

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 52017 OF 2018

(Arising out of Order-in-Appeal No. CC(A) CUS/D-I/GEN/136/2018 dated 12.04.2018 passed by the Commissioner of Customs (Appeals) New Custom House, New Delhi)

Volvo Auto India Private Limited

Tower A, Ground Floor, Unitech Cyber Park,
Greenwood City, Section 39, Gurgaon,
Haryana 122001

.....Appellant

VERSUS

Commissioner of Customs (Import & General)

New Custom House,
New Delhi

.....Respondent

APPEARANCE:

Shri Sparsh Bhargava, Advocate for the Appellant
Shri Sunil Kumar, Authorised Representative for the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**DATE OF HEARING: 18.03.2021
DATE OF DECISION: 25.05.2021**

FINAL ORDER NO. 51515/2021

P. Venkata Subba Rao :

This appeal seeks the quashing of the Order-in-Appeal¹ No. CC(A) CUS/D-I/GEN/136/2018 dated 12.04.2018 passed by the Commissioner of Customs (Appeals) New Custom House, New Delhi. The Commissioner (Appeals) has allowed the appeal of the department and has set aside the order of Order-in-Original No. SVB/Cus/Review/YP/58/2014 dated 22.12.2014² passed by the Deputy Commissioner of Customs, Special Valuation Branch, New Custom

**1 . Impugned order
2 . Order-in-original**

House, New Delhi. The operative part of the impugned order is as follows:

ORDER

"14. In view of the foregoing discussion and findings, I set aside the impugned order and allow the appeal filed by the department.
15. Appeal is disposed of accordingly."

2. The appellant is a subsidiary of M/s. Volvo, Sweden who own 99.99% of the appellant's shares. The parent company manufactures Completely Built Units (CBU) of motor vehicles which are imported and sold by the appellant. Customs duty is chargeable on most goods including motor vehicles on *ad valorem* basis. The value of the goods for the purpose of calculation of Customs duty is the transaction value as per Section 14 of the Customs Act provided the buyer and seller are not related persons. As per this section, Rules can be framed to determine when they are deemed to be related persons and if they are related persons, how the valuation should be done. It is undisputed that the appellant (importer) and the parent company who exports the goods to them are related persons as per Rule 2(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007³.

3. If the buyer and seller are related persons, it needs to be seen if the invoice value is affected by their relationship. If it is not, the invoice value should be accepted in terms of Rule 3(3)(a). This determination of whether the relationship affected the invoice value, and if so, to what extent, is an exercise which requires detailed investigation after calling for information from the importer. The assessing officer who has to deal with the current imports everyday does not have the required time and resources. Therefore, the mechanism set up to deal with such cases, is to refer the matter to a Special Valuation Branch⁴ for investigation and pending investigation, the Bills of Entry are assessed provisionally. As

3 . Rules

4 . SVB

per the practice prevalent during the relevant period, the SVB would conduct a detailed investigation and the Assistant Commissioner or Deputy Commissioner in-charge of SVB would pass an appealable order. Based on this order, the assessing officer will finalise the assessments of all the Bills of Entry (which were originally provisionally assessed). Thus, there is an appealable order of SVB and the order finalizing the assessments itself is also appealable. In order to avoid this duplication, in 2016, Central Board of Excise and Customs⁵ issued **Circular No. 04/2016-Customs dated 09.02.2016** directing that the SVB should not, henceforth, pass an appealable order but should only furnish an investigation report to the assessing officer, who, would accordingly finalise the assessments. As per the practice during the relevant period of this case, SVB did pass Appealable orders.

4. Every assessment of a Bill of Entry is an independent appealable order. Every assessment has to be based on the transaction value provided the other conditions are satisfied. Thus, legally, each transaction can be examined to see if the relationship between the importer and exporter has affected the price. It is possible it did not affect the price in one invoice but it may have affected the price in another. However, it is impractical to start an investigation into each Bill of Entry. Therefore, the practice that has been (as per the Board's circulars issued from time to time) to accept an SVB order/ report as good for three years and review it thereafter with a rider that it is subject to an occasional review. The first Order in Original No. SVB/Cus/III/SNO/2011 was passed on 25-11-2011 by the Deputy Commissioner SVB, New Delhi holding that 'the importer and the foreign supplier are related in terms of Rule 2(2), however, the invoice value of the goods imported by the importer from the foreign supplier are NOT

influenced by their relationship.” It further held that the transaction value may be accepted as per Rule 3(3)(a). This order states that it is valid for period of three years from the date of issue (para 21) and that the decision is subject to occasional review/ a final review after a period of three years. This order has not been appealed against by either the Revenue or the appellant.

5. After three years, a second Order in Original No. SVB/CUS/Review/YP/58/2014 dated 22.12.2014 was passed again holding that the relationship has not affected the invoice value of the goods imported and it may be accepted as per Rule3(3)(a).

6. Aggrieved by this order, Revenue filed an appeal before the Commissioner (Appeals), who passed the impugned order ‘setting aside the order in original and allowing the appeal filed by the department.’ It needs to be pointed out that the impugned order neither remanded the matter to the original authority with directions to pass a *de novo* order nor has it modified the order in original indicating how the valuation should be done. Consequently, there is a stalemate and no further order appears to have been passed by the original authority. However, the impugned order found that the order-in-original was not legally correct for the following reasons:

- a) The OIO was not a speaking order inasmuch as it accepts that the transaction was on principal to principal basis but on the other hand, notes that the foreign supplier is covering the ‘losses’ incurred by the importer by paying TRUE UP amounts. These are accumulated losses which must be examined with reference to all the expenditures and outstanding incomes which was not done in the impugned order.
- b) There is a contradiction in the order as in para 4 it has been mentioned that “no expenses are incurred by the importer on behalf of or by understanding or agreement with or under instructions from

the suppliers of the goods, e.g., advertising, propaganda expense or any other expense for the sale of the imported goods.” However, in para 11, it is mentioned that the importer “needs to manage the customs taxability, inventory cost and simultaneous distribution of imported goods as well as sales promotions including advertising and marketing for its entire business in India.” Whether such expenses had a bearing on the price was required to be analysed.

- c) The adjudicating authority has compared the prices of cars sold to the importer (i.e., the appellant herein) and the prices at which similar cars but with extra features were sold to unrelated buyers, viz., embassies in India. The prices at which the cars were sold the embassies were approximately 33% higher. An in-depth analysis of the amount charged for the extra features needs to have been done.
- d) The adjudicating authority has not verified the balance sheets to conclude that no amount is paid or payable directly or indirectly to or on behalf of the supplier of the imported goods for engineering, development, art work, design work and plans and sketches undertaken elsewhere than in India.
- e) The adjudicating authority has only relied upon the explanation provided by the importer to conclude that the price has not been influenced by the relationship.

7. The appellant’s challenge to the impugned order is on the following grounds:

- a) The impugned order has been passed after an inordinate delay of more than one year after hearing and hence needs to be set aside.
- b) The impugned order has been passed in violation of principles of natural justice and the submissions made before the first

appellate authority were not considered nor discussed in the order.

- c) The impugned order is pre-meditated and unilateral.
- d) The TRUE UP payments were payments received by the appellant from the foreign supplier who is also their principal not for sale or purchase of the imported cars but as subvention payments to recoup the losses and other expenses incurred by the appellant. Subvention payments by a parent company to its loss making subsidiary are in the nature of 'capital receipts' and NOT 'revenue receipts' They rely on the following income tax case laws:
 - i. Seimens Public Communication Network (P) Ltd. vs CIT [2017] 77 taxmann.com 22 (SC)
 - ii. CIT vs Handicrafts and Handlooms export corporation of India Ltd. [2014- 49 taxmann.com 488 (Delhi)
- e) There is no contradiction in the OIO. In para 4, it was recorded that *"no expenses are incurred by them on behalf of or by understanding or agreement with or under instructions from the suppliers of the goods e.g, advertising, propaganda expenses or any other expense for the sale of the imported goods."* In para 11, it is recorded that *"the importer is operating as a distributor in India and is incurring expenses on activities like marketing, advertising, after sale services, etc. and is also required to maintain a minimum stock. In the light of the submissions made and judgments cited by the importer, I hold that the importer operating at higher commercial level, i.e., distributor and purchasing in bulk quantity"*. The appellant argued that as a bulk buyer and distributor, they need to take responsibility for their own stocks and they also need to promote sales for their

own business. It does not mean that they are incurring these expenses on behalf of the foreign supplier. Neither are any extra payments made by them to their foreign supplier.

- f) In tax proceedings, there needs to be consistency. Since the first SVB order dated 25-11-2011 was not challenged by the department, the subsequent SVB order (OIO dated 22.12.2014) should be on the same lines. The department cannot challenge such an SVB order. The Department's order ought to have been dismissed by the first appellate authority as the first SVB order has attained finality.

8. Learned Authorised Representative supports the impugned order. He submits as follows:

- a) The first SVB order was valid for three years and after three years, the issue was re-examined and a new SVB order was passed. The principle of promissory estoppels does not apply to taxation. If some issues were not addressed or considered in the first SVB order, nothing prevents these being considered in the second SVB order.
- b) The original authority has failed to examine and verify the quantum of losses incurred by the appellant is equal to the amounts of True up amounts received by them or otherwise.
- c) As per Rule 10(1) (e) of Valuation Rules, if the advertising and marketing costs are relatable to the imported goods, they are includable in the assessable value as has been held by this bench in **Reebok India [2018 (364) ELT 581 (Tri-Delhi)]**
- d) It does not matter whether True up amounts are in the nature of capital expenses or revenue expenses for the

purpose of customs. The only thing which matters is whether it is includible in the transaction value.

- e) The order of the original authority has not fully examined the books of account and balance sheets when coming to the conclusion that the relationship between the appellant and the foreign supplier has not influenced the transaction price and therefore it needs to be accepted under Rule 3(3)(a).
- f) The original authority has not properly verified if the difference in price between the sale to the appellant and the sale of same models of cars but with additional features to unrelated parties.
- g) Therefore, the matter may be remanded to the original authority with directions to pass a speaking order.

9. We have considered the arguments on both sides and examined the records of the case.

10. We find that the impugned order is inconclusive inasmuch as it found several mistakes with the order in original but has neither decided those issues so as to modify the order in original nor has it remanded the matter to the original authority for re adjudication. It allows the departmental appeal and sets aside the order in original. In cases where there is a demand for additional duty, or imposition of penalty, if the order of the lower authority is set aside, it ceases to exist or at least have any effect. Thus, there will not be any confirmed duty, penalty, etc. This is not such a case. The Order in original says that the relationship between the importer and their foreign supplier has not affected the transaction price and therefore, the same needs to be accepted (and assessments finalized). If it is set aside, the impugned order should have either held that the relationship affected the price and should also have then decided how the valuation should be done or

it should have remanded the matter for a re-decision. However, the impugned order did neither and is therefore inconclusive.

11. The impugned order needs to be set aside on this ground alone. Nevertheless, since arguments have been made by both sides, we proceed to decide on the other issues so raised.

Delay in passing the impugned order and allegations of pre-meditated order

12. The appellant argues that the impugned order is vitiated because it was passed one year after the hearing was conducted. We agree that it is not a healthy practice to pass an order after such a long time. However, no legal provision has been brought on record to show that the delay renders the impugned order invalid. We, therefore, find that the delay, though, highly undesirable, does not invalidate the impugned order in the absence of any such legal provisions.

13. The appellant argues that the impugned order is pre-meditated. This is an allegation in the appeal but this imputation against the learned first appellate authority is not backed by any evidence and needs to be dismissed.

Arguments that the earlier SVB order stops the department from opening up the issues in the second SVB order

14. The argument of the appellant is that in the first SVB order in 2011, their invoice values were accepted as not affecting the price in terms of Rule 3(3)(a). Therefore, in the second order passed in 2015 a different view could not have been taken. The Department's argument is that there is no promissory estoppel in taxation.

15. We have considered the matter. It is now well established that in Customs Act, each Bill of Entry is an assessment and can be appealed against. If excess duty is paid, the importer has to file an appeal against the assessment and can file a refund claim. Similarly, if there is short

payment, a demand can be raised by the department by issuing a Show Cause Notice. Both the appeal against the assessment by the assessee and the demand by the department are subject to limitation of time after which neither can an appeal be filed by the assessee nor can the department raise a demand. Thus, insofar as the Bill of Entry is concerned, it reaches finality.

16. However, such assessment does not bind either the assessee or the department with respect to any future imports. If, for instance, excess duty was paid due to wrong classification of goods, erroneous computation of value or by not claiming an eligible exemption notification, etc. it does not mean that the assessee has to continue to pay excess duty in all his future imports. Conversely, if duty is short paid and the department failed to issue a notice within time, it does not mean that the department is estopped from making correct assessments of future Bills of Entry and collecting the correct amount of duty. Otherwise, it would lead to anomalous situation where the duty leviable will be based not on the correct legal position but on the past practices including erroneous ones. If the appellant's argument is accepted, for instance, if there are three Custom Houses and identical goods were correctly classified, valued and charged to duty at Custom House A, excess duty is erroneously charged in Custom House B and short duty is charged erroneously in Custom House C and appeals and demands were not raised within time to correct the mistakes, the errors in Custom House B and Custom House C would prevail over the law. Further, in the same custom house, for the same goods, if one importer is charged erroneously less and another is charged properly, there will be two different laws for them. Taxes and duties can never be assessed so. The principle of *Res Judicata* applies only to the extent of the assessment of the particular Bill of Entry at the particular level attaining

finality. Thus, we find no force in the argument of the appellant that once a decision has been taken in the first SVB order, it binds the department in the subsequent SVB order.

17. Legally speaking nothing stops the officer from examining each import made by an importer from a related person to see if the relationship affected the price. As it will be rather cumbersome to do so, the investigation done once and an SVB order issued is normally applied for imports for a period of three years assuming that in all these years, the price is not affected by the relationship. Both the SVB orders issued in this case clearly indicate that they are subject to occasional review and also a final review after three years. Otherwise, an unscrupulous importer can import on invoices which are not influenced by the relationship until an order is passed by the SVB and then start importing on invoices with much lower prices from the related party. If this happens, nothing stops the department from examining the valuation in such cases. Therefore, we find no force in the argument of the appellant that since the first SVB order had found that their relationship with the foreign supplier had not affected the prices at that time, the department cannot examine if such is the case in all subsequent imports.

True Up payments

18. The appellant is a subsidiary of the foreign supplier and as parent company, they own 99.99% of the shares of the appellant. The appellant imports the motor vehicles manufactured by their parent company and distribute and sells them in India. When the appellant suffers any losses, the foreign supplier, who is also the parent company, pays the appellants to make up for the losses which are called True Up payments. According to the appellant, these are in the nature of capital subvention by the parent company and they have nothing to do with

the invoice values of the cars which they import. The Department's case is that these are in the nature of transfer of funds from the parent company to the appellant and it does not matter whether they are recorded under capital receipts or revenue receipts. It should have been seen by the original authority as to how much loss was incurred by the appellant and how much was paid by the foreign supplier as True up payments and if these payments affected the invoice price of the imported goods.

19. We note that the appellant importer pays and the foreign supplier send the goods to them. What is relevant is the invoice price and if there is any additional consideration **flowing from the importer to the foreign supplier** so that the correct transaction value can be determined. For instance, if the importer is being invoiced for and is paying Rs. 100 to the foreign supplier and the importer is separately transferring Rs. 10 to the foreign supplier, it needs to be seen if this Rs. 10 is meant to be consideration for the sale of the goods. If so, the value is to be taken as Rs. 110 and not Rs. 100. In this case, the **True Up payments are flowing not from the appellant to the foreign supplier but the other way round**. Therefore, if these are reckoned to arrive at the transaction value, the invoice value will have to be lowered which does not advance the case of the Revenue at all.

20. The argument of the learned Authorized Representative is that it needs to be seen how much loss was suffered by the appellant and how much was paid as a True up payment and if the difference affected the invoice price.

21. We find no force in this argument. True Up is an arrangement between the appellant and the parent company. No law requires such a payment nor can it influence the transaction prices. Let us say, the appellant has suffered a loss of \$ 10,000. The shareholders suffer this

loss in proportion to the shares held by them. Since the parent company owns 99.99% of the shares of the appellant, it suffers a loss of \$9,999 on their investment in the appellant. Alternatively, the parent company can transfer to the appellant to cover some or all of the loss as True Up payment to keep the appellant company afloat. The parent company need not pay as True Up any of this loss or may pay as True Up some or all of the loss. The losses incurred by the appellant have no bearing on the invoice value whether the losses are recouped by the parent company in the form of True Up payments or not.

Expenses on marketing and advertisement, etc.

22. The case of the Department is that in para 4 of the Order in Original it is mentioned that "no expenses are incurred by the importer on behalf of or by understanding or agreement with or under instructions from the suppliers of the goods, e.g., advertising, propaganda expense or any other expense for the sale of the imported goods". On the other hand in para 11, it is stated that the importer "needs to manage the customs taxability, inventory cost and simultaneous distribution of imported goods as well as sales promotions including advertising and marketing for its entire business in India." Whether such expenses had a bearing on the price was required to be analysed. Learned authorized representative of the Department submitted that such payments are includable in the assessable value as per Rule 10 (1)(e). The appellant's case is that these are expenses incurred by them on their own account to promote their own business. We find that Rule 10(1) stressed by the learned Authorised Representative reads as follows:

"10. Cost and services. -

(1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods

(a) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-

- (i) commissions and brokerage, except buying commissions;
- (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
- (iii) the cost of packing whether for labour or materials;
- (b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:-
 - (i) materials, components, parts and similar items incorporated in the imported goods;
 - (ii) tools, dies, moulds and similar items used in the production of the Imported goods;
 - (iii) materials consumed in the production of the imported goods;
 - (iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;
 - (c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;
 - (d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;
 - (e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.**

Explanation.- Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods."

23. Thus Rule 10 (1) (e) requires that any payment made as a condition for sale to either the seller or to a third party to satisfy the obligations of the seller is to be included in the value. We find that if the appellant is responsible for certain activities such as customs, taxability, inventory costs, distribution and sales promotions including advertising and marketing for its entire business in India, it cannot be called a payment to their foreign supplier but would be managing affairs related to its own business. It would have been a different case, if the appellant was required, as per the agreement to promote, at its cost, the sales by the foreign suppliers to other customers in India or make some payment on behalf of the seller to a third party. In such a case, some expense would have been incurred by the appellant which

could have been examined to see if it formed an additional consideration for the sale of the goods to the appellant. For instance, if the appellant was paying \$100 for the imported goods and in addition was incurring, say \$10 to promote the sales of the foreign supplier to other customers, this \$10 could have been said to be an additional consideration for sale. The appellant is a distributor and is in the business of selling the cars which necessarily requires them to deal with imports, pay taxes, promote sales, advertise, etc. These, in our considered view, cannot be termed as expenses incurred on behalf of the foreign supplier although the foreign supplier would also indirectly benefit if the appellant's business improves. The foreign supplier is also independently selling the goods (cars) to embassies, etc. and there is nothing on record to show that the appellant has incurred any expenses to promote such sales.

Comparison with prices of sales to independent buyers

24. The next allegation of the department accepted in the impugned order is that adjudicating authority has compared the prices of cars sold to the importer (i.e., the appellant herein) and the prices at which similar cars but with extra features were sold to unrelated buyers, viz., embassies in India. The prices at which the cars were sold the embassies were approximately 33% higher. An in-depth analysis of the amount charged for the extra features needed to have been done. We find that it is not in dispute that the cars which were sold by the foreign supplier to independent buyers (embassies) were different and had additional security features such as bullet proofing customized as per their requirements. It is also not in dispute that those cars were sold in retail while the appellant bought the cars in bulk, being a distributor. It is common knowledge that the retail prices to individual buyers are

higher than the bulk prices to distributors. The Commissioner (Appeals), in the impugned order, observed that the original authority should have determined whether the additional features were worth so much as to account for the higher prices. It is not clear as to how it is expected of the adjudicating authority to achieve this considering that there are no cars with these additional features sold to the appellant. The premium for the additional features and customisation is decided by the manufacturer and paid for by those independent customers. The difference between sale in retail and sale in bulk also must be accounted for. There is nothing in the impugned order that the Commissioner (Appeals) has come to *prima facie* conclusion based on some data that the additional features and the difference in quantities do not account for the price difference. It is not also indicated how the original authority is expected to achieve this quantification. We, therefore, find no substance in such a direction in the impugned order for re-examination.

25. Another finding in the impugned order is that the adjudicating authority has not verified the balance sheets to conclude that no amount is paid or payable directly or indirectly to or on behalf of the supplier of the imported goods for engineering, development, art work, design work and plans and sketches undertaken elsewhere than in India.

26. We finding nothing in the order to show that some payments were noticed by the Commissioner (Appeals) towards engineering, development, art work, etc. If the Commissioner (Appeals) could not, after considering the department's appeal for one year after concluding the hearing, find that some payments were made towards these, it is not justifiable to brush aside the order of the original authority on some

suspicion without any basis. We cannot, therefore, agree with this finding of the order.

24. The last of the findings in the impugned order is that the original authority had come to a conclusion that the relationship has not affected the price merely on the importer's statements. We find that original authority had given findings based on analysis. If the Commissioner (Appeals) found some reason to conclude otherwise, he could have so decided after pointing out how the relationship affected the invoice price and what elements should be added to the invoice price to arrive at the value but he did not.

25. Thus, for all the reasons stated above, the order dated 12.04.2018 passed by the Commissioner (Appeals) allowing the appeal filed by the Department and setting aside the order-in-original cannot be sustained. Accordingly, it is set aside. The appellant shall be entitled to all consequential reliefs, if any. The appeal is, accordingly, allowed.

(Order Pronounced on 25.05.2021)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)