CASE NO.:
Appeal (civil) 3635 of 2006

PETITIONER:
Commnr. of Customs (Port), Chennai

RESPONDENT:
M/s Toyota Kirloskar Motor Pvt. Ltd

DATE OF JUDGMENT: 17/05/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

1. Leave granted.

2. This appeal is directed against a final order dated 07.12.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'the CESTAT') passed in Appeal Nos. C/231/04 and C/949/04 whereby and whereunder the appeal preferred by Respondent herein was allowed and that of Appellant herein was dismissed.

3. Kirloskar Systems Limited entered into an agreement with Toyota Motor Corporation, Japan. It is also a major shareholder in the Respondent-Company. For the purpose of establishing an automobile manufacturing plant, Respondent imported some capital goods and parts thereof.

4. Dispute between the parties revolves round the valuation of the said capital goods and parts imported by the respondent from Toyota Motor Corporation for manufacture of automobile in India. Under the agreements entered into by and between the respondent and the said Toyota Motor Corporation, royalty and know-how fees were to be paid.

5. According to the Revenue such payments were to be added to the invoice value of the goods so as to arrive at a proper transaction value, in terms of Rule 9(1)(c) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (for short, 'the Rules). Payments of royalty, according to the Revenue, have a direct nexus to the imported goods as the same go into the manufacture of the licensed vehicles and spare parts.

6. Before embarking upon the rival contentions of the parties, we may notice the basic and undisputed facts of the matter.

7. A Technical Assistance Agreement was entered into by and between Toyota Motor Corporation and the respondent herein. Some of the payments were required to be made towards engineering services and for imparting training to its personnel at Japan.

In the said agreement, the terms 'licensed vehicles', 'local parts', and 'licensed products' have been defined. By reason of the said agreement, the respondent was given manufacturing licence for the licensed products of Toyota. The licence was to be given on non-exclusive, non-divisible, non-transferable and non-assignable basis and was not to include any right to grant sub-licences without the licensor's prior consent.

Articles 3 and 4 of the said agreement, which are material for our purpose, read as under :

"Article 3 Ordinary Assistance

(a) The Licensor shall, in accordance with the formalities and conditions separately prescribed by it, furnish the licensee, upon its request, with such technical know how, information, data etc. relating to the licensed products in written, verbal or any other form, as then are or where used by the Licensor and are then in the hand of and freely disposable by the Licensor and as are then considered necessary and applicable by the Licensor for the manufacture of the licensed products from among those stipulated in appendix-C attached hereto.

(b) Any technical know-how, information, data, etc. furnished to the Licensee by the Licensor in accordance with the preceding paragraph (a) and all copies thereof shall, at the licenses expense, be sent back to the Licensor even during the terms of this agreement, as soon as the Licensor requests their return, considering the same unnecessary for the licensee, the Licensee shall also impose said obligation upon its employees, officers and directors who may have the custody of or access to such know-how information data etc. and those reproduced, whether those persons are in or out of office."

Appendix C of the agreement provides for technical know-how, information data, etc. which were to be furnished by the licensor to the licensee under Article 3 being those which had separately been designated by the licensor from amongst those specified therein, namely, for : (i) studying the feasibility of local parts manufacturing, (ii) manufacturing of local parts, and (iii) production, preparation of licensed products.

Article 4 of the agreement reads as under :

"Article 4 \026 Additional Assistance

(a) At the Licenses written request, the Licensor may furnish the Licensee with manufacturing, engineering and other know how and information relating to the licensed products which are not readily available in the licensors records but which the Licensor is willing to develop especially for the licensee, and which shall be furnished through such documents and assistance as designated at the discretion of the Licensor from among those stipulated in appendix D attached hereto and any other documents and assistance from time to time designated by the licensor.

(b) In the event of the preceding paragraph (a), the Licensee shall pay the Licensor all fees, and all costs and expenses incurred by the Licensor in developing and furnishing such know-how, information, documents and or assistance.

(c) If the assistance rendered under paragraph (a) hereof is technical assistance or engineering assistance concerning the licensed products, such assistance will be provided in accordance with the procedures and conditions set forth in Appendix E

attached hereto"

Appendix D provides for assistance to be furnished by the licensor to the licensee in terms of Article 4, which are separately designated by the licensor from amongst those specified therein, namely, for : (i) construction of plant, (ii) production and preparation, and (iii) pilot production and production model.

Article 7 provides for basic requirements for manufacture of the licensed products. Article 11 provides for inspection thereof. Article 16 provides for payment of royalty in the following terms :

"Article 16 - Royalty

(a) The Licensee shall pay the Licensor royalty on all of the licensed products manufactured by the Licensee while this agreement is effective under article 30 hereof, in consideration of the license to use the technical know how, information, data, etc. furnished by the Licensor under article 3 hereof. The amount of the royalty shall be fixed in accordance with paragraphs (a) and (b) of Article 17 hereof.

(b) The Licensee may deduct from the royalty payments hereunder any withholding taxes which the Licensee is required under the law of the territory to pay for the account of the licensor, provided that the Licensee shall pay such taxes on behalf of and in the name of the Licensor and furnish the Licensor with proper certificates for the same from the authorities concerned, to enable the Licensor to obtain credit therefor against its Japanese taxes. Handling fees or any other expenses incurred in remitting the amount of royalty shall be for the account of the Licensee and shall not be deducted from the royalty payments."

The mode and manner in which calculation of royalty is to be made has been provided under Article 17, sub-clause (2) whereof is as under :

"(2) With respect to the unit Local Parts (such as engines, transmissions, steering links and axles), as separately agreed upon by the parties hereto, manufactured by the Licensee itself during each calendar quarter for sale (i) as spare parts for the licensed vehicles and or (ii) as original equipment parts and or spare parts for other vehicles than the licensed vehicles, the Licensee shall pay the Licensor royalty equivalent to three percent (3%) of the local value added of those unit Local Parts. For this purpose, the number of the unit Local Parts subject to royalty shall be determined at the time of their line off at the factory where they are manufactured, and the local value added shall be Licensees wholesale or selling prices of those unit Local Parts minus the following costs and tax, if included therein :

(i) All costs for the KD parts which are incurred until such KD parts have been brought into the above mentioned factory;
(ii) All costs for such Local Parts as are standard bought out components as used to manufacture those licensed vehicles and as listed in appendix H

attached hereto, which are equivalent to the Licensees cost of production thereof if those are manufactured by the Licensee itself or the Licensees purchase prices thereof if those are purchased by the Licensee from third parties and;

(iii) Sales tax, excise tax, commodity tax or any other tax of similar nature (other than any of such taxes to be refunded to the licensee) imposed directly on the manufacture, sale or delivery by the Licensee of those unit Local Parts."

Article 21 provides for patents.

8. Indisputably, in terms of the said agreement, the Respondent imported capital goods from Toyota Motor Corporation for manufacture of Passenger Utility Vehicles. Proceeding on the basis that the supplier is related to the respondent, the matter relating to valuation of the said capital goods was referred to the Special Valuation Branch for verification in regard to acceptance or otherwise of the declared invoice value. The Special Valuation Branch by reason of a circular dated 06.04.1999 was directed to continue to assess the value of imports from the related supplier provisionally.

9. Another agreement known as 'TMSS Overseas Parts Export Agreement' was entered into by and between the respondent and the Toyota Motor Management Services Singapore Pvt. Ltd. The said agreement covered the seal of the TMSS. The Assessing Authority passed an order in original dated 31.01.2003 holding : (1) In view of Articles 3 and 4 of the agreement, a lump sum amount of J.Y. 1,015,000,325 paid up to 31.10.2002 towards technical know-how should be loaded to the value of goods imported as components, tools and new capital goods imported from related supplier. (2) The value of components be arrived at by the adjustments, namely, proportionate addition of lump sum amount and by loading of 5% royalty. (3) The invoice values of spares/accessories be loaded by 2% on account of royalty payment and 3% on spares/accessories imported after 01.01.2004.

10. In coming to its conclusions, as noticed hereinbefore, the Assessing Authority recorded the following findings :

"42. It has already been pointed out that it is Toyota Motor Corporation which decide what Toyota Products would be sold to TKML and having decided that TMC had made it mandatory on the part of the importers to use the technical assistance agreement and thus it can be concluded that import of Toyota Products is subject to conditions related to the use of TAA.

43. Thus in terms of Rule 9(1)(c) of the CVR 88, Royalties and license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued shall be added to the extent that such royalties and fees are not included in the price actually paid or payable for the imported goods.

xxx xxx xxx

46. Since the goods were imported from the supplier cum collaborator (and their subsidiaries) who transferred the technical know how and the

licensee to use their technology for which the foreign collaborator receives the royalty on the sale proceeds of the finished products the value of the imported goods will naturally be influenced by the relationship as well as the collaboration agreement.

47. The very fact that royalty is paid to the supplier on locally manufactured products, makes it clear that the manufacture of such products is dependent upon the Technical knowhow/ Technology/ Licence/ Patent available with the supplier which may be transferred either in the collaboration agreement or which may be inherent in the goods supplied. Otherwise, there is no rationale for payment of royalty in a locally manufactured products which will not be the case if the transaction involves outright sale of equipment/machinery/component etc.

48. The logical conclusion is that the royalty is relatable to the imported goods as the royalty is nothing but an inherent condition to the transaction\005.Hence, the royalty payable by the importers to their collaborator/supplier is includible in the assessable value of the imported goods as per Rule 9(i)(c) of the CVR 88."

11. An appeal preferred thereagainst by the respondent before the Commissioner of Customs was dismissed, holding :

"a) Royalty is not to be added to the value of components parts such as Unit Local Parts and KD Parts.

b) Royalty is to be added to the value of components parts falling under the category of other than Unit Local Parts.

c) TKH is to be added only to the value of capital goods and tools imported from related supplier during the tenure of the agreement and should be apportioned to the total value of such goods.

d) TKH is not to be added to the value of the components.

e) Remaining portion of the Order-in-Original remains unaltered."

12. Aggrieved by and dissatisfied therewith, both the parties preferred appeals there- against before CESTAT. By reason of the impugned judgment, CESTAT held :

"\005As regards royalty which goes under "ordinary assistance" relevant article of the agreement stipulates that upon request the foreign supplier shall furnish to the importer such technical know-how, information, data relating to the licensed products. The licensed products are the automobile to be manufactured in India under the agreement as well as specific parts. It is to be seen that the technical know how, information etc. to be

furnished are for studying the feasibility of Local Parts manufacturing, for manufacturing of local parts, for production preparation of licensed products etc. What is important is that none of assistance is in relation to the goods under import. Further, royalty is to be computed at the agreed percentage of local value addition of vehicle manufactured under licence or unit local parts manufactured and sold or exported. Thus, the computation also has no bearing upon the imported goods or their value\005In the agreement under question or the import of goods, there is nothing indicating that royalty payment is a condition of the sale of the imported goods. Thus, the requirement of royalty being a condition of sale also is not satisfied. In view of these, we are of the opinion that there is no requirement in the present case for adding royalty payment to the price payable for the purpose of determining the transaction value of the imported parts\005In sum, all payments are towards assistance rendered in India for setting up the plant. None of this is in relation to the goods under import. Thus, the payments under 'lump sum payments heading' also do not satisfy the requirement under rule 9D(c) of the payments being "related to the imported goods" or being a condition of sale of the goods being value. Thus, there is no legal sanction for adding this payment also the price paid in order to arrive at the transaction value."

13. Mr. Gopal Subramanium, the learned Additional Solicitor General of India, would submit that the agreements entered into by and between the respondent and the said Toyota Motor Corporation must be read in their entirety, wherefrom it would be evident that the terms laid down therein are relevant for determining the conditions of import. According to the learned counsel it must be held to be involving continuous exercise and in view of the fact that the patent was held by the respondent and furthermore grant of licence and know-how technology being sine qua non for running the automobile manufacturing plant set up by the respondent at Bangalore, Articles 3 and 4 of the Agreement have rightly been invoked for the purpose of determination of the transaction value of the capital goods. Strong reliance, in this behalf, has been placed by the learned Additional Solicitor General on Collector of Customs (Preventive), Ahmedabad v. Essar Gujarat Ltd., Surat [(1997) 9 SCC 738].

14. Mr. R. Parthasarthy, the learned counsel appearing on behalf of the respondent, on the other hand, would submit that on a proper reading of the decision of this Court in Essar Gujarat Ltd. (supra), it would appear, that only the costs which were required to be incurred by the importer before importation of the capital goods had been taken into consideration for determination of the transactional value of the imported goods. It was submitted that a conjoint reading of the provisions of Section 14(1) of the Central Excise and Salt Act, 1944 and Rules 3, 4 and 9(1)(c) of the Rules, would clearly show that the valuation must be relatable to the goods imported, a logical corollary whereof would be that the same must be payable as a condition of import and not for the purpose of setting up of a manufacturing plant wherefor goods may be used.

15. Drawing our attention to Articles 3 and 4 of the agreement, the learned counsel submitted that ordinary assistance and additional assistance provided for therein are in relation to the manufacturing activities to be carried out in India by the respondent and the same has nothing to do with the import of the capital goods.

16. It was furthermore submitted that the provisions of the Act and the

rules framed thereunder do not lay down any provision for determination of the value on the basis as to whether the parties are related or not.

17. The Customs Act, 1962 (for short, 'the Act') was enacted to consolidate and amend the law relating to customs. The terms 'goods' and 'import' have been defined in Section 2(22) and Section 2(23) respectively in the following terms :

"2(22). "good" includes \026

(a) vessels, aircrafts and vehicles;
(b) stores;
(c) baggage;
(d) currency and negotiable instruments; and
(e) any other kind of movable property;"

"2(23) "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;"

Chapter V provides for levy of, and exemption from payment of customs duties. Section 14 provides for valuation of goods for the purpose of assessment in the following terms :

"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 \026

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 \026

(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;"

18. The Central Government in exercise of its power conferred upon it under Section 156 of the Act, made rules known as "Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Rule 3 provides for determination of the method of valuation, stating :

"Determination of the method of valuation.- For the purpose of these rules, -

(i) the value of imported goods shall be the transaction value;

(ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be

determined by proceeding sequentially through
Rules 5 to 8 of these rules."

19. How the transaction value would be determined has been laid down in Rule 4 of the Rules, stating that the same 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 the said rules. Rule 9 of the Rules provides for determination of transaction value, stating :

"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) 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 imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.

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

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

20. The issue before us is no longer res integra in view of the decision of this Court in Commissioner of Customs (Port), Kolkata v. M/s J.K. Corporation Limited [2007 (2) SCALE 459], wherein it is stated :

" 9. The basic principle of levy of customs duty, in view of the afore-mentioned 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 knowhow for the purpose of setting up of a plant from the machinery imported or running thereof, the same would not be computed for the 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(1A) are clear and explicit. The Rules and the Act, therefore, must be construed, having regard to the basic principles of interpretation in mind."

21. Reliance, as noticed hereinbefore, however, has been placed by the learned Additional Solicitor General on Essar Gujarat Limited (supra).

22. We may, thus, at the outset, consider the applicability of Essar Gujarat Limited (supra) in the facts of the present case. In Essar Gujarat Limtied (supra), a plant was originally installed at Emden, Germany, which went in liquidation in respect whereof a bank was appointed as receiver of the plant. A tender was floated for sale of the plant on "as is where is" basis. Essar Gujarat Limited (EGL) made an offer of 26 million. The offer, however, did not materialize as the Central Government's clearance could not be obtained. The plant was sold to M/s Teviot Investments Limited (TIL). EGL entered into a contract with TIL for purchase of the Direct Reduction Iron Plant on the terms and conditions mentioned therein. Another agreement was also entered into in respect thereof. EIL intended to enhance the capacity of the plant for which a Collaboration Agreement was entered into by and between EIL and M/s Voeist Alpine AG (VA), the relevant provisions whereof were as under :

"EGL will set up at Hazira, Gujarat, a gas-based Direct Reduction (DR) Plant which is to be re-engineered for a rated capacity of 8,80,000 tpy of Hot Briquetted Iron (HBI) and for this purpose decided to buy the existing gas-based DR plant of NOHDDEUTSCHE FERROWERKE (MORD FERRD) located at Emden, West Germany, which had a rated capacity of 8,00,000 tpy DRI under the prevailing operating conditions at Emden based on the Midrex Process and to incorporate Hot Discharge and Hot Briquetting facilities."

23. In the said agreement it was stipulated that the collaborator (VA) had been holding the construction licence and rights to use patents from Midrex International B.V. for marketing, sale, design and construction of the Midrex plants at Hizira, India.

24. This Court noticed Articles 3 and 10 of the agreement in question in paragraphs 7 and 8 of the judgment, which read as under :

"7. In Article 3 of the agreement under the heading Midrex Process Licence and Technical Services it was provided that in addition to the services being provided by V.A., Midrex will provide certain technical services to

V.A. or to EGL in connection with transfer of technology covered under the process licence agreement attached to in Annexure 12 of the agreement. The services included:
(a) basic engineering package for the hot discharge and hot briquetting system;
(b) advice to Essar on optimum utilisation of iron oxide lump ore and iron oxide pellets;
(c) provide information and documentation to allow Essar to implement improvements in plant design and/or operating procedures which have been developed by Midrex or other Midrex Process Licensees;
(d) provide continuing information to Essar on operating results from other Midrex Plants to assist Essar in optimizing plant-operating efficiency including operating reports, operation bulletins and operation seminars.
8. Article 10 of the agreement is as under:

Article 10: CONTRACT DHILL:
In consideration of fulfilment by Collaborator of its obligations under this Agreement, Essar shall pay to COLLABORATOR as below:
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."

25. Paragraph 10 of the agreement, therefore, had two components : (i) Services to be provided outside India; and (ii) Technical Services. Noticing the terms subject to which the licence was granted in favour of EGL as also the agreements with Midrex and VA, this Court observed :
"\005This agreement with V.A. recites that the plant, when it was bought, had a rated capacity of 8,00,000 tpy DRI

under the prevailing operating conditions based on the Midrex Process. It was recited that the Collaborator (V.A.) was holding construction licence and rights to use patents from Midrex for marketing, sale, design and construction of the Midrex Plants at Hazira, India. The services that were to be rendered by V.A. would also include technical services in connection with the Midrex Process and engineering services necessary for this purpose. The Collaborator agreed to use Midrex construction and process licence for this project at Hazira, India. It was recorded that EGLs contract with Midrex had been annexed to the contract with the Collaborator."

26. In the aforementioned fact situation, a contention raised on behalf of the EGL that the pre-condition for obtaining a licence was not the condition of sale was rejected, holding that without the same, the plant would be of no use to EGL, wherefor the overriding clause was inserted showing that the same was a condition of sale.

27. It was in the aforementioned premise, payments made to Midrex by way of licence fee was held to be liable to be added to the price actually paid to TIL for purchase of the plant by EGL. Construing the provisions of Section 14 of the Act read with Rule 9 of the Rules, it was held :

"18. The entire purpose of Section 14 is to find out the value of the goods which are being imported. The EGL in this case was purchasing a Midrex Reduction Plant in order to produce sponge iron. In order to produce sponge iron, it was essential to have technical know-how from Midrex. It was also essential to have an operating licence from them. Without these, the plant would be of no value. That is why the precondition of a process licence of Midrex was placed in the agreement with TIL. It will not be proper to view that agreement with TIL in isolation in this case. The plant would be of no value if it could not be made functional. EGL wanted to buy the plant in a working condition. This could only be achieved by paying not only the price of the plant, but also the fees for the licence and the technical know-how for making the plant operational. Therefore, the value of the plant will comprise not only the price paid for the plant but also the price payable for the operation licence and the technical know-how. Rule 9 should be construed bearing this in mind."

28. This Court noticed several curious aspects of the three agreements, but ultimately held that whereas the amounts payable in terms of clauses 10.1.1.1, 10.1.1.2 and 10.1.2.1 were to be taken into consideration for the purpose of determining the transactional value, 10% of the amount, however, for payment of engineering and consultancy fee as specified under the agreement was held to be payable by way of guess work.

29. Therefore, law laid down in Essar Gujarat Limited (supra) and J.K. Corporation Limited (supra) are absolutely clear and explicit. Apart from the fact that Essar Gujarat Limited (supra) was determined on the peculiar facts obtaining therein and furthermore having 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 transactional value.

30. The observations made by this Court Essar Gujarat Limited (supra) in paragraph 18 must be understood in the factual matrix involved therein. The ratio of a decision, as is well-known, must be culled out from the facts involved in a given case. A decision, as is well-known, is an authority for what it decides and not what can logically be deduced therefrom. Even in Essar Gujarat Limited (supra), 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.

31. The transactional value must be relatable to import of goods which a' fortiori would mean that the amounts must be payable as a condition of import. A distinction, therefore, clearly 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.

32. 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.

33. 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.

34. We may furthermore notice that Interpretative Note appended to Rule 4 also plays an important role in a case of this nature which 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 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."

35. The said rule clearly states that the charges or costs envisaged thereunder were not to be included in the value of the imported goods subject to satisfying the requirement of the proviso that charges were

distinguishable from the price actually paid or payable for the imported goods.

36. Interpretation of the said rule came up for consideration before a Bench of this Court in Tata Iron & Steel Co. Ltd. v. Commissioner of Central Excise & Customs, Bhubaneswar, Orissa [(2000) 3 SCC 472], wherein it was held :

"\005This 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\005"

37. Yet again a three-Judge Bench of this Court in Union of India and Others v. Mahindra and Mahindra Ltd., Bombay [(1995) Supp. (2) SCC 372], opined :

"\005Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs. It is, no doubt, open to the Revenue to allege and prove that the apparent is not the real and that the price for the sale of the CKD packs is not the true price, and the price was determined by reckoning or taking into consideration the lump sum payment made under the collaboration agreement in the sum of 15 million French Francs.\005"

It was furthermore held :

"9. On an evaluation of the relevant clauses in the collaboration agreements and the attendant circumstances, we are of the view that the concurrent judgments of the High Court at Bombay do not merit interference in this appeal. The crucial aspects appearing in the case are that the parties were dealing at arms length, that the seller and the buyer have no interest in the business of each other, that, ordinarily, the technical know-how of the machine can take in the assembly thereof, that the CKD packs and spares were supplied to the respondents by the collaborator not at a concessional price but at the price at which they were sold to others, that, as agreed to by the respondents, the option was entirely with the respondents to order the parts as per their requirements, that there was no obligation on the respondents to purchase CKD packs at all, that long before the supply of the CKD packs and spares, the royalty due to the collaborators was paid, that there is no

material to show that the supply of the CKD packs or spares weighed with the parties in fixing the payments under the collaboration agreement but, on the other hand, the collaboration agreement for the technical know-how and the supply of CKD packs and spares are independent commercial transactions; in other words, there existed no nexus between the lump sum payment under the agreement for the technical know-how and the determination of the price for supply of CKD packs or spares. It is by highlighting the above aspects that the learned Single Judge and the Division Bench concluded that the contention that the price quoted in the invoices tendered by Mahindra & Mahindra (respondents) does not reflect the correct price because a part of the value of imported packs and components was already received by foreign collaborator while determining the consideration of 15 million French Francs cannot be accepted, and the collaboration agreement does not support the claim nor was there any material available to the Assistant Collector to warrant such a conclusion, and, therefore, resort to Section 14(1)(b) of the Act and Rule 8 of the Customs Valuation Rules is clearly incorrect and unsustainable and the Assistant Collector was bound to accept the price mentioned in the invoices for the purpose of assessing the customs duty."

38. It may be true, as has been contended by the learned Additional Solicitor General, that Rule 9(1)(c) of the rules had not been taken into consideration therein, but the same does not make much difference.

39. For the views we have taken, we are of the opinion that the CESTAT cannot be said to have committed any error in arriving at its decision in the impugned judgment. There is, thus, no merit in this appeal, which is dismissed accordingly. In the facts and circumstances of the case, there shall, however, be no order as to costs.