and inasmuch as separate values thereof have not been shown the entire value of 12.5 million DM of technical documentation covered by contract DM 301 was liable to be included in the value of the equipments. Secondly, the Tribunal has held the provisions of Rule 9(1)(e) being attracted and coming into play for the purpose of determining the valuation of the equipment and materials imported on the reasoning that the drawings and engineerings were compulsorily purchasable by the appellant along with the equipment and materials and hence the value of the two was liable to be clubbed. Shri Ashok Desai, the learned senior counsel for the appellant has vehemently attacked the correctness of the reasoning employed by the Tribunal and has submitted that the Tribunal has gone totally amiss in interpreting the rules and judging the case thereunder. It was submitted by Shri Ashok Desai that the interpretation as placed on the rules by the Tribunal is not correct. We will presently test the correctness of the contention so advanced. Section 12 of the Customs Act is the charging section. Section 14 provides for the duty of customs being chargeable on any goods by reference to their value. In exercise of the powers conferred by Section 156 of the Customs Act, 1962 the Central Government has framed Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Clause (f) of Rule 2 defines "transaction value" to mean the value determined in accordance with Rule 4. Under Rule 3 either the value of imported goods shall be the transaction value or if it cannot be determined then the same shall be determined by proceeding sequentially through Rules 5 to

8. Rule 4 provides 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. Under Rule 9, the value or price of certain cost and services is liable to be added to the transaction value while determining the value of the imported goods. Rule 9, insofar as relevant and to the extent referred to by the Tribunal is extracted and reproduced hereunder:-

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, -

xxx xxx xxx

(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 used in the production of 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; xxx xxx xxx
>
> (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.

xxx xxx xxx (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. [emphasis supplied] Reference has also been made by the Tribunal to the Interpretative Notes. Rule 12 provides that the Interpretative Notes specified in the Schedule to these rules shall apply for the interpretation of these rules.

Note to Rule 4 reads as under:-

> "Note to Rule 4 Price actually paid or payable The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.
>
> Activities undertaken by the buyer on his own account, other than those for which an adjustment is provided in Rule 9, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the value of imported goods.
>
> The value of imported goods shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the

imported goods :

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

(b) The cost of transport after importation;

(c) Duties and taxes in India.

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

[emphasis supplied] 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 included 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 of 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 services 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 at 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 scrutinising 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 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. 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.

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 subject matter of contract DM 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.

So far as 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 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 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 third para of 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 sentisized 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 is permissible under the Rules if based on objective and quantifiable data and no addition except as provided for by Rule 9 is permissible.

The abovesaid reasons demolish the edifice on which the order of the Tribunal is based. However, still the only thing that remains to be considered is whether there has been under valuation of blast furnace equipment covered by the contract MD 302. It is a pure and simple case of finding out `the price actually paid or payable for the goods' - the phrase as occuring in Rules 2(f), 4 and 9, so as to find out the transaction value and levy duty thereon under Sections 12 and 14 of the Customs Act. One of the allegations made in the show cause notice given to the appellant was of the blast furnace equipments(BFE) having been undervalued by transferring a part of the value of the equipments to the value of engineering documents and drawings. In substance the show cause notice alleged the blast furnace equipment having been under valued by artificially excluding therefrom the value of technical documents. According to the Revenue such documents are even otherwise and in ordinary course supplied by the seller to the buyer. Because of the absence of such documents the goods sold being equipments would be of no use at all but the appellant had so manipulated the single transaction by bifurcating the single content into two documents so as to under value the blast furnace equipments by transferring a part of the value of such equipments to the value of engineering documents and drawings. The gist of the allegation is under valuation of blast furnace equipment. Shri Kirit Raval, the learned Additional Solicitor General has submitted that from the stage of the show cause notice till before the Tribunal the Revenue has kept its plea alive. Vide para 7 of its order the Tribunal noted this plea of the Revenue but did not go into it as the Tribunal considered it not necessary in view of other findings arrived at. The learned Additional Solicitor General submitted that if this Court may not sustain the order of the Tribunal then in all fairness the Revenue should be allowed an opportunity of substantiating its plea of under valuation followed by such other relief to which it may be entitled in the event of its succeeding on its plea. We find merit in this submission. In our opinion on the order of the Tribunal being set aside the matter needs to be sent back to the Tribunal for examining on merits the abovesaid plea of the Revenue which was refused to be gone into earlier on account of its having been found to be unnecessary.

The appeal is allowed. The impugned order of the Tribunal is set aside. The case is sent back to the Tribunal to entertain and examine the plea of the Revenue if the contract DM 302 is undervalued on the basis of the material already available on record. The Tribunal shall consistently with the observations made and findings recorded in this judgment hear and dispose of the appeal before it within a period of six months from the date of communication of this order. The bank guarantee furnished by the appellant shall be kept alive and the amount deposited shall also continue to remain in deposit till the date of decision by the Tribunal whereafter the bank guarantee and the deposit shall be dealt with consistently with the order of the Tribunal.

Though we have set aside the order of the Tribunal and made a remand we would like to clarify a few points.

Apart from the appellant, two officers of the company namely Dr.J.J. Irani and Shri S.L. Shrivastava and an engineering consultant of the appellant, namely, M/s M.M. Dastur & Co. were also proceeded against and penalties were imposed on them. They were exonerated by the Tribunal. The

Revenue has not come up in appeal against the order of the Tribunal exonerating the abovesaid three. This order of remand would not reopen the proceedings against those three. Similarly, the Tribunal has held that the duty liability of the appellant in spite of a finding of under valuation could not be re-determined by pegging the value of the equipment at an amount over and above 21.2747826086 million DM as this was the figure found by the adjudicating officer and not challenged by the Revenue.

The amount of penalty levied on the appellant was reduced by the Tribunal to Rs.4 crores which too has not been challenged by the Revenue. On hearing the case after remand if the plea of the Revenue may find favour with the Tribunal, the dutiable value of the equipment and materials shall not exceed 21.2747826086 million DM and the amount of penalty shall not exceed Rs.4 crores.

Shri Ashok Desai, the learned senior counsel for the appellant submitted that the Tribunal has also held, vide para 9 of its order, that the liability of the goods to confiscation did not arise and that part of the order should also be held to have achieved a finality. With this submission we do not agree. If the Tribunal may find the equipments forming the subject matter of contract DM 302 to be under valued the legal consequences flowing from such finding may follow. The appeal stands disposed of accordingly. No order as to the costs.