

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH - COURT NO. 01

Customs Miscellaneous Application No. 85984 of 2022

(on behalf of Appellant)

in

Customs Appeal No. 85273 of 2014

(Arising out of Order-in-Appeal No. 989 (Gr. V A&B)/2013 (JNC)/IMP-760 dated passed by Commissioner of Customs (Appeals), Mumbai-III)

Tata Play Limited

.....Appellant

3rd Floor C-1, Wadiya International Centre
(Bombay Dyeing Building),
Pandurang Bhudhkar Marg, Worli,
Mumbai – 400 707.

VERSUS

**Commissioner of Customs
(Import) , Nhava Sheva,**

.....Respondent

JHCH Post Uran District Raigad
Nhava Sheva.

Appearance:

Shri Akhilesh Kangsia, Advocate a/w Ms. Apoorva Singh, Advocate for
the Appellant

Shri Ashwini Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR.M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85960/2023

Date of Hearing: 15.06.2023

Date of Decision: 15.06.2023

PER : S. K. MOHANTY

Applicant/Appellant has filed this miscellaneous application, praying for change of cause title in the appeal filed before the Tribunal. It has been stated that pursuant to the approval of learned NCLT, the name of the applicant-appellant company was changed from "Tata Sky Limited" to "Tata Play Limited" with effect from

19.01.2022. Prayer made by the applicant-appellant is considered and accordingly, Registry is directed to change the name of the applicant-appellant company from "**Tata Sky Limited**" to "**Tata Play Limited**" in the cause title annexed to the appeal memorandum. With the consent of both sides, the appeal is taken up for hearing and disposal today.

2. Briefly stated, the facts of the case are that the appellants are engaged *inter alia*, in the business of providing Direct-to-Home (DTH) broadcasting services to their subscribers all across the country. For the said purpose, the appellants got license dated 24.03.2006 from the Government of India, Ministry of Information & Broadcasting Services, in terms of Section 4 of the Indian Telegraph Act, 1985 and the Indian Wireless Telegraph Act, 1933. For providing the aforesaid broadcasting service, the appellant is importing Set-top Boxes (STBs) into India from various countries. Since the commencement of their business in 2006 till 31.03.2011, the appellants were providing the imported STBs to their subscribers by way of sale. Hence, on import of such STBs into India, the appellants were paying Additional Duty of Customs (CVD) on Retail Sale Price (RSP) basis in terms of the *proviso* to Section 3(2) of the Customs Tariff Act, 1975. However, for the period post 01.04.2011, the appellants changed their method of providing the DTH services to their subscribers. The earlier method of selling the imported STBs was discontinued and the subscribers were provided with the imported STBs on 'entrustment basis' in terms of Tata Sky subscriber's agreement. Under this model of contract, the STBs were offered to the subscribers on entrustment basis and the ownership of the imported STBs was vested with the appellants themselves.

2.1 During the month of February, 2013 the appellants had filed four nos. of Bills of Entry (B/Es) before the customs authorities at the port of import. The said B/Es were self-assessed with regard to charge of CVD on the transaction value, owing to the reason that the imported STBs were not meant for sale to the subscribers, but the same were to be offered to the subscribers on entrustment basis.

2.2. However, the proper officer at the port of import did not accept the self-assessment made by the appellants and passed the Order-in-Original dated 06.03.2013, by holding that the said B/Es should be assessed to CVD on RSP basis and not on transaction value as self-assessed by the appellants. On appeal against the said O-in-O dated 06.03.2013, the appellants have preferred appeal before the learned Commissioner of Customs (Appeals), Mumbai-II, which was disposed of vide Order-in-Appeal No. 989 (Gr.V A&B)/2013(JNCH)/IMP-760 dated 22.10.2013 (for short, referred to as "the impugned order"). Vide the impugned order, the learned Commissioner (Appeals) has endorsed the views expressed by the original authority and rejected the appeal filed by the appellants.

2.3. Feeling aggrieved with the impugned order, the appellants have preferred this appeal before the Tribunal.

3. Learned Advocate appearing for the appellants submitted that the imported STBs were not sold, but only provided to the subscribers on entrustment basis and to substantiate such stand, has relied upon various clauses contained in the subscription contract entered into between the appellants and their subscribers. Thus, he contended that in absence of any sale/purchase agreement between both the parties to the agreement, the CVD amount has to be calculated on the basis of transaction value and not on the basis of RSP. Learned Advocate further submitted that the issue arising out of the present dispute is no more *res integra* in view of the Final Nos. A-2349-2350/2015-WZB(CB) dated 31.07.2015, passed by the Mumbai Bench of the Tribunal in the case of *M/s Bharti Telemedia Ltd. & Ors. Vs. Commissioner of Customs (Import), Nhava Sheva, reported in 2016 (331) E.L.T. 138 (Tri.-Mumbai)* and the Final order No. 41185/2019 dated 28.10.2019 passed by the Chennai Bench of the Tribunal in the case of the appellants themselves.

4. Per contra, the learned Authorised Representative appearing for the Revenue reiterated the findings recorded in the impugned order and further submitted that since the RSP is statutorily

required to be affixed on the package of the imported goods, the appellants have correctly done so and as such, the CVD amount has to be computed on the basis of RSP. Thus, he stated that the impugned order passed by the learned Commissioner (Appeals) is in conformity with the statutory provisions. To support such stand, he has relied upon the judgement of the Hon'ble Supreme Court in the case of *M/s Jayanti Food processing (P) Ltd. Vs. Commissioner of C. Ex. Rajasthan reported in 2007 (215) E.L.T. 327 (S.C.)*.

5. Heard both sides and examined the case records, including the written submissions filed by both sides.

6. The issue involved in this appeal for consideration by the Tribunal is, as to whether, the value of imported STBs should be determined for the purpose of levy of CVD in terms of Section 3(2) of the Customs Tariff Act, 1975 read with Section 14 of the Customs Act, 1962 as claimed by the appellants; or, on the basis of Retail Sale Price as per the first *proviso* to Section 3(2) of the Act of 1975 (*supra*) read with Section 4A of the Central Excise Act, 1944, as claimed by the Revenue.

7. Additional Duty of Customs (CVD) is levied on the imported goods brought into India to counter balance the taxes and duties levied on the similar goods manufactured in the country. Section 3 of the Customs Tariff Act, 1975 has outlined the provisions for levy of such duty on importation of the goods from outside the country. Sub-section (2) of Section 3 *ibid*, relevant for consideration of the present dispute is extracted herein below:

"(2) For the purpose of calculating under sub-sections (1) and (3), the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of --

(i) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed

under sub-section (2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include--

(a) the duty referred to in sub-sections (1), (3), (5);

(b) the safeguard duty referred to in sections 8B and 8C;

(c) the countervailing duty referred to in section 9; and

(d) the anti-dumping duty referred to in section 9A:

PROVIDED that in case of an article imported into India,--

(a) in relation to which it is required, under the provisions of the Legal Metrology Act, 2009 (1 of 2000) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such article; and

(b) where the like article produced or manufactured in India, or in case where such like article is not so produced or manufactured, then, the class or description of articles to which the imported article belongs, is--

(i) the goods specified by notification in the Official Gazette under sub-section (1) of section 4A of the Central Excise Act, 1944, the value of the imported article shall be deemed to be the retail sale price declared on the imported article less such amount of abatement, if any, from such retail sale price as the Central Government may, by notification in the Official Gazette, allow in respect of such like article under sub-section (2) of section 4A of that Act; or

(ii) the goods specified by notification in the official gazette under section 3 read with clause (1) of Explanation III of the Schedule to the medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1995), the value of the imported article shall be deemed to be the retail sale price declared on the imported article less such amount of abatement,, if any, from such retail sale price as the Central Government may, by notification in the Official Gazette, allow in respect of such like article clause (2) of the said Explanation.

Explanation: Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section.

PROVIDED FURTHER that in the case of an article imported into India, where the Central Government has fixed a tariff value for the like article produced or manufactured in India under sub-section (2) of section 3 of

the Central Excise Act, 1944, the value of the imported article shall be deemed to be such tariff value.

Explanation--Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section."

8. On perusal of the aforementioned statutory provisions, it is clear that CVD has to be calculated or assessed, either in terms of transaction value [Section 3(2)] 'or' on RSP basis [*proviso* to Section 3(2)]. In other words, as per the statutory provisions, all the imported goods would be assessed to CVD on transaction value determined under Section 14 *ibid*, except in cases, where the following two conditions are satisfied, in which case, the imported goods would be assessed to CVD on RSP basis:

(i) firstly, there must be a requirement under the provisions of the Legal Metrology Act, 2009 (LM Act) or the Rules made thereunder or under any law for the time being in force to declare the RSP on the imported goods; and

(ii) secondly, such goods should be notified under a Notification issued under Section 4A of the Central Excise Act, 1944.

9. On careful examination of the above quoted statutory provisions, it transpires that both the aforementioned conditions have to be satisfied for assessing imported goods to CVD on RSP basis. In deriving powers under Section 52 of LM Act, the Central Government had framed the Legal Metrology (Packaged Commodity) Rules, 2011 ("PC Rules", for short). Rule 6 of the PC Rules provides a list of declarations to be made on packages intended for retail sale. Rule 6(1)(e) *ibid*, provides for declaration of RSP on the packages, mentioning therein '*the retail sale price of the package*'. It transpires on reading of the said rule that the RSP has to be declared on packages which are intended for resale. The term 'retail sale price' has been defined in Rule 2(m) to mean maximum price at which a commodity in packaged form may be sold to the consumer and the price shall be printed on the package in the manner provided therein. The said rule is extracted herein below:

'Maximum or Max. retail price Rs/₹..... inclusive of all taxes or in the form MRP Rs/₹..... incl., of all taxes after taking into account the fraction of less than fifty paise to be rounded off to the proceeding rupees and fraction of above 50 paise and up to 95 paise to the rounded off to fifty paise;'

10. On a conjoint reading of Rule 6(1)(e) *ibid* and Rule 2(m) *ibid*, it transpires that affixation of RSP under the former rule would arise only in cases/situations, where the packages are to be sold to the ultimate consumers. In other words, till the time there is no element of sale involved in transferring the title of the goods from the seller to the buyer, the requirement to affix RSP would not arise. For ascertaining the facts, whether the goods in question were sold by the appellants to their subscribers or provided to them on entrustment basis, we have examined various clauses in the agreement entered into between the appellants and subscribers. Further, we have also perused the certificate dated 14.01.2014 issued by M/s M.L. Jethva & Co., Chartered Accounts, certifying that the appellants company had not sold the imported STBs during the disputed period and also have not raised any invoices towards sale of STBs on payment of VAT from the subscribers. Further, it has also been certified therein that the appellants company have raised invoices on their distributors, towards activation and subscription charges, and is charging service tax on the same. Furthermore, on perusal of the audited Balance Sheet for the relevant period, we also find that the appellants have claimed depreciation on the STBs, meaning thereby that those STBs are their fixed assets. Since such declarations made in the Balance Sheet is a requirement under the company law statute and being approved by the statutory auditors, the same cannot be questioned by the Customs department in saying that such disputed goods were sold by the appellants to their subscribers in order to be categorized under the LM Act and PC Rules for assessment of the disputed goods under the RSP basis.

11. To sum up, we conclude that there is no element of sale involved in as much as the ownership of the STBs were never passed on by the appellants to the subscribers. Thus, in absence of any element of sale i.e., transfer of property in goods from one person to another, the question of affixation of RSP in the packages would not arise and if the importer choose to do so, the same cannot be questioned, in the absence of any specific statutory provisions in vogue, restricting such practice. An identical issue came up for consideration in the case of *Jayanti Food Processing (P) Ltd. (supra)* and upon analysis of the statutory provisions, the Hon'ble Supreme Court have held as under:

'29. It was then suggested that the free gift by Pepsi to its customers would amount to distribution and would, therefore, be amounting to "retail sale" and the package of KITKAT would be "retail package". However, what is material is the definition of "retail sale price." The requirement of Rule 6(1)(f) is specific. It requires the retail sale price of the package be printed or displayed on the package. If there is no sale involved of the package, there would be no question of Rule 6(1)(f) being attracted. There is a clear indication in the definition of "retail sale price" as provided in Rule 2(r) which clearly explains that the MRP means the maximum price at which the commodity in packaged form "may be sold" to the ultimate consumer. Thus, the definition of "sale" in Section 2(v) of the SWM Act becomes relevant. Therefore, unless there is an element of sale, as contemplated in Section 2(v). Rule 6(1)(f) will not be attracted and thus such package would not be governed under the provisions of SWM (PC) Rules which would clearly take such package out of the restricted arena of Section 4A(1) of the Act and would put it in the broader arena of Section 4 of the Act.'

12. We find that the issue with regard to determination of value for levy of CVD on imported STBs is no more open for any debate, in view of the decision of the Co-ordinate Bench in the case of *M/s Bharti Telemedia & Ors. (supra)*, wherein it has been held that there

is no retail sale in use of the STBs by ultimate consumers and therefore, Section 4A *ibid*, will not apply and valuation has to be done as per Section 4 *ibid*. It is also observed that CBEC has accepted the said order passed by the Tribunal and vide Circular No.1020/8/2016-CX dated 11.03.2016 has issued the instructions to the field formations for following the assessment procedures of CVD on imported STBs on the basis of the decision rendered by the Tribunal (*supra*). We also find that the Revenue's appeal (Customs Appeal No.34 of 2016) filed against the decision of the Tribunal in the case of *M/s Bharti Telemedia & Ors. (supra)*, was disposed of by the Hon'ble Bombay High Court, holding that since the circular dated 11.03.2016 (*supra*) is clear and the order of the Tribunal has been accepted by the Board, nothing survives in the appeal filed by the Revenue and accordingly, the same was disposed of by the Hon'ble Court. We also find that the Co-ordinate Bench of the Tribunal at Chennai in the case of the appellants themselves, vide Final Order No. 41185/2019 dated 28.10.2019, has set aside the CVD demand, holding as under:

'5.1. On perusal of the facts of the case, it is seen that in the agreement entered by the appellant with the subscribers, it is clearly stated that the hardware (Set Top Box) will always remain the property of M/s. Tata Sky Ltd. and the ownership cannot be transferred. It is also stated that such hardware cannot be moved from the address without prior written consent of the appellant. This would go to show that there is indeed no sale of the Set Top Boxes to the subscribers. Further, it has been submitted by the Ld. Counsel for the appellant that the value of the Set Top Boxes is shown as capital assets in their Financial Statements.

5.2 Ld. Counsel for the appellant has also submitted that they only collect Activation Service and such other service charges and the price of the Set Top Box is not collected from the subscribers. The decision in M/s. Bharti Telemedia Ltd. (supra) categorically holds that the levy of CVD cannot sustain when there is no sale of Set Top Boxes. The Board

Circular (supra) has accepted the said decision and clarified that in identical circumstances, CVD cannot be demanded.'

13. In view of the fact that CVD has to be assessed in general on the transaction value provided under Section 4 *ibid*, which admittedly has been done by the appellants, we are not in agreement with the submissions made by the learned AR that the valuation has to be done on RSP basis in the present case. Thus, we are of the considered view that the judgement in the case of *Jayanti Food Processing (P) Ltd. (supra)* would not be of any help to the Revenue for deciding the appeal differently. Rather, the ratio of the said judgement supports the case of the appellants inasmuch as element of sale is only the condition precedent for determination of the issue, whether the valuation of imported goods for CVD purpose has to be done on transaction value basis or on RSP basis. This fact is evident from the paragraph 29 in such judgement quoted above.

14. In view of the foregoing discussions and analysis, we do not find any merits in the impugned order passed by the learned Commissioner (Appeals), in so far as he had endorsed the views of the original authority that the subject assessments should be done on RSP basis. Therefore, the impugned order is set-aside and the appeal is allowed in favour of the appellants.

(Operative part of the order pronounced in the open court)

(S. K. Mohanty)
Member(Judicial)

(M.M.Parthiban)
Member (Technical)