FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Dated: **24/09/2015**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **C/A/52929/2015-CU[DB]** dated **28/08/2015**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **129-A(4) of the Customs Act, 1962.**

Asstt. Registrar(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	C/602/2010	**ADVANCED SCAN SUPPORT TECHNOLOGIES,** 786, SECTOR-28, FARIDABAD, HARYANA
		Name and Address of Respondent
2		-C.C.(JODHPUR) HQ at New Central Revenue Building, Statue Circle, C Scheme, Jaipur -302005.

Copy To

3 Advocate(s) / Consultant(s):

Piyush Kumar,Adv
B-25, Lajpat Nagar - III,
New Delhi

4 Additional Party's Name & Address :

5 Bar Association, CESTAT, Delhi

6 Director Publications, Customs, Excise. I.P. Estate, Delhi

7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

14 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

15 C.D.R. **16** Office Copy **17** Guard File

Asstt. Registrar(CUSTOMS Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI – 110 066.

Date of Hearing 28.08.2015

For Approval &Signature :

Hon'ble Mr. R.K. Singh, Member (Technical)
Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

Appeal No.C/602/2010-CU[DB]
[Arising out of Order-in-Original No.03/2010, dated 07.07.2010 passed by the C.C., Jodhpur]

M/s. Advanced Scan Support Technologies — Appellant

Vs.

C.C., Jodhpur — Respondent

<u>Appearance</u>
Mr. Reena Rawat, Advocate - for the appellant
Mr. BB Sharma, DR - for the respondent

CORAM: **Hon'ble Mr. R.K. Singh, Member (Technical)**
Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Final Order No. 52929/2015, dated 28.08.2015

Per Mr. R.K. Singh :

Appeal has been filed against Order-in-Original dated 07.07.2010. The brief facts of the case are that the appellant imported two CT scanner machines vide Invoice No.326 dated 22.03.2010 with the following description:-

Sl. No.	Description	Value (US$)
1.	Used and Old GE DXI CT Scanner Machine (Model 2003)	31,000
2.	Used and Old GE DXI CT Scanner Machine (Model 2001)	29,000
	Total	60,000

The appellant submitted a Chartered Engineer's certificate dated 15.03.2010 issued by Mr. Hirose Akira, Japan, according to which the machine manufactured in 2001 was valued at US$ 29,000 and another one manufactured in 2003 was valued at US$ 31,000, which were the values declared by the appellant. The appellant also submitted another inspection report issued by Mr. Ramesh C. Agarwal, Chartered Engineer, Jaipur, who estimated the value of the two machines at US$ 66,000. Revenue obtained the information from the website of "Dotmed", which indicated US$ 1,15,000 as the value of GE High Speed DXI CT Scanner of good condition manufactured in 2001. As this value was far higher than that declared, Revenue got the goods examined by Mr. IPS Arora, Chartered Engineer at ICD, CONCOR, Kanakpura, Jaipur, who after examining the machines adopted the value which was US$ 72,000 (average of US$ 29,000 and US$ 1,15,000) for the CT scanner of 2001 model. Similarly, value for the 2003 model was given as US$ 78,750. Revenue adopted these values by citing Rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

2. The appellant submitted a letter stating that it accepts the value proposed by Revenue as detention and demurrage charges were adding up and added that neither it wanted any Show Cause Notice to be issued nor it wanted any personal hearing. Accordingly, the Commissioner passed the order assessing the value at Rs.70,03,969/- as against 27,51,551/-

declared by the appellant. In addition he also confiscated the goods and allowed redemption on payment of redemption fine of Rs.1,50,000/-. He also imposed penalty of Rs.1,50,000/-.

3. The appellant has contended that (i) there was no mis-declaration and it had only acceded to the valuation to avoid further detention and demurrage charges and delay. (ii) The Chartered Engineer certificate suggesting the value which was accepted by Revenue was obtained at the back of the appellant. (iii) The principles of natural justice were violated as the Chartered Engineer's certificate was relied upon without offering it opportunity to cross-examine the Chartered Engineer. (iv) The declared value should be accepted and there was no ground available to reject the same. It cited the Supreme Court judgement in the case of ***Eicher Tractors Vs. Union of India [2000 (122) ELT 321 SC]*** in support of the said proposition adding that that judgement has been followed by CESTAT like in the case of ***Metplast IndiaVs. CC, Nhava Sheva [2004 (173) ELT 59 (Tri.-Mum)]***. (v) Onus was on Revenue to prove the under-valuation, which has not been discharged. (vi) The website relied upon by the Commissioner is an auction website and the value was often

changing. (vii) It was not a case for confiscation or imposition of penalty as there was no *mala fide* or mis-declaration. The appellant cited CESTAT judgement in the case of ***M/s. Handtex Vs. CC, Raigad [2008 (226) ELT 665 (Tri.-Del.)].***

4. Ld. Departmental Representative, on the other hand, supported the impugned order.

5. We have considered the contentions of both sides. We find that whatever may be the reasons, the appellant expressly gave its consent to the value proposed by Revenue and expressly stated that it did not want any Show Cause Notice or personal hearing. Even the duty was paid without protest. By consenting to enhancement of value and thereby voluntarily foregoing the need for a Show Cause Notice, the appellant made it unnecessary for Revenue to establish the valuation any further as the consented value in effect becomes the declared transaction value requiring no further investigation or justification. To allow the appellant to contest the consented value now is to put Revenue in an impossible situation as the goods are no longer available for inspection and Revenue rightly did not proceed to further

collect and compile all the evidences/basis into a Show Cause Notice as doing so, in spite of the appellant having consented to the enhancement of value and requested for no Show Cause Notice, could/would have invited allegation of harassment and delay in clearance of goods. When Show Cause Notice is expressly foregone and the valuation is consented, the violation of principles of natural justice cannot be alleged. In the present case, while value can be challenged but such a challenge would be of no avail as with the goods not being available and valuation earlier having been consented, the onus will be on the appellant to establish that the valuation as per his consent suffered from fatal infirmity and such onus has not been discharged. Further, valuation of such goods requires their physical inspection and so re-assessment of value in the absence of goods will not be possible. The case of *Eicher Tractors Vs. Union of India (supra)* cited by the appellant is not relevant here as in that case there was no evidence that the assessee had consented to enhancement of value.

6. We find that the CESTAT's judgement in the case of ***Vikas Spinners Vs. CC, Lucknow [2001 (128) 143 (TRI – Del]***,CESTAT, dealing with a similar situation, held as under:-

> *"**7.**In our view in the present appeal, the question of loading of the value of the goods cannot at all be legally agitated by the appellants. Admittedly, the price of the imported goods declared by them was US $ 0.40 per Kg. but the same was not accepted and loaded to US $ 0.50 per Kg. This loading in the value was done in consultation with Shri Gautam Sinha, the Representative and Special Attorney of the appellants who even signed an affirmation accepting the loaded value of the goods on the back of the Bill of Entry dated 7-5-1999. After loading of the value, the appellants produced the special import licence and paid the duty on the goods accordingly of Rs. 4,22,008/- on 19-5-1990. <u>Having once accepted the loaded value of the goods and paid duty accordingly thereon without any protest or objection they are legally estopped from taking somersault and to deny the correctness of the same</u>. There is nothing on record to suggest that the loaded value was accepted by them only for the purpose of clearance of the goods and that they reserved their right to challenge the same subsequently. They settled their duty liability once for all and paid the duty amount on the loaded value of the goods. The ratio of the law laid down by the Apex Court in Sounds N. Images, (supra) is not at all attracted to the case of the appellants. The benefit of this ratio could be taken by*

them only if they had contested the loaded value at the time when it was done, but not now after having voluntarily accepted the correctness of loaded value of the goods as determined in the presence of their Representative/Special Attorney and paid the duty thereon accordingly." (emphasis added)

Similarly, in the case of ***Guardian Plasticote Ltd. Vs. CC (Port), Kolkotta [2008 (223) ELT 605 (Tri. – Kol.)]*** CESTAT has held as under:-

> *"4. The learned Advocate also cites the decision of the Tribunal in the case of M/s. Vikas Spinners v. C.C., Lucknow - 2001 (128) E.L.T. 143 (Tri.-Del.) in support of his arguments. We find that the said decision clearly holds that enhanced value once settled and duty having been paid accordingly without protest, importer is estopped from challenging the same subsequently. It also holds that enhanced value uncontested and voluntarily accepted, and accordingly payment of duty made discharges the burden of the department to establish declared value to be incorrect. In view of the fact that the Appellants in this case have not established that they had lodged any protest and on the contrary their letter dated 21-4-1999 clearly points to acceptance of the enhanced value by them, the cited decision advances the cause of the department rather than that of the Appellants contrary to the claim by the learned Counsel."*

Thus, the valuation has to be upheld in the present case.

7. However, it is a fact that nothing has been brought out in the impugned order which shows that the appellant mis-declared the goods or declared a value which was different from the amount which was actually paid to the suppliers. Appellant even submitted a Chartered Engineer certificate from Japan in support of the valuation. It has also to be noted that although it gave consent to the valuation and gave up its right for show cause notice or personal hearing the fact remains that it was so done to avoid delay in clearance and accumulation of demurrage charges. Thus, it is simply a case of valuation dispute devoid of any *mens rea* on the part of the appellant. Consequently, it is a case for demand of differential duty on account of valuation rather than a case warranting confiscation and/or penalty. As has been held by Supreme Court in the case of *Handtex Vs. CC, Raigad* (supra) "*every change made by the assessing officer during the course of assessment whether relating to rate of duty or value need not lead to an inference of mis-declaration by the importer.*"

8. It is also pertinent to note that the appellant never consented for confiscation and penalty and did not forego its right for a show cause notice/personal hearing with regard thereto. Therefore, confiscation and penalty have to be held to have been ordered in violation of the principles of natural justice and ~~therefore~~ for that reason also they cannot be sustained.

9. In the light of the analysis above, the appeal is partially allowed only to the extent that the confiscation/redemption fine and penalty are set aside (but the valuation is upheld).

(R.K. Singh)
Member (Technical)

Sulekha Beevi

(Sulekha Beevi CS)
Member (Judicial)

SSK

FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Dated: 15/12/2015

To

Appellant as per address in table below

Respondent as per address in table below

<u>Final Order No. **C/A/53695/2015-CU[DB]** dated **04/11/2015**</u>

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **129-A(4)** of the **Customs Act, 1962.**

Asstt. Registrar(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1 C/MISC/51201/2015	C/50868/2015	**Richemont India Pvt Ltd** Regus Business Centre Level 14, Rectangle 1, Commercial Complex D-4, Saket SOUTH NEW DELHI 110017
		Name and Address of Respondent
2		C.C.-New Delhi(air Cargo Export) NEW CUSTOM HOUSE, NEW DELHI.

Copy To

3 <u>Advocate(s) / Consultant(s):</u>

R. Muralidharan (Consultant)
BUILDING 10,TOWER C,
18TH FLOOR DLF CYBER CITY, GURGAON-122002 (HARYANA)
TOWER C, DLF CYBER CITY,
GURGAON,
HARYANA-122002

4 Additional Party's Name & Address :
5 Bar Association, CESTAT, Delhi
6 Director Publications, Customs, Excise, I.P. Estate, Delhi
7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38
14 The ICFAI society, 52, Nagarjuna Hill.Punjagutta Hyderabad.-500082
15 C.D.R. 16 Office Copy 17 Guard File

Asstt. Registrar(CUSTOMS Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. I

Date of hearing / decision : 04.11.2015

For Approval and Signature:

Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. R. K. Singh, Member (Technical)

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 26 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Customs Appeal No. 50868 of 2015

(Arising out of order-in-original No. SVB/CUS/45/DRPK/2013 dated 30.10.2013/ 04.11.2014 passed by the Commissioner of Customs (Appeals) New Delhi).

M/s Richemont India Pvt. Limited — Appellant

Vs.

CC, New Delhi — Respondent

Appearance:

Sh. N. Venkatraman, Sr. Advocate with Sh. R. Murlidharan and Sh. Dheeraj Srivastava, Advocates for the appellant

Sh. Amresh Jain, DR for the Revenue

Coram:

Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. R. K. Singh, Member (Technical)

Final Order No. 53695/2015

Per: R. K. Singh:

Appeal has been filed against Order-in-original No. SVB/CUS/45/DRPK/2013 dated 30.10.2013 in terms of which the transaction value declared by the importer in the import invoice in respect of imports made from M/s Richemont Dubai (FZE) was rejected and value was ordered to be re-determined by loading the transaction value by 12.5% in terms of Rule 4 of the Customs Valuation Rules, 2007 on the ground that the transaction value was influenced as the supplier and the appellant were related persons.

2. The appellant has contended that:

(i) The imports were made under a Distributorship Agreement with Richemont Dubai.

(ii) It concedes that the supplier was related person and therefore Revenue was justified in having a reasonable doubt about the declared value.

(iii) The loading has been ordered on the ground that the price charged by the supplier from the independent parties was12.5% higher than the price charged from the appellant. However, in the table given in para 6 and 14 of the impugned order, it is nowhere indicated whether the price charged from the retail importers was in relation to the imports around the same time and at the same level and for the identical goods.

(iv) The imports made by the retailers (the price paid by whom was compared with the price charged from the appellant) were in the range of about 29 to 48 watches per year while the imports made by the appellant were 1859 watches in the year 2012-13 and 2398 watches during 2013-14 which shows that the level of imports were vastly different and hence not comparable.

(v) The role of a distributor is substantially different and the distributor is also required / expected to arrange marketing, distribution & domestic logistics, advertising & promotion and keep stock of goods. It cited the judgments in the cases ***of Komet Precision Tolls India Pvt. Limited vs. CC – 2009 (245) ELT 737 (Tri. Bang.), CC vs. Hewlett Packard Limited – 1999 (108) ELT 221 (Tri. Mad.)*** to support the proposition that to compare the value with the value of contemporaneous imports adjustment has to be made on account of difference is commercial level and quantity imported which has not been done in the present case.

(vi) The expenses made by the appellant on marketing, distribution and advertising are post- importation expenses and therefore are not includible in the assessable value. The appellant showed that these post import expenses actually amounted to 12.5% which showed that the transaction value was not influenced by the relationship.

(vii) The appellant has incurred expenses considering the business requirement in India. Out of Rs. 8.32 crores of such expenses, Rs. 3.28 crores were accounted for by amount reimbursed by the appellant to the foreign supplier as these expenses were incurred by the foreign supplier on the appellant's behalf to promote sale of its products in India. As these expenses were reimbursed by the appellant they cannot be considered as consideration towards the imported goods.

(viii) The appellant was not obliged to incur these expenses in terms of distribution agreement with overseas supplier and therefore these were not incurred as a condition of sale. It cited the judgments in the cases of ***Union of India vs. Mahindra & Mahindra Limited – 1995 (76) ELT 481 (SC), CC vs. Toyota Kirloskar Motor Pvt. Ltd. – 2007 (213) ELT 4 (SC) and CC vs. Essar Steel Ltd. – 2015 (319) ELT 202 (SC)*** to support the proposition that post import expenses cannot be included in the value of the imported goods.

3. Ld. DR on the other hand stated that as per the distribution agreement the appellant was required to undertake to employ such commercial methods as shall enhance the prestige, integrity and market situation of the products and it was also required to submit to the supplier for approval its marketing and communication budget for the following year which shall include detailed promotion public relations and media plan which showed that the expense on marketing and sales promotion etc. was a condition of sale and therefore, such expenses are includible in the assessable value in terms of Rule 10(1)(c) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. As has been indicated, such expenses came to about 12.5% of the total value of imports. Ld. DR cited the case of ***Matsushita Television and Audio (I) Limited vs. CC – 2007 (211) ELT 200 (SC)*** to support the proposition that payment of continuing royalty was a condition of sale and includible in the assessable value.

4. We have considered the contentions of both sides. At the very outset, it is pertinent to note that the appellant has conceded that the appellant and the supplier being related persons and Revenue was justified in having reason to doubt the truth or accuracy of the value declared. In terms of Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rule, 2007, this is sufficient to allow determination of value as per Rules 4 (onwards) of the said Valuation Rules.

5. Both sides argued at length about includibility/ non includibility of the expenses on advertising and sales promotion etc. made by the appellant in the assessable value. Both sides submitted several judgments in support of their respective contentions. While the appellant asserted that such expenses were not a condition of sale and were post import expenses and therefore not includible in the assessable value as per Rule 10(1)(c) of the said Rules, ld. DR forcefully argued to the contrary. We, however find that the primary adjudicating authority has not invoked Rule 10(1)(c) and 10(1)(e) for loading the declared value. Indeed, it is seen that in the discussion and finding portion of the impugned order the Commissioner formulated the issue to be decided in this case as under:

> "(i) Whether the Importer and the Foreign Supplier are related persons in terms of Rule 2(2) of the Valuation Rules, 2007
>
> (ii) Whether the transactions between the Importer and the Foreign Supplier are influenced by such relationship and
>
> (iii) Whether any addition on account of payment of royalty, technical know-how fee, interest etc. made by the Importer to the Foreign Supplier is required to be made to the assessable value of the goods imported by the Importer from the Foreign Supplier under Rule 10 of the Valuation Rules, 2007."

But in the remaining discussion and finding portion, nowhere the Commissioner invoked Rule 10 for the purpose of loading the value. As a matter of fact, as is evident from the "order portion" of the impugned order the transaction value has been loaded by 12.5% (only) in terms of Rule 4 of CVR, 2007. Therefore, we do not think it necessary or relevant to dwell on the aspect whether the expenses on advertisement and sales promotion etc. incurred by the appellant are includible in the assessable value in terms of Rule 10 because the adjudicating authority has not invoked the Rule 10 for loading the declared value.

6. As the loading has been determined by the adjudicating authority (only) in terms of Rule 4 of the CVR, 2007 it is useful to reproduce the said rule below:

"Rule 4. Transaction value of identical goods.- (1) (a) Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being value:

Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

(b) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods.

(c) Where no sale referred to in clause (b) of sub-rule (1), is found, the transaction value of identical goods sold at a different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustment leads to an increase or decrease in the value.

(2) Where the costs and charges referred to in sub-rule (2) of rule 10 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.

(3) In applying this rule, if more than one transaction value of identical goods is found, the lowest such value shall be used to determine the value of imported goods."

We find that in para 23 of the impugned order, the Commissioner has categorically noted that "*NIDB data in respect of contemporaneous imports of identical/ similar goods was scrutinized; however, no data for similar/ identical goods of any other brand or company were available on the DOV website*".

Rule 4 requires that in applying this Rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine value of imported goods and where no sale referred to in clause (b) of sub-rule (1) is found the transaction value of identical goods sold at a different commercial level or in different quantities or both is required to be adjusted to take account of the difference attributable to the commercial level or to the quantity or both and such adjustments is required to be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments. The appellant has been able to demonstrate that as a distributor its imports were at a different commercial level and in much larger quantity compared to the imports made by the individual retailers. From the tables given in paras 7 and 14 of the adjudication order used to arrive at the finding that the price declared by the appellant was 12.5% lower when the price paid by individual retailers, we find that there is not even a whisper as to what were the commercial levels or quantities involved in respect of invoice dated 22.11.2011 for imported goods by some unrelated importer and invoice dated 12.12.2012 for imports made by the appellant. These two invoices have been mentioned in the said tables. Thus, the comparison of price per piece on the basis of these two invoices to infer that the price paid by appellant was 12.5% lower due to relationship is obviously invalid and not in accordance with the requirements of Rule 4 of the CVR, 2007. Further, the prices were compared only for two models of watches and simple extrapolation thereof to all other models of watches for the purpose of revising ~~reviewing~~ their values upwards does not have any legal basis for sustainability. The appellant has argued, and reasonably so, that the margin of 12.5% vis-a-vis the price for direct sales to independent retailers is not an unreasonable margin to be given to a distributor. However, we are not particularly on that aspect; we are only concerned with the determination whether loading has been done in conformity with the requirements of Rules 4 of CVR, 2007. We find that even in the limited comparison (for only 2 models of watches) as given in tables in paras 7 and 14 of the impugned order for the purpose of loading the value by 12.5% there is complete disregard of the requirement of adjustment to be made for differences in commercial levels as well as in the quantity of goods imported and therefore, we do not find the loading of 12.5% to be in conformity with the requirements of Rule 4 of the CVR. This conclusion is supported by CESTAT decision in the case of ***Hewlett Packard Ltd.*** (supra) wherein it was inter-alia held as under:

> "....*In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time-*
>
> *the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;*
>
> *(i) the deductive value for identical goods or similar goods;*
> *(ii) the computed value for identical goods or similar goods.*

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of Rule 9 of these rules and cost incurred by the seller in sales in which he and the buyer are not related;
A plain reading of the above provisions shows that when the value of contemporaneous imports are to be considered vis-a-vis imports by related persons, then in view of the proviso to sub-rule 3(b), due account has to be taken of demonstrated difference in commercial levels, quantity levels and adjustments in accordance with the provisions of Rule 9. Now the facts of this case are undisputed regarding the contemporaneous imports at higher price cited by revenue. However, learned Advocate for the appellant has seriously contended that the levels, both commercial and of quantity, in the two imports are very widely different. We find great merit in this argument, because it would be totally illogical to compare the value of 5 pieces of goods imported directly by consumers for actual use whose cumulative value is only Rs. 7.5 lakhs with imports of similar goods running into hundreds of crores on 300 or more Bills of Entry per month by HPL. (para 21)."

Similar view was held in the case of ***Komal Precision Tools India Pvt. Limited*** (supra).

7. Regarding the contention of ld. DR that the appellant was required to incur expenses on advertisement, sale and promotion etc. as per the distribution agreement and such expenses also turn out to be 12.5% which was the discount given to the appellant vis-a-vis the price charged from the independent retailers and therefore the loading is justified, we find that distribution agreement does not specify any amounts which are required to be so spent and the approval ~~required~~ to be obtained for incurring expenses cannot be read to mean that the exporter had the right to dictate as to how much amount the appellant was required to spend in these areas. Further, such sales promotion / advertisement cannot be said to be for the benefit of exporter alone inasmuch as the appellant also would get the benefit thereof and therefore to treat this entire amount as additional consideration for import of goods in order to arrive at the loading factor is not sustainable. But as stated earlier, we are only concerned with Rule

4 of CVR, 2007 (which the adjudicating authority has used for loading the value) and not with Rule 10 thereof while the contention of ld. DR falls within the ambit of Rule 10 (which has not been used by the adjudicating authority to arrive at loading) and for this reason it is not necessary to discuss this contention of ld. DR or for that matter the contention of the appellant that expenses incurred were not incurred as condition of sale of goods, and so the judgments cited by both sides regarding inclusion (or otherwise) of the expenses incurred by the appellant in the assessable value in terms of Rule 10 do not remain germane to the issue.

8. In the light of the foregoing, we are of the view that the loading of 12.5% is not sustainable in terms of Rule 4 of the CVR, 2007. Accordingly, the appeal is allowed.

(Justice G. Raghuram)
President

(R. K. Singh)
Member (Technical)

Pant