CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 1938 of 2010

(Arising out of Order-in-Original No. 05/2010 Cus. Adjn. dated 27/05/2010 passed by Commissioner of Customs, Bangalore)

HIMATSINGKA SEIDE LTD 10/24, KUMARA KRUPA ROAD, HIGH GROUNDS, BANGALORE 560001	Appellant(s)

VERSUS

Commissioner of Customs BANGALORE-CUS NULL C.R. BUILDING,QUEENS ROAD, P.B.NO. 5400, BANGALORE - 560001 KARNATAKA	Respondent(s)

Appearance:

Shri Thirumalai, ADVOCATE PRESTIGE TRADE TOWER, LEVEL 14, 46 FLOOR, PALACE ROAD, HIGH GROUNDS, BANGALORE - 560001 KARNATAKA	For the Appellant
Shri P. Gopakumar, Jt. Commissioner(AR) Smt. C.V. Savitha, Superintendent(AR)	For the Respondent

WITH

ii. Excise Appeal No.20563 of 2018 [Himatsingka Seide Ltd.]
iii. Excise Appeal No.20564 of 2018 [Himatsingka Seide Ltd.]
iv. Excise Appeal No.20566 of 2018 [Himatsingka Seide Ltd.]
v. Excise Appeal No.20624 of 2018 [Himatsingka Seide Ltd.]
vi. Excise Appeal No.20461 of 2019 [Himatsingka Seide Ltd.]

CORAM:
HON'BLE MR. P.K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20335-20339, 20340 / 2020

Date of Hearing: 03/03/2020

Date of Decision: 03/03/2020

Per : P. ANJANI KUMAR

Brief facts of the case are that M/s Himatsingka Seide Ltd, the Appellant (or M/s HSL'), was set up in 1987 as an export oriented unit engaged in the manufacture and export of silk fabrics; Himmatsinka Filati (HF) was also set up as EOU in collaboration with Filatti Buratti, Italy in 1998; the two EOUs namely HSL and HG were merged *w.e.f* April 1, 2008; an independent wholly owned subsidiary of HSL, M/s Himmatsingka Woven Private Ltd(M/s HWPL), was set up in 2003 to engage in retail trade of fabrics in India through a chain of stores called "Atmosphere" which is the brand name of the retail business and not the brand name. On the basis of audit objection department issued different SCNs to the units as follows holding that for purposes of valuation of clearances of goods, by the holding company to the subsidiary company, the marketing expenses incurred by the subsidiary should be included to the value of the finished goods. The same were confirmed but for demand, for the period February 2009 to September 2009, January 2010 to March 2011, 2011-12 and April 2011 to July 2012, which was dropped on account of being barred by limitation. Appeals were filed as below.

Appeal/ Details	**C/1938/ 2010**	**E/20624/ 2018**	**E/20563/ 2018**	**E/20564/ 2018**	**E/20566/ 2018**	**E/20461/ 2019**
Period of Dispute	2/2003 -1/ 2009	10/2009 -12/2009	8/2012 -3/2013	8/2014 -8 2015	4/2013 -7/2014	9/2015 to 2/2016
SCN date	20-4-2009	18-10-2010	16-08-2013	30-07-2015 & 05-02-2016	22-04-2014 & 01-10-2014	19-09-2016
Demand Rs	2,65,39,968	17,46,141	16,28,992	42,44,211	6,50,905	31,53,535
Impugned Order	05/2010 07-06-2010	119/2018 8-2 2018	89-91/2018 24-1-2018	89-91/2018 24-01-2018	89-91/2018 24-01 2018	201/2018 27-4-2018
PenaltyRs	2,65,39,968	4,40,000	4,07,248	10,61,053	1,62,727	3,15,354

2. Learned counsel for the appellants submits that in respect of Appeal No. C/1938/2010, the demands of Rs. 2,14,83,610 and

Rs.6,48,250 were confirmed on M/s Himatsingka Seide Ltd and M/s Himatsingka Filati for the period 2003-04 to 2007-08 and demand of Rs.44,08,108 was confirmed on M/s Himatsingka Seide Ltd for the period 1-4-2008 to 1-1-2009. Rest of the demands is confirmed on M/s HSL. The allegations in the SCN and the grounds taken in the OIO are summarised as follows.

- The minutes of the 107th Board meeting indicate that the appellants approved Rs 18.9 Cr for retail business; M/s HWPL had requested for additional funds to meet the capital and advertisement expenses; mutuality of interest as emphasized in the minutes of meeting of Board of Directors was not disclosed to the Department;
- the appellant was not entitled to claim deductions towards Advertising, Publicity expenses, Marketing and Promotional expenses incurred by the subsidiary company;
- consolidated financial accounts of the Appellant and M/s HWPL indicate that the expenses, incurred by HWPL at the behest of the Appellant, have been absorbed by holding company and ultimately getting charged off in the accounts; The marketing expenses borne by HWPL are charged to the profit and loss accounts of the Appellant; therefore, are relatable to the sale cost of the subject fabrics and are includable in the assessable value for the purpose of payment of duty by the Appellant;
- The balance sheet also shows that they are incurring expenses towards advertisement and promotional activities for brand building of the brand, "Atmosphere".
- the Appellant has given portion of their bonded premises after de-bonding to HWPL for their use; Appellant had been standing guarantor for the various loans and other financial instruments for HWPL; entire sales of HWPL comprises of goods manufactured and supplied solely by the Appellant; the Directors of HWPL report the progress of HWPL to the Appellant regularly; the objective of formation of HWPL was to promote the brand of HSL

within the domestic market and to utilize the entitlement of HSL 100% EOU towards the DTA clearances;

- The sampling cost of showrooms of HWPL, which were charged to profit and loss account of the Appellant indicates that the Appellant has diverted from the conventional sale to showroom sales and was also catering to domestic market through the subsidiary company HWPL; these facts indicate mutuality of interest between the two companies. Also, the Directors are common;
- AsperRule8of Customs Valuation Rules, the value of the goods is to be computed value which should consist of the sum of the cost of the value of materials and fabrication or processing employed in production, the amount of profit and general expenses and value or cost of other ancillary expenses;
- Therefore, expenses towards brand building incurred by HWPL by way of advertising and sales promotion and marketing at the behest of the Appellant and charged off in the consolidated accounts of the Appellant related to the sale and cost of subject fabrics at the hands of the Appellant and are includable in the assessable value for the purpose of payment of duty by the Appellant.

3. Learned Counsel submits on the consolidated financial statements that they essentially present a combined accounts and financial position of all the group entities, put together; the very purpose of preparing a consolidated financial statements would be defeated if expenses are booked again separately in such financial statements; it is evident from the standalone financial statements of the Appellant that such marketing/ promotional expenses has no relation, whatsoever, with the standalone Profit & Loss account of the Appellant; it is necessary for the purpose of consolidation, as per the Indian Accounting Standard 110 (Accounting Standard 21) "*Consolidated Financial Statements*", the expenses, incomes, profits and losses of all group entities are shown in one single financial statement; furthermore, as per the clause 32 of the *"Listing Agreement"*, all the listed companies having subsidiaries must prepare consolidated financial statements and publish such consolidated financial statement in its annual report; the Companies Act, 2013 which is the governing legislation for the companies also vide Section 129(3) has mandated the preparation of consolidated financial statement by the parent companies; consolidated financial statements prepared in accordance with the Generally Accepted Accounting Principles (GAAP) followed in India i.e., Indian Accounting Standards, will give a holistic financial position and result of the group and not of the parent company; the group will include the parent, intermediary parent and all subsidiaries; the name 'consolidated financial statement' itself suggests that it is consolidation of the assets, liabilities, income and expenses of all group entities; however, this does not mean that such assets, liabilities, income and expenses of each group entity can be interchanged and concluded to be held/incurred at the behest of another group entity.

3.1. Therefore, the notion of the Ld. Commissioner that the expense incurred by M/s HWPL has been charged off in the annual financial accounts of the Appellant is not legally tenable; by no stretch of imagination, can it be contended that the expenses incurred by subsidiary are, expenses of the holding company; even assuming but not admitting that these promotional expenses have been incurred at Appellant's behest, as alleged, then the corresponding benefit in the form of sales should also, form part of the turnover, which is not the case; even if the appellant and HWPL, who are different legal entities, though related, do not have freedom to account the expenses of one in the other, which has not been appreciated by the Ld. Commissioner; though HWPL is a subsidiary of the Appellant, there is no denying the fact that HWPL is nevertheless a separate legal entity under the provisions of the Companies Act, 2013 (earlier Companies Act, 1956); it is the only entity privileged to use the brand "ATMOSPHERE" at all times and under its own name; use of this brand name in any of the Appellant's products would therefore amount to offense in terms of the Indian Copyright Act, 1957, Trade Marks Act, 1999 and Rules there under; it is a settled position of law that a balance sheet entry could never become an income or an expenditure, as the case may be; it was held in *Mahindra Holiday and Resorts India Ltd2018-VIL-668-CESTAT-CHE-ST*, that *"…an amount showed in the balance sheet could neither be an income nor a consideration nor a payment or the gross amount charged in terms of Section 67(a) and (c) and hence, it is nothing but a financial adjustment in the nature of book entry."*; CESTAT Mumbai held similarly in *Reliance Infratel Ltd2015-TIOL-2160;Greenwich Meridian Logistics 2016-TIOL-869; Phoenix International Freight Service Pvt Ltd2016-TIOL-2353 a*nd *Thermax Instrumentation Ltd2015-TIOL-2376.*

4. Learned Counsel submits that Marketing and Promotional Expenses incurred by HWPL are not to be included in assessable value for purpose of duty; the objective of setting up of brand 'Atmosphere' was with a larger purpose of gaining presence in the local market in retail since the parent company as an EOU was not permitted to participate fully in the local market; HWPL was set up so as to give full attention to the domestic retail market altogether; the clearance are permissible as per Para 6.8 of the Foreign trade Policy. He submits that CESTAT held, in *Lakme Ltd 2003 (162) ELT 272 (Tri-Mumbai)*,that the new company set up by the manufacturer for marketing purpose and expenditure incurred for advertisement and publicity not being part of assessable value under Section 4 of the Central Excise Act, 1944; intention of the parties to be seen for setting up a new factory and it should not be only for avoidance of tax; the facts of the said case are similar to the instant case; the ratio was followed in *Sai Mirra Innopharma P Ltd 2007 (215) ELT 561 (Tri.-Chennai)* (affirmed by Hon'ble Supreme Court in *2015 (326) ELT 633 (SC);* Supreme Court's in the case of *CCE, Mysore Vs TVS Motors Co*

Ltd 2016 (331) ELT 3 (S.C.),held that 'The expression 'in connection with the sale of the goods' would only mean that but for the payment of the additional amount, the sale of the goods would not take place'. He further relies upon the following and states that the issue was decided similarly.

(i). Skoda Auto India Pvt Ltd. 2020 (2) TMI 1194 – CESTAT Mumbai,

(ii).Ford India Pvt Ltd 2017 (5) TMI 1388 – CESTAT Chennai;

(iii).Luminous Electronics Pvt Ltd2016 (338) ELT 154 (Tri.-Del.)

(iv). Escorts Ltd 2017 (358) ELT 300 (Tri.-Chan.).

(v). Hero Honda Motors Ltd 2015 (324) ELT 404 (Tri.-Del.***)***

(vi). Racold Appliances 1994 (69) ELT 312

He submits that Therefore, they are not liable for pay the Central Excise duty on the advertisement and sales promotion expenses incurred by the HWPL.

5. Learned Counsel submits that there is no mutuality of interest between the Appellant and HWPL; mere fact of providing of a loan to the company would not render the parties as mutually interested; reliance is placed on the case of CCE, Hyderabad-I Vs Agarwal Rubber Pvt Ltd 2009 (238) ELT 336 (Tri -Bang), wherein it was held that *mere financial accommodation in form of loans, would not by itself be construed as pervasive financial control exercised by one company over other;* This decision was followed in Balsara Hygiene Products Ltd Vs CCE, Vapi 2012 (278) ELT 526 (Tri-Ahmd) and affirmed by the Supreme Court in 2015 (321) ELT A146. He submits that mere advancing loan does not prove mutuality; appellant has been charging interest on loan extended to HWPL, since January 2008; department has not made out any case to establish that the relationship with HWPL has influenced the price; mutuality of interest has neither been established nor evidence of flow back of money brought out and hence, undervaluation cannot be alleged; he relies upon.

(i). *Apsara Metallica Industries 2019 (369) ELT 1619 (Tri.-Mumbai)*.

(ii). Bharat Petroleum Corporation Ltd2016 (342) ELT 602 (Tri.-Chennai).

(iii). BPL Sanyo Utilities & Appliances Ltd2007 (220) ELT 175 (Tri-Bang).

5.1. Learned Counsel further submits that learned Commissioner finds the mutuality of interest and thus concludes that marketing and promotion expenses incurred by HWPL are includible in the assessable value; English meaning of 'Mutuality' is "a reciprocal relation between interdependent entities"; therefore, for mutuality of interest to exist between two entities, there should necessarily be interdependence; mandatory condition is that one entity should hold interest in another and vice versa; Apex Court held, in the case of Kwality Ice Cream Co 2010 (260) ELT 327 (SC), that *what is important is that each of the parties involved should have an interest, whether direct or indirect in the business of each other; what is of importance is certain interdependence and reciprocity beyond the relationship of either a distributor or manufacturer so as to consider as to whether the parties are 'related persons'.*

5.3. He submits that the holding company is a listed company and the holding and subsidiary companies are managed by their respective Board of Directors; the brand name "Atmosphere" is registered in the name of the Subsidiary company and part of its assets; therefore the marketing expenses cannot be directed by the holding company to promote a brand not of its own; impugned order holds that since both Appellant and HWPL have the same directors, there exists a mutuality of interest between them; there should be a test of mutuality of interest in the activities by each other in their respective firms. He relies upon (i). Hercules Hoists Ltd 2015-TIOL-2129-CESTAT-Mum

(ii). Goodyear South Asia Tyres Pvt Ltd and Others 2015-TIOL-165-SC-CX.

(iii). Subhash Project and Marketing Ltd 2018-TIOL-1360-CESTAT-CHD.

(iv). CCE, Ahmedabad v. Xerographic Ltd. 2010 (257) ELT 11 (SC)

(v). UOI v. Atic Industries Ltd 1984 (17) E.L.T. 323 (S.C.)

(vi). Alembic Glass Industries Ltd Vs CCE & C 2002 (143) ELT 244 (SC)

(vii). Sri Krishna Alloys Vs CCE, Salem 2015 (326) ELT 329 (Tri-Chennai) affirmed by the Hon'ble Supreme Court 2016 (332) ELT A139 (SC)

(viii). CCE Vs Detergents India Ltd 2015-TIOL-56-SC-CX

(ix). CCE Vs Nestle India Ltd 2015(326) ELT226(SC)

He submits that therefore, mutuality of interest will be existing only if an entity is so associated with the other that they have interest directly or indirectly in the business of each other; in the present case, the HWPL is merely a subsidiary of the Appellant and there is no mutuality of interest.

6. Learned counsel submits that same prices cannot be charged for exports and domestic clearance as observed in Para 53 of OIO. He relies upon

(i). Morarjee Brembana V CCE 2003 (154) ELT 500 (T)

(ii). I.G. Petrochemicals - 2006 (201) E.L.T. 294 (Tri.-Mumbai) (both upheld by the Hon'ble Supreme Court in 2015 (318) ELT 600).

(iii). Uniworth Textiles Ltd 2009 (244) E.L.T. 401 (Tri-Del)

(iv). Shri Ahimsa Mines & Minerals Ltd2016 (343) ELT 529 (Tri - Del).

7. Learned counsel submits on the issue of limitation (in respect of Appeal No. C/1938/2010),that it is evident from the records that during the relevant period, i.e, March 2003 to January 2009, the Appellant has cleared goods from their export oriented units to DTA as per the provisions and permission from DGFT authorities; appellant on their own sought provisional assessment of the goods cleared to DTA as there were no independent sales of the products in the local market; while replying to the queries, raised by the department vide letter dated November 22, 2004, they submitted that the transfer price calculated by them exceeded the value derived under the deductive method of valuation computed under Rule 7 of the Customs Valuation Rules; indirect marketing expenses were highlighted by their exclusion in the set of calculation under the deductive method and this was taken in to account while ordering the finalization of assessment vide order dated March 29, 2003; while computing under the deductive method, deductions in the form of additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind is allowed; the indirect marketing expenses were not incurred at the instance of the Appellant; it is an undisputed fact that the two sets of calculations were made available to the assessing authority for finalization of provisional assessment along with the Balance Sheets of the Companies and all other information as detailed in the aforementioned letter; extended period cannot be invoked as the provisional assessment has not been challenged by the Department in any appellate proceedings; on the other side, the same has been finalized by the assessing officer on the set of records and the figures, submitted by the Appellant; it cannot be said that the Appellant had suppressed the amount on which revenue wants to claim the differential duty. He relies upon.

(i). Future Techno Designs (P) Ltd 2006 (202) ELT 443 (Tri-Bang) maintained by the Hon'ble Supreme Court in 2008 (225) ELT A130 (SC).

(ii). Priya Blue Industries Ltd 2002 (148) ELT 809 (Tri-Del), affirmed by the Hon'ble Supreme Court in 2004 (172) ELT 145 (SC).

(iii).*ITC Ltd. v. CCE, Kolkata-IV 2019 (368) ELT 216 (SC).*

8. Learned Authorised Representative, appearing for the department reiterated the findings of OIO and OIA. He argues that the brand "atmosphere" belongs to the appellant rather than to HWL; the appellants have opened various outlets and have managed to sell the entire clearance to DTA through the subsidiary firm; they are related and as such, the expenses on account of marketing and advertisement incurred by the subsidiary should be included in the assessable value of the goods cleared by the appellants. He relied upon the decision in the case of Endress+Hauser Flowtec (I) Pvt. Ltd. Vs. CCE, Aurangabad [2008(11) TMI 159 – CESTAT, Mumbai].

9. Heard both sides and perused the records of the case. Brief issues that require consideration in the instant case are as to whether the appellants and their subsidiary are related and if so, whether such relationship has influenced the valuation of the goods cleared by the appellants; whether the Department has arrived at the valuation correctly and whether extended period was invocable in the first appeal No.C/1938/2010.

10. Firstly, we would like to deal with the valuation arrived at in the case. All the impugned orders decided the valuation in terms of Rule 7 of CVR, 1988 or Rule 8 of CVR, 2007. It was argued in all the OIOs that the appellant while arriving at the value of the goods cleared by the appellants, under Rule 7/8 of CVR, have not included the expenses incurred by the subsidiary towards the marketing/advertising alleging that the same have been incurred on behalf of and at the behest of the appellant. The OIOs silent on as to why the said Rule 7/8 have been invoked. There is no discussion on as to why the value declared by them needs to be rejected and why it should be arrived at under Rule 7/8 of Customs Valuation Rules, sequentially proceeding with preceding Rules in terms of Rule 3.

> 3. **Determination of the method of valuation.** – For the purpose of these Rules-
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> i. the value of imported goods shall be the transaction value;
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> ii. if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules.

11. The impugned orders are silent as to how the appellants claim of valuation under Rule 7 was legally tenable and how Rules preceding the same are not applicable. The respective authorities have only disputed the fact that certain expenses incurred by the subsidiary on account of Marketing and Advertisement were not included and that they are related. We find that Rule 7 of Customs Valuation (Determination of Price of imported goods) Rules, 1988 lay down as follows.

> 7. Deductive value. – (1) Subject to the provisions of Rule 3 of these rules, if the goods being valued or identical or similar imported goods are sold in India, in the condition as imported at or about the time at which the declaration for determination of value is presented, the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions :-
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> i. either the commission usually paid or agreed to be paid or the additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind;

ii. the usual costs of transport and insurance and associated costs incurred within India;

iii. the customs duties and other taxes payable in India by reason of importation or sale of the goods.

(2) If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, the value of imported goods shall, subject otherwise to the provisions of sub-rule (1) of this rule, be based on the unit price at which the imported goods or identical or similar imported goods are sold in India, at the earliest date after importation but before the expiry of ninety days after such importation.

(3) (a) If neither the imported goods not identical nor similar imported goods are sold in India in the conditions as imported, then, the value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India

(b) In such determination, due allowance shall be made for the value added by processing and the deductions, provided for in items (i) to (iii) of sub-rule (1) of this rule.

However, we find that the Revenue has not considered the above provisions as it is seen that they have accepted the costing method applied by the appellants. Moreover, if Rule 7A of the Rules is applied, no proper reasoning has been given in the impugned orders.

12. We find that Hon'ble Apex Court has gone in to the issue of valuation of clearances by EOUs to DTA in the case of Morarjee Brembana Ltd 2015 (318) ELT 600 (SC)and have held as follows.

9. Mr. Radhakrishnan has, however questioned the aforesaid view of the Tribunal and argued that since the respondent is hundred per cent export-oriented unit, any sale or clearance of cotton fabric by the respondent to DTP should be treated as transaction sale and therefore Rule 4 would be applicable. However, this argument has to be rejected in view of proviso to Section 3 of the Central Excise Act, 1944 which reads as under:

"**Section 3. Duties specified in the [Schedule to the Central Excise Tariff Act, 1985] to be levied.** - (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985 :

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, --

(i) In a free trade zone and brought to any other place in India; or

(ii) By a hundred per cent export-oriented undertaking and allowed to be sold in India;

shall be an amount equal to the aggregate of the duties of customs which would be leviable under section 12 of the Customs Act, 1962 (52 of 1962), on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)."

10. As is clear from the bare reading of the aforesaid proviso, in those cases where excisable goods are produced or manufactured by hundred per cent export oriented undertaking are allowed to be sold in India, the duty of excise has to be the amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, on like goods produced or manufactured outside India if imported into India and where the said duties of custom are chargeable by reference to their value, the value of such excisable goods shall be determined, in accordance with the provisions of the Customs Act and Customs Tariff Act, 1975.

> **11.** Keeping in view the aforesaid proviso to Section 3 of the Central Excise Act, in our opinion the Tribunal has rightly held that the sale price charged to customer in India of the goods under assessment cannot be considered as a price in the course of International trade. To this extent we do not find fault with the view taken by the Tribunal.
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> **12.** As pointed out above, if Rule 4 is not applicable, the valuation of the goods has to be arrived at by applying Rules 5 and 8 in sequential order. It is here, as noted above, the Tribunal fell in error as applicability of Rules 5 and 6 depended on certain factual aspects which had to be gone into. The Tribunal has made certain observations on facts but without any material before it.
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> **13.** The appropriate course of action for the Tribunal, in such a given situation was to remit the case back to the Commissioner to decide the issue after allowing the appellant to produce evidence in this behalf.

In view of the above, we find that the issue needs to go back to the original authority to consider the Rules of valuation and to give clear findings on the conclusions arrived thereof. Moreover, we find that the initial SCN was adjudicated by the Commissioner and the subsequent SCNs were adjudicated by lower authorities. In the interest of Justice, we hold that all the SCNs be adjudicated now by Commissioner who is competent to adjudicate the case involving highest duty.

13. Coming to the issue of applicability of the extended period, we find that in respect of the appeal No.C/1938/2010, it was contended that extended period was invocable as the appellants have suppressed the fact that the expenses on marketing and advertisement have been borne by the subsidiary who is also a buyer of the goods from the appellants and the fact that the appellants have suppressed the fact that the marketing / promotional expenses incurred by HWPL have been charged off in the financial accounts of HSL as confirmed by the auditor's report. The appellants have taken the plea that earlier provisional assessment was made and was

finalised and even under circumstances, Department has invoked extended period. We find that the submissions of the appellant that they have submitted all the details at the time of provisional assessment and the department has gone through their submissions and finalised the assessments. However, we find that in respect of OIO NO.89-91/2018 (appeal No.E/20563/2018, E/20564/2018, E/20566/2018), demand for extended period was dropped. We also find that as an EOU the appellants should have submitted a B17 bond to the jurisdictional authorities. However, these Show Cause Notices have not been issued invoking the conditions of the bond. We find that the submissions of the appellants have not been considered in detail in as much as the manner in which the provisional assessments were finalised have not been discussed at all.

14. Coming to the allegation that M/s. HSL and M/s.HWPL are related entities, we find that the department relied upon the fact that the appellants have given loan to M/s.HWPL as can be seen from the minutes of the meeting and that the expenses of marketing and advertisement have been charged off in the consolidated accounts of the appellants. The appellants submit that even if it is a fact that they have advanced some loans to their subsidiary, the act in itself will not show any relation between the appellants and their subsidiary in terms of Customs Valuation Rules. They have relied upon the following cases:

i. CCE, Aurangabad Vs. Goodyear Asia Tyres Pvt. Ltd. [2015-TIOL-165-SC-CX]
ii. Morarjee Brembana Ltd. Vs. CCE, Nagpur [2003(154) ELT 500 (Tri. Mumbai)]
iii. CCE, Raigad Vs. IG Petrochemicals [2006(201) ELT 294 (Tri. Mumbai)]
iv. CCE, Nagpur Vs. Morarjee Brembana Ltd. [2015(318) ELT 600 (SC)]
v. Uniworth Textiles Ltd. Vs. CCE, Nagpur [2009(244) ELT 401 (Tri. Del.)]

We find that in the case of Goodyear South Asia Tyres and others, it was held that advancement of loan by itself cannot be a reason to hold them as related persons in terms of Section 4(4)(c) of Central Excise

Act, 1944. We find that the impugned order has not considered the submissions of the appellants on this account.

15. It was also alleged in the SCNs and affirmed in the OIO that marketing and advertisement expenses borne by the subsidiary were on behalf of the appellants and therefore, are includable in the assessable value. The appellants relied upon the following cases to say that such expenses are not includable in the assessable value of the appellants

i. Lakme Ltd. Vs. CCE, Mumbai-II [2003(162) ELT 272 (Tri. Mum.)]

ii. Sai Mirra Innopharma P. Ltd. (SMIPL) Vs. CCE, Chennai-II&IV [2007(215) ELT 561 (Tri. Chennai), which is affirmed by the Hon'ble Supreme Court in 2015(326) ELT 633 (SC).

iii. CCE, Mysore Vs. TVS Motors [2016(331) ELT 3 (SC)]

iv. CCE&Customs, Aurangabad Vs. Skoda Auto India Pvt. Ltd. [2020(2) TMI 1194 – CESTAT, Mumbai]

v. Luminour Electronics Pvt. Ltd. Vs. CCE, Delhi [2016(338) ELT 154 (Tri. Del.)]

vi. Hero Honda Motors Ltd. Vs. CCE, Delhi-III [2015(324) ELT 404 (Tri. Del.)]

16. The Revenue has also alleged that the appellants have charged off such expenses in the consolidated accounts. However, the appellants submit that the consolidated financial statements are required to be prepared in terms of Section 129(3) of the Companies Act, 2013; the fact that balance sheet of the subsidiary i.e HWPL also shows the expenses on account of marketing and advertisement is ignored by the Department. We find that the impugned order has not given any findings after going through the submissions of the appellants and balance sheets of different companies.

17. In view of the above, all the impugned orders are set aside and appeals are allowed by way of remand to Commissioner of

Customs in the interest of Justice. Learned Commissioner shall go through all the facts of the case; submissions of the appellant and cases relied upon by the appellant and pass an order within 4 months of receipt of this order, as may be practicable.

(Operative portion of the Order was pronounced
in Open Court on **03/03/2020**)

(P.K. CHOUDHARY)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

PA/Raja...