

A COMMISSIONER OF CUSTOMS, AHMEDABAD

v.

M/S. ESSAR STEEL LTD.

Civil Appeal No.3042 of 2004

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APRIL 13, 2015

[A.K. SIKRI AND R. F. NARIMAN, JJ.]

C *Customs Act, 1962 – s. 14 – Valuation of goods for*
purposes of assessment – Assessee entering into technical
service agreement with foreign supplier in relation to
implementation of a project to set up a plant in India for
production of certain goods – Subsequently, purchase order
for import of plant and machinery placed – Assessment to
D *customs duty – Payment made for the technical services*
agreement, if 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 in terms of r. 9(1)(e)
E *– Held: Conjoint reading of the technical services*
agreement and the purchase order, do not lead to the
conclusion that fees for the technical services agreement
is in any way a pre-condition for the sale of the plant itself
– Technical services agreement read as a whole is only to
successfully set up, commission and operate the plant after
F *it has been imported into India – On facts, r. 9(1)(e) would*
not be attracted – Thus, consideration for the technical
services to be provided by the foreign company cannot be
added to the value of the equipment imported to set up the
plant in India – Customs Valuation (Determination of Price
G *of Imported Goods) Rules, 1988 – r. 9(1)(e).*

Dismissing the appeal, the Court

HELD: 1.1 A cursory reading of Section 14 of the

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Customs Act, 1962 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. [Para 7] [1075-C-D]

1.2 A reading of Rule 4 and Rule 9 of the Customs Valuation (Determination of Price of Imported Goods) Rules of 1988, 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. [Para 8] [1077-E-F]

1.3 On an analysis of the technical services agreement dated 13.4.1991, it is clear that the respondent has only associated foreign Company 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 foreign Company is basically to coordinate and advise the respondent so that the respondent can successfully set up, commission and operate the plant in India. 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

A 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
 B post-importation of the plant into India. 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-
 C importation activities. [Paras 9 and 10] [1077-H, 1078-A-F]

1.4 A conjoint reading of the technical services agreement and the purchase order do not lead to the
 D conclusion that the technical services agreement is in any way a pre-condition for the sale of the plant itself. On the contrary, the technical services agreement read as a whole is really only to successfully set up, commission and operate the plant after it has been
 E imported into India. Therefore, it is clear, 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 the foreign Company cannot be added to the value of the equipment imported to set
 F up the plant in India. [Para 11] [1078-G-H; 1077-A-B]

Collector of Customs (Preventive) v. Essar Gujarat Ltd.
 1996 (8) Suppl. SCR 757 : (1997) 9 SCC 738 – relied on.

G *Tata Iron & Steel Co. Ltd. v. Commissioner of Central Excise & Customs, Bhubaneswar, Orissa* 2000 (1) SCR 876 : (2000) 3 SCC 472; *Commissioner of Customs (Port), Kolkata v. J.K. Corporation Limited* 2007 (2) SCR 196 : (2007) 9 SCC 401; *Commissioner of Customs v. Ferodo India (P) Ltd.* 2008 (3) SCR 147: (2008) 4 SCC 563;
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Commissioner of Customs (Port), Chennai v. Toyota Kirloskar Motor (P) Ltd. 2007 (7) SCR 94: (2007) 5 SCC 371 – referred to. A

Case Law Reference

1996 (8) Suppl. SCR 757 referred to Para 5 B

2000 (1) SCR 876 referred to Para 14

2007 (2) SCR 196 referred to Para 15 C

2008 (3) SCR 147 referred to Para 16

2007 (7) SCR 94 referred to Para 17 D

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3042 of 2004.

From the Judgment and Order dated 24.06.2003 of the Custom Excise & Gold (Control) Appellate Tribunal, Wzb. Mumbai in Appeal No.C/490/2002-Mum. E

N. K. Kaul, ASG, K. Radhakrishnan, Nisha Bagchi, Attrey Chatterji, Channan Parwani, Pooja Sharma, B. Krishna Prasad, for the Appellant. F

S. K. Bagaria, Vikram Nankani, Vivek Jain, Mahesh Agarwal, E. C. Agrawala, Vipin Jain, Vishal Agrawal, K. Ajit Singh, Devika Mohan for the Respondent. G

The Judgment of the Court was delivered by

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A **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
B 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
C 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:

D "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
E "PLANT UNITS' attached hereto and made thereof,"

Project is defined as:

F "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:-

G "2.0. SCOPE OF SUPPLY:

H 2.1. Technical consultant shall render following
engineering and other technical Services from outside
India;

2.1.1. Project Engineering Services: A

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. B C D E

2.1.2. Supervision and Monitoring of the Project: F

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 G

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 H

A 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.

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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.

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2.1.5. Procurement support services:

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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."

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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:

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"9.0. PATENTS.

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9.1. The Technical Consultant make no

representation or warranty that any process, A
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 B
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 C
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 D
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 E
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 F
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 G
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. H

A 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,
B copyrights and other intellectual properties and keep them secret and confidential.

C 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.

D 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
E 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
F ESSAR holds more than 30% of the equity capital.

G 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."

H 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.

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

A 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:

B “31. Since, the contract for technical consultancy was
C signed before the purchase order placed, it is evident
D that the payment made on account of the technical
E consultancy agreement is a condition of sale of
F imported goods. Even though, this aspect has not
G been covered in the agreement for technical
H 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.”

G 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

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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.

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:

“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

- A 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;
- B (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:
- C 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.
- D (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.
- E (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.
- F (3) For the purposes of this section—
- G (a) 'rate of exchange' means the rate of exchange—
- (i) determined by the Board, or
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(ii) ascertained in such manner as the Board may direct, A

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)." B

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. C
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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:- F
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"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, - H

- A** (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:-
- B** (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;
- C** (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:-
- D**
- E** (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;
- F** (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;
- G**
- (c) Royalties and licence fees related to the imported goods that the buyer is required to pay, directly or
- H**

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. A

(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; B

(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. C

9(2) xx xxx D

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." E

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. F
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A 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,
B 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
C 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
D 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
E 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.

F 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.

G 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
H 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 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:

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10.1.1	Process licence and allied technical services	DM (German Marks)
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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
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10.1.1.2	Cost of technical services provided under Article 3 in connection with Midrex process	DM 1,01,00,000 lump sum
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D *Technical Services*

10.1.2.1	Payment for engineering and consultancy fee as specified under this agreement	DM 2,31,00,000 lump sum
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10.1.2.2.	Payment for theoretical and practical training outside India	DM 22,00,000 lump sum
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	Total	DM 3,74,00,000 lump sum
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F 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

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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.

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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".

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A 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:

B “12. Interpretative Notes. – the interpretative notes specified in the Schedule to these rules shall apply for the interpretation of these rules.”

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

“Note to Rule 4

Price actually paid or payable

D 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.

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G 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.

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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

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

(b) The cost of transport after importation; C

(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." D

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

"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; F

(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 G

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

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A 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
B 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
C 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
D 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
E 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
F 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
G 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

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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

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A 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
B 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
C 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
D 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:

E “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,
F 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
G 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
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Midrex was not a condition of sale, but a clause A
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 B
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 C
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 D
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 E
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 F
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: G
(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 H

A 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)

B “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 (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.
D 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.”

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

F “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.
G 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

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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. “

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

A and licence fees and values mentioned in Rules
9(1)(a) to 9(1)(d). It refers to “all other payments
B 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
C 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
D 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
E 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
F 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
G 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.

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Therefore, in our view, the adjudicating authority erred A
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) B
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 C
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 D
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” E
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. F

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 G
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 H

A 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.

D 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.

F 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.

G 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

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COMMNR. OF CUSTOMS, AHMEDABAD v. ESSAR 1093
STEEL LTD. [R.F. NARIMAN, J.]

nothing to do with the import of the capital goods. A
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. B

Nidhi Jain

Appeal dismissed.