REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1834 OF 2006

COMMISSIONER OF CENTRAL EXCISE,
NAGPUR-I .....APPELLANT(S)

VERSUS

M/S. INDORAMA SYNTHETICS (I) LTD. .....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

The respondent (hereinafter referred to as the 'assessee') is engaged in the manufacture of polyester chips, polyester staple fibre, polyester filament yarn and other goods. It had been clearing the same on payment of central excise duty. The period involved in this appeal is 1999-2002. During this period, the goods that were cleared as *'deemed exports'* to advance licence holders were at a price lower than what was being charged to the other buyers who did not hold an advance licence. As per the Commissioner of Central Excise, Nagpur-I (hereinafter referred to as the 'Revenue'), it found that the reason for selling the goods to

the aforesaid particular class of buyers at a lesser price was that the assessee had received *'additional consideration'* and, therefore, its inclusion was necessitated having regard to the formula provided for arriving at the *'transaction value'* contained in the statutory scheme.

2) We would narrate the details of purported *'additional consideration'* at a later point of time at an appropriate stage. However, we may point out here that on surrender of advance licence with the aforesaid buyers, the assessee could receive drawback from the Government/Director General of Foreign Trade (DGFT) as per the Export-Import (EXIM) Policy and this was stated to be the additional consideration. Suffice it to point out at this juncture that the Revenue issued five separate show cause notices asking the assessee to pay the differential duty as the said additional consideration was to be included while arriving at the *'transaction value'* of the said goods in terms of Section 4 of the Central Excise Act, 1944 (hereinafter referred to as the 'Act') read with Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred to as the 'Rules'). The assessee challenged the stand of the Revenue by filing replies. After examining the matter, the Commissioner

took the view that price was not the sole consideration flowing from the buyer to the assessee. Not only such buyers, who were sold the goods at a lower price, were *'related persons'*, even the goods were sold at depressed price. Therefore, the Commissioner confirmed the demand of differential duty as mentioned in the show cause notices and also levied penalties and interest. The assessee challenged the order of the Commissioner by filing appeal before the Custom Excise & Service Tax Appellate Tribunal (for short, the 'Tribunal') taking the plea that *'additional consideration'* under Section 4 of the Act refers only to the additional consideration flowing from the buyer to the assessee and in the present case no such additional consideration flew from the advance licence buyers of the *'deemed exports'*. The Tribunal, in arriving at this conclusion, relied upon its own decision in the case of ***IFGL Refractories Ltd.*** v. ***Commissioner of Central Excise, Bhubaneswar-II***[1] wherein it was held that statutory benefits allowed by statutory authorities cannot be considered as additional consideration flowing to a manufacturer from the buyer. In the opinion of the Tribunal, the drawback was received from the Government and not from the buyers and, therefore, such drawback could not be

1 2001 (134) ELT 230

treated as additional consideration for the purpose of arriving at *'transaction value'* as per the definition thereof under Section 4 of the Act.

3) Pertinently, the decision of the Tribunal in ***IFGL's*** case stands overruled by this Court in ***Commissioner of Central Excise, Bhubaneswar – II*** v. ***IFGL Refractories Ltd.***[2] In the said case, this Court has held such a consideration, namely, duty drawback, to be the *'additional consideration'* inasmuch as the benefit of duty drawback accruing to the seller was the result of surrender of advance licence by the buyers. The discussion and the rationale which goes into forming the aforesaid opinion is contained in para 9 of the judgment, which reads as under:

> "9. Ultimately it was agreed that M/s. Visakhapatnam will surrender its advance licences and in lieu thereof the respondents will get the advance intermediate licences. Thus, without the advance licences of M/s. Visakhapatnam Steel Plant, being made available to the respondents, the prices would have been as were quoted earlier. It is only because of the advance licences being surrendered by M/s. Visakhapatnam Steel Plant and in lieu thereof advance intermediate licences being made available to the respondents that the respondents could offer lower prices. The surrendering of licences by M/s. Visakhapatnam Steel Plant and as a result thereof the respondents getting the licences had nothing to do with any Import and Export Policy. It was directly a matter of contract between the two parties. This resulted in additional consideration by way of "advance

2 (2005) 6 SCC 713

> intermediate licence" flowing from M/s. Visakhapatnam Steel Plant to the respondents. The value received therefrom is includible in the price. The Tribunal was wrong in stating that such an arrangement can never be placed upon the platform of additional consideration. In so stating the Tribunal has ignored and/or lost sight of the fact that it was in pursuance of the contract of sale between the respondents and M/s. Visakhapatnam Steel Plant that the licences were made available to the respondents. The Export and Import Policy had nothing to do with the arrangements/contract under which the licences flowed from the buyer to the seller. At the cost of repetition it must be mentioned that had the respondents had advance intermediate licence on their own i.e. without M/s. Visakhapatnam Steel Plant having to surrender its licences for the purposes of the contract, then the reasoning of the Tribunal may have been correct. But here, in pursuance of the contract of sale, there is directly a flow of additional consideration from the buyer to the seller. The value thereof has to be added to the price. We are thus unable to accept the broad submission that where parties take advantage of policies of the Government and the benefits flowing therefrom, then such benefit cannot be said to be an "additional consideration".

4) In a matter like this, this Court could simply follow the aforesaid judgment and set aside the order of the Tribunal, allowing this appeal. However, Mr. V. Lakshmikumaran, learned counsel appearing for the assessee, made a fervent and passionate plea that the aforesaid judgment of this Court in ***IFGL's***[3] case needs re-consideration. He, thus, pleaded for referring the matter to a larger Bench. Detailed and elaborate submissions were made in this direction which were stoutly refuted by the learned counsel for

3 Note 2 above

the Revenue. We may immediately record that the assessee's counsel has not succeeded in persuading us to refer the matter to a larger Bench. Hereinafter, we record our reasons for taking this view. For this purpose, we may first state at this stage the mechanism that goes into getting the benefit of duty drawback in the kitty of the assessee.

5) As mentioned above, the assessee had been selling polyester staple fiber to two classes of domestic buyers, in addition to exporting the same in the international market. One of the category of domestic buyers were those who were having advance licence and the other category without any such licence. The assessee had issued two different price lists. Those buyers who had advance licence but agreed to surrender the said licence, were offered price of ₹37.50 per kg. Other category, with no such licence, were sold the goods at ₹50 per kg. As per the assessee, it was exporting polyester staple fiber during the relevant period at an average price of ₹36 per kg against its own advance licence for exports.

6) Advance licence is issued under the EXIM Policy. The holder of the advance licence could procure imported raw material against the said licence for manufacture of finished goods. However, as

per para 7.7 of the EXIM Policy 1997-2002, the advance licence holder intending to source the materials from indigenous source in lieu of direct import had the option to source them against advance release orders denominated in foreign exchange/Indian rupees. In such a case, the licence was to be invalidated for direct import and permission in the form of ARO was to be issued entitling the supplier of the goods the benefits of deemed export. Para 10.2 of the EXIM Policy laid down the categories of supply which would be recorded as *'deemed exports'* under the policy. The first such clause (a) was *'supply of goods against advance licence/DFRC under the duty exemption/ remission scheme.* Under para 10.3, benefits for deemed exports were specified. Advance licence for intermediate supply/deemed export was specified as one of the benefits for deemed exports.

7) The advance licence holder category buyers got their licences invalidated/surrendered. Thereafter, DGFT issued licence in favour of the assessee herein permitting it to procure the goods duty free from indigenous manufacturers and on the supply of this material to such buyers, treating the same as *'deemed exports'*, thereby earning the benefits of duty drawback. Para 7.11 of the EXIM Policy facilitated this process and it reads as under:

> "7.11 Advance Licence for Intermediate Supplies – The Advance Licence for intermediate supply shall be considered by the licensing authority concerned. The Advance Licence for intermediate supply shall be issued after making the licence invalid for direct import of items to be supplied by the intermediate manufacture. In such cases, a copy of the invalidation letter will be given to the licence holder and copy thereof will be sent to the intermediate supplier as well as the licensing authority of the intermediate supplier as well as the licensing authority of the intermediate supplier. The licencee in such case has an option either to supply the intermediate product to holder of Advance Licence for physical exports/deemed exports or to export directly."

8) The aforesaid narratives would demonstrate that the assessee could get the duty drawback and it could happen when advance licence holder category of buyers got their advance licences invalidated thereby surrendering the benefits accrued under such advance licence. Issue for consideration is as to whether it would constitute *'additional consideration'* received by the assessee as per the definition of *'transaction value'* contained in Section 4 of the Act read with Rule 6 of the Rules. We, therefore, shall reproduce the relevant portion of the provisions of Section 4 which existed at the material time, which read as under:

> "**4. Valuation of excisable goods for purposes of charging of duty of excise. –** (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall –
>
> (a) in a case where the goods are sold by the

> assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value.
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> xx xx xx
>
> (d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

9) As is clear from the reading of the aforesaid provision, the duty of excise is chargeable on the excisable goods with reference to the value of such goods. Generally, the price of the goods, i.e. the price at which such goods are ordinarily sold by the assessee to a buyer is to be the value of the goods. This value is called the *'transaction value'*. The Central Government has also framed the Rules which, *inter alia*, lay down the provisions for determination of value. Rule 6 thereof, with which we are specifically concerned, reads as under:

> "**RULE 6.** Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole

consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

Explanation. - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely:

(i) value of materials, components, parts and similar items relatable to such goods;

(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods."

10) Even when these goods are sold by the assessee at different prices to different classes of buyers (not being related persons), each such price is to be deemed to be the normal price of such goods in relation to each class of buyers. However, as per the

definition of *'transaction value'* contained in this very section, i.e. Section 4(3)(d), certain charges can be added to the price at which the goods are actually sold, under certain circumstances. These include the provision for advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty commission etc. In the present case, we are not concerned with this aspect. However, Rule 6 of the Rules specifies that if the goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4, then the value of such goods shall be deemed to be the aggregate of such transaction value *plus* the *'amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee'.* The implication of this Rule is that any form of additional consideration which flows from the buyer to the assessee, monitory value thereof is to be included while arriving at the transaction value. It is not necessary that such an additional consideration is to flow directly and even indirect consideration is includible. It is in this context we have to examine as to whether the consideration in the form of drawback, which accrued in favour of the assessee, could be connected with the buyer. To put it otherwise, though the immediate source of the duty drawback is the Government, whether its flow can be traced

back to the buyer? If it is so, it ay become a case of indirect consideration coming from the buyer and can be added to the transaction value.

11) In the case of ***IFGL***[4], this Court has given the answer in the affirmative to the aforesaid issue. It is also conceded by the learned counsel appearing for the assessee that the said judgment was rendered on almost identical fact situation. That is why the endeavour of Mr. Lakshmikumaran is to impress upon us to take a different view. He sought to discredit the opinion of the Court in the said case by arguing that the advance licence for intermediate supply was granted by the DGFT to the assessee under the EXIM Policy and it had nothing to do with the buyer. He conceded that it could happen only after buyers got their advance licences invalidated. But his explanation was that it was not necessary that such a licence could be issued to the assessee merely because the advance licence in favour of the buyer was invalidated. He emphasized that DGFT could still refuse to issue the advance licence for intermediate supply to the assessee.

12) This argument does not convince us at all. Fact remains that the issuance of advance licence for intermediate supply to the

4 Note 2 above

assessee was facilitated as a result of surrender of advance licence in favour or the buyer by the buyer. Thus, getting the licence invalidated for direct import of items in favour of the buyer was the trigger point for issuance of the advance licence for intermediate supply in favour of the assessee. Possibility of refusal on the part of DGFT to issue licence in favour of the assessee is only in the realm of conjecture. Fact is that the assessee got the licence and it became possible only on account of sacrifice made by the buyers. Further, what is important is that the buyers got their advance licences for direct import in their favour invalidated with the sole purpose of purchasing the polyester staple fiber from the assessee at lesser price, i.e. ₹37.50 per kg. Therefore, the argument of the assessee that benefit in the form of imports without payment of duty flows to the assessee only pursuant to and based on licence issued by DGFT to the assessee and does not flow from the invalidation letter received by the customer from DGFT is too ingenuous an argument to be accepted.

13) Another argument which was advanced by the learned counsel for the assessee was that discounted price is charged from the advance licence holder category of buyers by the assessee

because of saving in customs duty on inputs due to statutory notification with consequent reduction in cost of production and, therefore, it is not a consideration flowing from a buyer. In this behalf, the submission was that the customs duty, otherwise leviable on the inputs going into the manufacture of polyester staple fiber, is exempted by the statutory notification issued by the Central Government, being Notification No. 31/1997-CUS, and it is because of the benefit availed by the assessee under this Notification that it is able to effect supply of polyester staple fiber on discounted price to an ultimate exporter holding advance licence. Therefore, the additional discount offered to a customer, who is the exporter, is never an additional consideration.

14) The aforesaid argument of the learned counsel for the assessee may appear to be impressive, when taken in isolation i.e. without having regard to all the attending facts. However, when the argument is tested keeping in view the entirety of the circumstances, as already taken note of above, the hollowness of this argument stands exposed, inasmuch as, this argument glosses over the fundamental fact that the assessee had been able to get the benefit of Notification No. 31/1997-CUS based on licence issued by DGFT in its favour and the *raison d'etre* for

issuance of said licence by the DGFT to the assessee was invalidation of the advance licence by the buyers. Therefore, the source or *gangotri* from where the benefit has ultimately reached the assessee is the advance licences which were held by the buyers and their act of invalidation made it possible to flow down the benefit so as to reach the stream of the assessee.

15) Yet another argument which was raised by Mr. Lakshmikumaran was that carving out this category of buyers, namely, those who are/were the holders of advance licence, to be eligible for purchase at a discounted price was only a *'condition for sale of goods'* put forth by the assessee. He submitted that *'it was not a consideration for sale of goods'*. He, thus, drew distinction between *condition for sale* and *consideration for sale* of goods and in support of this submission referred to the celebrated and classic judgment of the English Court in ***Thomas*** v. ***Thomas***[5]. This judgment has been analysed by Chitty on Contracts (31st Edition – Volume I) and Mr. Lakshmikumaran made the said analysis as part of his submission. That was a case where a testator, shortly before his death, expressed a desire that his widow should, during her life, have the house in which he lived, or £100. After his death, his executors *'in consideration of such*

5 (1842) 2 QB 851

desire' promised to convey the house to the widow during her life or for so long as she should continue a window, *'provided nevertheless and it is hereby further agreed'* that she should pay £1 per annum towards the ground rent, and keep the house in repair. In an action by the widow for breach of this promise, the consideration for it was stated to be the widow's promise to pay and repair. An objection that the declaration omitted to state part of the consideration, *viz.* the testator's desire, was rejected. Patteson, J. said: *'Motive is not the same thing with consideration. Consideration means something which is of value in the eye of the law moving from the plaintiff'.* Commenting upon the aforesaid remarks, Chitty observes:

> "This remark should not be misunderstood: a common motive for making a promise is the desire to obtain the consideration; and an act or forbearance on the part of the promisee may (unless the court is prepared to "invent" a consideration) fail to constitute consideration precisely because it was not the promisor's motive to secure it. What Patteson J. meant was that a motive for promising did not amount to consideration unless two further requirements were satisfied, *viz:* (i) that the thing secured in exchange for the promise was "of some value in the eye of the law"; and (ii) that it moved from the plaintiff. Consideration and motive are not opposites; the former concept is a subdivision of the latter. The consideration for a promise is (unless the consideration is nominal or invented) always a motive for promising; but a motive for making a promise is not necessarily consideration for it in law. Thus the testator's desire in *Thomas v.*

> *Thomas* was a motive for the executors' promise but not part of the consideration for it. The widow's promise to pay and repair was another motive for the executors' promise and did constitute the consideration for that promise."

16) From this very judgment, Chitty also explains the distinction between *consideration* and *condition*. According to him, the plaintiff's remaining a widow was not part of the consideration but a condition of her entitlement to enforce the executor's promise. This case is contrasted with another judgment in ***Re Soames***[6]. The discussion in this behalf reads as under:

> "On the other hand, in *Re Soames* A promised £3,000 to B if B would set up a school in the running of which A was to have an active part. It was held that, by establishing the school, B had provided consideration for A's promise. It seems that the distinction between consideration and condition depends, in such cases, on whether "a reasonable man would or would not understand that the performance of the condition was requested as the price or exchange for the promise." In *Thomas v. Thomas* the executors had not requested the plaintiff to remain a widow; while in *Re Soames* a request by A that B should establish the school could be inferred from A's expressed intention to participate in its management. This distinction is further illustrated by *Carlill v. Carbolic Smoke Ball Co.* where the claimant provided consideration for the defendants' promise by using the smoke-ball; but her catching influenza was a condition of her entitlement to enforce that promise."

17) We are afraid, such a distinction between *consideration* and

6 (1897) 13 TLR 439

condition, as sought to be drawn by the learned counsel for the assessee, would not apply to the instant case. It was possible if the transaction between the buyers and the assessee was seen in isolation. However, in the present case, it needs to be emphasized at the cost of repetition that the resultant effect of invalidating the advance licence by the buyer was issuance of licence for intermediate supply in favour of the assessee and the said licence enured certain benefits in favour of the assessee. In the present case, on these facts, we have to simply see as to whether the definition of *'transaction value',* as contained in Section 4 of the Act read with Rule 6 of the Rules, would encompass this benefit as amounting to additional consideration. Our conclusion is that it would come within the ambit of additional consideration indirectly flowing from the buyers to the assessee. Therefore, the instant case is more akin to the decision in ***Re Soames***[7].

18) At this stage, we would like to recall the following findings arrived at by the Commissioner, which are not upset by the Tribunal in the impugned decision or even disputed by the assessee:

(a) The assessee had supplied goods to a particular type of buyers at

7 Note 6 above.

much lower price than the price charged from the general buyers in the normal course of trade as it had obtained the facility of invalidating of advance licences from such buyers and procured imported raw material (duty free) against such licences for manufacturing of finished goods. It is, therefore, alleged that the assessee and the buyers had mutuality of interest in the business of each other and there was a flow back and the price was not the sole consideration for sale in these cases in accordance with the provisions of Section 4(1)(a) of the Act.

(b) Therefore, they were related persons in terms of provisions of the erstwhile Section 4(4)(c), presently Section 4(3)(b)(iv) of the Act.

(c) It is observed that para 7.7 of the EXIM Policy on Advance Release Order speaks of mutuality of interest as the assessee had procured duty free imported raw materials against invalidation of advance licence of the consignees and in turn it sold the finished goods to the said consignees at lower prices as compared to other normal buyers. Thus, the price was not the only consideration.

(d) Once the advance licence is invalidated, the said clearance to the buyers who were earlier holding the said licences need not be

treated as deemed export and rightly the assessee had cleared the said goods to such buyers on payment of excise duty, but at lower value than the clearance made to the normal buyers. Thus, the assessee appeared to have derived double benefits in these transactions, i.e. (i) enhanced sale and paid less duty on lower value; and (ii) imported duty free raw materials.

(e) In this case, the right to procure duty free imported raw material is being transferred to supplier by the buyer. This indicates the flow back of additional considerations from the buyer of the said goods to the seller, which is the assessee.

19) On the facts of this case, we are of the opinion that the Commissioner has rightly come to the conclusion with regard to the fact that additional monetary consideration, in addition to the price being paid for the goods, i.e. transfer of advance import licence in favour of the seller by the buyer enabling the seller of the goods to effect duty free import of the raw materials and bringing down the cost of production/procurement, is a consideration, the monetary value of which has to be considered under the provisions of the Rules, i.e. Rule 6 thereof.

20) Thus, we do not see any reason to deviate from the decision

rendered by this Court in ***IFGL's***[8] case.

21) Before we part with, one more aspect to which our attention was drawn by Mr. Lakshmikumaran needs to be addressed. Referring to another judgment of this Court in ***Commissioner of Central Excise, Bangalore*** v. ***Mazagon Dock Ltd.***[9], a vain attempt was made to show that this judgment was contrary to the decision rendered by this Court in ***IFGL's***[10] case. We do not find it to be so. Interestingly, the Hon'ble Judges {*S.N. Variava and Dr. AR Lakshmanan, JJ.*} who comprised the Bench that decided ***IFGL's*** case were the same who rendered the judgment in ***Mazagon Dock Ltd.'s*** case. Another pertinent factor which is to be taken note of is that the two decisions were rendered within a short gap of a fortnight. The decision in ***Mazagon Dock Ltd.*** was rendered on July 28, 2005 whereas ***IFGL's*** case was decided on August 09, 2005. Thus, at the time of pronouncing of the judgment in ***IFGL's*** case, the same very Bench was conscious of its judgment given immediately before in ***Mazagon Dock Ltd.***

22) A reading of the judgment in ***Mazagon Dock Ltd.'s*** case would reveal that in the said case subsidy of 20% was received by the

8 Note 2 above
9 2005 (187) ELT 3 (SC) :: 2005 (127) ECR 268 (SC)
10 Note 2 above

assessee therein from the Government, which was sought to be included by the Revenue as *'additional consideration'* to arrive at the transaction value for the purpose of central excise. The Court held that this subsidy was not received from the buyer either directly or indirectly and, therefore, could not be included in the price of goods *qua* purpose of excise. On the facts of that case, the Court found that the respondent in the said case had entered into contract with Oil & Natural Gas Corporation Limited (ONGC) for manufacture and supply of jack-up rigs. For such a contract, as per the policy of the Government, 20% subsidy was to be received from the Government and 10% from ONGC. As far as 10% subsidy received from ONGC is concerned, the same was also to be includible in the transaction value as additional consideration flowing from the buyer. However, 20% subsidy from the Government was under the Government's own scheme with no role of ONGC (buyer in the said case). Obviously, it could not be said that this subsidy had any flow from the ONGC either directly or indirectly. The said judgment, therefore, has no bearing on the present matter.

23) In view of the foregoing, we are of the considered opinion that this case is squarely covered by the judgment of this Court in ***IFGL's***[11]

11 Note 2 above

case. We, thus, allow this appeal, set aside the decision of the Tribunal and restore the order passed by the Commissioner. In the facts and circumstances of this case, there shall be no order as to costs.

.....J.
(A.K. SIKRI)

.....J.
(ROHINTON FALI NARIMAN)

NEW DELHI;
AUGUST 21, 2015.