CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. I

CUSTOMS APPEAL NO. 51160 OF 2022
[E-HEARING]

[Arising out of Order-in-Appeal No. CC(A)/Cus/D-II/ICD/PPG/1522/2021-22 dated January 10, 2022 passed by the Commissioner of Customs (Appeals), New Delhi]

Freewill Sports Pvt. Ltd. ..... **Appellant**
S-32 Industrial Area
Jalandhar – 144 004
PUNJAB

Versus

Commissioner of Customs ..... **Respondent**
ICD, Patparganj
New Delhi – 110 096
Madhya Pradesh

APPEARANCE:

Shri Sudhir Malhotra, advocate for the appellant
Shri M.K. Shukla, authorized representative of the department

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

Date of Hearing/ Decision: November 27, 2025

FINAL ORDER NO. 51816/2025

JUSTICE DILIP GUPTA :

The appellant has filed this appeal to assail the order dated January 10, 2022 passed by the Commissioner of Customs (Appeals)[1] by which the appeal that was filed by the appellant to assail the order dated August 10, 2018 passed by the Additional Commissioner of Customs rejecting the assessable value declared

1 **Commissioner (Appeals)**

by the appellant and directing for inclusion of expenses incurred towards advertisement and sales promotion for the period from 2011-12 to 2016-17 has been confirmed with differential customs duty, interest and penalty.

2. The appellant is engaged in the import of sports goods and fitness products from different countries. The appellant incurred expenses on sales promotion and advertisement of the goods imported by the appellant, but the expenditure was not included in the assessable value of the imported goods.

3. A show cause notice dated August 17, 2016 was issued to the appellant by the Directorate of Revenue Intelligence alleging that the amount incurred by the appellant towards advertisement and sales promotion of the imported goods should be included in the assessable value in terms of rule 10(1)(e) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007[2]. To support this contention, the show cause notice placed reliance upon the statement made by the Managing Director of the appellant under section 108 of the Customs Act, 1962[3] wherein he stated that though initially they were under an impression that the expenditure incurred after the import was not required to be included in the transaction value, but later on, after seeking instructions they believed that it was to be added and that is why they deposited part differential duty during investigation.

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2. the 2007 Valuation Rules

3 the Customs Act

4. The Additional Commissioner, by order dated August 10, 2018, confirmed the demand proposed in the show cause notice and appropriated the amount deposited by the appellant during investigation.

5. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals), by an order dated January 10, 2022, dismissed the appeal and upheld the order passed by the Additional Commissioner. Paragraphs 5.2 and 5.3, which are relevant, are reproduced below :

> **"5.2** The issue involved is inclusion of marketing/promotional expenses made by the Appellant (for the foreign brands, which were imported and sold in India by them) in the assessable value of such imported goods. I note that the Rule 10 (1)(e) of CVR, 2007 states that:-
>
> "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,-
>
> …….
>
> (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."
>
> (Emphasis Supplied)
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> **5.3 In view the above provisions, the expenses incurred by the appellant towards sales promotion and advertisement of foreign brands (goods of which they imported and sold in India) are includible in the assessable value**. The calculations for different ports and for different brands have been duly explained in the impugned order. **I note that all the arguments raised by the**

> **Appellant in the instant appeal were already made before the Adjudicating Authority and the same have already been countered in the impugned order. The appellant has not been able to make any case in their favour. Rather, the Managing Director had agreed in their statement that said expenses need to be included in the assessable value. The confessional statements of Managing Director have not been retracted till date**. In light of case of M/s Sodagar Knitwear [2018(362) E.L.T. 819 (Tri-Del)] which has been upheld by Hon'ble Apex Court [2018(362) E.LT. A213 (S.C.)], it is now not open to the Appellant to challenge the reassessments/demand."
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> **[emphasis supplied]**

6. Shri Sudhir Malhotra, learned counsel appearing for the appellant has assailed the order passed by the Commissioner (Appeals) and contended that :

(i) The statement made by the Managing Director under section 108 of the Customs Act cannot be considered as relevant in the absence of the procedure contemplated under section 138B of the Customs Act having been followed; and

(ii) The expenses incurred by the appellant towards the marketing and promotion of the imported goods are not covered under rule 10(1)(e) of the 2007 Valuation Rules. In support of this contention, learned counsel placed reliance upon the decision of the Tribunal in **Commissioner of**

Customs, Patparganj, Delhi vs **Adidas India Marketing Pvt. Ltd.**[4]

7. Shri M.K. Shukla, learned authorized representative appearing for the department, however, supported the impugned order and submitted that the appellant did not add the expenses incurred towards advertisement and marketing which was required to be added in the assessable value and, therefore, the Commissioner (Appeals) was justified in confirming the demand under rule 10(1)(e) of the 2007 Valuation Rules. In support of this contention, learned authorized representative placed reliance on the decision of the Tribunal in **Giorgio Armani India (P) Ltd.** vs **Commissioner of Customs, New Delhi**[5]**.**

8. The submissions advanced by the learned counsel appearing for the appellant and the learned authorized representatives appearing for the department have been considered.

9. The Commissioner (Appeals) after making reference to the provisions of rule 10(1)(e) of the 2007 Valuation Rules merely drew a conclusion that the expenses incurred by the appellant towards sales promotion and advertisement of the imported goods are includible in the assessable value. No reasons have been given by the Commissioner (Appeals) as to why such expenses should be added to the assessable value. Rule 10(1)(e) of the 2007 Valuation Rules provides that in determining the transaction value, there shall be added to the price actually paid or payable

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4 2020 (374) ELT 394 (Tri.-Del)

5 2018 (362) ELT 333 (Tri.-Del)

for the imported goods, all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller. The Commissioner (Appeals) was required to specifically consider how the provisions of rule 10(1)(e) of the 2007 Valuation Rules would apply in the present case. The Commissioner (Appeals) only relied on the statement of the Managing Director of the appellant made under section 108 of the Customs Act to conclude that the expenses incurred towards sales promotion and advertisement of the imported goods would be includible in the assessable value.

10. This statement of the Managing Director of the appellant was made under section 108 of the Customs Act. It cannot be considered as relevant as the provisions of section 138 of the Customs Act were not complied with.

11. The issue relating to relevance of statement made under section 108 of the Customs Act was considered by this Tribunal in **Surya Wires Pvt. Ltd.** vs. **Principal Commissioner, CGST, Raipur**[6] and it was observed:

> "**21.** It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of sub-section (1) of these two sections makes it evident that the

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6. Excise Appeal No. 51148 of 2020 decided on 01.04.2025

statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-section (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B of the Customs Act, the provisions of sub-section (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as they apply in relation to proceedings before a Court. **What, therefore, follows is that a person who makes a statement during the course of an inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain.**"

(emphasis supplied)

27. After examining various judgments of the High Courts and the Tribunal, the Tribunal observed:

"**28.** It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central

> Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. **The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/ investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence.**"
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> **(emphasis supplied)**

12. As the procedure contemplated under section 138B of the Customs Act was not followed in the present case, the statements made by the Managing Director of the appellant under section 108 of the Customs Act could not have been relied upon in view of the aforesaid decision of the Tribunal in **Surya Wires**.

13. This apart, instead of considering the submissions made by the appellant, the Commissioner (Appeals) noted that these submissions were considered by the adjudicating authority and the appellant could not make out any case in its favour.

14. Even the cases referred to by the appellant have not been considered and a general statement has been made that they are confined to the facts of the case.

15. This issue relating to addition of the amount incurred by the appellant towards advertisement and sales promotion to the assessable value was examined at length by a Division Bench of the Tribunal in **Adidas India.** After examining the provisions of rule 10(1)(e) of the 2007 Valuation Rules and Note to rule 3 contained in the Schedule, the Tribunal held :

> **"17.** Section 14(1) of the Customs Act provides that the value of the imported goods and export goods shall be the transaction value of such goods, which would be price actually paid or payable for the said goods, where the buyer and the seller of the goods are not related and the price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf. The 2007 Rules have been framed in exercise of the powers conferred by Section 14(1) of the Customs Act. They provide for, amongst others, determination of the method of valuation as also the cost and services.
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> **18.** It would be seen that Rule 3 deals with the determination of the method of valuation. It provides that subject to Rule 12, the value of the imported goods shall be the transaction value adjusted in accordance with provisions of Rule 10. Rule 10 deals with cost and services. It provides that in determining the transaction value, the amount referred to in (a), (b), (c), (d) and (e) of sub-rule (1) of Rule 10 shall be added to the price actually paid or payable for the imported goods. **The payment referred to in (e) of sub-clause (1) of Rule 10 is in issue in this appeal. It provides that in determining the transaction value, 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 shall be added. Sub-rule (4) of Rule 10 stipulates that no addition shall be made to the price actually paid or payable in determining the value of the imported goods, except as provided for in Rule 10.

19. It, therefore, clearly emerges from a bare perusal of Rule 10(1)(e) that it contemplates two situations when all other payments actually made or to be made can be added to the price actually paid for determination of the transaction value. The first is a situation when all other payments made by the buyer to the seller as a condition of sale of the imported goods to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid have to be added. The second is a situation when all other payments made by the buyer to a third party as a condition of sale of the imported goods to satisfy an obligation of the seller to the extent that such payments have not been included in the price have to be added. For the sake of convenience, Rule 10(1)(e) can be broken up into two parts for the purpose of determining the transaction value by adding :

(a) such payments actually made or to be made as a *condition of sale* of the imported goods *by the buyer to the seller* to satisfy an obligation of the seller;

Or

(b) such payment actually made or to be made as a *condition of sale* of the imported goods *by the buyer to a third party* to satisfy an obligation of the seller.

20. What also needs to be noticed is that in both the aforesaid two situations there are two requirements. The first requirement is that the payment should be made *as a condition of sale* and the second requirement is that they should be made to *satisfy an obligation of the seller* which can be towards the buyer as contemplated in (a) or towards a third party as contemplated in (b). Both the aforesaid twin requirements have to be

satisfied before any payment made by the buyer to the seller or the buyer to a third party can be added to the price actually paid by the buyer to the seller for determining the transaction value. In other words, whenever such a payment is made either by the buyer to the seller or the buyer to a third party, **the payment should necessarily be made as a condition of sale of the imported goods to satisfy an obligation of the seller**. As an example, the obligation of the seller could be when the seller owes a debt to the buyer or to a third party. In such a situation, the seller may require the buyer to adjust the debt. Rule 10(1)(e) requires that this requirement should be a condition of sale of the imported goods, for it is not that every debt which the seller owes to the buyer or a third party can be added to the price of the imported goods. Such an obligation of the seller has to be a condition of sale. It is only in such a situation that all other payments made as a condition of sale of the imported goods, by the buyer to the seller, or by a 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 can be added to the price actually paid for determining the transaction value.

21. In regard to the first condition that such payment should actually be made or to be made by the buyer to the seller or by the buyer to a third party as a condition of sale of the imported goods, it is also necessary that there is an enforceable right available to a seller to enforce such a condition. Thus, an option must not be available with the buyer to ignore the condition of sale. In regard to the second condition, notwithstanding the fact that such payment has to be made by the buyer as a condition of sale of the imported goods, then too unless and until it is established that the seller has a pre-existing obligation to pay the said amount to the buyer or a third party and the buyer is only discharging the said obligation of the seller, such payment cannot be added to the price actually paid by the buyer for the imported goods in terms of Rule 10(1)(e). **The seller must, therefore, have an obligation to pay an amount to the buyer or to a third party and the discharge of the same is by the buyer as a condition of sale of the imported goods. Any payment made by a buyer to a third party on his own account,**

> **even as a condition of sale of the imported goods in terms of a clause of the agreement between the buyer and seller, cannot be added to the value of the imported goods since such payment has not been made to satisfy an obligation of the seller**.
>
> **22.** The importance of sub-rule (4) of Rule 10 of the 2007 Rules cannot also be lost sight of. It, in very clear terms, provides that no addition shall be made to the price actually paid or payable in determining the value of the imported goods, except as provided for in Rule 10."
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> **[emphasis supplied]**

16. Learned authorised representative appearing for the department has placed reliance on the agreement entered into between Major Sports SA and the appellant. Clause 5 of the agreement deals with 'Marketing Support'. This clause is reproduced below :

> "**5. MARKETING SUPPORT**:
>
> To help FREEWILL SPORTS in marketing our products, we will provide :
>
> with no charge in first year the following promotions supports,
>
> - catalogues, posters (in English language) and some POP material in English.
> - a support of 5% discount on our products."

17. A bare perusal of this clause would indicate that the Major Sports SA helped the appellant in marketing the product and provided catalogues, posters and some POP material in English and a support of 5% discount on the products in the first year.

18. It cannot be concluded from this clause, in view of the decision of the Tribunal in **Adidas India,** that the discount was

given as a condition of sale of the imported goods by the buyer to the seller.

19. In any view of the mater, as the Commissioner (Appeals) has not confirmed the demand on this basis, it is not open to the learned authorized representative appearing for the department to raise this ground.

20. Thus, for all the reasons stated above, the expenses incurred by the appellant on its own account for sales promotion and advertisement of the imported product cannot be included in the assessable value under rule 10(1)(e) of the 2007 Valuation Rules.

21. It is, therefore, not possible to sustain the order dated January 10, 2022 passed by the Commissioner (Appeals). It is, accordingly, set aside and the appeal is allowed with consequential relief, if any.

(Dictated and pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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