CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/503/2007-DB
[Arising out of Order-in-Appeal No. 63 & 64/2007 dated 29/03/2007 passed by Commissioner of Central Excise (Appeals-I), Bangalore]

E/1045/2009-DB
[Arising out of Order-in-Appeal No. 36/2009 dated 31.08.2009 passed by Commissioner (Appeals), LTU, Bangalore]

E/885/2011-DB
[Arising out of Order-in-Original No. 91/2010-(CE) Commr. dated 29/12/2010 passed by Commissioner of Central Excise & Customs, Large Taxpayer Unit, Bangalore]

M/s. HEWLETT PACKARD (I) SALES (P) LTD
NO.24, SALARPURIA ARENA, HOSUR MAIN ROAD, ADUGODI, BANGALORE

Appellant(s)

Versus

C.C.E.-BANGALORE-I
POST BOX NO 5400...CR BUILDINGS,
BANGALORE,
KARNATAKA
560001

Respondent(s)

Appearance:

Shri G. Shivadass and Mr.Syed Peeran, Advocate
V. lakshmikumaran &
V. sridharan
WORLD TRADE CENTRE NO.404-406,
4TH FLOOR, SOUTH WING BRIGADE
GATEWAY CAMPUS NO.26/1,
DR. RAJKUMAR ROAD, MALLESWARAM.
BANGALORE - 560 055
KARNATAKA

For the Appellant

Mr. Madhup Sharan, Asst. Commr., AR

For the Respondent

Date of Hearing: 05/12/2018
Date of Decision:17/01/2019

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No.20055-20057/2019

Per : P. ANJANI KUMAR

Briefly stated the facts of the case are that M/s. Hewlett Packard India Ltd was engaged in the manufacture of personal computers falling under CETH 8471. M/s. Hewlett Packard India Sales Pvt. Ltd was set up as an EHTP from 2001 onwards. The appellants were selling the computers to their wholesale dealers both at factory and their depots. The appellants have entered into agreements with their wholesalers/distributors (also called re-sellers) for purchase and sale of the computers in question. In terms of the agreement, the appellants extended 30% of the discount to the wholesale dealers from the list price. The agreement also contained a clause towards the Re-sellers providing re-seller through the inventory reports to the appellants and in respect of which additional discount of 1% is provided to the re-sellers. More or less similarly worded agreements were in place during the periods disputed in the three SCNs. This has been the bone of contention between the appellants and the Revenue. SCNs issued were confirmed by OIO and OIA as detailed below:

Appeal No./Party	Date of SCN	Period covered	OIO/OIA
E/1045/2009, Hewlett Packard India Ltd.	07.11.2001	October 2000 to August 2001	36/2009 dated 31.08.2009
E/503/2007, Hewlett Packard India Ltd.	14.09.2005	April 2001 to November 2002	63,64/2007 dated 29.03.2007
E/885/2011, Hewlett Packard India Sales (P) Ltd.	21.01.2010	January 2005 to March 2008	91/2010 dated 29.12.2010

2. Revenue has issued a SCN dated 26.03.2001 covering a period from April 1999 to Sept. 2000. It was contended by the Department that the appellants are remunerating the re-sellers with 1% trade discount included in the 30% trade discount. The effective trade discount is only 29% and 1% being the remuneration for the services rendered by the re-sellers appears to be in the form of a commission and not a trade discount. Therefore, the same merit inclusion in the assessable value. The SCN was confirmed by the Commissioner and upheld by the

Tribunal vide Order No. 634/2003, 2003 (162) ELT 399 (Tri. Bang) and an appeal filed by the appellants was rejected by the Hon'ble Supreme Court in 2004 (167) ELT A-137 (SC).

3. Learned counsel for the appellants has based his arguments on the following:

3.1. Earlier decision of Apex Court in their own case is not applicable to period after 01.07.2000 when new valuation rules have come into force by introducing the transaction value as per which only those amounts which are charged are recovered from the buyer are liable to the added to the price paid or payable to arrive at the transaction value. He also submitted that the above decision was rendered not only under the old valuation rules but also the wordings of the agreements were altogether different as seen below:

Agreement prior to 01.04.2001

C. "**Remuneration**

HP will remunerate Re-seller for this service with an additional discount of 1% already included upfront in re-seller's discounts. Failure to comply with any of the requirements will entitle HP to remove the additional discount on future orders."

In view of the above, the Hon'ble Tribunal held that discount cannot be equated to remuneration etc. which are not allowed to be deducted from the assessable value. However, subsequently, the agreements have been changed w.e.f 1^{st} April, 2001 to reflect the true nature of this class and to reflect the understandings of the parties. The amended clauses now read as follows:

REPORTS:

Wholesalers will receive a 1% discount upfront for providing HP or HP's designate with Reseller Sell-through and Inventory Reports ("RSI") in a format specified by HP.

Agreement w.e.f. 1^{st} December 2003

8. **Product Access & Discounts**

a. This agreement applies to Products, discounts and Estimated Volumes as listed on the Asia Pacific Partnership Online Portal (APPOL) under the Re-sellers' profile.

Further, in Clause 2B, against SI No. 7, it is mentioned as follows:

"7. Volume Distributor discounts include 1% discounts for providing HP or HPs designate with Reseller Sell through and inventory Reports in a format specified by HP on a weekly basis'.

3.1.1. Ld. Counsel submitted that single factual defence can make a world of difference has held by Hon'ble Supreme Court in the following cases:

(i) CCE, Calcutta Vs Alnoori Tobacco Products – 2004 (170) ELT 135 (SC).

(ii) CCE, Bangalore Vs Srikumar Agencies – 2008 (232) ELT 577 (SC).

3.2. Ld. Counsel for the appellants submitted that net realization from the buyer alone is relevant for arriving at the assessable value under the New Valuation Rules w.e.f. 01.07.2000. He further submitted that transaction value includes various amounts charged by the assessee by reason of sale or in connection with the sale and also includes any expenses incurred by the buyer of the goods as the condition to the sale of goods; CBEC clarified vide Circular F. No. B-10/1/2000-TRU dated 12.05.2000 that as per the definition of the transaction value whatever is recovered from the buyer by reason of or in connection with the sale, whether payable at the time of the sale or at any other time is includable in the transaction value; CBEC vide Circular M.F. (DR) F. No. 354 /81/ 2000-TRU dated 30.06.2000 clarified that new Section 4 essentially seeks to accept different transaction values which may be charged by the assessee to different customers. He submitted that Hon'ble Supreme Court in the case of ***M/s. Grasim Industries Ltd***.

reported in ***2018-TIOL-181-SC-CEX-CB*** has observed that "transaction value" as defined in Section 4 (3) (b) brought into force by the Amendment Act 2000 statutorily engrafts the additions to the "normal price" under the old Section 4 as held to be permissible in the case of ***M/s. Bombay Tyre International Ltd.*** He also submitted that the term "paid or payable" has been interpreted by the Hon'ble Supreme Court in the case of ***Purolator India Ltd. Vs. CCE, Delhi-III, 2015 (323) ELT 227 (SC)*** stating that " *The expression "actually paid or payable for the goods, when sold" only means that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid, has been paid in part, or has not been paid at all. The basis of "transaction value" is therefore the agreed contractual price*.

The same understanding was given by Hon'ble Supreme Court in the case of ***CCE, Mysore Vs. TVS Motors Co. Ltd. 2016 (331) ELT 3 (SC)*** which approved the decision of Bombay High Court in the case of ***Tata Motors Ltd. Vs. UOI, 2012 (286) ELT 161 (Bom.).*** The above decision has been continuously held by the Tribunal in the following cases while dealing with additional charges:

(i) Luminous Electrical Pvt Ltd. Vs Commissioner of C.Ex. Delhi, 2016 (338) ELT 154 (Del.).

(ii) Ford India Pvt Ltd. Vs Commr. of C.Ex., 2017 (6) GSTL 273 (Tri. Chennai).
(iii) Mercury Pneumatics Vs Commr. of C.Ex., 2017 (348) ELT (Tri. Mum.).
(iv) Hyundai Motors India Ltd. Vs CCE & ST, 2017 (346) ELT 431 (Tri. Chennai).

3.3. The Ld. counsel submitted that whereas the old Section 4 (4) (d) provided for deduction of "trade discount" from the value to arrive at the normal value, value under new Section 4 does not include "trade discount" allowed in accordance with normal practice in the trade. Hon'ble Supreme Court in the case of Bombay Tyres International (supra) put to rest the entire issue of discount holding the same to be permissible deduction from the normal price, provided the same is known to the buyer at the time of purchase of goods and the same is actually passed on. The issue of discounts has not undergone any change under new Section 4 w.e.f. 01.07.2000 as held by the Apex Court in the case of ***Purolator India Ltd.*** (Supra). CBEC Circular dated 30.06.2000 (supra) clarified at Para 9 as under:

> *"As regards discounts, the definition of transaction value does not make any direct reference. In fact, it is not needed by virtue of the fact that the duty is chargeable on the net price paid or payable. Thus, if in any transaction a discount is allowed on declared price of any goods and actually passed on to the buyer of goods as per common practice, the question of including the amount of discount in the transaction*

value does not arise. Discount of any type or description given on any normal price payable for any transaction will, therefore, not form part of the transaction value for the goods, e.g. quantity discount for goods purchased or cash discount for the prompt payment etc. will therefore not form part of the transaction value. What is important is that it must be established that the discount for a given transaction has actually been passed on to the buyer of the goods. The differential discounts extended as per commercial considerations on different transactions to unrelated buyers if extended cannot be objected to and different actual prices paid or payable for various transactions are to be accepted for working assessable value…"

3.4. The Ld. counsel for the appellants further contended that in respect of EHTP unit valuation requires to be done under Section 14 of the Customs Act read with Rule 3 of the Customs Valuation Rules, 1988 on the basis of transaction value; as per amendment to Section 14, transaction value for the sale of goods is to be adjusted by specifically adding to the price paid or payable for the goods any expenses incurred by the buyers towards costs and services. The Ld. counsel further submitted that the intention of the parties to the agreement is to provide discount and that no service is rendered by the Re-sellers if the parties to the contract agree that a particular amount is a discount then it is so and is not open to a different interpretation by the Department in the absence of any evidence showing a different intention. In all the statements recorded by the Department, the officers and dealers of the appellants categorically stated that it was only a discount as mentioned in Clause 2B of the Agreement. He further submitted that in any case, the alleged service by the Re-sellers is a post-sale activity.

3.5. The Commissioner (A) has upheld the invocation of longer period by the Department on the ground that the appellants had changed the name of additional discount given in the present agreement and this fact was not brought to the notice of the Department. It is submitted that Commissioner (A) himself admitted, in Para 12 of the Order that there has been no change in the nature of the discount given by the appellants. The SCNs have been issued on 14.09.2005 covering a period from April 2001 to Nov. 2002 and on 27.01.2010 covering a period from January 2005 to March 2008. The demands are barred by limitation as SCNs have been issued after four and half years or three years. The very same issue of inadmissibility of additional discount of 1% was the subject matter of earlier SCN issued on 26.03.2001 covering a period from April 1999 to Sept. 2000. Further, the issue of additional discount of 1% was a subject matter of SCN dated 07.11.2001 for the period from October 2000 to August 2001. Therefore, the longer period of limitation is not invokable as there is no suppression of facts and the facts are already known to the Department as a demand based on the amended Clause of Agreement was already a matter of dispute in the SCN dated 07.11.2001. He relied upon the Hon'ble Supreme Court in the case of ***Nizam Sugar Factory Vs. CCE, 2006 (197) ELT 465*** wherein it was held that suppression of facts cannot be alleged on the same assessee when the facts of the case were known to them in as much as the Department issued a SCN in respect of identical facts for the earlier period. He also relied upon the following cases:

(i) Caprihans India Ltd. Vs CCE, Surat – 2015 (324) ELT 8 (SC).
(ii) CCE, Mumbai Vs Cona Industries – 2017 (352) ELT 12 (Bom.).
(iii) MAA Communications Bozell Ltd. Vs CCE, Bangalore - 2017 (3) GSTL 89 (Tri. -Bang.)

3.6. Lastly, the Ld. Counsel has submitted that there is an overlap in respect of period April 2001 to August 2001 as the same has been raised in two SCNs issued on 07.11.2001 and 14.09.2005. He further submitted that as the demand is not maintainable on merits as wells as limitation, no penalty can be imposed.

4. Ld. AR for the Department has reiterated the findings of the OIO and has relied upon the following cases mainly to argue that extended period of limitation can be invoked on similar set of facts:

(i) Salora International Ltd. Vs CCE, Delhi-II, 2018 (12) GSTL 173 (Tri. Del.).
(ii) Audi Automobiles Vs CCE, Indore, 2018 (360) ELT 1062 (Tri. Del.).
(iii) Gestamp Automotive India Pvt Ltd. Vs CCE, Pune-II, 2017 (7) GSTL 337 (Tri. Mum.).
(iv) Burn Standard Co. Ltd. Vs CCE-Calcutta-II 2000 (119) ELT 650 (Tri.).

5. Heard both sides and perused the records of the case. Brief issues that needs to be decided in this case are as below:

(i). whether the additional discount of 1% provided by the appellants to resellers is includible in the assessable value of the goods cleared by the appellants under the new Section 4 of CEA,1944 post 1.7.2000

(ii). Whether the 3 SCNs under consideration are barred by limitation.

5.1. Coming to the first issue, the appellants submitted that the issue (in respect of old Section 4) came for consideration before this bench, in their own case, which passed an order 2003(162) ELT 399(Tri-Bang) upholding that compensation given to wholesale buyers for additional service of providing market intelligence for benefit of appellants was a commission and not discount as understood in trade of impugned commodity which could be deducted from assessable value. Hon'ble Supreme Court has upheld the above order. The contention of the appellants is that in view of the changed legal position and change in the wordings of the contract the above decision is no longer applicable. They argued that as per Section 4 of CEA, 1944 and Section 14 of the Customs Act, 1962(as applicable to their EHTP unit) the valuation should be on the basis of 'Transaction value' that is to say, the net realization from the Customers which forms the basis for levy of duty.

5.2. The appellants submitted that the agreements have undergone a change as follows w.e.f 1st April, 2001

Agreement prior to 01.04.2001

C. "**Remuneration**

HP will remunerate Re-seller for this service with an additional discount of 1% already included upfront in re-seller's discounts. Failure to comply with any of the requirements will entitle HP to remove the additional discount on future orders."

Agreement w.e.f 1st April, 2001

REPORTS: *Wholesalers will receive a 1% discount upfront for providing HP or HP's designate with Reseller Sell-through and Inventory Reports ("RSI") in a format specified by HP.*

Agreement w.e.f. 1st December 2003

8. **Product Access & Discounts**

a. This agreement applies to Products, discounts and Estimated Volumes as listed on the Asia Pacific Partnership Online Portal (APPOL) under the Re-sellers' profile.

Further, in Clause 2B, against SI No. 7, it is mentioned as follows:

"7. Volume Distributor discounts include 1% discounts for providing HP or HPs designate with Reseller Sell through and inventory Reports in a format specified by HP on a weekly basis'.

We find that as observed by the Additional Commissioner in the OIO, there is not much material change in the agreements before or after 1.7.2000 as far as the provision of discounts is concerned. Both the agreements indicated that the appellants would remunerate/provide the wholesaler/Re-seller for the service of providing reports. Both agreements indicate that the additional discount of 1% is already included upfront in discount. However, in the new agreement, condition related to failure to comply with any of the requirements, appears to be not included in the main clause. The appellants submitted that the operation of the condition earlier or at present was similar. In case of default, the discount is reduced to the extent of 1% in subsequent sales.

5.3. The appellants submitted that in terms of agreement, the appellants extended 30% discount to the wholesalers from the list price. The fact that a minimum discount of 30% would be available is known and accepted both by the appellants and the wholesalers by virtue of the agreement and by virtue of consistent practice followed by the appellants. The wholesalers place purchase orders on the appellants for various models of computers. The wholesalers consider the list price available on the web deduct 30% and indicate the net purchase price at which the goods are to be supplied to them. The price lists/purchase orders would indicate that the appellants have been extending the discount at a minimum of 30%. The letters received by the appellants from majority of their customers indicate that they had been extended the minimum discount of 30% in all their transactions. The appellants submitted that details compiled for a short time indicate that the appellants have supplied the goods to their customers at a minimum discount of 30% (Actual discounts are ranging from 30-45%). In a few cases where the discount extended is less than 30%, the appellants have claimed deduction of discount as actually extended to the buyers and duty has been paid on the assessable value based on actual discount. We find that the Ld. Commissioner (in respect of Appeal No E/885/2011) observed that:

> *"I observe that prior to 1.12.2003; they had an agreement which was revised from 1.12.2003. The goods are sold by M/s HP only through their 'wholesalers' 'distributors/ resellers'. While 'wholesalers' 'distributors' can only sell to registered 'resellers', a reseller was bound to sell only to end-user customer. There was no retail sale by M/s HP. The first tier buyers are termed as 'distributors' and the second tier buyers are termed 'resellers'. There is no change in the selling pattern before and after the agreement was revised from 1.12.2003. I observe that at point No 7 of the Clause 2B of the agreement, it is specifically mentioned that ' Volume Distributor discounts include 1% discounts for providing HP or HPs designate with Reseller Sell through and inventory Reports in a format specified by HP on a weekly basis'.*
>
> *From the agreement, I observe that the amount of 1% reduced from the invoice price, by terming it as discount is in fact not a 'trade discount' as it is commonly understood in the trade but it is in the nature of commission for the services rendered by the dealers which in fact form part of the cost of the product. Also that the reports sent by the dealers are in the nature of market intelligence about the products. The reports provide information about movement of different products in the market. The distributors are in a position to provide this information as they as they themselves stock these different products. These reports do not benefit the dealers but benefit HP only. The distributors are commercially indifferent to the results of their reports. Thus, M/s HP are benefitted by these reports compensating the distributers in the monetary terms by*

reducing the cost price of their products by 1% from the invoice price. The amount paid to the dealer as remuneration (discount) is an expense incurred by HP and the information given by the distributors is an ongoing service. It is an ongoing service rendered by distributors to M/s HP and is an input to determine the production pattern of M/s HP. Thus I hold that this discount is not in the nature of normal trade discount and the same is to be added to the cost and the transaction value has to be adjusted in accordance with the provisions of Rule 10(erstwhile Rule 9) of Customs Valuation Rules, 2007.

5.4. We find that the Commissioner has relied upon the appellant's own case Supra wherein this Bench has held at Para 5 as follows:

> *"c) A reading of entire para 7, of the "Reseller Sell-through and Inventory reports", indicates, that 'services' envisaged thereby, are not a 'service' which would be normally provided for by a 'buyer', to a 'seller', on a principal to principal basis. If that was so, then this agreement was not called for as para 10 of the 'Wholesaler Programme Terms' did provide for Reports. The 'compensation' for this 'service' is termed as 'remuneration' in the concerned agreement. Remuneration as per Black's Law Dictionary is a reward, a recompense, a salary or a compensation for services rendered. They cannot be 'discounts' which could be offered on price of goods sold; these services are not being rendered gratis, for mutual benefit of HP and the wholesaler/reseller by the later. Therefore, Remuneration of this 1%, would be in the nature of an 'expense' incurred by HP, for marketing, not the goods being sold, but also for goods sold earlier or later to the same buyer or another buyer of HP. It is only being calculated or determined and paid or effected, as per the Remuneration terms, with reference to an additional discount of 1% already included upfront in resellers discount. Merely because it is reckoned at 1% of the discount, as eligible and is not a fixed sum, the same will not take it out from the non-deductible amounts from assessable value under Section 4 of the Central Excise Act, 1944. There is force in the arguments being placed by the ld. DR, in as much as, that these reports sent by the dealers, are in the nature of market intelligence, about the products of HP and their competitors. The reports, therefore, did not benefit the dealers as made out by the ld.*

Advocate for the appellants, but are benefiting the manufacturer exclusively in effectively moving his products in the marketing chain vis-a-vis the competitors. We find that the case law relied upon by the ld. Advocate does not come to the rescue of HP, in the facts of this case.

(d) Considering the arguments that the amount of 1% is not in the nature of a commission, it is found, 'Commissions' are different from 'remuneration' in as much as 'commissions' are amounts payable, as 'compensations' to an 'agent' for services rendered, while 'remunerations' are amounts payable by master for 'services' rendered by a 'servant to a master'. The relationship, between principal to principal or/and principal and an agent, and master and servant, cannot be equated. There is doubt that the agreement termed as 'Wholesale Programme Terms' is on principal to principal basis, the same vide para 10 provides for certain reports when it is read with para 7. That agreement does not create a relationship of principal and an agent, to constitute payments consequent thereto to be commissions. Trade discounts offered therein would be eligible abatements. However, we have found that it has not been demonstrated before us that these reports, consequent to para 10 are the same and serve the same purpose as the reports consequent to para 7 of 'Segment Operational Policy', which is a separate agreement entered into. Therefore, while property may be getting transferred from HP to the 'wholesale buyer' vide 'Wholesale Programme Terms' the need to enter into a detailed agreement termed 'Segment Operational Policy' detailing 'Reseller Sell-Through and Inventory Reports' and evaluation by HP of such functions and consequential 'remuneration' for the same, alongwith penal consequences for non-performance would indicate that another relationship is being created by 'Segment Operation Policy Agreement' between HP and the wholesale buyer; besides the 'Wholesale Programme Terms' of sale. The issue would be, whether the 'buyer' is an 'Agent' of HP. The Commissioner has observed the same and concluded that the same person has acted as an 'Agent' and 'Wholesale Dealer' of HP. The appellants have contested this finding on the ground : -

"The definition of the "wholesale dealer" in Section 2(k) when it refers to the expression "agent" seeks to cover a wholesale dealer who, apart from acting as a wholesale dealer by purchasing and selling excisable goods, also acts as an agent for the purpose of stocking such goods belonging to others for the purpose of sale. What the provisions seek to recognize is the fact that a wholesaler can act not

only as a dealer but also as an agent. This does not, however, mean that for the same consignment he can play a dual role. If for a particular consignment a wholesaler has acted as a purchaser of the goods to whom the property in the goods has been transferred, he cannot in the same vein be acting as an agent for the consignment. All that the definition recognizes is the fact that a wholesale dealer, apart from purchasing and selling goods, can also either for the same seller or for some other seller stock the goods and transfer it to others as per the directions of the principal.

In this case, the wholesalers have purchased the goods from the appellants. The property in the goods has been transferred as soon as the goods were sold to them. The appellants do not have the right to recall the goods from the dealers. The wholesalers are not under any obligation to the appellants after the goods have been purchased by them. It is their right to decide the person to whom they sell the goods as also the price at which they would sell the goods. It is also the right of the wholesaler to decide the discount which he would extend to his purchasers. The appellants would have no right to decide the quantum of discount either. In such a situation, it can hardly be said that the wholesaler is acting as an agent of the appellants for the goods purchased by him."

However, it is an admitted position, that Remunerations made, are for performance in future; not necessarily for the same goods. The Remuneration is, effected and service as per Para 7 of 'Segment Operational Policy' agreement is expected. It is only in future a penalty is imposed, if service was not provided. The ld. Advocate in his submissions was emphatic in his statements that penal clause have never or rarely been enforced. If that be so, then no nexus exists between the goods sold, pursuant to "Wholesale Programme Terms' and services rendered or required/anticipated, consequent to para 7 of the 'Segment Operational Policy'. It would not be creating the wholesale dealer for the very same goods to be an agent or a servant. No bar under the Central Excise Law or any law was shown, that same 'Wholesale buyer' cannot enter into another agreement to perform "additional services" for HP. In this view of the matter, the plea that 'wholesale buyer' could not be an 'agent' or 'servant' cannot survive. This Remuneration is for 'services' flowing from a different contract. Therefore, we cannot uphold the abatement of this 1% since we cannot find 'remuneration', 'rewards', 'recompense', 'salary' and 'compensations' to be equivalent to discount eligible for abatement under Section 4 as the same cannot be equated to discount.

Therefore, we uphold the finding that this 1% should be disallowed since it is a commission.

(e) In the facts of this case, the 'Wholesale buyer' is purchasing on principal to principal basis and thereafter consequent to another agreement accepting 'amounts' termed as 'Remuneration' to perform certain additional services on behalf of HP. By merely terming 1% compensation as the 'Remuneration' the nature of 'compensation' effected will not cease to be a 'commission' paid, if it is in nature of a compensation for service. Mere change of the nomenclature of the package of compensation to remuneration will not take it out of the purview of being a 'commission' in the facts of this case. It is well-settled law, that nature of the abatement is to be examined from the totality of the material. Merely because it is termed as 'additional discount' would not make it an eligible discount in the same fashion and for the same reasons, that, by merely calling a payment as commission, it does not become an ineligible discount. Similarly, by calling a 'commission' as a 'remuneration' will not make it eligible. The nature of an abatement claim under Sec. 4 of the Central Excise Act, 1944, are required to be looked into and determined, to arrive at whether the abatements claimed, is in the nature of a 'discount' as understood from the agreement/or and in the trade or not. No material has been placed before us to bring on record and prove that in this commodity's trade, such 'remunerations' are considered known and accepted as 'discounts'. As regards the facts herein, it is found that the same is not a 'discount'. In view of this fact, we find this claim of abatement to be not in the nature of a discount. It is in the nature of a compensation caused by an additional liability of functions undertaken, for the benefit of HP, by the reseller. Such abatements are not permissible deductions under Section 4."

From the above, It is seen that this Bench has not considered the remuneration paid by the appellants as a discount.

5.5. The appellants submitted that Hon'ble Supreme Court in the case of M/s. Grasim Industries Ltd. (Supra), held that "Transaction Value" as defined in Section 4(3)(b) brought into force by the Amendment Act, 2000, statutorily engrafts the additions to the "Normal Price" under old Section 4 as held to permissible as held in the case of Bombay Tyres International Ltd. We find that the Hon'ble Supreme Court has held in the instant case that there is no material difference between old Section 4 and new Section 4. It was held as under:

> *"Accordingly, we answer the reference by holding that the measure of the levy contemplated in Section 4 of the Act will not be controlled by the nature of the levy. So long a reasonable nexus is discernible between the measure and the nature of the levy both Section 3 and 4 would operate in their respective fields as indica ted above. The view expressed in Bombay Tyre International Ltd. (supra) is the correct exposition of the law in this regard. Further, we hold that "transaction value" as defined in Section 4(3)(d) brought into force by the Amendment Act, 2000, statutorily engrafts the additions to the 'normal price' under the old Section 4 as held to be permissible in Bombay Tyre International Ltd. (supra) besides giving effect to the changed description of the levy of excise introduced in Section 3 of the Act by the Amendment of 2000. In fact, we are of the view that there is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price'.*

In view of the above, we hold that these discounts are not in the nature of discounts as understood in the common parlance. They are directly or indirectly an expenditure to the appellants. The remuneration due to the wholesalers is given in the form of discounts. Therefore, these add to the cost of the products that the appellants are selling. More so, in respect of the EHTP unit the clearances made to the wholesalers in the domestic market are in the nature of imports by the wholesalers. Therefore, all the amounts paid or payable by the wholesalers form part of the" transaction value" for the purpose of the wholesalers in terms of Section 14 of the Customs Act, 1962.

5.6. The appellants submitted that the Apex Court in the case of M/s. TVS Motors Co. Ltd. (supra) upheld the decision of Bombay High Court in the case of M/s. Tata Motors Ltd. (supra) wherein it was held that pre-delivery inspection and after-sales service charges are not includable in the "transaction value". We find that in the above cases, it was held that these expenses were not includable in the assessable value of car as these were not paid by dealer to the manufacturer and dealers rendered these services as their legitimate activity, meeting labour cost for same from their retailing profit. On this very specific issue, the instant case of the appellant is different from the decision in Tata Motors in as much as the dealers of the appellants are not carrying out the service as part of their legitimate activity, meeting the cost from their profit. In case of failure of the distributors/wholesalers to send the market reports, the discount offered is varied in the subsequent period. For this reason, we find that the case law cited is not applicable. Similarly, the other cases cited by the appellants are not also applicable. Therefore, we find that the principle enunciated by this Bench and uphold by the Hon'ble Supreme Court in the appellant's own case holds good for the period after 01.07.2000 also in view of the Hon'ble Supreme Court's decision in the case of Grasim Industries (supra).

6. Coming to the issue of limitation, we find that the appellants have been regularly filing their monthly ER-1 Returns indicating the quantities of computers manufactured and cleared every month, the details of invoices raised during the said month and the total value of clearances affected during the month in question. Department has already issued a SCN dated 26.03.2001 for the period April 1999 to Sept. 2000 to the appellants for the very same issue. It is pertinent to note that the Additional Commissioner and Commissioner (A) in respect of the SCN 07.11.2001 (Appeal No. E/1045/2009) have observed that there has been no change in the nature of the discount given by the appellants. Therefore, we hold that when the Department is quite aware of the activities of the appellants, no suppression, nonetheless of a material fact with intent to evade payment of duty can be alleged. Further, SCN issued on 14.09.2005 and 27.01.2010 covering the period April 2001 to Nov. 2002 and January 2005 to March 2008 has been issued well after three years. As the Department has already raised a issue subsequent to the new Section 4 of CEA, 1944, it not open to the Department to issue two more SCNs invoking extended period. We find strength in the appellant's submission relying on the decision of Apex Court in the case of ***Nizam Sugar Factory*** (supra) wherein it was held that suppression of facts cannot be alleged on the same assessee when the facts of the case were known to them in as much as the Department had issued a SCN in respect of identical facts for the earlier period. The Ld. AR has relied upon certain cases and has submitted that extended period is invokable. We have gone through the ratio of the cases and find that the facts contained therein are different from the present case. Therefore, we hold that the SCNs are barred by limitation. In view of our finding on the merits, as above, we hold that the demands are sustainable only for the normal period, wherever SCNs cover the normal period also. Therefore, we find that the demand in respect of Appeal No. E/1045/2009 is upheld for the normal period and demands in respect of Appeals No. E/503/2007

& E/885/2011.

7. In view of the above, we partly allow the Appeal No. E/1045/2009 and remand back to the Original Authority for confirmation of duty for the normal period. Appeals No. E/503/2007 & E/885/2011 are allowed *in toto* on limitation.

(Order was pronounced
in Open Court on **17/01/2019**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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