

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH- COURT NO. I

CUSTOMS APPEAL NO. 50439 OF 2021

(Arising out of Order-in-Original No. 13/VKP(14)ADG(Adj.)/DRI/N. Delhi/2020-21 dated 27.11.2020 passed by the Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi.)

M/s. Ericsson India Private Limited

Ericsson Forum, DLF Cyber City,
Sector-25A, Gurgaon,
Haryana-122002

...Appellant

versus

Additional Director General (Adjudication),

Directorate of Revenue Intelligence,
New Customs House,
New Delhi- 110037

...Respondent

WITH

CUSTOMS APPEAL NO. 50440 OF 2021

(Arising out of Order-in-Original No. 13/VKP(14)ADG(Adj.)/DRI/N. Delhi/2020-21 dated 27.11.2020 passed by the Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi.)

Shri Tej Nirmal Singh,

M/s. Ericsson India Private Limited
Ericsson Forum, DLF Cyber City,
Sector-25A, Gurgaon,
Haryana-122002

....Appellant

versus

Additional Director General (Adjudication),

Directorate of Revenue Intelligence,
New Customs House,
New Delhi- 110037

...Respondent

AND

CUSTOMS APPEAL NO. 50441 OF 2021

(Arising out of Order-in-Original No. 13/VKP(14)ADG(Adj.)/DRI/N. Delhi/2020-21 dated 27.11.2020 passed by the Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi.)

Shri Bharat Bandhu,

M/s. Ericsson India Private Limited
Ericsson Forum, DLF Cyber City,
Sector-25A, Gurgaon,
Haryana-122002

....Appellant

versus

Additional Director General (Adjudication),

Directorate of Revenue Intelligence,
New Customs House,
New Delhi- 110037

...Respondent**APPEARANCE:**

Mr. V. Lakshmikumaran, Mr. Anurag Kapur, Ms. Rubel Bareja and Ms. Anisha Arya, Advocates for the appellant

Mr. Mihir Ranjan, Special Counsel of the Department

CORAM:**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT****HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)****DATE OF HEARING: 15.09.2025****DATE OF DECISION: 14.10.2025****FINAL ORDER NO's. 51568-51570/2025****JUSTICE DILIP GUPTA:**

Customs Appeal No. 50439 of 2021 has been filed by M/s. Ericsson India Private Limited¹ to assail that portion of the order dated 27.11.2020 passed by the Additional Director General (Adjudication), (DRI), New Delhi² that holds that the amount of royalty paid by Ericsson India to Telefonaktiebolaget LM Ericsson, Sweden³ towards knowhow for the manufacture of Radio Base Station, Mobile Switching Centers and Base Station Controllers is includible in the transaction value of the components imported by Ericsson India from Ericsson AB, Sweden⁴ in terms of rule 10(1)(c) of the Customs Valuation (Determination of the Value of Imported Goods) Rules 2007⁵. Accordingly, the demand of customs duty has been confirmed and ordered to be recovered from Ericsson India by invoking the extended period of limitation under

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1. **Ericsson India**
 2. **the Additional Director General**
 3. **LM Ericsson Sweden**
 4. **Ericsson Sweden**
 5. **the 2007 Valuation Rules**

section 28 of the Customs Act, 1962⁶ with interest and penalty under section 114A of the Customs Act.

2. **Customs Appeal No. 50440 of 2021** has been filed by Tej Nirmal Singh to assail that portion of the order dated 27.11.2020 passed by the Additional Director General that imposes penalty upon him under section 112(a)(ii) of the Customs Act.

3. **Customs Appeal No. 50441 of 2021** has been filed by Bharat Bandhu to assail that portion of the order dated 27.11.2020 passed by the Additional Director General that imposes penalty upon him under section 112(a)(ii) of the Customs Act.

4. Ericsson India is a wholly owned subsidiary of LM Ericsson Sweden. Ericsson India is engaged, since 2005, in the manufacture/assembly and sale of Radio Base Station, Mobile Switching Centers and Base Station Controllers (collectively referred to as 'finished goods'), used in GSM networks and marketed under LM Ericsson Sweden trademark. In relation to its business activities, Ericsson India imported various components like screen covers, shield covers, cables, tools, crimp tools, radio units, digital units, small and micro-electronic chips and printed circuit boards (collectively referred to as 'imported goods') from its related foreign supplier i.e. Ericsson Sweden during the Financial Years 2012-2014. It needs to be noted that the components imported by Ericsson India from Ericsson Sweden were exempt from basic customs duty levied under section 12 of the Customs Act as they fell under the category of Information Technology Goods under the Notification dated 01.03.2005. Ericsson India, however, paid CVD and SAD on the import of components.

6. **the Customs Act**

5. The imported goods were, therefore, cleared by Ericsson India upon payment of additional duty of customs⁷ levied under section 3(1) of the Customs Tariff Act, 1975⁸, special additional duty of customs⁹ levied under section 3(5) of the Customs Tariff Act, and customs cess. The transfer price for the imported goods was based on LM Ericsson Sweden Global Transfer Pricing guidelines. In other cases, Ericsson India procured components from local vendors or unrelated foreign suppliers for use in manufacture of the finished goods. Such components included cables, steel cabinets, power units, crimpers, cable connectors and high carbon steel screws. According to Ericsson India, a rough ratio of the components imported and indigenously procured for the manufacture of finished goods was 80:20 i.e. about 20% of the value of final products would comprise of locally procured items.

6. During the relevant period, the finished goods were manufactured/assembled by Ericsson India at its factory located in Jaipur by employing technical know-how, manufacturing, performance, and quality specifications provided by LM Ericsson Sweden as per the Global Standard Process of manufacturing. These finished goods were subsequently cleared upon payment of the applicable central excise duty. Ericsson India availed CENVAT credit in respect of the duties paid on the imported goods and utilized such credit towards the discharge of its excise duty liability on the finished goods.

7. In consideration of the grant of technical know-how and intellectual property rights, Ericsson India remitted royalty payments to

7. CVD
8. the Customs Tariff Act
9. SAD

LM Ericsson Sweden in accordance with the terms and conditions stipulated in the Technical Co-Operation Agreement(s).

8. Additionally, Ericsson India also imported assembled goods like 3G BSC, 3G Products and Mini links from Ericsson Sweden. The products were then sold to customers on High Sea Sales basis. In such transactions, the customers, being the High Sea Sales buyers, undertook all customs compliances and cleared the goods from customs at the transaction value, i.e., the selling price, and payments to Ericsson Sweden were made by Ericsson India as per invoices raised in accordance with the Transfer Pricing Agreement between Ericsson India and Ericsson Sweden. The ratio of the high sea sales to domestic manufacturing was 20:80.

9. The factual position leading up to the present dispute is as follows:

Date	Particulars
23.12.2008	<u>Ericsson India entered into a Technical Co-operation Agreement dated 23.12.2008 with LM Ericsson Sweden</u> for grant of non-exclusive rights and licenses to manufacture, sell, repair, and service finished goods using Ericsson knowhow and Ericsson IPR. Article 4.1 of this Agreement provided for payment of royalty of 5% of the total net selling price of the finished goods, spare and replacement parts and accessories of the finished goods, and services. <u>Net selling price refers to the net sale value excluding excise duties and sales tax of the licensed products manufactured and shipped from the factory at Jaipur after making deductions from the value of all imported components.</u>
18.02.2011	Ericsson India entered into a supply contract dated 18.02.2011 with Ericsson Sweden for supply of components for manufacture of finished goods ('Supply Agreement').

02.07.2004	Special Valuation Branch ¹⁰ , by Order dated 02.07.2004, accepted the declared import prices as 'transaction value' under section 14 of Customs Act read with rule 3(1) of the 2007 Valuation Rules.
05.07.2007 18.05.2010 30.05.2013	Ericsson India made an application to SVB for review of the SVB Order dated 02.07.2004, along with updated SVB questionnaires and copies of Financial Statements for the year ending March 2007-2012. It was held by the SVB orders dated 05.07.2007, 18.05.2010 and 30.05.2013 that the declared invoice prices of the imported goods are not influenced by the mutual relationship between Ericsson India and Ericsson AB Sweden and are based on Transfer Pricing Policy. Thus, the declared invoice prices were accepted in terms of rule 4(3)(a) and 4(3)(b) read with section 14 of the Customs Act.
27.06.2013	<u>Ericsson India entered into a fresh Technical Co-operation Agreement dated 27.06.2013 (effective from 01.04.2012) with LM Ericsson Sweden</u> for grant of non-exclusive rights and licenses to manufacture, sell, repair, and service finished goods using Ericsson knowhow and Ericsson IPR. <u>Article 5.1 of this Agreement dated 27.06.2013 provided for payment of royalty of 5.75% of the gross sales made by Ericsson India of the finished goods assembled / manufactured in the factory at Jaipur. Gross Sale means the sale value excluding Excise Duties and Sales Tax of the licensed products manufactured and sold from their factory in Jaipur without making any deduction for the value of imported components. Both the Agreement are identical in form and substance except the royalty clause.</u>
21.01.2014 to 01.08.2014	Investigations were initiated by Panchnama dated 21.01.2014. Statements of Shri Rajesh Gosain, General Manager (Taxation), Shri Tej Nirmal Singh, Director and Head of Supply and Shri Bharat Bandhu, Head of Company Control were recorded.
31.07.2014 04.08.2014 10.09.2014	As a matter of co-operation, Ericsson India by letters dated 31.07.2014, 04.08.2014 and 10.09.2014 paid the applicable duty (CVD, SAD and Customs Cess) on the

10. SVB

	<p>royalty payments made to LM Ericsson Sweden during the relevant period, while reserving its rights of remedies, and submitted that royalty payment under Agreement dated 27.06.2013 to LM Ericsson Sweden and import of components from Ericsson Sweden under Supply Agreement, are two separate transactions with two separate entities, the former being a service transaction and the latter being a sale (import of goods).</p> <p>Ericsson India, upon the request of the Additional Director General, by letter dated 06.04.2015, also submitted details of apportioned royalty payments to the various Bills of Entry during the relevant period.</p>
03.08.2015	A show cause notice alleging that payment of royalty by Ericsson India to LM Ericsson Sweden is includible in the value of imported goods.
18.03.2016	Ericsson India submitted a detailed reply dated 18.03.2016 to the show cause notice.
04.08.2016	The Additional Director General (Adjudication), passed an Order dated 04.08.2016 confirming the entire demand with interest and penalty.
30.11.2016	Being aggrieved by the order dated 04.08.2016, Ericsson India filed an appeal before this Tribunal.
14.08.2017	The Tribunal by Final Order dated 14.08.2017 remanded the matter to the Adjudicating Authority to re-examine the matter in view of the license agreement and the supply contract, as was observed by the Supreme Court in Commissioner of Customs vs. Ferodo India Pvt. Ltd., 2008 (224) E.L.T.23 (S.C.) .
03.12.2020	The Additional Director General, after remand, held that the amount of royalty paid by Ericsson India to LM Ericsson Sweden is includible in the value of goods imported by Ericsson India from Ericsson Sweden in terms of rule 10(1)(c) of the 2007 Valuation Rules.

10. It is this order dated 03.12.2020 passed by the Additional Director General that has been assailed in this appeal.

11. The Additional Director General firstly held that prior to 01.04.2012, in terms of the Technical Co-Operation Agreement dated 23.12.2008, the value of imported raw materials had to be excluded for

computation of royalty but not after that date. The relevant observations are reproduced below:

"5.3 Prior to 01.04.2012, royalty was paid at the rate of 5% of Net Selling Price. Net Selling Price means the net sale value excluding Excise Duties, Sales Tax of the products manufactured and shipped from the factory of EIL at Jaipur after making deduction there from the value of all imported components. **From 01.04.2012, the rates of royalty payable were revised to 5.75% calculated on gross sales made by EIL. Gross Sale means the sale value excluding Excise Duties and Sales Tax of the licensed products manufactured and sold from their factory in Jaipur without making any deduction for the value of imported components.** Thus, prior to 01.04.2012, value of imported raw materials was being excluded for computation of royalty, but not after that."

(emphasis supplied)

12. The Additional Director General then examined the subsequent Technical Co-Operation Agreement dated 27.06.2013 that was effective from 01.04.2012 and ultimately recorded the following findings in paragraph 6.29 of the order:

"6.29. In this background, my findings are as follows;

- (a) As discussed above, in the present case, the royalty is paid on the Gross sale price of the goods which includes the sale value and the cost of imported goods excluding excise duties and sales tax of the licensed products manufactured from the factory.** Further, it is an accepted fact that in the absence of Ericsson knowhow and IPR, EIL would not have been in a position to procure the impugned goods and assemble the equipment out of these. **As per the terms of the Technical cooperation Agreement dated 27.06.2013 (effective from 01.04.2012), LME or its affiliates were to provide components, sub-assemblies, parts, know-how etc. to EIL and EIL was to purchase components in terms of a purchase agreement. Thus, the supply of**

components in terms of the said purchase agreement was a condition in the technical cooperation agreement dated 27.06.2013. Thus, payment of royalty to LME is a condition of sale of goods from EAB to EIL.

- (b) It has been discussed above that it is an admitted fact that the procurement of indigenous and imported component had to be of quality standards and technical specifications set by Ericsson globally. It is also an admitted fact that EAB is the only such manufacturer of impugned goods i.e. the goods as per the raw material specifications of Ericsson knowhow and the said knowhow would work only with those components which were being exclusively supplied by EAB, which is also a subsidiary of LME. xxxxxxxxxxxx.
- (c) I find that the Noticee has tried to downplay the fact that the technical cooperation agreement dated 27.06.2013 expressly stated that Licensor i.e. LME or its affiliates would provide complex components, sub-assemblies, parts, in addition to knowhow etc. and that the supply contract dated 31.01.2011, in para 3.1 provides for purchase by the Buyer and the sale by the Supplier of the Components and Software etc. This is a crucial factor in this case.
- (d) It has also been discussed that the transfer price in the case of import of components is based on a global transfer price list which was to be fixed on the basis of cost plus a margin of 5%, unlike in the case of imports of assembled products from EAB, which were sold on high sea sales basis. The manufacturing/ assembling process is same in both the cases. In the case of import of assembled products, sold on high sea sales basis, no royalty is charged, whereas the knowhow and the IPR are same in both the cases. It was noted that the condition no. 6 of the supply contract, on Pricing Adjustment, is very relevant which states that "the Buyer's purchase price for the components covered herein shall be established from time to time and shall be in accordance with the internationally accepted arm's length standard. The seller and the buyer shall, after every six months or more frequently, if wanted, review

the components prices to ensure that such prices are consistent with the arm's length standard. "This information have not been provided by the Noticee during investigation.

- (e) **The Noticee has by placing reliance on Commentary on the GATT Customs Valuation Code by Saul L. Shermanhas, has contended that provision of specification or detailed design to the Exporter is only for the purpose of advising the supplier of what the buyer wants and the cost of such engineering and design are not includible in the price of such goods. This general principle has no application in the instant case as here both EIL and supplier (EAB) are subsidiaries of LME and it is an admitted position that the design, specification etc. of the goods supplied by EAB are property of LME.** Further, if the EAB makes payment to LME for use of such specification etc., it will recover the same from EIL, as forming part of Consideration. In this case, the EIL is making payments directly to the LME, and hence, the same is includible in the Assessable Value.
- (f) **It is an accepted fact that in the absence of Ericsson Knowhow and IPR, EIL would not have been in a position to procure the impugned goods and assemble the equipments out of these. Thus, it appears that payment of royalty to LME is a condition of sale of goods from EAB to EIL. As per the terms of the agreement dated 27.06.2013 (effective from 01.04.2012), LME or its affiliate were providing components, sub-assemblies, parts etc. to EIL and EIL was to purchase components in terms of a purchase agreement. Thus, it appears that the supply of components in terms of the said purchase agreement was a condition of sale in the technical cooperation agreement dated 27.06.2013.**
- (g) **As discussed earlier, the copy of TCA agreement dated 23.12.2008 was not submitted by EIL to SVB in any of the years for which applications had been made for issuance and/or renewal of SVB orders. EIL had knowingly and deliberately submitted only the**

copy of the supply agreement, which was entered into in pursuance of the technical cooperation agreement (TCA), which did not have any mention of the royalty payable to LME in relation to such imported goods.”

(emphasis supplied)

13. The Additional Director General then held that as all the requirements of rule 10(1)(c) of the 2007 Valuation Rules were met the royalty paid by Ericsson India to LM Ericsson Sweden would be included in the transaction value of goods imported by Ericsson India from Ericsson Sweden. The observations are:

“6.30. It clearly emerges that all the requirements specified in Rule 10(1) of the valuation rules are met in this case inasmuch as that;

- a) **Royalty paid by EIL to LME was in respect of inter-alia complex components, sub-assemblies, parts, know how etc. which were provided by LME or its affiliates (Ericsson AB, in this case);**
- b) Royalty was being paid directly to LME for the components, knowhow and parts etc. which are to be supplied by LME or its affiliates (Ericsson AB);
- c) **Payment of royalty to LME was a condition of sale of goods from EAB to EIL.** As per the terms of the agreement dated 27.06.2013 (effective from 01.04.2012), LME or its affiliates were to provide components, sub-assemblies, parts etc. to EIL and EIL was to purchase components in terms of a purchase agreement. **Thus, the supply of components in terms of the said purchase agreement was a condition in the technical cooperation agreement dated 27.06.2013.”**

14. The Additional Director General then concluded:

“6.31 I conclude that in the Ferodo case the Apex court observed that in the case of Matsushita Television, the pricing arrangement was not produced before the department. Therefore, the view was taken that royalty

payment had to be added to the price of the imported goods. As discussed in above paras, in the instant case also the Noticee misled the department by deliberately suppressing the above discussed vital information etc. in order to avoid payment of due customs duties. Therefore, even going by the ratio of the Ferodo judgment, the amount of royalty is justified to be added to the price of the imported goods.”

15. The Additional Director General also held that the goods were liable to confiscation in terms of section 111(m) of the Customs Act and, therefore, penalty under section 114A of the Customs Act would be leviable on the appellant. The Additional Director General also imposed penalty upon Tej Nirmal Singh and Bharat Bandhu under section 112(a)(ii) of the Customs Act.

16. Shri V. Lakshmikumaran, learned counsel for the appellant assisted by Shri Anurag Kapur, Ms. Rubel Bareja and Ms. Anisha Arya, made the following submissions:

- (i) Royalty paid under the Technical Co-Operation Agreements is not includible in the assessable value of imported components. Technical Co-Operation Agreement dated 23.12.2008 and Technical Co-Operation Agreement dated 27.06.2013 are **indential** in so far they relate to post importation activities;
- (ii) Both the Technical Agreement do not stipulate that payment of royalty is a *sine qua non* for import of components. Therefore, royalty for technical know-how does not automatically become a 'condition of sale' merely because it is inclusive of the value of imported goods;
- (iii) It is a settled principle that where royalty payments pertain to post-importation activities, such royalty is

not includible in the assessable value of imported goods under rule 10(1)(c) of the 2007 Valuation Rules. In this connection reliance was placed on the following decisions:

- a) **Toyota Kirloskar Motor Private Limited vs. Commissioner of Cus., Chennai¹¹;**
- b) **Commissioner of Cus. (Port), Chennai vs. Toyota Kirloskar Motor P. Ltd.¹²;**
- c) **Commissioner of Customs, Chennai vs. IBEX Gallegher Ltd.¹³;**
- d) **The Commissioner of Customs (Import), vs. Vestas Wind Technology India Pvt. Ltd.¹⁴;**
- e) **Commissioner of Customs (Sea), Chennai vs. Remy Electricals India Ltd.¹⁵;**
- f) **Commissioner of Cus. (Import), Mumbai vs. Bridgestone India Pvt. Ltd.¹⁶;**
- g) **The Commissioner of Customs vs. GH Induction India Pvt. Ltd.¹⁷;**

(iv) Thus, as payment of royalty is not a 'condition of sale' of imported goods and relates to post-import activities, it is not includible in the assessable value of imported goods under rule 10(1)(c) of the 2007 Valuation Rules;

(v) Mere inclusion of value of imported goods cannot lead to addition of royalty paid on finished goods in the transaction value of imported goods. In this connection, reliance has been placed on the following judgments:

- (a) **Ferodo India (P) Ltd. vs. Commissioner of Customs, Mumbai¹⁸** affirmed by

11. 2006 (200) E.L.T. 289 (Tri. – Del.)
 12. 2007 (213) E.L.T. 4 (S.C.)
 13. 2005 (191) E.L.T. 967 (Tri. – Bang.)
 14. Customs Appeal No. 40973 of 2023 decided on 11.07.2023
 15. Customs Appeal No. 318 of 2007 decided on 08.05.2017
 16. 2013 (292) E.L.T. 403 (Tri.- Mumbai)
 17. Customs Appeal No. 42516 of 2013 decided on 31.08.2023

- Supreme Court in **Commissioner of Customs vs. Ferodo India Private Limited, 2008 (224) E.L.T. 23 (S.C.)**;
- (b) **Commissioner of Customs, Mumbai vs. BASF Strenics Pvt. Ltd.¹⁹**;
- (c) **Sandvik Asia Pvt. Ltd. vs. Commissioner of Customs (Import), Mumbai²⁰**;
- (d) **Kruger Ventilation Indus. (North India) Pvt. Ltd. vs. Commr. of Customs (Import), New Delhi²¹, affirmed by Supreme Court in (2023) 9 Centax 75 (S.C.)**;
- (vi) The judgment of the Supreme Court in **Matsushita Television & Audio (I) Ltd. vs. Commissioner of Customs²²** would not be applicable to the facts of the present case;
- (vii) Technical Co-Operation Agreement does not stipulate import of components under a purchase agreement with LM Ericsson Sweden or its affiliates;
- (viii) It is an admitted fact in the impugned order that Ericsson India not only procures components from Ericsson Sweden but also procures them from other third parties, i.e., unrelated foreign suppliers and local producers. This information was submitted as part of additional submissions dated 07.08.2020 by Ericsson India, but the same has not been taken into consideration by the Additional Director General. The same was also disclosed before SVB by way of

18. 2002 (142) E.L.T. 343 (Tri. – Del.)
 19. 2006 (195) E.L.T. 206 (Tri.-Mumbai)
 20. 2015 (329) E.L.T. 493 (Tri.- Mumbai)
 21. 2022 (382) E.L.T. 541 (Tri. – Del.)
 22. 2007 (211) E.L.T. 200 (S.C.)

submissions of TP Report for the Financial Years 2011, 2012 and 2013;

- (ix)** Ericsson know-how does not extend to 'manufacturing' raw materials and components;
- (x)** In absence of substantive provisions under the Customs Tariff Act, demand of interest, imposition of penalty and confiscation on amount of CVD and SAD is not sustainable;
- (xi)** The extended period of limitation could not have been invoked in the present case;
- (xii)** Interest under section 28AA/28AB of the Customs Act is not payable, imported goods are not liable to confiscation under section 111(m) of the Customs Act and penalty under section 114A is not sustainable; and
- (xiii)** Penalties on individuals under section 112A(ii) are not imposable.

17. Shri Mihir Ranjan, learned special counsel of the respondent made the following submissions:

- (i)** Royalty under the revised Technical Co-Operation Agreement dated 27.06.2013 (effective 01.04.2012) is 5.75% of gross sales, which includes the cost of imported components;
- (ii)** Without the know-how and IPR of LM Ericsson Sweden, Ericsson India could not have procured/import components or manufactured the finished goods. The royalty is inseparable from imports. Bhaat Babdhu, Head Company Control Hub, Ericsson India admitted this fact in his statement;

- (iii) The supply of components by Ericsson Sweden was contemplated in the Technical Co-Operation Agreement itself, thereby linking royalties to imports;
- (iv) The judgment of the Supreme Court in **Matsushita Television**, where royalty was held includible because the formula for royalty included imported components, would be applicable in the present case;
- (v) Reliance by the Ericsson India on **Ferodo** is misplaced;
- (vi) The acceptance of the import price by SVB does not preclude the addition of a royalty in the recovery proceedings under section 28 of the Customs Act. SVB examined transaction value under rule 3 and not royalty liability under rule 10(1)(c) of the 2007 Valuation Rules;
- (vii) The sourcing of Ericsson India from unrelated parties is irrelevant because even if some components are brought from others, royalty is payable on gross sales, including those made using imported parts from Ericsson Sweden;
- (viii) To support the aforesaid contentions, learned special counsel placed reliance on the following decisions:
 - (a) **Matsushita Television;**
 - (b) **Agro Tech Foods P. Ltd. vs. Commissioner of Customs (I), Nhava Sheva²³;**
 - (c) **Toyota Kirloskar; and**
 - (d) **Collector of Customs (Prev.) Ahmedabad vs. Essar Gujarat Ltd²⁴.**

23. 2015 (330) E.L.T. 448 (Tri.-Bom.)

24. 1996 (88) E.L.T. 609 (S.C.)

18. The submissions advanced by the learned counsel for the appellant and the learned special counsel appearing for the department have been considered.

19. The issue that arises for consideration in this appeal is as to whether royalty paid by Ericsson India to LM Ericsson Sweden towards know-how can be included in the transaction value of the components imported by the Ericsson India from Ericsson Sweden under rule 10(1)(c) of the 2007 Valuation Rules.

20. The relevant portion of rule 10(1)(c), therefore, needs to be examined and it is reproduced below:

"10. 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) *****

(b) *****

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

21. It would be seen that in determining the transaction value, rule 10(1)(c) of the 2007 Valuation Rules requires that **there shall be added to the price actually paid or payable for the imported goods royalties related to the imported goods that the buyer is required to pay as a condition of the sale of the goods being valued, to the extent that such royalties are not included in the price.** Rule 10(1)(c) of the 2007 Valuation Rules, therefore, requires that not only should the payment of royalty be related to the imported goods but the buyer should have paid royalty as a condition of the sale of goods. Only if these conditions are satisfied can royalty payment be

added to the price actually paid for the imported goods, to the extent that such royalties are not included in the price.

22. The Additional Director General has, in the order impugned, drawn a distinction between the Technical Co-Operation Agreement dated 23.12.2008 and the Technical Co-Operation Agreement dated 27.06.2013 which was made effective from 01.04.2012. Such a distinction has been drawn because prior to 01.04.2012 royalty was paid at the rate of 5% of the Net Selling Price which price excluded the value of all important components, but w.e.f. 01.04.2012 payment of royalty was revised to 5.75% calculated on gross sales which included the value of the imported components.

23. It would, therefore, be useful to reproduce the relevant clauses of two Agreements.

Technical Co-Operation Agreement dated 23.12.2008

24. The preamble to the agreement provides that Ericsson India has been provided access to Ericsson technical know-how and Ericsson IPR. **'Ericsson Know-how'** is defined in Article 1.4 to mean information relating to trade secrets, processes, product development, operations, methods, manufacturing facilities and techniques of licensor or its appropriate affiliate which is necessary for manufacture, sale and use of licensed products or for the use or sale of Licensed Parts. **'Ericsson IPR'** is defined in Article 1.5 to mean all patents and copyrights, and trademarks which are owned or licensed to the extent sub-licensable by licensor which are in existence and which are necessarily infringed by the manufacture, sale and use of licensed products or for the use or sale of licensed parts or otherwise by use of Ericsson know-how.

25. In consideration for the above, Article 4.1 of the Technical Co-Operation Agreement provides for charge of royalty @5% of the total Net Selling Price of Licensed Products, Licensed Parts and Services sold by the licensee. The Net Selling Price of Licensed Products would be calculated as gross sale price of Licensed Products minus excise duty, sales tax and the cost of imported components used in manufacturing of said licensed products. The Agreement also provided for royalty free period prior to 31.03.2008 and royalty was to be paid w.e.f. 01.04.2008. Accordingly, Ericsson India paid royalty to LM Ericsson Sweden for the years 2008-09 and 2009-10 as per the terms of the Agreement. Royalties were not paid for the years 2010-11 and 2011-12 as the royalty payment worked out to NIL in terms of the applicable formula.

Technical Co-Operation Agreement dated 27.06.2013 (effective from 01.04.2012)

26. Royalty under Article 5.1 of this Agreement was agreed to be @ 5.7% of the gross sale price of Licensed Products and Licensed Parts assembled/manufactured and sold by Ericsson India. The gross sales price of Licensed Products was calculated as local sale value of Licensed Products manufactured by the licensee minus the excise duty and sales tax on the manufacture and sale of said Licensed Products. Accordingly, Ericsson India paid royalty to LM Ericsson Sweden under this revised Technical Co-Operation Agreement dated 27.06.2013 for the years 2012-13 and 2013-14.

Discussion

27. As noticed above, the Additional Director General in paragraph 5.3 of the order held that prior to 01.04.2012 royalty on the imported raw materials had to be excluded, but from 01.04.2012 royalty had to be included.

28. According to learned counsel for the appellant, both the Technical Co-Operation Agreements relate to technical know-how namely (i) Specification for Licensed Products, Including; (ii) Process details for manufacturing Licensed Products; (iii) Details of established quality control procedures for the Licensed Products; (iv) Specifications for process consumables; (v) Training of the Licensee's executives; (vi) Test facility, test, procedures and results, specifically; (vii) Specifications for manufacturing consumables; (viii) Unique quality assurance procedures; and (ix) Plant and Equipment layout. However, all the terms and conditions of both the Agreements are identical except for the mode of calculating royalty. Under the first Agreement, royalty is calculated at the rate of 5% of the Net Selling Price after excluding the value of imported components. Under the second Agreement, royalty is calculated at the rate of 5.7% of the gross sales without deducting the value of imported components from such sale price.

29. Learned counsel submitted that there is no artificial price split to pay higher royalty. Both the Technical Co-Operation Agreements are identical in scope and substance and do not stipulate that payment of royalty to LM Ericsson Sweden is a *sine qua non* for import of components from Ericsson Sweden. Thus, royalty for technical knowhow does not automatically become a 'condition of sale' merely because it is inclusive of the value of imported components. Learned counsel also submitted that where royalty payments pertain to post-importation

activities, such royalty is not includible in the assessable value of imported goods.

30. The contention of learned counsel for Ericsson India that royalty for technical know-how does not automatically become a 'condition of sale' merely because it is inclusive of the value of imported components and that where royalty payments pertain to post importation activities, such royalty is not includible in the assessable value of imported goods is supported by the decision of the Supreme Court in **Commissioner of Customs (Port), Kolkata vs. M/s. J.K. Corporation Limited**²⁵. The relevant portion of the judgment is reproduced below:

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

(emphasis supplied)

25. 2007 (2) SCALE 459

31. The submission advanced by the learned counsel for Ericsson India that mere inclusion of value of imported goods cannot lead to addition of royalty paid on finished goods in the transaction value of the imported goods was also examined by the Tribunal in **Ferodo India** and it was held that since royalty payment related to the goods to be produced in India, it could not be added to the value of the imported goods. The relevant portion of the decision of the Tribunal is reproduced below:

"9. A perusal of the various clauses, and in particular, clause 4.1 makes it clear that the royalty and licence fees are not related to supply of materials or capital goods. They only deal with selection of material suppliers, assistance that would be available in that area from the foreign shareholder etc. The earlier clauses of the agreement under clause (1), clause (2) and clause (3) etc. clearly show that the licence fees and royalty are in relation to supply of know how and use of the foreign shareholder's brand name on the products to be manufactured by the appellant in India. Perusal of other clauses of the agreement, in particular, clauses 11.1 and 11.2 also makes this position very clear. It is also noticed that with regard to the imports in question the foreign shareholder was only assisting the appellant with regard to identification and procurement of goods abroad and they made available the invoices of the original suppliers to appellant. Those prices conformed to the sale price of the appellant's foreign shareholder. Thus, the invoices covering the import of capital goods, spares and raw materials represented the full value of the goods under import. Viewed from that angle also, there was no justification to load the declared value of the goods.

8. The licence fee and royalty payment being entirely related to the goods to be produced in India and training the appellant's personnel by the foreign shareholder, these payments are in no way related to the imported capital goods or materials. Therefore, the addition ordered in the impugned order is contrary to

the specific provisions contained in Rule 9(1)(e). It is also contrary to the legal position stated in this Tribunal's decision in the case of Vesta RRB India Ltd., Tata Timken Ltd., etc. The judgment of the Apex Court in Essar Gujarat Ltd. [1996 (88) E.L.T. 609 (S.C.)] has no application to the present case. Rule 9(1)(e) also is not attracted as there was no indirect payment also towards the cost of the goods under import."

(emphasis supplied)

32. The department challenged the aforesaid order of the Tribunal before the Supreme Court. The Supreme Court distinguished the judgment of the Supreme Court in **Matsushita Television**, on which reliance was placed by the department and on which reliance was also has been placed by the learned special counsel appearing of the department, and held that as there was no nexus between the royalty paid for the know-how and the goods imported for manufacture of Licensed Products, royalty could not be added to the value of the imported goods. The judgment of the Supreme Court in **Matsushita Television** was distinguished because of the consideration clause and other surrounding circumstances in the matter. The relevant portion of the judgment of the Supreme Court is reproduced below:

"20. **Be that as it may, in the present case, on reading TAA we find that the payments of royalty/licence fees was entirely relatable to the manufacture of brake liners and brake pads (licensed products). The said payments were in no way related to the imported items.** In the present case, no effort was made by the Department to examine the pricing arrangement. No effort was made by the Department to ascertain whether there exists a price adjustment between cost incurred by the buyer on account of royalty/licence fees payments and the price paid for imported items. No effort was made by the Department to ascertain enhancement of royalty/licence fees by reducing the price of the imported items. In the circumstances, we find no infirmity in the

impugned judgment of the Tribunal. In this case, the Department has gone by TAA alone. **On reading TAA in entirety, we are of the view that there was no nexus between royalty/licence fees payable for the know-how and the goods imported for the manufacture of licensed products. The Department itself has invoked Rule 9(I)(c).**

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23. In the case of Matsushita Television & Audio India Ltd. v. CoC reported in 2007 (211) E.L.T. 200 (S.C.) the question which arose for determination was whether royalty amount was attributable to the price of the imported goods. In that case, the appellant was a joint venture company of MEI, Japan and SIL for obtaining technical assistance and know-how. **Under the agreement, the appellants were to pay MEI a royalty @ 3% on net ex-factory sale price of the colour TV receivers manufactured by the appellants for the technical assistance rendered by MEI. The appellants were to pay a lump-sum amount of U.S. \$ 2 lakhs to MEI for transfer of technical know-how. It was the case of the appellant that payment of royalty was not related to imported goods as the said payment was made for supply of technical assistance and not as a condition pre-requisite for the sale of the components.**

24. One of the questions which arises for determination in this civil appeal is whether reliance could be placed by the Department only on the Consideration Clause in the TAA for arriving at the conclusion that payment for royalty was includible in the price of the important components.

25. Rule 4(3)(b) of the CVR, 1988 provides for an opportunity for the importer to demonstrate that the transaction value closely approximates to a "test" value. A number of factors, therefore, have to be taken into consideration in determining whether one value "closely approximates" to another value. These factors include the nature of the imported goods, the nature of the industry itself, the difference in values etc. As stated above, Rule 4(3)(a) and Rule 4(3)(b) of the CVR, 1988 provides for

different means of establishing the acceptability of a transaction value. In the case of Matsushita Television (supra) the pricing arrangement was not produced before the Department. In our view, the Consideration Clause in such circumstances is of relevance. As stated above, pricing arrangement and TAA are both to be seen by the Department. **As stated above, in a given case, if the Consideration Clause indicates that the importer/buyer had adjusted the price of the imported goods in guise of enhanced royalty or if the Department finds that the buyer had misled the Department by such pricing adjustments then the adjudicating authority would be justified in adding the royalty/licence fees payment to the price of the imported goods.** Therefore, it cannot be said that the Consideration Clause in TAA is not relevant. Ultimately, the test of close approximation of values require all circumstances to be taken into account. **It is keeping in mind the Consideration Clause along with other surrounding circumstances that the Tribunal in the case of Matsushita Television (supra) had taken the view that royalty payment had to be added to the price of the imported goods."**

(emphasis supplied)

33. The Tribunal in **BASF Strenics** also examined this issue and held that since the payment of royalty was not related to the import of goods, and neither was it a condition of sale of the goods, the royalty payment could not be added to the value of the imported goods under rule 9(1)(c) of the earlier Valuation Rules, which rule is similar to rule 10(1)(c) of the 2007 Valuation Rules. The Tribunal further held that merely because a particular formula has been designed to calculate the royalty amount, which also includes the raw material cost, it cannot be said that royalty payment is related to the imported goods. The Tribunal also found that royalty payment relates to the goods manufactured and

sold indigenously. The relevant observations of the Tribunal are as follows:

"9. As regards application of Rule 9(1)(c), we note that only such royalty, payment of which is related to the imported goods and is made as a condition of sale of such goods can be added to the declared price. In the instant case, the payment of royalty is not related to imports of Ethyl Benzene and Styrene Monomer. It appears, the respondents do not have any obligation to import these goods only from their collaborators abroad. It has been noted by the lower authorities that they have in fact imported these goods from non-related suppliers at comparable prices. As such, it cannot be said that the royalties have been paid as a condition of sale of the imported goods. On the other hand, the agreement between the collaborators abroad and the respondents requires payment of royalty on finished goods manufactured and sold in India. **The amount of royalty specified under the agreement relates to sale price of the goods less certain deductions.** The applicant Commissioner himself has stated in the grounds of appeal that in effect the royalties are being paid on manufacturing cost plus profit plus the value of raw materials. **Just because a particular formula has been designed to calculate the royalty amount which also includes the raw material cost, it cannot be said that the royalty payment is related to the imported goods.** In fact, the royalty is payable on the "Net Selling Price" of all "Agreement Products" under the agreement and such products have been defined to mean "polystyrene polymers manufactured in whole or in part according to existing technology or improvement." Such payment of royalty is not therefore restricted to polystyrene polymers manufactured using impugned goods imported from the related suppliers only. **We find that the impugned agreement provides for payment of running royalty under the know-how agreement and relates to goods manufactured and sold indigenously. Such payment of royalty to BASF, Germany is for using BASF** technology and has also been approved by the R.B.I. In view of the foregoing, we are of the view that the amount of royalty in question cannot be

added to the declared value under the said sub-rule (c) either.

10. Revenue's contention seeking addition of royalty under Rule 9(1)(c) and Rule 9(1)(d) fails in view of our findings above. As such, we dismiss the appeals filed by the department. The cross objection filed by the respondents also stands disposed off."

(emphasis supplied)

34. In **Sandvik Asia**, the Tribunal also examined this issue and held that since payment of royalty does not relate to the imported raw material and is in fact related to the finished goods, royalty payment cannot be added at the value of the imported goods under rule 10(1)(c) of the 2007 Valuation Rules. The observations are as follows:

"8. Coming to the merits of the present case, we may straight away refer to the relevant provisions of the Customs Valuation Rules, 2007, i.e., Rule 10(1)(c) under which it is to be decided to whether the royalty paid is includible in the value of imported goods for assessment to duty. **As pointed out by the Id. Counsel, we find that the two conditions required to be satisfied for invoking Rule 10(1)(c) are:-**

- (i) Royalty is related to the imported goods; and**
- (ii) Royalty is paid as a condition of sale of imported goods.**

From the facts it is clear to us that the royalty is not related to the imported raw material the royalty is related to the finished goods. Only because imported goods are contained in the finished goods, it cannot be said that royalty is related to the imported goods. The royalty is only paid for using the Trademark, i.e., Sandvik on the products manufactured and sold in India. Therefore, we are of the view that the first condition of Rule 10(1)(c) is not satisfied because the royalty is not related to the imported goods."

(emphasis supplied)

35. In **Kruger Ventilation**, the Tribunal again observed, in respect of a similar Technical Agreement, that merely because the value of the goods imported was also included would not be sufficient to add royalty to the assessable value. The Tribunal also held that payment of royalty was not a condition of sale of the imported goods. The observations are as follows:

"22. In the present case, we find that the Technical Aid Agreement entered into between the appellant and M/s. Kruger Ventilation Industries Pvt. Ltd., Singapore was a technical aid agreement on a non-exclusive basis to manufacture and assemble centrifugal fans, axial fans, in-line fans, roof exhaust fans and mixed flow fans (goods) and to instruct the licensee in the methods of working the processes relating to or in respect of or for the manufacture of the goods and to provide total management. The restrictions in the agreement are with respect to import or export of final products by the appellant but not with respect to imports. It is also mandated that the goods were to be manufactured strictly in accordance with the specifications provided by technology provider. A license fee @ 5% had to be paid on the total net turnover of the goods. We have gone through the agreement and do not find anything in it that it also provides import of the components. **Therefore, the goods were not imported under the agreement and any royalty under the agreement cannot be related to it. Further, there is no condition that the importer has to obtain the approval of the technology provider either for import or for procuring components domestically. Therefore, the royalty paid by the appellant @ 5% on the final products under the technical aid agreement cannot be said to be a condition for sale and added to the assessable value of the imported goods. It is true that the royalty is paid is as percentage of the net turnover of goods manufactured, which includes not only the component which are domestically procured but also which are imported as well as any value addition by the appellant. However, this in itself, is not sufficient to add royalty to the assessable value.**

23. It needs to be seen whether the payment of such royalty is pre-condition to the sale of the imported goods. No such condition emerges from the agreement in the present case. The goods were also not imported under the agreement. In view of the above, we find that the royalty cannot be included in the assessable value."

(emphasis supplied)

36. This issue was also extensively examined by a division bench of the Tribunal in **M/s. Valeo Friction Materials India Ltd. vs. Commissioner of Customs**²⁶. The issue that arose for consideration before the Tribunal was whether royalty payment can be included in the transaction value of the imported goods under rules 3 and 10 of the 2007 Valuation Rules. The Tribunal held that they could not be included and the relevant observations are as follows:-

"8. From the appeal records, it is evident that the Appellant has entered into a Technology License Agreement dated 11.02.1998 ("agreement") with M/s. Valeo, France for transfer of technology to the Appellant for the purpose of manufacturing and assembling of "products" in India for a consideration of payment of royalty which was agreed at 3.75% of the "Net Sales Value" of the product manufactured and sold.

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13. xxxxxxxxx. A reading of various clauses of Agreement indicate that the royalty is payable at 3.75% of the annual net sales of the product sold by the Company. There is a clear formula regarding the method to arrive at the above net sales value of the product sold. The royalty payment covers transfer and use of technology providing information of technical knowledge, design formula, technical know-how, procedures for manufacturing and secret and confidential information which have been developed or acquired

26. Customs Appeal No. 42211 of 2014 decided on 31.05.2024

by VALEO which are used for the manufacture of the products viz., clutch facings. Even initially the products manufactured by the Indian Company would be evaluated by VALEO, France in order to ensure the products conformed to the quality specifications and accepted procedures prescribed by VALEO. Such royalty payment also covers technical assistance in sending industrialization specialists to the appellant's plant in India for imparting training to the employees of the appellant. It also covers training of the appellant's personnel at VALEO's plants located abroad. From the Technology Licence Agreement, it is also evident that the products manufactured by the appellant and even their packing will be utilizing the VALEO trade mark. Thus, the right to use the name 'VALEO' shall be exercised by the appellant according to the terms and conditions flowing from the Technology Licence Agreement.

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15. From the above, it can be safely inferred that payment of royalty is not completely relatable to import of raw materials as there is no condition of sale attached for their import. Distinction which exists between an amount payable as the condition of import and amount payable in respect of sale of manufactured goods using the brand name has to be understood properly. Rule 10(1)(c) of the Customs Valuation Rules, 2007 states that royalties and licence fees related to the import goods that the buyer is required to pay directly or indirectly as a condition of sale of the goods have to be added to the transaction value of the imported goods. We find that there is no such condition that emerges from the agreement between the appellant and the VALEO, France which provides that royalty payment is a pre-condition for sale / import of raw materials. There is no evidence to establish as to how the royalty payment is linked to the import of raw materials.

20. Further, relying on the following decision of higher judicial fora, the appellant has argued that the royalty payment is only for providing technical assistance for manufacture and sale of licenced products and import of raw materials is incidental to such manufacture and sale. There is no condition of

sale attached to importation of raw materials and having not met the required conditions of Rule 10(1)(c), payment of royalty amounts cannot be added to the transaction value of import of raw materials.”

(emphasis supplied)

37. The contention advanced by the learned counsel for Ericsson India that since both the Technical Agreements do not stipulate that payment of royalty to LM Ericsson Sweden is a *sine qua non* for import of components from Ericsson Sweden, royalty for Technical Know-how will not automatically become a 'condition of sale' merely because it is inclusive of the value of imported components, therefore, deserves to be accepted. This apart, the payment of royalty pertains to post importation activities and as such cannot be included to the value of the assessable goods.

38. It is reiterated that both the Technical Agreements relate to transfer of technical know-how, amongst others, in the form of design sheets detailing manufacturing methods and specifications of raw materials for all the components used in the manufacture/assemble or the products and the payment on royalty is not a condition of sale of imported goods and in fact relates to post import activities. The Additional Director General committed an error in observing that the Technical Co-Operation Agreement stipulates import of components under a purchase agreement with LM Ericsson Sweden. In this connection, it would be relevant to examine Article 1.7 of the Technical Co-Operation Agreement dated 27.06.2013. The Article is reproduced below:

“1.7. “System Components” shall mean the components of the GSM Mobile Telephone System which shall be

purchased by EIL under the terms and conditions of a Purchase Agreement. Without limiting the foregoing, the System Components shall Include base station transceivers ("RBS"), and Mobile Switching Center ("MSC"), and Base Stations Controllers ("BSC") that control radio traffic."

39. A perusal of the said Article makes it abundantly clear that the Agreement merely stipulates that Ericsson India shall purchase 'System Components', i.e., components of GSM Mobile Telephone System namely, RBS, BSC and MSC (finished goods) under the terms and conditions of a purchase agreement. However, the provisions of a Purchase Agreement under the said Technical Co-Operation Agreement dated 27.06.2013 does not extend to the imported goods i.e., components used in manufacture of finished goods. The finding in the impugned order is, therefore, factually incorrect.

40. It is not in dispute that Ericsson India not only procures components from Ericsson Sweden but also procures them from other third parties, i.e., unrelated foreign suppliers and local producers. A tabular representation of the procurement of imported goods by Ericsson India during the relevant period is as follows:

Scope of procurement	2012-13		2013-14	
	CIF Value (in MINR.)	%	CIF Value (in MINR.)	%
Import from Ericsson Sweden	4007	42	2281	25
Import from foreign unrelated suppliers	3105	32	5872	63
Indigenous procurement	2463	26	1107	12
Total value of components	9,576	100	9,260	100

41. This information regarding procurement of components from unrelated foreign suppliers and/or ingenious producers was placed by

Ericsson India as part of additional submissions dated 07.08.2020 but the same has not been taken into consideration by Additional Director General. The same was also disclosed before SVB in the TP Report for the Financial Years 2011, 2012 and 2013.

42. The impugned order also holds that since LM Ericsson Sweden is providing technical know-how to Ericsson India through the provision of specifications for both imported and indigenously procured components in the form of detailed performance specifications, royalty paid by Ericsson India to LM Ericsson Sweden for the goods imported from Ericsson Sweden is required to be included in the transaction value of the imported goods.

43. This finding is factually incorrect in view of the provisions of Article 2.1.2 of Technical Co-Operation Agreement dated 27.06.2013.

The said Article is reproduced below:

- "2.1 Limited License to use Ericsson Know-How
- 2.1.1 Subject to the terms and conditions of this Agreement, Licensor hereby grants to Licensee a non-transferable, non-exclusive license to use or otherwise practice Ericsson Know-How solely within the Territory during the Term of this Agreement for the limited purposes of.
 - 2.1.1.1. Assembling/ manufacturing of the Licensed Products and Licensed Parts;
 - 2.1.1.2. Management of the manufacturing facility belonging to and operated by Licensee;
 - 2.1.1.3. ordering of the Licensed Products, Licensed Parts, System Components and the GSM, CDMA and WCDMA Mobile Telephone System, and
 - 2.1.1.4. conducting Services for the Licensed Products manufactured by the Licensee."

44. A perusal of the said Article shows that Ericsson know-how does not extend to 'manufacturing' raw materials and other components of Licensed Parts and Licensed Products. Thus, the assumption that if Ericsson Sweden makes payment for use of such specification, it will recover the same from Ericsson India is not correct.

45. Co-ordination and advice provided post importation activities cannot lead to a conclusion that technical services are a precondition for the sale of imported goods.

46. In this connection, it would be pertinent to refer to the relevant observations made by the Supreme Court in **Essar Steel Ltd. vs.**

Commissioner of Customs, Ahmedabad²⁷ and they are:

"9. What is clear is that technical services to be provided by Met Chem Canada Inc., is basically to coordinate and advise the respondent so that the respondent can successfully set up, commission and operate the plant in India. **It will be noticed that coordination and advice is to take place post-importation in order that the plant be set up and commissioned in India. In fact, all the clauses of this agreement make it clear that such services are only post-importation.**

11. **Another thing to be noticed is that a conjoint reading of the technical services agreement and the purchase order do not lead to the conclusion that the technical services agreement is in any way a pre-condition for the sale of the plant itself.** On the contrary, as has been pointed out above, the technical services agreement read as a whole is really only to successfully set up, commission and operate the plant after it has been imported into India. It is clear, therefore, that clause 9(1)(e) would not be attracted on the facts of this case and consequently the consideration for the technical services to be provided by Met Chem Canada

27. 2015 (319) E.L.T. 202 (S.C.)

Inc., cannot be added to the value of the equipment imported to set up the plant in India.”

(emphasis supplied)

47. Thus, for all the reasons stated above, the order dated 27.11.2020 passed by the Additional Director General holding that the royalty paid by the appellant to LM Ericsson Sweden would be includible in the transaction value of the components imported by Ericsson India from Ericsson Sweden in terms rule 10(1)(c) of the 2007 Valuation Rules, therefore, cannot be sustained would have to be set aside.

48. This would also mean that penalty could not have been imposed upon Ericsson India under section 114A of the Customs Act.

Invocation of extended period of limitation

49. During the relevant period the normal period of demand under section 28(1) of the Customs Act was one year. The show cause notice dated 03.08.2015 covers imports from 29.03.2016 to 26.02.2014. The entire period is, therefore, covered by the extended period of limitation and that is why the show cause notice has invoked the provisions of section 28(4) of the Customs Act.

50. The impugned order has holds that the extended period of limitation was correctly invoked. The relevant paragraphs of the order dealing with the invocation of the extended period of limitation are reproduced below:

“7.1 The present notice has been issued under Section 28 of the Customs Act, 1962 by invoking the extended period of limitation. **It has been alleged that the Noticee had not disclosed the fact of royalty payment before the SVB authorities and obtained favourable SVB orders by mis-declaration and suppression of facts. The Noticee**

has claimed that they had not paid any royalty to the supplier, but to its parent company and had therefore, rightly declared before the SVB that there was no royalty payment to the supplier of the goods.

7.2 I find that the Noticee is a 100% owned subsidiary of LME and the supplier company was also a subsidiary of LME. In Rule 10(1)(c) of the Valuation Rules, the term used is "royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly". It is also an admitted position that the Annexures were filed after due deliberations, in Taxation and Legal departments of the Noticee Co.

7.3 Therefore, it cannot be accepted that they were not aware about the legal provisions that even the indirect payment of royalty and License fee has to be declared.

7.4 The copies of Annexures filed by the Noticee before the SVB authorities in year 2013 clearly shows that the Noticee has deliberately suppressed the existence of Technical Co-operation Agreement, while filing the said Questionnaire e.g. in reply to a question, it is stated that "Ericsson' brand is owned by Supplier, whereas, the Noticee was well aware that the said brand was owned by their parent Company i.e. LME.

7.5 The Noticee has argued that in fact the payment of royalty was disclosed before the SVB authorities, as the royalty payments were reflected in their Annual Financial Statements, the copies of which were supplied to SVB. The Noticee has further contended that they were under the bona-fide belief that the payment of royalty was liable to Service Tax and hence failed to pay Customs Duty on the same.

7.6 The Noticee has also contended that the issue involved is pure question of law and hence mala-fide cannot be alleged and hence, extended period of limitation cannot be invoked. In support of the aforesaid contentions, the Noticee has placed

reliance on many judicial pronouncements such as Uniworth Textiles Ltd. Versus Commissioner Of Central Excise, Raipur 2013 (288) E.L.T. 161 (S.C.), Collector of Central Excise v. H.M.M. Ltd. 1995 (76) E.L.T. 497 (S.C.), Easland Combines Vs Collector of Central Excise, Coimbatore 2003 (152) E.L.T. 39 (S.C.), Shahnaz Ayurvedics Vs Commissioner of Central Excise, Noida 2004 (173) E.L.T. 337 (All.). I find that the facts and circumstances in these citations are different from that of the present case. **In the present case there is clear evidence of wilful misstatement or suppression of facts with the intention to evade payment of duty whereas none of the said cases have such facts.**

7.7 It is a settled law that when the deceitful intention of the party to defraud Revenue is manifested then the plea of bona-fide belief cannot come to its rescue. xxxxxxxxxxxx.

7.8 I, therefore hold that keeping in view the facts of the case, the invocation of extended period of limitation in the SCN is justified.”

(emphasis supplied)

51. The contention of Ericsson India that payment of royalty was disclosed before the SVB, as the royalty payments were reflected in the Annual Financial Statements, copies of which were supplied to SVB, and that it was under a bona fide belief that since payment of royalty was liable to service tax, customs duty was not payable has not been considered in the impugned order.

52. The contention of Ericsson India that the issue involved is a pure question of law and, therefore, no mala fide can be alleged was rejected by the Additional Director General merely because there was clear evidence of willful mis-statement for suppression of facts with intention to evade payment of duty.

53. The issue that arises for consideration is when the Technical Know-how is in relation to the manufacture/assembly of the Licensed Products and pertains to post-importation activities, then can royalty be included in the assessable value of goods.

54. This issue has examined by the Tribunal time and again and in view of the decisions referred to above, payment of royalty has not to be included in the price of the imported goods.

55. Two Special Valuation Branch proceedings were also conducted in the year 2010 and 2013.

56. In May 2010, Ericsson India made an application to the Special Valuation Branch for review of order passed in 2007. Ericsson India filed the Special Valuation Branch questionnaire and other documents with the Special Valuation Branch, including three years Annual Financial Statements and TP studies for the year ending March 2007, 2008 and 2009. After scrutiny of the submitted documents, which included the Financial Statements and transfer pricing studies of Ericsson India, the Special Valuation Branch accepted the declared import prices as transaction value under section 14 of the Customs Act by order dated 18.05.2010.

57. Ericsson India contends that Schedule 19 of the Financial Statements i.e. 'Administrative, selling and distribution expenses' and Schedule 22 i.e. 'Notes to accounts' under serial no 15 disclosed the 'related party transactions'. Both these Schedules disclosed payment of royalty payment to the parent company in the year 2008-09 as a separate line items under the head 'royalty'. The Special Valuation Branch order of 2010 notes in paragraph 3 that importer has filed the financials for the year 2009.

58. Again in the year 2013, when the Special Valuation Branch order of 2010 came up for review, Ericsson India filed the Special Valuation Branch questionnaire, written submissions dated 29.05.2013 with the copies of Financial Statements for the years ending March 2010, 2011 and 2012 along with TP studies. After scrutiny, the import values were accepted as 'transaction value' under section 14 of the Customs Act by Special Valuation Branch order dated 30.05.2013.

59. The Financial Statements for the year ending March 2010 and March 2011 disclosed the payment of the royalty to parent company under the 'Administrative, selling and distribution expenses' Schedule and also under the related party transactions in Notes to Accounts.

60. It cannot, therefore, be urged by the department that it had no knowledge of the fact that royalty was paid by the appellant to LM Ericsson Sweden.

61. In any view of the matter, the finding recorded in the impugned order that the appellant had suppressed relevant facts with an intent to evade payment of duty is a bald statement without any supporting evidence of factual position.

62. It has repeatedly been held that there should not only be suppression of facts but such suppression should be with an intent to evade payment of duty.

63. The provisions of section 11A (4) of the Central Excise Act came up for interpretation before the Supreme Court in **Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay**²⁸. The Supreme Court observed that section 11A(4) of the Central Excise Act empowers the Department to reopen the proceedings

28. 1995 (78) E.L.T. 401 (S.C.)

if levy has been short levied or not levied within six months from the relevant date but the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. It is in this context that the Supreme Court observed that the act must be deliberate to escape payment of duty.

The relevant observations are:

"2. ***** The Department invoked extended period of limitation of five years as according to it the duty was shortlevied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs.

4. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. **It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty.** Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

(emphasis supplied)

64. This decision of the Supreme Court in **Pushpam Pharmaceuticals** was followed by the Supreme Court in **Anand Nishikawa Co. Ltd. vs. Commissioner of Central Excise, Meerut**²⁹ and the relevant paragraph is as follows:

"27. Relying on the aforesaid observations of this Court in the case of **Pushpam Pharmaceuticals Co. v. CCE** we find that "suppression of facts" can have only

29. (2005) 7 SCC 749

one meaning that the correct information was not disclosed deliberately to evade payment of duty.

When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. **There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act.** We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was 7 (2005) 7 SCC 749 11 E/52953/2018 not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts."

(emphasis supplied)

65. It would also be appropriate to refer the decision of the Delhi High Court in **Mahanagar Telephone Nigam Ltd. vs. Union of India and others**³⁰. The Delhi High Court observed that merely because MTNL had not declared the receipt of compensation as payment for taxable service, does not establish that it had wilfully suppressed any material fact. The Delhi High Court further observed that the contention of MTNL that receipt was not taxable under the Act is a substantial one and no intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return. The relevant portion of the observations are:

"28. In terms of the proviso to Section 73(1) of the Act, the extended period of limitation is applicable only in cases where service tax has not been levied or paid or has been short-levied or short-paid or erroneously

30. W.P. (C) 7542 of 2018 decided on 06.04.2023

refunded by reason of fraud, or collusion, or wilful misstatement, or suppression of facts, or contravention of any provisions of the Act or the Rules made thereunder with an intent to evade payment of service tax. **However, the impugned show cause notice does not contain any allegation of fraud, collusion, or wilful misstatement on the part of MTNL. The impugned show cause notice alleges that the extended period of limitation is applicable as MTNL had suppressed the material facts and had contravened the provisions of the Act with an intent to evade service tax.** Thus, the main question to be addressed is whether the allegation that MTNL had suppressed material facts for evading its tax liability, is sustainable.

41. **In the facts of this case, the impugned show cause notice does not disclose any material that could suggest that MTNL had knowingly and with a deliberate intent to evade the service tax, which it was aware would be leviable, suppressed the fact of receipt of consideration for rendering any taxable service.** On the contrary, the statements of the officials of MTNL, relied upon by the respondents, clearly indicate that they were under the belief that the receipt of compensation/financial support from the Government of India was not taxable. **Absent any intention to evade tax, which may be evident from any material on record or from the conduct of an assessee, the extended period of limitation under the proviso to Section 73(1) of the Act is not applicable.** The facts of the present case indicate that MTNL had made the receipt of compensation public by reflecting it in its final accounts as income. **As stated above, merely because MTNL had not declared the receipt of compensation as payment for taxable service does not establish that it had willfully suppressed any material fact.** MTNL's contention that the receipt is not taxable under the Act is a substantial one. **No intent to evade tax can be**

inferred by non-disclosure of the receipt in the service tax return.”

(emphasis supplied)

66. It is, therefore, clear from the aforesaid discussion that the extended period of limitation could not have been invoked as facts had not been suppressed, much less with an intent to evade payment of customs duty.

67. The contention of the appellant that it bona fide believed that it was not liable to pay duty on the payment of royalty also deserves to be accepted. It cannot be urged by the department that merely because the belief is subsequently found to be wrong, there would be a mala fide intention in not paying customs duty. If a dispute relates to interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation. This is what was observed by the Supreme Court in **Commissioner of C. Ex. & Customs vs. Reliance Industries Ltd.**³¹.

68. The extended period of limitation, therefore, could not have been invoked in the facts and circumstances of the case.

69. As the entire period of dispute is for the extended period of limitation, the impugned order confirming the demand by invoking the extended period of limitation cannot be sustained for this reason also.

70. The imposition of penalty upon Tej Nirmal Singh and Bharat Bandhu under section 112 (a)(ii) of the Customs Act cannot, for the reasons stated above, be sustained.

71. In view of the aforesaid discussion, the order dated 27.11.2020 passed by the Additional Director General deserves to be set aside and

31. 2023 (385) E.L.T. 481 (S.C.)

is set aside. Customs Appeal No. 50439 of 2021, Customs Appeal No. 50440 of 2021 and Customs Appeal No. 50441 of 2021 are, accordingly, allowed.

(Order pronounced on **14.10.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Jyoti