

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

PRINCIPAL BENCH – COURT NO. II

Custom Appeal No. 53392 of 2018-DB

(Arising out of Order-in-Original No. 18/PPG/BBG/COMM./2018 dated 5.7.2018 passed by the Commissioner of Customs, New Delhi)

M/s Quest Retail Private Limited

Appellant No. 1

7th Floor, Infinity Towers,
A, Phase-II, Gurgaon,
Haryana -122002.

Versus

**Commissioner of Customs & Excise,
Patparganj**

Respondent

Inland Container Depot,
Patparganj, Gazipur,
New Delhi-110 096.

With

Custom Appeal No. 53393 of 2018-DB

(Arising out of Order-in-Original No. 18/PPG/BBG/COMM./2018 dated 5.7.2018 passed by the Commissioner of Customs, New Delhi)

Ms.Shriti Malhotra, Director

Appellant No. 2

M/s Quest Retail Private Limited

7th Floor, Infinity Towers,
A, Phase-II, Gurgaon,
Haryana -122002.

Versus

**Commissioner of Customs & Excise,
Patparganj**

Respondent

Inland Container Depot,
Patparganj, Gazipur,
New Delhi-110 096.

And

Custom Appeal No. 53394 of 2018-DB

(Arising out of Order-in-Original No. 18/PPG/BBG/COMM./2018 dated 5.7.2018 passed by the Commissioner of Customs, New Delhi)

**Mr. Suwendu Sahu, General Manager
(Legal & Finance)**

Appellant No. 3

M/s Quest Retail Private Limited

7th Floor, Infinity Towers,
A, Phase-II, Gurgaon,
Haryana -122002.

Versus**Commissioner of Customs & Excise
Patparganj**

Inland Container Depot,
Patparganj, Gazipur,
New Delhi-110 096.

Respondent**Appearance**

Shri Amit Jain, Advocate &
Ms. Vijya Nandani, Advocate

- for the appellant

Shri Sunil Kumar, DR

- for the respondent

CORAM:HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 30.1.2019

Date of Decision: 16.7.2019

Final Order No. 50896-50898/2019

Per **Bijay Kumar :**

All these appeals are filed against the order-in-original dated 5.7.2018 passed by the Commissioner of Customs, ICD, Patparganj in pursuance of Show Cause Notice dated 24.8.2016 issued by the Directorate of Revenue Intelligence, (DRI), Delhi. The period of demand is from 6.9.2011 to 18.3.2015 involving a Customs duty demand of Rs. 1,34,60,188/. The issue involved in the case is as to whether the royalty charge and franchisee fees paid to the foreign supplier in terms of agreement dated 8.2.2006 and two side letters dated 19.1.2006 and 16.3.2010, are liable to be included in the assessable value of the imported goods for purpose of payment of Customs duty under Rule 10(1) and Rule 10(1)(e) of the Customs Valuation (Determination of Value Imported Goods) Rules, 2007. Following duty demands under Customs Act along with

penalty have been confirmed in the impugned order against the appellants:

- (i) Rs.91,75,546/- under Section 114A of the Customs Act, 1962; on the appellant No. 1
- (ii) Rs. 4,27,000/- under Section 112(a)(ii) of the Customs Act, 1962; on the Appellant No. 2
- (iii) Rs. 13,00,000/- on Ms. Shriti Malhotra (Director of M/s Quest Retail Private Limited); on appellant No. 3
- (iv) Rs. 13,00,000/- on Mrs. Suvendu Sahu (General Manager (Legal & Finance) of M/s Quest Retail Private Limited).

2. The brief facts of the case are that the appellant No. 1 is engaged in the business of import and retail sale of the 'body shop' brand of cosmetics and toiletries (hereinafter referred as the imported goods also) through its retail stores in India. The appellant No. 1 has entered into Franchise Agreement dated 8.2.2006 (for short, Agreement) and two side letters dated 19.1.2006 and 16.3.2010 to the agreement with the brand owner M/s The Body Shop International plc. (for short, M/s Body Shop), England, for grant of franchisee and other rights in relation of aforesaid retail business. In terms of the franchise agreement an initial franchise fees of GBP 1,00,000 was payable in addition to franchise fee @ GBP 5,000/- per store opening from the opening of second store, in terms of the said side letter dated 19.1.2006. Similarly, by side letter dated 16.3.2010 store opening fee of GBP 5,000/- per store was waived off for year 2010 and for opening of store with effect from year 2011 was also liable to be waived off only after

achievement of specific target of store opening in terms of number for the years 2010 to 2015. The franchise agreement provided for the payment of royalty fee for the management, consultation advice, service of training provided to the appellant in connection with the use of the system and the proprietary marks of M/s Body Shop. The royalty in the franchise agreement was initially not payable, however, the appellant started paying the same @ 2% on total annual retail sales, from 2010 onward in terms of the side letter dated 16.3.2010. The side letter further contained a clause that if sale fell below the projection range, the royalty fee would be paid @ 2.5% per annum on total sales value and when the sales exceeds the projection range, royalty shall be payable @ 1% on the incremental sales. The royalty payment, as per the appellant is a consideration for services rendered by the appellant 1 and the applicable service tax has been paid thereon under the Finance Act, 1994, for which they are duly registered with the Service Tax Department. Similar proceeding as the present one was also initiated in past by the Department by Show Cause Notice dated 12.3.2012 along with other importers proposing the inclusion of value of royalty charges/license fee for the determination of the assessable value of imported goods in terms of Rule 10(1)(c) of Customs Valuation Rules, 2007 read with Section 14 of Customs Act, 1962 (for short "Act"). The amount demanded was paid by the appellant No. 1 in order to avoid the protracted litigation by approaching the Settlement Commissioner, who vide order dated 30.5.2014, settled the case by holding that the royalty payment made by the applicant No. 1 is includible in the assessable value for

the purpose of payment of Customs duty in terms of Section 14 of Act read with Customs Valuation Rules.

3. The learned Advocate submitted that the DRI which has issued the Show Cause Notice under Section 28(2) of the Act is pertaining to period after amendment of Customs Act in year 2011 and therefore the jurisdiction issue of DRI for issuance of Show Cause Notice is not disputed. Further, also, it is submitted that the royalty paid under the franchise agreement is not a consideration for sale of the imported goods and relatable to post-importation activities, which is not includible for computation of assessable value for payment of Custom duty placing reliance on the judgment of Hon'ble Supreme Court in the case of **Commissioner of Customs Vs. Ferodo India Pvt. Ltd. – 2008 (224) ELT 23 (SC)**. It was further submitted that the payment is in the nature of running royalty as per the agreement based on a percentage of sales of imported merchandise in India and hence there is no nexus with the transaction relating to purchase of imported merchandise for from the foreign supplier placing reliance on the decision of **Commissioner of Cus. (Import), Mumbai Vs. Bridgestone India Pvt. Ltd. – 2013 (292) ELT 403 (Tri.-Mumbai)** and **Commissioner of Customs (I) Mumbai Vs. Max Atotech Ltd. – 2014 (301) ELT 531 (Tri.-Mumbai)**.

3.1 The learned Advocate also states that royalty is paid for the services received by the appellant from Body Shop and the method of calculation would not determine, if royalty is required to be included in the assessable value as the said royalty has been paid for services provided by appellant to operate as a franchisee,

therefore, the royalty payment is not in relation to import of goods for which reliance was placed on the decision of **CC, Mumbai Vs. BASF Strenics Pvt. Ltd. – 2006 (195) ELT 206 (Tri.-Mum)**.

3.2 It is the contention of the learned Advocate that the royalty has been paid by the appellant subsequent to import of the goods and hence is not includible in the assessable value for the goods which were imported by the appellant.

3.3 Regarding the order of Settlement Commissioner, the learned Advocate submits that approaching the Settlement Commissioner for previous Show Cause Notice does not amount to admission of guilt, placing reliance on the decision of **Bosch Chassis Systems Vs. CCE – 2008 (232) ELT 622 (Tri.-LB)**. It was further submitted that the order of Settlement Commission does not deal with the disputed question of law and there is no findings in the order of Settlement Commission regarding inclusion of royalty/franchise if any, for the purpose of import of these goods from Body Shop, International. It is also contended that the appellant had already paid service tax on the amount of royalty paid for the technical assistance and know how provided as per franchise agreement and once a particular activity has been treated to be a service, the same cannot be considered for payment of Customs duty in terms of Valuation Rules for the imported goods. The appellant had filed a copy of service tax return to demonstrate that the applicable service tax had been paid for the amount of royalty/franchise fee. Learned Advocate also submits that the Show Cause Notice, which have issued on the appellant under Section 28 of the Act, is not correct as all Bills of entry at the

strength of which imported goods had been cleared by the Customs are provisionally assessed. The finalization of these 32 Bills of Entry, which were provisionally assessed under Section 18 of the Act, the adjudicating authority could not have confirmed the duty demand and imposed the penalty by resorting to Section 28 of the Act. In this regard, reliance was placed on the decision of **Saharsh Distributors Pvt. Ltd. Vs. Commissioner of Customs, New Delhi – 2017 (354) ELT 672 (Tri.-Del.)**. By concluding the argument, learned Advocate raised the issue of demand being time barred on account of the fact that there was no suppression on the part of the appellant as the Department was in complete knowledge of the business model of the appellant at the time of issuance of earlier Show Cause Notice placing reliance on the decision in the case of **Nizam Sugar Factory Vs. Collector of Central Excise, AP – 2006 (197) ELT 456 (SC)**. It was also submitted that the appellant was under a bona fide impression that royalty fee paid by them is not related to import of the goods but pertained to post importation activities in nature of contract for service after importation and the appellant have discharged the service tax on that transaction. Therefore, it was contended that the demand is time barred and, therefore, the learned adjudicating authority has committed an error while confirming the said demand in the impugned order invoking the extended period.

4. Learned Authorised Representative on behalf of the Department reiterated the findings contained in the impugned order. After the conclusion of hearing, as per the direction of the

Bench, learned Authorised Representative made written submission dated 15.2.2019 where he is stated as under :

- (a) Royalty and franchise fee is includible in the assessable value of the imported goods under the provisions of Rule 10(c) and 10(e) of the Customs Valuation Rule and the plea of the appellant that the payment is related to the post importation activity is incorrect. The conditions of franchise agreement read with the side letter dated 19.1.2006 and 16.3.2010 are ploy meant for diverting income to avoid payment of Customs duty on royalty amount charged while importing the goods from their principal, M/s Body Shop, London.
- (b) It is submitted that the agreement and side letter dated 19.1.2006 specifically speaks of franchisor-supplier possible method for diverting income for its franchisee system by which royalty will replace margin and if the royalty was relevant for design of stores, expertise, supervision, guidance etc. and the same is linked to the market condition of the goods. This would not have been there. It is further submitted that if the royalty is for services as claimed by the appellant the penalty at higher rate could not have been linked to the projected sale amount. The franchisee/appellant/ importer is not permitted to sale any product other than the product of the franchisor 'Body Shop' which clearly reflects that there is a relation between the imported goods and royalty payment and thus this amount of royalty is required to be included in the assessable value,

while computing the assessable value Section 14 of Customs Act for import of the goods. Learned Authorized Representative placing reliance on the decision of **Matushita Television and Audio Ltd. – 2007 (211) ELT 200 (SC)**, wherein it is held that if royalty is relatable to imported goods and which is condition of sale is correctly includible in the assessable value, argued that the royalty amount is required to be included for payment of Customs duty in the case of appellant.

- (c) The learned Authorised Representative further relied upon the decision of **Indo Overseas Films – 2007 (210) ELT 348 (Mad.)**, wherein it is held that not only cost of goods paid but also royalty and rights conferred in the distribution agreement was paid as the condition of the sale and, therefore, royalty is payable.
- (d) It is further contended by the learned Authorised Representative that in terms of the decision of **Associated Cement Companies Ltd. – 2001 (128) ELT 21 (SC)**, **Living Media India Ltd. – 2011 (271) ELT 3 (SC)** and **Star Entertainment Pvt. Ltd. – 2015 (327) ELT 238 (Tri.-Mumbai)**, **Agro Tech Foods Pvt. Ltd. – 2015 (330) ELT 448 (Tri.-Mum.)** and **Avaya Global Connect Ltd. – 2016 (337) ELT 402 (Tri.-Del.)**, wherein it is held that where royalty payment which is a condition of sale and hence is includible in the assessable value under the Customs Act, 1962/Customs Valuation Rules.

- (e) Learned Authorised Representative submits that there is no bar in imposition of Customs duty when the service tax is paid on the same transaction placing reliance on the decision of the judgement of this Tribunal in the case of **Atul Kaushik – 2015 (330) ELT 417 (Tri.-Del.)**, wherein it is held that the license fee paid is includible in the assessable value of the goods in terms of Customs Act and Rules made thereunder and there is no provision warranting exclusion from the assessable value for the purpose of customs purpose on the ground that the service tax has become chargeable on license fee and different statute. This decision has been affirmed by Hon'ble Supreme Court **(2016 (342) ELT A40 (SC))**. Therefore, the decision of Hon'ble Tribunal in **Multimedia case** (supra) is per incurium as the Hon'ble High Court was not made aware of case of **Indo Overseas** (supra). Hon'ble Mumbai Tribunal which finds its mention in case of **Warners Bros – 2018 (359) ELT 546 (Tri.-Mumbai)** has discussed this.
- (f) Learned Authorised Representative also submits that there is no bar in raising demand and imposition of penalty in case of provisionally assessed Bill of Entry. The condition of the appellant and placing reliance in case of **Saharsh Distributors Pvt. Ltd.** (supra) is not correct on account of the fact that the adjudicating authority has ordered finalization of provisionally assessed Bills of Entry by invoking Section 18 of the Customs Act and not confirmed

the demand under Section 28. No penalty has been imposed in invoking Section 28 of the Customs Act as contended by the appellant. The Director and General Manager of the appellant had the complete knowledge about the non-inclusion of the royalty/franchise fee in the assessable value and they deliberately failed to disclose the same before the proper office while assessing the bill of entry and, therefore, the penalty imposed on them is fully justifiable.

5. Learned Advocate filed the rejoinder to the written submission of learned Departmental Authority on 5.3.2019. the rejoinder, inter alia states as follows:

(a) the royalty payment made under franchise agreement is not a condition of sale of imported goods, but related to post importation activities considering the local sale value of imported goods determining the royalty amount, which is merely a method/formula adopted by the parties to the agreement in order to arrive at the royalty amount. From this formula/calculation method, it cannot be inferred that the payment of royalty is related to the imported goods.

(b) Reliance was placed on Customs Valuation Commentary on the GATT Customs Valuation Code by Saul L. Sherman, which clarifies that royalty or 'license fee is not necessarily 'related to the imported goods', merely because its calculation is based on the value of the imported goods or on the proceeds from the further sale of the imported goods. The question depends, rather, on a

Careful examination of exactly what the royalty or license fee is being paid for.

(c) Further, as per Clause 6.3 of the franchise agreement read with the side letter dated 16.3.2010, it is clear that royalty is paid for provision of management, consultation, advice, service and training provided to the appellant / its personnel, in connection with the use of Body Shop 'System' and the 'Proprietary Marks' of M/s Body Shop.

(d) In response to the submissions, it is submitted that the projection range pertaining to the rate of payment of royalty is given only as a business practice so that the appellant achieves the quarterly target as provided by M/s Body Shop International PLC (hereinafter referred to as the "supplier"). It is submitted that the appellant is not disputing the fact that royalty payments are being made in relation to the local sales of the impugned goods. The submission of the appellant is that payment of royalty on such sales being in the nature of a post-importation activity, cannot be linked to the goods being imported. Further, as submitted above, method of calculation of royalty cannot be the basis for saying that such royalty payments are being made in relation to the imported goods.

(d) It is also submitted that the argument of the Id. DR that the imported goods and goods being sold are one and the same as there is no processing or manufacture being undertaken on any of the imported goods and they are sold as such, is legally not sustainable in light of the definition of 'imported goods' under

Section 2(25) of the Customs Act, 1962, as per which goods cease to be imported goods once they are cleared for home consumption. It is submitted that royalty is being paid by the appellant on the local sale of these goods after clearance thereof and not on the sale of the imported goods by the supplier to the importer. Therefore, such royalty payment cannot be said to be related to the imported goods. Payment of royalty is not a condition of sale for import of the impugned goods by the appellant.

(e) Further, the franchise agreement nowhere mentions that the appellant cannot import the impugned goods without payment on royalty, which has been held by the department is completely presumption and assumption.

(f) The judgment in the case of Matsushita Television (supra) relied upon by the DR is distinguishable because royalty was related to import price including the cost of imported components. This is not the issue in case at hand. Similarly the case of Indo Overseas Films (supra) the payment of royalty was held to be condition precedent for importation which is not the case in this import which is evident from clause 6.3 of the franchise agreement which stipulates that franchise fee/royalty is in relation to assistance and management service being provided by the supplier of the appellant.

(g) Regarding the case of Associated Cement Companies (supra), the same is also distinguishable in the facts and circumstances of the case as intellectual input was also incorporated in the imported goods at the time of their import which is not the situation in the

present case as the royalty is paid for assistance and expertise received for use of proprietary marks and system in order to run the business of retail sale in India, post clearance of the imported consignment. Similarly in *Avaya Global Connect Ltd.* (supra) is also sought to be distinguished on the ground that initial royalty was paid for import of components in making cards in India. In this import the royalty was also relatable to the cost of imported items which were used in the manufacture of card in India. There is a clear finding in this case that the royalty is paid for post importation service and hence the judgment is in support of appellant rather than the department.

(h) Regarding the service tax and customs duty is mutually exclusive, it is submitted that the nature of the present transaction i.e. royalty remittance is for the technical assistance and know-how under the franchise agreement which has been treated as a service by the Service Tax Department and the payment has been made on the basis of reverse charge mechanism under the provisions of Rule (2)(1)(d) of Service Tax Rules, 1994.

5.1 The learned Advocate has submitted that the extended period is not invocable in this case, under Section 28(4) of the Customs Act on the ground that the exactly similar show cause notice has been issued to the appellant on 12.3.2012. Further, the issue is regarding one of the interpretation of law and, therefore, there is no element of collusion, willful, mis-statement or suppression of fact and hence extended period cannot be invoked. Reliance placed by learned DR in the case of **Maldhari Sales Corporation** (supra) is not relevant in the facts and circumstances of the present case.

5.2 Penalty, which has been imposed under Section 112(2)(ii) is not also imposable on the appellant in case of the provisionally assessed bill of Entry placing reliance on the decision of **Indian Oil Corporation Ltd. Vs. Commissioner of Cus. & C. Ex., Cochin – 2004 (178) ELT 713 (T)**, which has been affirmed by Hon'ble Supreme Court in **2015 (321) ELT A50 (SC)**. Further, a Show Cause Notice under Section 28 of the Customs Act cannot be issued in case of provisionally assessed Bills of entry which has been done in this case placing reliance on the decision of **Commissioner of Customs, Mumbai Vs. Exotic Fashion – 2010 (262) ELT 651 (Tri.-Mumbai)**, wherein it is held that pending finalization of assessment, it would be premature for the Department to propose confiscation of the goods and imposition of penalty.

5.3 Further, penalties that have been imposed on the co-applicant is also not sustainable as there is no evidence of their being benefitted by the alleged evasion of the Customs duty by non-inclusion of royalty/franchise fee in the assessable value of the imported goods. The two co appellants were merely acting in their official capacity and hence penalty imposed on them under Section 112(a)(ii) of the Customs Act is not sustainable and is liable to be set aside.

6. We have heard the learned parties extensively and also perused the case records.

7. The issue before us is to decide as to whether the appellant No. 1 has committed error in terms of the Customs Act and Valuation Rules made there under, by not including royalty fee

while clearing the consignment at the time of import. It is the contention of the Department that the royalty fee/franchise fee, which is in terms of agreement and side letters, are only a ploy to deprive of legitimate customs duty in terms of Section 14 of the Customs Act read with Section 10 of the Customs Valuation rules. On the other hand, the appellant contended that franchise/royalty fee is not relatable to the import of the goods but is pertaining to events which can be termed as post importation activity. At this juncture, we feel it appropriate to extract the agreement dated 2006 along with side letter which is as under:

(i) "Clause 6.3 of the said agreement reads as under:

Unless the company otherwise agrees in writing, the Franchisee shall pay to the company, without demand by the last business day of each month, such royalty fee for the management, consultation, advice, service and training provided by the company in respect of the use of the System and the Proprietary Marks as the Company may from time to time prescribe (which at the time of signature of this Agreement is equivalent to 0% of the Gross turnover of the immediately preceding month or \$0 whichever is higher). The first payment of the said royalty is to be made by the last business day of the second month after the commencement date and the last payment thereof is to be made by the last business day of the month immediately following the month in which this Agreement is terminated or the term hereof expires."

I find that other than clause 6.3 of the agreement there also exists a letter dated 19.1.2006 which was addressed to Shri V.P. Sharma, Quest Retail Private Limited, Jaipur by Mr. Peter Saunders, Chief Executive Officer. The Body Shop International Plc. which was related to Franchisee Agreement confirming grant of right on an exclusive basis to the Franchisee binding them:

(i) that in addition to the fee of 100,000 (Pounds) set out, Franchisee agrees to pay a further franchise fee of 5,000 (Pounds) per store opening from the date of the opening of your second store. You agree to pay this fee on the opening date of each store which date is to be agreed in advance by the Company.

(iv) that the renewal fee contemplated shall be 25,000 (Pound) in lieu of the 50,000 (Pound) currently provided for,

(v) that Clause 6.3 specifically speaks of Company's possible future method of deriving income from its franchising system, by which it is intended that the royalty would replace the Company's margin.

(vi) that they will support by supplying all such documents and information to the Franchisee as are reasonably and

usually required for the importation of the merchandise into the Territory.

2) The clause 6.3 of the side letter dated 19.1.2006 is reproduced below:

(i) For the avoidance of any doubt, this Clause 6.3 represents the Company's possible future method of deriving income from its franchising system, by which it is intended that the royalty would replace the Company's margin.

(ii) The Company agrees to provide you with three (3) months notice of any proposed adjustment to the royalty payable pursuant to Clause 6.3 of the Agreement.

(ii) The company will, as a general principle endeavor to take into consideration local market conditions before requiring such adjustments, and to seek a royalty which, after taking into account all of the circumstances would not be unreasonable. The company undertakes to you that it is not the intention of the Company that you would be disadvantaged financially as a result of this change, that the calculation of the amount of such royalty would be fully discussed with you and that it would not apply to product in your possession of which you had already paid the Company's cost price plus margin.

3) Further, clause 6.3 of the side letter dated 16.3.2010 is reproduced below.

(i) The parties agree that clause 6.3 of the Agreement is amended as follows:

(ii) The Franchisee shall pay a royalty net of VAT on total annual retail sales less VAT including any sub-franchisee retail sales less VAT from 1st January to 31st December in each year (the "Total Sales") of 2% p.a., provided always that the total sales fall within the annual projection range ("Projection Range") as defined in the Business Plan (the 2010 Business plan being attached as Annexure C to this letter) and as provided separately at Annexure F to this letter.

(iii) Should the total sales fall below this projection range, the franchisee shall pay a royalty of 2.5% p.a. on total sales, and for the avoidance of any doubt, the only penalty for failing to achieve the projection range sales shall be payment of the royalty at the higher 2.5% p.a. rate: that is to say such failure shall not constitute a material breach of the Agreement.

(iv) Should the total sales be in excess of this projection range, the franchisee shall pay a royalty of 1% p.a. on incremental sales above the projection range.

(v) Payments of the royalty shall be made quarterly, no later than the last business day of the month following the month of each quarter subject to withholding tax as applicable from time to time. In the first three quarters of any given year, the franchisee shall pay the royalty at 2% p.a. of each quarter's sales ("Quarterly Sales"). In the final quarter of any given year, the franchisee shall pay 2% p.a. on the quarterly sales for that quarter and shall either:

Where the total sales have fallen below the projection range, pay in addition another 0.5% p.a. royalty on the total sales:

Where the total sales have exceeded the projection range, such excess to be notified to the company in the first calendar month of the following year, the franchisee shall be entitled to reclaim 1% p.a. of the royalty amount on any and all retail sales which have exceeded the projection range from the company, which the company shall repay to the franchisee not later than 30 days after the last day of the month in which the company receives notice of such excess, by way of a credit note save where the company receives notice in good faith, any dispute to be governed by the provisions of the Agreement. The credit note will reflect both the gross and net amount and the net amount will be carried forward to offset against the next payment due.

(vi) You acknowledge that you have agreed to waive the requirement for the company to give you three (3) months prior notice of this adjustment to the royalty payable pursuant to clause 6.3 of the agreement, as required by the first side letter.

(vii) Notwithstanding the above agreement to clause 6.3 the parties agree that the royalty payable from 1st January 2010 to 28th February 2010 shall apply only to those items within the 30% of inventory where franchisee has implemented lower retail prices for 2009. The royalty payments due as set out above shall apply to the total range of merchandise from 1st March 2010 or such other date as agreed mutually between both parties.

(viii) With regard to the withholding tax referred to in this paragraph, franchisee agrees that any tax withheld in this regard must be substantiated by providing the company with a copy of the challans evidencing payment of the tax into the bank (the "challans") and also with a copy of a completed Form 16A as provided by the Income Tax Act 1961, being a self-certification if the same payment (the "Form"). A challans and a form must be provided for the period Jan 1st to March 31st in each calendar year and both shall be delivered to the company within thirty (30) days of closure of the respective period. In the event of failure to provide either or both of the challans and the form, the amount of the withholding tax shall become immediately due and payable to the company."

8. Further, the relevant Section of the Customs Act and the Customs Valuation Rules, which are relevant one also reproduced as under :

"Section 14. Valuation of goods (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the

time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf: Provided further that the rules made in this behalf".

Rule 10.....

(c) royalties and license 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;

(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.

9. From the perusal of the Customs Act and the Valuation rules, it is evident that only if royalty payable is for pre-importation activity, as a condition of sale from the supplier to buyer then only it is to be added for the purpose of calculation of Customs duty in terms of Rule 10(1)(c) of the Customs Valuation Rules read with Section 14 of the Customs Act. A perusal of the agreement along with side letter indicate that the franchise/royalty fee is paid for provisions of management, consultation, advice service and training provided to the appellant in connection with use of Body shop products and the proprietary Marks of M/s Body shop. The condition of payment of the royalty, which is contingent upon the volume of sale in the domestic market after importation of the goods has no connection with the import of goods. Once the goods

have been cleared from the Customs area the same is not required to be treated as imported goods and all the activities of the management, consultation etc. is relatable to the goods which is ceased to be imported goods in terms of the Customs Act, 1962. We find that the learned Advocate, on behalf of the appellant has countered all the decisions relied upon by learned Authorised Representative in the facts and circumstances of the case which we also find that is appropriate and relevant to the case at hand. We find that in the case of **Ferro Alloy, Bridgestone India Pvt. Ltd.** and **Max Atotech Ltd.** (supra), the Hon'ble Supreme Court and Hon'ble Tribunal have held that if there is no nexus of royalty payment with that of the imported merchandise and which relate to the subsequent marketing thereof the same is not required to be included for the purpose of payment calculation of Customs duty on the imported goods, in terms of Customs Act and Valuation Rules.

10. We also find that while a large number of consignments which has been adjudicated upon in the impugned order, is provisionally assessed and the Commissioner has ordered the finalization thereof in terms of Section 18 of the Customs Act, but also imposed a penalty of equivalent amount under Section 28(4) of the Customs Act. This is clearly not permissible as per Section 18 of the Customs Act, on the ground that the relevant date for payment of duty has yet to arrive after finalization of the assessment by the proper officer in terms of the impugned order. Similarly, in case of demand pertaining to the Bills of Entry which has been finally assessed has not been re-determined by any

assessment and also not permissible without filing appeal against the assessment order as has been held in **Priya Blue** case.

11. In view of above, the impugned order is also not sustainable. Regarding the demand hit by limitation, we find considerable force in the contention made by the appellant. It is on record that earlier show cause notice has been issued to the appellant on the similar set of facts and circumstances and in respect of same agreement and side letters. The case was adjudicated upon and the same was settled by the order of Settlement Commission dated June 2014. This indicates the fact that both the department and the appellant were aware of the entire fact regarding non-inclusion of royalty/franchise fee in the assessable value for the purpose of payment of customs duty. When the facts are known to both the parties there cannot be any suppression of facts requiring invocation of extended period of limitation. In holding so, we place reliance on the decisions as under:

(1) Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut - 2005 (188) ELT 149 (SC);

(2) Continental Foundation JV Vs. CCE, Chandigarh - 2007 (216) ELT 177 (SC);

We find that the reliance placed on **Madura Sales Corporation** (supra) by DR is completely out of context and not applicable in this case. As the impugned order is not sustainable on merits as well as on limitation and there is no question of imposition of penalty on other appellants.

12. We also find that the appellants have discharged the service tax liability on the reverse charge mechanism on the same

transaction treating it to be service, therefore, the same cannot be treated as royalty for the importation of goods which is clearly relatable to the various services received by the appellant.

13. We also find that agreement and side letter are more of a service agreement and royalty is measured in terms of sales effected by the various stores, which are to be opened by the appellant. Not only that the amount of royalty is also measured in terms of value of sale by the appellant, but that is graded and dependent upon the volume of sale in the domestic market. The treatment of such type of royalty as condition of sale for the import of goods by the appellant is not explicit from the agreement. The agreement is more of the management of store, sales and other related activities. The issue regarding includibility of such royalty in assessable value for the purpose of payment of Customs duty has been decided by international ruling as well as appearing at para 5(a) of the order, which we do agree.

14. For all the above reasons, we set aside the impugned order and allow the appeals with consequential benefit, if any, as per law. The penalties on the other appellants are also set aside.

(Pronounced in open Court on 16.7.2019)

(Anil Choudhary)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

RM