

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

COURT-I

Date of hearing: 20.12.2017
Date of Decision: 12.01.2018

Appeal No. C/51559/2017- [DB]

[Arising out of the Order-in-Original No. 03/PPG/BBG/Comm/2017 dated 28.06.2017, passed by The Commissioner of Customs, New Delhi.]

M/s Reebok India Company ... Appellant

Vs.

CC, Patparganj ... Respondent

Appearance:

Present Shri Anil Sood, Advocate for the appellant

Present Shri R.K. Majhi, DR for the respondent

Coram: Hon'ble Justice Dr. Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

FINAL ORDER No. 50117/2018

Per: V. Padmanabhan

1. The present appeal is against the Order-in-Original No. 3/2017 dated 28.06.2017.
2. The present appellant is a subsidiary of M/s Reebok International Ltd. (RIL, England). They regularly import various sports goods such as shoes, cloths, bags etc from their parent. Such goods bear the brand name 'Reebok'. The appellant has entered into Distribution Agreement with RIL England as well as Buying Agency Agreement with M/s Adidas International Trading B, V and other agreements. They had made an application before the Special Valuation Branch, New Delhi for approving the transaction value of such imports, since the imports made by the appellant from RIL, England were from related parties. The Directorate of Revenue Intelligence (DRI)

investigated the allegation that the appellant was importing goods from RIL, England, but were not including certain costs pertaining to advertising and promotions in the assessable value of the goods at the time of import. After completion of investigation and issue of show cause notice, the impugned order came to be passed in which the adjudicating authority rejected the assessable value of goods declared by the appellant, imported during the period December, 2011 to November, 2016 and confirmed the demand of differential duty amounting to Rs. 2,07,16,312/- along with interest and mandatory penalty. Aggrieved by the impugned order the present appeal has been filed.

3. With the above background we head Shri Anil Sood, Ld Advocate for the appellant as well as Shri R.K. Majhi, Ld. DR for the Revenue.
4. Shri Sood, Ld. Advocate for the appellant summarized the grounds of appeal as follows:-

The allegations of undervaluation have been made by the Department on the basis of para 4.134 of the Distribution Agreement dated 01/03/1995 entered into by the appellant with RIL, England. In terms of the above para, the appellant was required to incur the expenditure on advertisement and promotion of not less than 6 per cent of the total invoice value. The Department took the view that such expenditure is being incurred as a condition for sale of goods by RIL England and hence loaded the amount incurred as above to the transaction

value of goods already imported during the disputed period.

The assailed the demand on the following main grounds:-

- i. That, allegations are made solely on the basis of agreement and DRI has not satisfied the provisions of section 14 and rule 3 of the Customs Valuation Rules. That no evidence has been given by DRI that the prices of goods were less than the prices of identical and similar prices.
- ii. While invoking Rule 3, DRI did not discharge the onus to establish any of the conditions enumerated in Rule 3. The appellants have also relied upon the interpretative note to Rule 3(2)(b) in their defence. That as per this note, activities undertaken by the buyer on its own account, even though by agreement, are not considered indirect payment even though they might be regarded as of benefit to the seller.
- iii. Rule 10(1)(e) of the Customs Valuation Rules 2007 is not applicable.
- iv. Statement of Mr Mitra, Finance Director cannot be relied upon as he is not a legal expert.
- v. Advertisement expenses are post importation expenses and not includible in the assessable value, and advertisement expenses is not condition of sale.
- vi. Various judgments quoted by noticee in their defence reply, support their defence.

vii. That interpretation difference in statute does not amount to suppression and that therefore extended time period is not applicable and there are no grounds for demanding penalty and charging interest section 28AA.

5. The Ld. DR justified the impugned order. He submitted that in terms of the Distribution Agreement, the appellant has incurred the advertising and promotion expenses, not on their own account, but as a condition for sale of goods by their principal RIL England. Since such amount has been incurred on behalf of the exporter and in addition to the price of the goods invoiced, such expenses will be includible in the transaction value in terms of Rule 10 (1) (e) of the Customs Valuation Rules, 2007.
6. We have heard both sides and perused the records.
7. It is not in dispute that the appellant and Reebok International Ltd, England (RIL) are related, within the meaning of Rule 2(2) of the Customs Valuation Rules, 2007. The dispute has arisen in the context of Article 4.13.4 of the Distribution Agreement entered into by the appellant with RIL England. The wording of the Agreement is reproduced below for a ready reference:-

"Distributor agrees to spend on advertising and promotions a sum not less than six percent (6%) of its total net invoiced sales of PRODUCTS. As a guideline, at least half of this expenditure shall be in the form of media (print, radio and/or television) advertising. Details of such expenditure shall be reported quarterly to REEBOK and are subject to annual verification by independent audit."

The crux of the dispute is whether such expenditure incurred by the appellant in terms of the above clause will incur the

mischievous of Rule, 10 (1) (e) of the Customs Valuation Rules. For such payments to be added to the price actually paid, the same should be made as a condition of sale by the buyer to seller or by the buyer to the third party to satisfy the obligation of the seller and such payments are not already included in the price actually paid. There is no doubt that the amount is not already included in the price actually paid or payable. The appellant is allowed to import goods from the principal in terms of the above agreement only subject to the terms of the entire agreement. In terms of this agreement the appellant will have to necessarily spend 6 per cent of the invoice value on advertisement and promotion. It is an obligation of the appellant to its principal for import of goods. The other related question is whether such amounts have been spent by the appellant to satisfy an obligation of the seller i.e. RIL England.

8. In addition to para 4.13.4, further conditions are mentioned in clause 4.9. In terms of this clause, we note that the appellant is not only required to spend on advertising, but is required to submit marketing and business plan, advertising budget, and even is required to get vetted by Principal draft of any endorsement or promotion contract exceeding the value of US dollar 25 per cent year. These stipulations lead us to conclude that RIL UK is controlling every aspect of such promotion. RIL UK is the owner of the brand name 'Reebok' and it is obvious that such promotion, and advertising is towards promotion of their brand as a whole and not only in respect of goods being imported by the appellant. Therefore, from these agreements it

is evident that the appellant is carrying out such brand promotion on behalf of RIL England and such expenses were made on behalf of RIL UK. Hence we conclude that advertising and promotion expenses have been incurred as a condition of sale and on behalf of seller and may be considered as satisfying the obligation of the seller.

9. The Interpretative Note of Rule 3 (2) (b) of the Customs Valuation Rules forbids loading the expenses incurred relating to marketing of the imported goods, if such expenses are incurred by the buyer on his own account even though by agreement with the seller. It is clear from the discussion above that the appellant has incurred such expenses on the expression obligation of RIL England and as a clear condition of the sale of goods for disputing them in India. It cannot be concluded, in the facts of the present case, that the expenditure has been incurred by the appellant on their own account.

10. We have also considered the various case laws cited by the appellant in the appeal as well as argued. Most of the case laws deal with including in the transaction value with amounts paid towards royalty and other expenses. In the specific case cited by the assessee, Samsonite 2015 (327) ELT 528 Tribunal-Mumbai, the Tribunal has set aside the demand made by the Department by including certain expenses incurred by the M/s Samsonite towards advertising. However, after a careful perusal of the case we note that such expenses were charged to the account of M/s Samsonite by their principal as a share of

the global expenditure. Consequently we are of the view that facts of that case is distinguishable and will not be applicable to the present facts of the case.

11. The ground of time bar raised by the appellant is also not justified in the facts and circumstances of the present case. In the declaration made by the appellant before SVB the Distribution Agreement with the clause relating to the expenditure on advertising has not been produced. The lower Authorities have held that this amounts to suppression of facts and we agree with the observation in this regard.

12. In the result, we find no reason to interfere with the impugned order which is upheld for the reasons outlined therein. The impugned order is sustained and the appeal is rejected.

[Order Pronounced in the open court on__12/01/2018__]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

Rekha