CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 87587 of 2013

(Arising out of Order-in-Appeal No. 239/MCH/DC/SVB/2013 dated 25.03.2013 passed by Commissioner of Customs (Appeals), Mumbai-I.)

Arjo Huntleigh Healthcare India Private Limited **.....Appellants**
No.8, Shah Industrial Estate, Off Veera Desai Road,
Andheri (West)
Mumbai – 400 053.

VERSUS

Commissioner of Customs (Import) **.....Respondent**
New Custom House, Ballard Estate,
Mumbai–400 001.

Appearance:

Shri D.B. Shroff, Advocate for the Appellant
Shri Manoj 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/87468/2023

Date of Hearing: 10.07.2023
Date of Decision: 10.07.2023

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Arjo Huntleigh India Private Limited (Formerly known as Huntleigh Healthcare India Private Limited), Mumbai (herein after, referred to as 'the appellants'), assailing Order-in-Appeal No. 239/MCH/DC/SVB/2013 dated 25.03.2013 (herein after, referred to as 'the impugned order') passed by the Commissioner of Customs (Appeals), New Custom House, Mumbai-I, Ballard Estate, Mumbai.

2.1 Briefly stated, the facts of the case are that the appellants herein, as a wholly owned subsidiary of M/s Huntleigh Technology PLC of UK, *inter alia*, were engaged in import of medical equipment viz., (i) Deep Vein Thrombosis (DVT) systems, (ii) Pressure Area Care Systems (PACS) for patients who suffer from bed sore, (iii) medical beds and (iv) patient lifters and diagnostic equipment, for sale and service or its hire, in the domestic market in India.

Further, the appellants also acted as indenting agents for purchase of medical and diagnostic equipment by third parties from their group company. In January, 2007, Getinge group acquired Huntleigh Technology PLC, through its 'Extended Care division' named Ajro International, and thus the appellants had become a wholly-owned subsidiary company of Getinge AB group under the name of the merged entity viz., Arjo Huntleigh International Limited operating in more than nine countries. The appellants have been importing these items from their group companies since 2002.

2.2 Since the import transactions made by the appellants were from their group companies, the appellants-importer had registered under Special Valuation Branch (SVB) of the Customs House, Mumbai and the Bills of Entry (B/Es) were assessed provisionally. In the initial stage of imports, after examining the important transactions made by the appellants, the Deputy Commissioner of Customs, GATT Valuation Cell vide Order-in-Original No. 719/DC/SVB/BGK/05/06 dated 14.10.2005 had passed a speaking order accepting the invoice price under Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (herein after, for short, referred to as "Customs Valuation Rules or CVR", 'in abbreviated form') subject to the usual checks, scrutiny and verification by Assessing Groups. It is also stated in the original order that the aforesaid decision was subject to occasional/final review after a period of three years. Subsequently, during the periodical review by an Order-in-Review No. 78/ DC/SVB/KRC/2009-10 dated 01.05.2009 was passed concluding that the appellants-importer and the supplier Huntleigh Healthcare UK and their associate companies were related person in terms of Rule 2 (2) of the CVR. Further, in the said order dated 01.05.2009, the declared invoice value was accepted. The aforesaid orders were not objected to by the jurisdictional administrative Commissioner of Customs in review of the above orders and therefore no appeal had been filed and these orders were considered as accepted under Section 129D(2) of the Customs Act, 1962. Further, in one another review conducted for the subsequent period vide an Order-in-Review No. 496/DC/SVB/AK/2012-13 dated 01.08.2012, the Deputy Commissioner of Customs, GATT Valuation Cell had passed an order in acceptance of the declared invoice prices after comparison of prices adopted for 3rd party imports, after according the reasons for its acceptance. The jurisdictional administrative Commissioner of Customs in review of the aforesaid order dated 01.08.2012, had authorised the proper officer for filing an appeal and

accordingly, the Department had filed an appeal under Section 129(D)(4) ibid before the Commissioner of Customs (Appeals). During the personal hearing opportunity given to both the parties the appellants had represented for upholding the orders passed in accepting the invoice prices declared by them; whereas none appeared from the Department's side. Learned Commissioner of Customs (Appeals) vide impugned order dated 25.03.2013 allowed the appeal filed by the Department by allowing loading of values and by setting aside the order passed by original authority dated 01.08.2012. Feeling aggrieved by the impugned order passed by the Commissioner of Customs (Appeals), the appellants have filed this appeal before the Tribunal.

3.1 Learned counsel for the appellant submits that the transaction value is not influenced by the relationship between the seller and the appellants-importer in the present case. In support of the same, he submitted the following grounds:

(i) Invoice price is on the basis of 'transfer price' fixed by the Group, and there was no Price list and there were no discounts or commission, on sale or purchase of goods offered to the appellants.

(ii) the department in comparison of import prices with the price charged to unrelated third party, had only relied upon for single item i.e., medical beds, whereas the imports predominantly consisted of other items namely Deep Vein Thrombosis (DVT) systems, Pressure Area Care Systems (PACS) for patients who suffer from bed sore, and patient lifters and diagnostic equipment, which account for 90% of their total imports. Thus, no systematic study of imports was made to claim the difference in price considered for loading by the department.

(iii) appellants were required to provide certain post sales activity such as transportation from the place of importation to the place of delivery, installation and commissioning of equipment, maintenance and warranty services etc., on behalf of foreign vendor. These services are included in the price quoted for import by third party directly through the appellants. Thus, in comparison to the price of imports supplied to the appellants-importer, where the appellants subsequent to import incur additional expenses for installation, commissioning, maintenance, servicing etc., on their own, the price charged to third party imports are higher on this account. They pleaded that this does not in any way influenced the transaction value.

(iv) the differential higher price payable by independent unrelated buyer are towards the support services rendered in after sales warranty service, maintenance by the appellants as a group company of supplier. Thus, it is not in the nature of commission payable as a condition of sale.

(v) the impugned order simply mentions the grounds of appeal and in confirmation of loading of value has gone by the same for rejecting the value declared under Rule 3(3)(a) of CVR, 2007 without laying down the principles as to how the valuation has to be arrived at in terms of CVR. The appellants claim that transaction value cannot be rejected as there is no allegation or proof of any flow back. Thus, they pleaded that as a result no additions were found to be warranted and even the impugned order does not propose to give any specific addition to be made to the import price.

On the above basis, they submitted that the impugned order is liable to set aside.

3.2 In support of their stand, learned Advocate had relied upon following decisions of the Tribunal and judgements of Hon'ble Supreme Court, in the respective cases mentioned below:

(i) *Ebro Armaturen India Pvt. Ltd. Vs. Commissioner of C. Ex., Bangalore-I* – 2021 (375) E.L.T. 259 (Tri.- Bang.)

(ii) *Richemont India Pvt. Ltd. Vs. Commissioner of Customs* – 2016 (343) E.L.T. 209 (Tri.-Del.)

(iii) *Komet Precision Tolls India Pvt. Ltd. Vs. Commissioner of Customs (A), Bangalore* – 2009 (245) E.L.T. 737 (Tri.- Bang.)

(iv) *Stahl India Pvt. Ltd. Vs. Commissioner of Customs* – 2005 (184) E.L.T. 408 (Tri. - Chen.)

(v) *Future Techno Designs (P) Ltd. Vs. Commissioner of Customs, Chennai* – 2006 (202) E.L.T. 443 (Tri. - Chen.) affirmed by Hon'ble Supreme Court in 2008 (225) E.L.T.A. 13 (S.C.)

(vi) *Commissioner of Central Excise, New Delhi Vs. Prodelin India Pvt. Ltd.* – 2006 (202) E.L.T. 13 (S.C.)

(v) *Commissioner of Customs Vs. Hewlett Packard Ltd.* – 2016 (342) E.L.T. 438 (Tri. - Chen.)

4. Learned Authorized Representative for the Department reiterates the findings of the learned Commissioner of Customs (Appeal) in the impugned order. Further, he also relies the following cases law in support of the department's case.

(i) *Varian India Pvt. Ltd. Vs. Commissioner of Customs (Import), Mumbai* – 2016 (342) E.L.T. 438 (Tri. – Bom.)

(ii) *Commissioner of Central Excise, Pune Vs. Kirloskar Brothers Ltd.,* - 2000 (115) E.L.T. 386 (Tri. – Bom.)

5. We have heard both sides and perused the case records and additional paper books submitted in this case.

6.1 The crux of the issue dealt in the impugned order is that the value of imports declared by the appellants was not acceptable to the department, as the import of identical goods to third party transactions in two cases were available and these were found higher than the prices charged for appellants -importer by 17.43% and 22.07%. Further, scrutiny of the invoices by Commissioner (Appeals) indicated that the discount is not shown in the invoice and unless and until the nature of discount viz. trade discount or quantity discount is clearly mentioned in the invoice, the same cannot be allowed; the discount is discriminatory in nature since it is available to related buyer only, therefore, the same should have been added to the assessable value. Thus, learned Commissioner (Appeals) came to conclusion that the supplier abroad did not treat the related and unrelated importer equally and to this extent the pricing policy was affected by the relationship. Therefore, she concluded that the prices are required to be loaded for 17% to 22% on the declared invoice price. By relying on the CBIC Circular No. 38/2007-Customs dated 09.10.2007, the learned Commissioner (Appeals) stated that the commission, management fees payable by appellants are required to be included in assessable value. The relevant paragraphs in the impugned order providing these findings are extracted and given below:

> *"4. I have carefully gone through all the submissions made by both the sides. The issue involved in this case is whether the impugned order made by accepting the declared value is proper and correct or not. It is observed that the suppliers are supplying identical goods to third party importers in India at a higher rate. As an example it is shown the product "Enterprise 8000" is being sold to the related Importer at the rate of GBP 1234.7, whereas the same product is being sold lo unrelated third party importers in India at the rate of GBP 1450 i.e. at a higher rate by 17.43%. Similarly, the product "Enterprise 3000" is being sold to related Importer at the rate of GBP 891.28, whereas the same product is being sold to unrelated third party importers at the rate of GBP 1088 i.e. at a higher rate by 22.07%. This indicates that the relationship between the related supplier and the Importer has affected the pricing policy of the supplier. A scrutiny of the invoices submitted by the Importer indicated that the discount is not shown in the invoice and unless and until the nature of discount viz. trade discount or quantity discount clearly mentioned in the invoice, the same cannot be allowed. ……..*
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> *5. From the aforementioned conditions, it is construed that the invoice price of the goods is influenced by the relation between importer and supplier. ….. As per Rule 12(1) (iii) (C) of the CVR, 2007, the sale involving special discounts limited to exclusive agents shall be rejected. Therefore, it is apparent that the supplier did not treat the related and unrelated importers equally. Hence, the pricing policy was affected by the relationship. In view of the above discussions, I find that the impugned order was made without considering crucial points and transactions taken place between the Importer and the related supplier.*

6. ……. The justification for above mentioned difference adduced by the Importer is that the Indian company is entrusted with servicing and installation of these imports not only during warrant period but also for the extended warranty period. The Importer further contends that the Supplier Company is giving the Indian importer a commission as well. Therefore, the comparison has to be always between the transaction values of the goods imported by the Importer and the unrelated Indian importers in terms of the provisions under Section 14 of the Customs Act, 1962 read with Rule 3 of CVR, 2007. Thus, the transaction value of related Indian Importer should have been loaded in terms of the Valuation Rules, 2007. Therefore, the adjudicating authority should have loaded 17% to 22% on the declared invoice value under Rule 4 of the CVR, 2007.

7. Further, it is noticed that the impugned order did not examine the cost of central information technology support received by the Importer from the related supplier and failed to analyse the same as per Rule 10(I) (c) of CVR, 2007. The justification given by the Importer that there are imports from these two companies which the payments are going is not valid as these two companies are related group companies, and thus are related companies and as, such there is a Probability of affecting the pricing policy of the related suppliers…"

6.2 On the above basis, the impugned order allowed additions sought by the department to be included in the assessable value of imported goods in terms of CVR, 2007. The above impugned order was accepted in review by the Committee of Commissioners on 09.04.2013 and consequently imports consignments of the appellants-importer were assessed on provisional basis with 1% Revenue Deposit to be made till finalization of the case.

6.3 On perusal of the case records, we find that the proper officer of Customs i.e., the Deputy Commissioner of Customs, GATT Valuation Cell/ SVB had initially made assessment of import transactions of the appellants under provisional assessment owing to the reason that appellants-importer and the overseas supplier are related persons. After perusal of the documents and information submitted by the appellants, the said Deputy Commissioner had passed an Order-in-Original No. 719/DC/SVB/BGK/05/06 dated 14.10.2005 by accepting the invoice price under Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The subsequent import transactions of the appellants-importer were also subject to scrutiny by Deputy Commissioner of Customs, GATT Valuation Cell and further orders were passed for finalizing the provisional assessments by Orders dated 01.05.2009 and 01.08.2012. However, the last order dated 01.08.2012 was reviewed by the Administrative Commissioner of Customs which resulted in an appeal that was filed by the Department before the

Commissioner of Customs (Appeals) leading to the issue of the impugned order.

6.4 The issues taken up by the Administrative Commissioner of Customs in review of the original order accepting the transaction value, was on the following grounds:

"1. The Annex-I to point 23 of the questionnaire submitted by importer vide their covering letter dated 10.07.2012 gives the details of imports by unrelated parties and their comparison with imports vide related importer. From the statement it is clear that the unit prices at which the goods are imported by unrelated third-party importers are much higher than the unit prices of identical goods by the related importer as illustrated below:

Product	Imports by related importer	Imports by Unrelated later parties	% Difference
Enterprise 8000	GBP 1234.70 (CIF Nhava Sheva)	GBP 1450 (CIF Delhi)	17.43
Enterprise 3000	GBP 891.28 (CIF Nhava Sheva)	GBP 1088 (CIF Nhava Sheva)	22.07

2. The difference was justified by the Adjudicating Authority in page 12 of Order-in-Review as towards providing post importation services such as installation service in warranty to their customers. If this is true, then the transaction value of related importer shall be more than that of the unrelated importer.

3. The justification for difference given by the importer file their written submission dated 18.07.2012 is that the Indian company is entrusted with servicing and installation of these imports not only during the warranty period but also for the extended warranty period. They further stated that Supplier Company are giving the Indian importer a commission. If this is true, then the comparison has to be always between transaction value of goods imported such under Section 14 of the Customs Act read with Rule 3 of CVR,'07. Thus the transaction value of related Indian importer should have been higher.

4. The Adjudicating Authority in Page 12 of the Order-in-Review has further stated that the importer M/s Arjo Huntleigh Healthcare India is importing bulk and they have to incur expenditure in storage and trading. This Rule 3(3)(b) of CVR,'07 read with the general note given in the interpretative notes (Rule 13) states very clearly that the comparison has to be done w.r.t. Quality factors and commercial factors. However, no such study has been done by original adjudicating authority.

5. The Adjudicating Authority in Page 12 has further stated that such types of discounts are allowed under CVR and normal trade practices. It may be noted that none of the invoices of the related importer show it as a discount. The lesson transaction value for the related importer is not a discount.

6. The Adjudicating Authority has erred in accepting the transaction value. In fact, the declarant transaction value of the related importer should have been enhanced by 17% - 22% under Rule 4 of CVR '07 as per the prices of identical goods.

7. The details of management fee being paid by the importer to M/s Getinge AB and M/s Arjo International AB Sweden (AQSE) is given in the importer's reply to point 26 of the questionnaire. In the discussion and findings portion of the order from page 10 to 12 there is no mention of how this management fee cannot be considered for addition to transaction value under Rule 10 of CVR, '07. The importer vide their written submissions made on 18.07.2012 has stated that these payments are share of Indian company for the cost of Central Information Technology support group. The Original Adjudicating Authority has failed to analysis as per Rule 10(1)(c) of CVR'07 to verify whether these payments (a) are related to imported goods (b) a condition of sale of imported goods. The justification given by the importer that there are no exports from these two companies to which the payment of going is not valid as these two companies are group companies and thus they are related companies for the importer."

7. On conjoint reading of the grounds appealed against the original orders and the findings and conclusion given by the learned Commissioner of Customs (Appeals) in the impugned order, it transpires that the loading of declared prices by 17% to 22% were ordered under Rule 4 of the CVR, 2007 on the basis of the two transactions referred in the case of import of 'Enterprise 8000/3000' hospital/medical beds. From the records of the case, it is clear that the appellants have imported a number of medical equipment including Deep Vein Thrombosis (DVT) systems, Pressure Area Care Systems (PACS) for patients who suffer from bed sore, patient lifters and diagnostic equipment besides hospital/medical beds. Further, the appellants by submitting the financial records, profit and loss account, Balance sheets, audited report pertaining to balance sheets had claimed that 90% of their imports are covered by PAC systems and Intermittent Pneumatic Compression (IPC) systems and the majority of the imports are not of hospital beds. Further, these PAC and IPC systems which are for use of patients who suffer from bed sore etc. are supplied on rental basis to hospitals and there were no other direct suppliers to any other independent importers. These aspects have not at all been examined by the learned Commissioner (Appeals) and by simply relying on two transactions of hospital beds indicating 17%-22% higher prices for independent buyers, have decided to load the declared invoice price by such 17-22% for arriving at the assessable value under Rule 4 of CVR. In order to examine the validity of the above order in terms of legal provisions under the Customs Statute, the relevant provisions of Section 14 of the Customs Act, 1962 and Rules of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007-CVR are extracted below:

"Valuation of goods.

14. *(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 may provide for,—*

(i) the circumstances in which the buyer and the seller shall be deemed to be related;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section;

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Determination of the method of valuation.

3. (1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10;

(2) Value of imported goods under sub-rule (1) shall be accepted:

Provided that -

(*a*) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -

(*i*) are imposed or required by law or by the public authorities in India; or

(*ii*) limit the geographical area in which the goods may be resold; or

(*iii*) do not substantially affect the value of the goods;

(*b*) the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued;

(*c*) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules; and

(*d*) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.

(3)(*a*) Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.

(*b*) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time.

(*i*) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;

(*ii*) the deductive value for identical goods or similar goods;

(*iii*) the computed value for identical goods or similar goods:

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of rule 10 and cost incurred by the seller in sales in which he and the buyer are not related;

(*c*) substitute values shall not be established under the provisions of clause (b) of this sub-rule.

(4) If the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through rule 4 to 9.

Transaction value of identical goods.

4. (1)(*a*)Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued :

Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

(*b*) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods.

(*c*) Where no sale referred to in clause (b) of sub-rule (1), is found, the transaction value of identical goods sold at a different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustment leads to an increase or decrease in the value.

(2) Where the costs and charges referred to in sub-rule (2) of rule 10 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.

(3) In applying this rule, if more than one transaction value of identical goods is found, the lowest such value shall be used to determine the value of imported goods.

Cost and services.

10. (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, artwork, 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.

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Rejection of declared value.

12. (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1)…..”

8.1 From plain reading of the above legal provisions, it transpires that in terms of Rule 3 ibid the value of the importer goods shall be the transaction value subject to adjustments in terms of Rule 10 of CVR. Thus, firstly the proper officer of customs had to come to a conclusion that the transaction value of imported goods cannot be determined under the provisions of sub-rule (1) of Rule 3 of CVR. In the present case, it is not the case of non-furnishing of information sought for, which had continued the doubt about the truth or accuracy of the value declared by the appellants, but on account of the specific transactions in respect of hospital beds in two cases of imports by unrelated parties. It is found that both in the grounds for review

of the original orders passed in accepting the transaction value and in the impugned order confirming the loading of transaction value, the aforesaid imports of two transactions have formed the basis for arriving at the conclusion for loading 17-22% for arriving at the assessable value under Rule 4 of CVR. Thus, we would like to examine the facts surrounding this specific findings of the impugned order. The case records show that out of the total eleven import transactions to unrelated buyers that was taken up for examination in review, 'Enterprise 8000' hospital beds were imported in four transactions and 'Enterprise 3000' hospital beds were imported in another two transactions; the other import transactions relate to import of bedside lockers, over bed table and other medical equipment with probes. The prices to such unrelated buyers in India for 'Enterprise 8000' was of GBP 1400 for CIF Delhi in one case and GBP 1450 CIF Chennai/Hyderabad in other three cases. Similarly, for 'Enterprise 3000', the prices for unrelated buyers is GBP 929 and GBP 1088 for CIF Nhava Sheva. In terms of the legal provision under Rule 3 (3)(b) ibid, the appellants have produced the details of the variation between the price of GBP 1450 CIF Chennai/Hyderabad for unrelated buyers and the price of GBP 1234.70 CIF Nhava Sheva adopted for appellants in import transactions of 'Enterprise 8000' hospital beds. We also find in the data of eleven transactions, there is no transaction showing the price of GBP 1450 for CIF Delhi, as claimed by the department, but for the supply to Global Health P Ltd., New Delhi is GBP 1400. The various factors which have contributed to the variation in the increased price for supply to independent buyer in the case of 'Enterprise 8000' hospital bed has been explained by the appellants as follows:

(i) As the place of importation for all goods imported by the appellants is at Nhava Sheva, for the additional transportation to the place of supply since contracted for CIF Delhi/Chennai/Hyderabad, an amount of GBP 35 is requited to be added;

(ii) In terms of the contractual arrangements with the independent buyers, the imported medical equipment is required to be installed, commissioned and handed over with accessories in satisfactory working condition and need to be maintained under warranty for a period of three years. Thus, the appellants stated that an amount of GBP 142.935 is to be added to the price;

(iii) Further, in respect of supplies to independent buyers, as the Letter of Credit and other commercial transactions are being handled by the appellants for the independent buyers, an amount of GBP 8.33 is to be added to the price;

8.2 In order to arrive at the appropriate valuation of imported goods, where buyer and seller are related, the prices taken up for comparison in the impugned order, in respect of 'Enterprise 8000' hospital beds are GBP 1450 CIF Delhi for unrelated buyer and the price of GBP 1234.70 CIF Nhava Sheva for the appellants. It is also a fact on record that the price to unrelated buyer is subject to various terms and conditions of the individual contract which included cost of transportation to the place of buyers; cost of delivery, installation, commissioning and satisfactory working of the equipment; warranty for a period of three years etc., whereas the purchases by the appellants-importer is in bulk quantity and for stock and re-sale or hire. Thus, in terms of Rule 3(3)(b) ibid the transaction value of identical goods sold to unrelated buyers duly accounting for difference in commercial level, quantity level, cost adjustments in terms of Rule 10 and cost incurred by seller and when compared with the transaction value of related person transaction, if closely approximates, then such transaction value is to be accepted under Rule 3 ibid. The impugned order clearly show that no such attempt was made by the learned Commissioner of Customs (Appeals) in complying with the CVR to firstly go through the process of Rule 3 ibid and then proceed sequentially through Rule 4 to Rule 9, in determination of the appropriate assessable value for the purpose of Customs Act, 1962. On the basis of the factual data submitted by the appellants and as detailed in the above paragraph 8.1, if the total costs involved in the sale to unrelated person is taken into account then the effective price of 'Enterprise 8000' hospital bed works out to GBP 1263.735 in the above case. This in comparison to similar bed supplied to the appellants as related person at GBP 1234.70, leading to a difference in the price of supply of 'Enterprise 8000' hospital bed at GBP 29 which works out to a variation in price of 2.35%. Similarly, for 'Enterprise 3000' hospital bed it works out to a variation in price of 11.24%. In other words, the prices charged to unrelated buyer is higher than the prices charged to the appellants to the extent of 2.35% in respect of 'Enterprise 8000' hospital bed and 11.24% in respect of 'Enterprise 3000' hospital bed. Further, as the imports by the appellants are for the entire year and is a continuous purchase transaction, as against the occasional purchase by an unrelated buyer who are mostly hospitals, there is a significant variation at the commercial levels and quantity levels, which also accounts for the different in price. These calculations and the legal position clearly demonstrate that the prices declared by the appellants in

respect of related party transactions have not been influenced by the relationship between the appellants and their supplier group company.

8.3 Further, we find that in respect of cost apportionment to the Central Information Technology support received by the appellants, there is no examination of the factual position with respect to the nature of payment and whether these are includable in terms of Rule 10 ibid. From the details available on record and the submissions made by the appellants, the cost involved in uniform standard software and IT services adopted within their group companies, being apportioned on the basis of turnover and size of the company, has no connection with import of goods by the appellants. Further, as submitted by the appellants, there is no import from the two of their group companies to whom such costs have been paid by them. We find that the costs which are required to be added or adjusted in determining the transaction value of imported goods under Sub-rule 3(b) to Rule 3 are stated in the proviso to the said sub-rule. In our considered view, the nature of costs incurred in the above case is not covered by the nature of services mentioned in Rule 10 ibid, and therefore, we are not in agreement with the finding given by the learned Commissioner of Customs (Appeals) that there is a probability that this would affect the pricing policy of the related suppliers.

9.1 We also find that the issue of valuation of transactions between seller and buyer, who are related, have been given due importance in the CVR in order to arrive at appropriate valuation for the purpose of assessment of customs duty under the Customs statute. Further, CBIC had also issued detailed instructions periodically for proper implementation of law in relation to assessment of special valuation transactions.

9.2 We find that the 'Special Valuation Branch' (SVB) or GATT Valuation Cell has been created under the major customs houses in order to provide as an institution specializing in investigation of transactions involving special relationships between buyer and seller or those involving other special circumstances surrounding the sale of imported goods, both of which have a bearing on the assessable value. In order to conduct proper assessment of import transactions through SVB scrutiny, Central Board of Excise and Customs (CBEC) had prescribed detailed instructions vide Circular Nos. 1/98-Customs dated 01.01.98 and 11/2001-Customs dated 23.02.2001, prescribing the procedure to be observed by the Custom Houses for referring

cases to Special Valuation Branches and time lines to be followed for finalising the provisional assessment in such cases. The relevant instructions corresponding to the disputed period are extracted and given below:

"Circular No. 11/2001-Cus., dated 23-2-2001

F. No. 467/32/2000-Customs.V

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Valuation (Customs) - Cases handled by Special Valuation Branch of the Customs Houses - Review of instructions.

The existing instructions and the procedures observed in the various Custom Houses in regard to cases taken up by the Special Valuation Branch of the Custom Houses have been reviewed by the Board and the following instructions are issued in modification of the earlier Circular No. 1/98-Cus., dated 1-1-1998 :-

(a) The 'Special Valuation Branch' (SVB, for short) as an institution specialising in investigation of transactions involving special relationships and certain special features having bearing on value of import goods should be continued. SVBs would continue to be located only at four major Custom Houses, i.e. Chennai, Calcutta, Delhi and Mumbai and any decision taken in respect of a particular case in any of these major Custom Houses shall be followed by all other Custom Houses/formations.

(b) The Special Valuation Branch of that major Custom House, (out of the 4 mentioned earlier) which is located proximate to the Head or Corporate Office of the importer (having special relationships etc. with the suppliers), would handle the investigations into valuation of such importer. Wherever in the declaration prescribed under the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (hereinafter referred to as "Valuation Rules, 1988"), the importer has himself made an averment that the transactions are between related persons in accordance with Rule 2(2) of the Valuation Rules, 1988, and there is a prima facie, justification for further inquiry, the concerned case of import may be referred to the SVB of the concerned Custom House, where a separate case file should be opened and a registration number assigned to the case. Similar reference to SVB to look into valuation on account of special relationship could be ordered by Commissioner concerned where though not disclosed by the importer, such relationship comes to light on any intelligence or while enquiring into transactions of any importer with a particular supplier.

(c) It will be deemed that, a prima facie, case exists, for investigation by the SVB where the importer is not able to provide evidence to the effect that the price has not been influenced by the relationship or where the importer is not able to demonstrate that the price for the said goods closely approximates to one of the following values ascertained at or about the same time -

(i) the transaction value of identical goods, or of similar goods, in respect of sales to unrelated buyers in India;

(ii) the deductive value for identical goods or similar goods; and

(iii) the computed value for identical or similar goods.

2. Apart from investigation of special relationship case, SVB will also handle more complicated cases of additions to declared transaction value as stipulated under Rule 9 of the Valuation Rules. No reference to SVB would be necessary where any additions are sought to be made under Clauses (a) and (b) of Rule 9(1). Where, however, the additions sought to be made are considered to be in the nature of 'royalty and licence fee' under Rule 9(1)(c), or where the value of any part of proceeds of any subsequent resale, disposal or use of imported goods accrues to the seller [i.e. Rule 9(1)(d)] or where any other payments are

made or are contemplated to be made in future by buyer to seller as a condition of sale of imported goods etc. [i.e. Rule 9(1)(e)], the case may be referred to the SVB after following the provisional assessment procedure.

3. All cases to be registered in the SVB for special investigation shall be with the specific approval of the concerned Commissioner of Customs. Without the approval of the Commissioner, no case should be referred to the SVB.

4. Where the imports requiring investigation by SVB are noticed in a Custom House or Customs formation other than Chennai, Calcutta, Delhi, or Mumbai Custom House, all the relevant records should be forwarded to the SVB of the concerned Customs House which would take up the investigation of the case, after following the provisional assessment procedure. The Custom House which would be undertaking the investigation will be determined in the terms of paragraph 1(b) above.

5. There should be greater co-ordination amongst the SVBs of the four Custom Houses which undertake investigations in case where special relations between the importer and supplier exist or in cases referred to in paragraph 2 above. The information available, showing special relationship in respect of a supplier and importer, under investigation in any SVB needs to be shared amongst the four Custom Houses on a regular basis. Once a case is registered by the SVB of one of the 4 Custom Houses, detailed information regarding the same along with PAN No. of the importer should be furnished to the Directorate of Valuation for maintaining a Central Registry. The Directorate of Valuation will also circulate such details through the monthly Valuation Bulletins to all Custom Houses, so that imports effected at any Custom House in such cases, under investigation by SVB are undertaken provisionally and interests of revenue are safeguarded.

6. The procedures so far being adopted for registration and subsequent investigation of the cases may continue to be followed. The requirement of furnishing information and the formats of the sample questionnaire, as also the list of the documents required to be submitted have since been reviewed and a consolidated questionnaire along with list of documents has been prepared (Annex-A). ***This should be issued by the assessing group, dealing with particular imports, to the importer soon after it is decided (with Commissioner's concurrence as mentioned earlier) to refer the case to a SVB. Any importer to whom the questionnaire is issued should be instructed to furnish the reply to the referring Custom House as well as to the SVB of the concerned major Custom House, within 30 days of receipt of the questionnaire.*** *The questionnaire should be issued by the Custom House referring the case to the SVB.*

7. Upon receipt of reply to the questionnaire within the prescribed time limit, the SVB will decide within 7 days whether the importer has replied to the questionnaire substantively. Otherwise, immediate further information not furnished will be sought before taking step for finalisation of investigation.

8. Board is very keen that decision to make reference to SVB and advancing all assessments of particular importer for goods from particular suppliers to be undertaken on provisional basis, should be made after very careful consideration and good deal of circumspection. It would be imperative for the concerned Commissioner of Customs to critically examine the issue involved and decide whether it merits detailed enquiries by SVB and adoption of the provisional assessment procedure. In each and every case, the decision would be taken at his level before provisional assessment is ordered and matter referred to SVB. There would be however no need to obtain Commissioner's approval for imports made under different bills of entry, in a particular case, once the case has been registered with the SVB.

9. The amount of extra duty deposit presently kept at 1% will be continued. Board has however decided that if the importer does not furnish complete reply to the questionnaire within 30 days, of receipt of the 'Questionnaire' by the importer, the extra duty deposit will be increased to 5% till the date of receipt of reply by the Department. It should therefore be impressed upon the concerned importers (in the public notice that is issued) to ensure timely replies being sent to the Questionnaire to avoid any higher deposit being insisted. Furthermore, where provisional assessment is being resorted to, the investigation and finalisation of the assessment must be completed within four months from the date of reply. If no decision is taken within 4 months, the extra duty deposit should be discontinued and the concerned Deputy Commissioner/Assistant Commissioner will be held responsible for inexplicable delay in finalisation.

10. It has been reported that the Declaration forms prescribed for valuation purposes are being filled up in a very casual manner by the importers leaving many columns blank. All the assessing officers must be directed to ensure correct filling up of these forms including reference to the relevant B/E before they allow individual clearances after provisional assessment. (The declaration form is being revised to include details of the ports/ICDs through which the imports will be effected).

Annex - A

Questionnaire to be filled by importers who are related to the foreign suppliers:

1. Name of the importer with full address of the Head or Corporate office, registered office, administrative office/factory and PAN No.

2. Whether the importer is a proprietorship/partnership/private limited company/public limited company/branch office of company incorporated outside India.

3. (a) Name of the foreign supplier from whom the goods are imported (b) nature of the business relationship of the importer with the supplier (e.g. subsidiary company/branch office/distributor/agent/indentor or any other) (c) nature of the transaction - e.g., sale to the importer, consignment sales, branch transfer or any other.

4. Whether any officer or director in the company/firm of the importer holds any office in any company incorporated outside India; if so, whether such a company is related to/associated in any way with the supplier of the imported goods. Also give details of converse situation, if applicable?

5. Whether the importer and the supplier of the goods are partners in business?

6. Whether there is an employer-employee relationship between the importer and the supplier of the imported goods and vice versa?

7. Whether the foreign supplier or any of their associated companies jointly or severally, directly or indirectly own, control or hold equity shares worth 5% or more of the total paid-up capital of your company or any of your associated companies?

8. Whether any other third person jointly or severally, directly or indirectly owns, controls or holds the equity shares worth 5% or more of the paid-up capital of the foreign supplier and of your company including associated companies?

9 (a) Whether the supplier of the goods is in a position, directly or indirectly, to exercise restraint over you, legally or operationally, in any manner? (b) Specify the role if any, of the supplier or any of its associate business entities, in your corporate policy, design specification, quality control, marketing, sub-licensing of patent, franchise, etc.? (c) Whether any legal liabilities created by contracts or agreements entered into by the supplier devolve on the importer?

10. Whether the importer is in a position, directly or indirectly, to exercise restraint over the supplier, legally or operationally, in any manner? Details as per (b) and (c) above for this converse position?

11. Whether a third party is in a position, directly or indirectly, to exercise restraint over both the importer and the supplier of imported goods, legally or operationally, in any manner? Details, as per (b) and (c) of (9) above?

12. Whether the importer and the supplier of the imported goods, together, are in a position, directly or indirectly, to exercise restraint over a third person, legally or operationally, in any manner? Details as per (b) and (c) of (9) above.

13. Whether the importer and the supplier of the imported goods are member of the same family?

14. (a) Whether the importer is a sole agent, distributor or indentor appointed by the foreign suppliers. (b) Give full particulars of all the suppliers of goods from outside India for whom the importer acts as agent/distributor/indentor?

15. Whether the importer is a branch or subsidiary of the supplier of the importer goods? (The word subsidiary has the same meaning here as in Section 4 of the Companies Act).

16. (a) Whether the importer is engaged in the local manufacture of any products of the suppliers of the imported goods? (b) If yes, whether the imported items are used in such manufacture? (c) If yes, whether the imported items are manufactured or exclusively supplied by the suppliers? (d) Whether the product manufactured by the importer using the imported goods is sold under a trade mark, design or patent owned or controlled by the supplier of the goods or any person related to them?

17. (a) Whether the imported goods are components parts of CKD/SKD sets for local assembly into finished goods? If yes, furnish a complete list of the items imported in CKD/SKD condition.

18. In the cases of (16) and (17) above; (b) Are the same components imported by any person into India as spares for stock and sale? If so, please furnish the prices at which such imports are made.

19. Whether the importer has imported any capital goods, plant, machinery, equipment, etc. from the supplier of the imported goods or its related or associated concerns or persons? Please furnish details.

20. Is any amount paid or payable, directly or indirectly, to or on behalf of the supplier of the imported goods for engineering, development, art work, design work, plans or sketches undertaken elsewhere than in India and connected with the production of the imported goods? Are any services rendered by or on behalf of the importer relatable to this?

21. Is the import of the goods covered under an agreement? Are there other agreements between the importer and the supplier? If yes, list them.

22. What is the basis of arriving at the price in the invoice? Is it (a) Price list with discount, (b) Net discounted price (c) Quotation, (d) Transfer price; or (e) Other (please specify)?

23. Do the suppliers of the imported goods supply the same directly to any other person in India? If so, please furnish the prices at which these imports are made with supporting documents.

24. What is the form of payment by the importer for the imported goods? Furnish the heads of accounts under which other payments, if any, are made to the supplier of the imported goods, and details of the payments/transfer of funds in any form.

25. Furnish the total quantity and FOB value of imports made by the importer from the same supplier during the last three years.

26. Amount of royalty/technical know-how fees/licence fee/any other fee paid or payable by the importer to the supplier of the imported goods.

27. Furnish the full details of amounts, if any, received by the importer in the form of agency commission, overriding commission or any other remuneration received either from other importers in India or from the supplier of the imported goods.

28. Expenses incurred by the importer on behalf of, by understanding or agreement with, or under instructions from the supplier of the imported goods, e.g. advertising, propaganda expenses or any other expenses for the promotion of sales of the imported goods.

29. Whether the supplier of the goods supplies identical, similar or connected items to buyers/branches/collaborators in other countries? If yes, prices at which such transaction have taken place, for the last one year.

List of Documents required to be submitted by the importer

A. In case of sole agent/sole distributor/sole concessionaire

1. Agency agreements of the importer with any person.

2. Specimen copies of the import invoices and bills of entry.

3. Specimen copies of invoices for import of identical, similar or connected goods by this party through the present importer.

4. Specimen copies of invoices for import of identical, similar or connected goods by a company associated with the importer.

5. Commission notes and credit notes in case of amounts received from outside India.

6. Annual reports of the importer's business concern for the last three years.

7. Price lists for import and sale of the imported goods.

8. Statement regarding percentage of shareholding of/in any Indian company along with number of common director.

9. Statement regarding equity participation of/in foreign company.

10. Indent/invoice-wise statement of commission received in the last three years.

11. Details of remittances along with method, mode and deferred payment details, if any.

12. Statement of expenses as required under question number 28 of the questionnaire.

B. In case of subsidiaries, holding companies, and those who have collaboration agreements or similar agreements

1. Collaboration agreement/joint venture agreement/other agreement with the supplier of the imported goods or with any other person acting for the supplier.

2. Approval of Government of India/R.B.I. to the agreement, if any.

3. Statement for the last three years till date, duly certified by a Chartered Accountant, containing the following information :-

(i) CIF value and landed cost of imports from the suppliers of the imported goods, the collaborator, or associated companies;

(ii) CIF value and landed cost of imports from other suppliers;

(iii) Value of standard bought-out components procured in India;

(iv) Value of other components procured in India;

(v) Ex-factory value of the goods;

(vi) Royalty, net and gross, payable or paid.

4. Representative sample invoices of own imports for the last three years and photocopies of relevant bills of entry.

5. Annual reports of importing company for the last three years.

6. Statement regarding equity participation in/of foreign company for last three years.

7. Statement regarding shareholding of/in any Indian company along with particulars of common director.

8. Current price-list of the products imported from the supplier of the goods, including spares and warranty parts imported by any other person.

9. Representative specimens of invoices of procurement of goods procured from some other person by supplier and supplied to the importer.

10. Representative specimens of invoices of imports of identical, similar or connected goods made by companies associated with importer.

11. Representative specimens of invoices of imports of identical or similar goods by any other person.

12. Representative specimens of invoices and bills of entry of imports of identical or similar items as spares and warranty parts by the importer or any other person.

13. Details of remittances along with method, mode and deferred payment details, if any.

14. Details regarding any other payment made to or on behalf or under the instructions of the supplier."

9.2 On going through the above instructions, we find that CBEC clearly provided for careful scrutiny of each case of SVB before they are being subjected to provisional assessment on the basis of the information provided by them. In fact, the said instructions provide specific responsibility on the jurisdictional Commissioner of Customs, as it is an important duty bestowed on him to critically examine the issue involved and decide whether it merits detailed enquiries by SVB and adoption of the provisional assessment procedure. Further, after having taken a view to subject to the import transactions under SVB provisional assessment, CBEC also instructed the field formations to finalise these within four months of submission of detailed reply. Further, the inexplicable or unsubstantiated or undue delay in finalization of provisional assessment was seriously viewed by the Board. In the present case, we find that the three consecutive orders passed by the original authorities have confirmed the transactional value after verification of the records and documents, additional details submitted by appellants-importer over a period of October, 2005 to August, 2012. However, during this process of registering for SVB provisional assessment, periodical review, no objection was raised by the Administrative Commissioner of Customs and only in the last order dated 01.08.2012, the whole issue was taken up for review by him on 31.10.2012, contrary to the CBECs expectations of handling SVB transactions, which resulted in the present dispute.

9.3 We find that the impugned order is very cryptic and does not give any cogent reasons for rejecting the declared assessable value. Moreover, the learned Commissioner of Customs (Appeals) does not discuss the submissions of the appellants as to the reasons for the variation in the price at which the appellants have imported and the price at which similar goods were sold to unrelated persons, in the light of data submitted by them. We also find that, as submitted by the appellants, the learned Commissioner being the first Appellate Authority did not discuss on the methodology to arrive at the import price having rejected the declared value in terms of CVR. Further, no specific directions were given to the lower authorities about

the manner in which the valuation is to be arrived at and the rules thereunder to be applied. Such an order cannot be implemented. As strongly argued by the appellants there is not even a whisper of flow back in the transaction. Therefore, we find that the impugned order is not legally sustainable.

10.1 In this regard, we find that the Tribunal in a number of cases has held that the issue of valuation of goods in related person transactions is required to be dealt in terms of the legal provisions of the Customs Act, 1962 and the Customs Valuation Rules-CVR. In the case of Future Techno Designs (P) Ltd. (supra), the Tribunal has held that the commission received by the indenting agent from foreign distributor to the consumers in India is not sufficient to invoke Rule 4(2) ibid for addition of the same to the transaction value. The relevant paragraph of the said decision is extracted and given below:

> ***"6.*** *We have gone through the records of the case carefully. The lower authorities have loaded the transaction value on the ground that the relationship between the appellant and the foreign supplier has influenced the price. Even though the appellant is a subsidiary of the foreign company, it cannot be said that the appellant-company is interested in the business of the foreign company. In other words, it was strongly contended that there is no mutuality of interest. During the relevant period, the transaction value would have been rejected only when there is mutuality of interest. Moreover, we have gone through the agreement between a FTD India and FTD Singapore. The agreement is purely for the sale of software. FTD Singapore purchases software from various suppliers and thus act as distributors. For this purpose, they a commission of 30% from most of the suppliers. The appellant as per the agreement is a sub-distributor. A Customer can place orders directly to supplier of software or distributor (FTD Singapore) or sub-distributor (FTD India) the appellant. The customer will make payment directly to the person on whom the purchase has been placed. If an order is placed on the appellant, payment also will be made to him. However, the appellant who is the sub-distributor gets a commission of 22.50% from the foreign distributor in most of the cases. In our view, the appellant is acting as an Indenting agent for supply of software to customers in India. It has also been held that the transaction of persons purchasing in bulk for stock and sale cannot be compared with the transaction of individual customers. In the case of Premnath Diesels cited supra it has been held that transaction value has to be as long as there is no evidence of mutuality of interest between the appellant and the foreign suppliers. Further it was held that commission paid by foreign sellers to the dealer in respect of sales to 3rd parties cannot be treated as additional consideration. Moreover, the circumstances particularised in Rule 4(2) of the Valuation Rules are absent. There is no justification for loading the transaction value. The impugned OIA has no merits, hence we allow the appeals with consequential relief."*

10.2 We also find that in a number of cases, the Tribunal had held why the rejection of transaction value in related party transaction is not sustainable in the absence properly determining the transaction value in terms of the legal provisions of Section 14 ibid and in terms of CVR. In the case of Ebro Armaturen India P Ltd., (supra) the order of the lower authorities was set

aside as it did not give cogent reasons for rejection of transaction value and did not follow the methodology provided under the CVR Rules. The relevant paragraph of the said order is extracted below:

> ***"8.*** *We have gone through the records of the case and heard both sides. The crux of the OIA is that the imports made by the appellant on the basis of inter-company price list is not acceptable as import of identical and similar goods are available and M/s. Sergi India have imported at a value much higher than the value at which the appellants have imported; he submits that the valves imported by M/s. Sergi needed were different and M/s. Sergi needed valves with modified shafts and special painting which will undergo substantial modifications in terms of material and labour; therefore, the prices quoted by M/s. Sergi cannot be compared as the items are not comparable. The next objection taken by the appellant is that the OIA simply mentions the grounds of appeal and goes by the same alone and rejects the value declared under Rule 3(3)(a) of CVR, 2007 without laying down the principles as to how the valuation has to be arrived at. The appellants claimed that the valuation cannot be rejected as there is no allegation or proof of any flow back. They also submit that the principals offer a lower price to the appellants to compensate them for the services rendered in marketing the product and in obtaining orders for the same and profit percentage earned by the appellants cannot by itself a matter of suspicion."*

10.3 In another case of Richemont India Pvt. Ltd. (Supra), the Tribunal had held that comparison of prices not in conformity with the CVR cannot be sustainable in law. Relevant paragraphs in the order are extracted below:

> ***"6.*** *As the loading has been determined by the adjudicating authority (only) in terms of Rule 4 of the CVR, 2007 it is useful to reproduce the said rule below :*
>
> ***"Rule 4. Transaction value of identical goods.*** *- (1) (a) Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being value :*
>
> *Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.*
>
> *(b) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods.*
>
> *(c) Where no sale referred to in clause (b) of sub-rule (1), is found, the transaction value of identical goods sold at a different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustment leads to an increase or decrease in the value.*
>
> *(2) Where the costs and charges referred to in sub-rule (2) of rule 10 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.*
>
> *(3) In applying this rule, if more than one transaction value of identical goods is found, the lowest such value shall be used to determine the value of imported goods."*

We find that in Para 23 of the impugned order, the Commissioner has categorically noted that "NIDB data in respect of contemporaneous imports of identical/similar goods was scrutinized; however, no data for similar/identical goods of any other brand or company were available on the DOV website".

Rule 4 requires that in applying this Rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine value of imported goods and where no sale referred to in clause (b) of sub-rule (1) is found the transaction value of identical goods sold at a different commercial level or in different quantities or both is required to be adjusted to take account of the difference attributable to the commercial level or to the quantity or both and such adjustments is required to be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments. The appellant has been able to demonstrate that as a distributor its imports were at a different commercial level and in much larger quantity compared to the imports made by the individual retailers. From the tables given in Paras 7 and 14 of the adjudication order used to arrive at the finding that the price declared by the appellant was 12.5% lower when the price paid by individual retailers, we find that there is not even a whisper as to what were the commercial levels or quantities involved in respect of invoice dated 22-11-2011 for imported goods by some unrelated importer and invoice dated 12-12-2012 for imports made by the appellant. These two invoices have been mentioned in the said tables. Thus, the comparison of price per piece on the basis of these two invoices to infer that the price paid by appellant was 12.5% lower due to relationship is obviously invalid and not in accordance with the requirements of Rule 4 of the CVR, 2007. Further, the prices were compared only for two models of watches and simple extrapolation thereof to all other models of watches for the purpose of revising their values upwards does not have any legal basis for sustainability. The appellant has argued, and reasonably so, that the margin of 12.5% vis-à-vis the price for direct sales to independent retailers is not an unreasonable margin to be given to a distributor. However, we are not particularly on that aspect; we are only concerned with the determination whether loading has been done in conformity with the requirements of Rules 4 of CVR, 2007. We find that even in the limited comparison (for only 2 models of watches) as given in tables in Paras 7 and 14 of the impugned order for the purpose of loading the value by 12.5% there is complete disregard of the requirement of adjustment to be made for differences in commercial levels as well as in the quantity of goods imported and therefore, we do not find the loading of 12.5% to be in conformity with the requirements of Rule 4 of the CVR. This conclusion is supported by CESTAT decision in the case of Hewlett Packard Ltd. (supra) wherein it was inter alia held as under :

"....In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time -

the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;

(i) the deductive value for identical goods or similar goods;

(ii) the computed value for identical goods or similar goods.

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of Rule 9 of these rules and cost incurred by the seller in sales in which he and the buyer are not related;

A plain reading of the above provisions shows that when the value of contemporaneous imports are to be considered vis-a-vis imports by

related persons, then in view of the proviso to sub-rule 3(b), due account has to be taken of demonstrated difference in commercial levels, quantity levels and adjustments in accordance with the provisions of Rule 9. Now the facts of this case are undisputed regarding the contemporaneous imports at higher price cited by revenue. However, learned Advocate for the appellant has seriously contended that the levels, both commercial and of quantity, in the two imports are very widely different. We find great merit in this argument, because it would be totally illogical to compare the value of 5 pieces of goods imported directly by consumers for actual use whose cumulative value is only Rs. 7.5 lakhs with imports of similar goods running into hundreds of crores on 300 or more Bills of Entry per month by HPL. (para 21)."

Similar view was held in the case of Komal Precision Tolls India Pvt. Limited (supra).

7. *Regarding the contention of ld. DR that the appellant was required to incur expenses on advertisement, sale and promotion, etc. as per the distribution agreement and such expenses also turn out to be 12.5% which was the discount given to the appellant vis-à-vis the price charged from the independent retailers and therefore the loading is justified, we find that distribution agreement does not specify any amounts which are required to be so spent and the approval to be obtained for incurring expenses cannot be read to mean that the exporter had the right to dictate as to how much amount the appellant was required to spend in these areas. Further, such sales promotion/advertisement cannot be said to be for the benefit of exporter alone inasmuch as the appellant also would get the benefit thereof and therefore to treat this entire amount as additional consideration for import of goods in order to arrive at the loading factor is not sustainable. But as stated earlier, we are only concerned with Rule 4 of CVR, 2007 (which the adjudicating authority has used for loading the value) and not with Rule 10 thereof while the contention of ld. DR falls within the ambit of Rule 10 (which has not been used by the adjudicating authority to arrive at loading) and for this reason it is not necessary to discuss this contention of ld. DR or for that matter the contention of the appellant that expenses incurred were not incurred as condition of sale of goods and so the judgments cited by both sides regarding inclusion (or otherwise) of the expenses incurred by the appellant in the assessable value in terms of Rule 10 do not remain germane to the issue.*

8. *In the light of the foregoing, we are of the view that the loading of 12.5% is not sustainable in terms of Rule 4 of the CVR, 2007. Accordingly, the appeal is allowed."*

10.4 In the case of Komet Precision Tolls India Pvt. Ltd., (supra), the Tribunal had held that taking into account the services, administrative cost incurred by the Indian entity, the effective discounted price is acceptable as transaction value. Relevant paragraph of the said order is extracted below:

"7. *We have gone through the records of the case very carefully. It is seen that the appellant is a subsidiary of the German company. Since, there is a relationship involved between the exporter and the importer, the Transaction Value was not accepted. On going through the records and also the impugned orders, we find that the impugned orders have given large number of data regarding the difference in price levels between the appellant and also the third parties. It is seen that the third parties are mainly the EOUs. The EOUs do not pay any Customs Duty. They get the item under exemption from Customs Duty. Moreover, the EOUs are the actual users whereas the appellants actually stock the goods and sell them. So, this is an important fact which is to be borne in mind. Moreover, the impugned orders have not actually given the comparative quantity imported*

by the third parties vis-à-vis the appellants, which we have given above in the submissions of the advocate in Tables A and B. On going through them, it is very clear that the quantity imported by the third parties range from 1% to 10% of the quantity imported by the appellant. So this point has to be kept in mind and the appellants have also furnished data regarding the discount offered by the foreign company to their various subsidiaries in other countries. The appellants have also given the expenditure incurred by their office in India. From this, it is very clear that the effective discount enjoyed by the appellants is only 59% in view of this administrative cost incurred by them. This point has not been taken into consideration by the learned Joint Commissioner and also the Commissioner (Appeals). Moreover, a similar case was the subject matter of the decision of the Tribunal in the case of CC, Chennai v. Hewlett Packard Ltd. which has been cited supra, wherein the valuation in respect of different classes of buyers have been elaborately dealt with. Related persons importing goods in bulk for stock and sale whereas individual consumers importing a small quantity of actual use, both constitute different classes of buyers especially when the relation between the buying company and the seller is not affecting the transaction. Here also, the transaction between the buyer and the seller is based on the Inter Company Price Agreement. It is not something very arbitrary. The appellants carry out stock and sale. They also undertake after sales service. All these factors have been taken into account while giving a discount of merely 76% to the appellant from the International Price List. We should not take that 76% as abnormal and fix an arbitrary discount. It has also been held that activities of stock and sale undertaken by subsidiary company should not be considered as indirect payment to seller as it is beneficial both to the subsidiary company and the seller. Cost of such activities should not be added to the price actually paid or payable in determining the value of the imported goods. In fact, the Interpretative Notes to Rule (4)(3)(b) of the Customs Valuation Rules had already been referred to. In view of all these factors, we do not find any justification for rejecting the Transaction Value in this case. It is also to be borne in mind that the adjudicating authority has accepted the Transaction Value in respect of two items considering the quantum of imports made by the third parties and the appellants. The same logic should be applied in respect of the other two categories also. This has not been done. In these circumstances, we do not find any justification for rejecting the Transaction Value. Thus the appeal is allowed with consequential relief."

10.5 In the case of Prodelin India (P) Ltd., (supra), the Hon'ble Supreme Court had held that the onus is on the department to state clearly that the declared price did not reflect the transaction value. Further, the requirement of addition under 'Costs and services' and demonstration of the declared prices closely approximating to the transaction value in certain situations as explained under Rule 3(3)(b) ibid [earlier 4(3)(b)] was explained in the said judgement. Relevant paragraph of the said judgement is extracted below:

"21. *A perusal of the details given in the letter dated 18-10-2000 and referred to in paras supra would clearly set the whole controversy at rest inasmuch as there is nothing in this break up or the various consideration which could lead to prove the department that the said technical fee related to the price of the imported goods. In our view, the Department has wrongly interpreted these clauses and wrongly attributed design, drawing, fabrication etc. to the imported goods whereas a perusal of this break up clearly reveals that the technical fee is in respect of the various jobs/consideration which M/s. PC USA was to perform in respect of the manufacture of the antennas system in India. It would also be evident by the findings given by the lower authorities and various grounds raised by the appellant before this Court that they are drawing unwarranted inferences and trying to relate to the various activities which M/s. PC USA was to perform in terms of the joint*

venture agreement and trying to relate the same to the imported good. Such a course on the part of the appellant cannot be countenanced.

22. *Further the appellant in their appeal itself have admitted at Para 2(c) about the scope of the services which M/s. PC USA was to provide to the respondent. A perusal of their own appeal would reveal that there is nothing on record to show that any technical fee was being charged in respect of the imported goods or pre-import function. Therefore, various contentions raised by the Department, in the present appeal, are wholly devoid of any merit.*

23. *This apart, the Department has not brought any evidence on record to show that the relationship between the respondent and M/s. PC USA has influenced the price or value of the imported goods. There is no evidence brought by the appellant that their relationship did influence the price of the imported components.*

24. *It is settled law that the onus to prove that the declared price did not reflect the true transaction value is always on the Department. It is also a settled law that the Department is bound to accept the transaction value entered between the two parties. It is not the case of the Department that M/s. PC USA were exporting the identical goods to other importers at higher price and that the Department has not made any effort to bring on record any evidence that identical or similar goods were imported by other importers at higher price. Therefore, in view of the clear position of law about the acceptance of the transaction value, the Customs authorities could not add the technical know-how fee in respect of the post-importation activities to the assessable value of the imported goods.*

25. *Our attention was also drawn to Rule 9(1)(c) of the Rules which reads as under :*

> ***"9. 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) .....*
>
> *(b) .....*
>
> *(c) royalities 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 royalities and fees are not included in the price actually paid or payable."*

26. *The original authority has ordered for loading of their value of the imports by 10% in terms of the said Rules which provide that they shall be added to the price actually paid or payable for the imported goods royalities 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 royalities and fees are not included in the price actually paid or payable. However, the respondent have proved beyond doubt that what they had paid to M/s. PC USA was not in respect of the value of the imported goods but the technical fee for post-importation operation.*

27. *The Department, in their grounds of appeal, before this Court relied upon the provisions of Rules 2(2)(i) and 2(2)(iv) and also Rules 4(3)(a) and 4(3)(b) of the Rules. For the sake of convenience, the Rules on which the Department is relying upon are reproduced herein below :*

> *"Rule 2(2)(i) : they are officers or directors of one another's businesses;*
>
> *Rule 2(2)(ii) : .....*
>
> *Rule 2(2)(iii) : .....*
>
> *Rule 2(2)(iv) : any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;"*
>
> *"Rule 4(3)(a) : Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.*
>
> *Rule 4(3)(b) : In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time -*
>
> *(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;*
>
> *(ii) the deductive value for identical goods or similar goods;*
>
> *(iii) the computed value for identical goods or similar goods."*

28. *Even assuming for argument's sake that the respondent and M/s. PC USA are related persons even in that case their transaction value is to be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price and the importer demonstrates that the declared value of the goods being valued, closely approximates to the value for identical goods or similar goods. In the present case,*

a perusal of the order-in-original would reveal that the loading was ordered in terms of Rule 9(l)(c) of the Rules. There was no challenge to the value declared by the respondent before the Customs Authorities. There was also no finding in the Order-in-Original that the value was not increased with Custom Valuation Rules, 1988 read with Rules 2(2)(i), 2(2)(iv), 4(3)(a) and 4(3)(b).

29. *However, in the grounds of appeal, it is not the case of the Department that the value requires to be loaded because of the provisions of Rule 9(1)(c). But the Department is treating the respondent and M/s. PC USA as a related person and straightaway invoked Rule 4(3)(a) or 4(3)(b). The Department, in our view, cannot adopt such a course unless it is alleged that some evidence is brought on record that the prices at which M/s. PC USA had supplied the imported goods to the respondent was not reflecting the correct transaction value. Therefore, their appeal is contrary to the grounds on which the original authority had ordered loading of the assessable value. The appellate authority also held that the loading was required in view of Rule 9(l)(c) of the Rules. The appellate authority, in fact went beyond the scope of the Order-in-Original and gave findings which were contrary to the Order-in-original. He entered into the issue of share holding and held that it was not a case which was covered by Rule 4(3)(a) and (b). Some of the findings rendered by the appellate authority is unwarranted and that the first appellate authority could not have given unsubstantiated findings and could not upheld the order of the original authority on the ground different from the findings of the adjudicating authority. Therefore, viewed from any angle, the appeal filed by the Department is wholly misconceived.*

30. *In the instant case, the appellant had reproduced the contents of their letter dated 18-10-2000 wherein they had brought on record the considerations for which they had paid fee to M/s. PC USA and had nothing to do with the imported goods and M/s. PC USA was only supplying the parts of antenna systems and not a complete antenna. This letter has been reproduced in the order of the Deputy Commissioner. However, he did not controvert the contentions raised by the respondent before him but went on to load the assessable value by 10% in terms of Rule 9(l)(c). When the respondent had taken a categorical stand about the nature of technical fee to be paid to M/s. PC USA and it was clearly contended that it was for post-importation activity, it was obligatory on the part of the original authority to have controverted the contents of the said letter. He simply ignored the same and went on to pass an adverse order. In the appeal also, the Department have accepted the same. Therefore, in the absence of anything brought on record contrary to the submissions of the respondent, the nature of technical fee, it is not open for the appellant to justify the loading of 10% in the invoice value ordered by the original authority.*

31. *We shall now consider the arguments advanced by learned counsel appearing for the respondent that the procurement of some parts from M/s. Tata Advance Material Ltd. had no bearing on the price of the imported goods. In this connection, we have perused the joint venture agreement which would reveal that there is nothing in that agreement which would put the respondent under obligation to procure component from the foreign collaborator or from M/s. Tata Advance Material Ltd. with whom the foreign collaborator had an agreement. It has already been stated in paragraphs supra that the respondent was procuring only one component from M/s. PC USA. Even if respondent was procuring certain components from M/s. Tata Advance Material Ltd. that had no bearing on the price/value of the imported goods. M/s. Tata Advance Material Ltd. were manufacturing the components indigenously and had nothing to do with the imported material. Further, the mere fact that M/s. PC USA had any agreement with M/s. Tata Advance Material Ltd. had nothing to do with the price of the feed horn which was being supplied by M/s. PC USA to the respondent. M/s. Tata Advance Material Ltd. were manufacturing some components indigenously, namely, reflector and metal structure. Therefore, the Department's case that the technical fees had influenced the price of the goods imported is factually incorrect and baseless.*

xx xx xx xx xx

40. *In our opinion, the various contentions raised by the Department, in the present case, are wholly devoid of any merit. In the result, the appeal stands dismissed. However, there shall be no order as to costs."*

10.6 In the case of Hewlett Packard Ltd. (supra), the Tribunal had distinguished the commercial level difference between the different classes of buyers and the assessee-importer who is dealing with stock and sale of imported goods, and held the prices have not been influenced by the relationship. The relevant paragraphs in the said order is extracted below:

> ***"21.*** *We proceed to examine these grounds as follows :-*
>
> *(i) It is fairly conceded by learned Advocate for the appellants that as HP USA holds 100% shares in HPI, therefore, they are related persons. We find that the provisions of Rule 2(iv) as also Explanation 1 to Rule 2 of the Customs Valuations Rules are clearly attracted to the facts of this case, therefore, it is now an undisputed position that the buyer and the seller herein are related persons in law.*
> *(ii) However, we cannot accept the contention of learned SDR that by merely because they are related persons, this relationship introduces a mutuality of interest between the two in view of the 100% shareholding involved. This is because Rule 4B(a) of the Customs Valuation Rules clearly lays down that "where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price". Therefore, instead of accepting the position that the said relationship ipso facto leads to discarding the transaction value declared in these imports, we have necessarily to examine whether this relationship did or did not influence the price i.e. to say whether this remains a transaction at arms length or on the contrary, there exists a mutuality of interest between the buyer and the seller, whereby, the price becomes affected.*
>
> *Learned Advocate has named the basic point in this connection viz., that there is no evidence led by the department to show any flow-back of profits from HPU to HPI. Therefore, while it is no doubt true that HPU as 100% shareholder of HPI has interest in the prosperity of HPI, the reverse proposition is not true. We find that this submission is well taken because there is not an iota of evidence to show that the profits earned by M/s. HP USA in any way flow back to HPI and that HPI has benefitted from them. Mutuality of interest means that there should be a two way traffic in this regard. Secondly, we find that the case law of Maruti Udhyog (Supra) cannot be distinguished from the facts of this case only on the ground that the quantum of shares held in Maruti Udhyog Ltd. by M/s. Suzuki Motor Corporation was only 26% at that time, whereas, here HPU holds 100% of the shares. This is because Rule 4(2)(iv) clearly lays down that even if 5% or more of the shares are held by one in another, the two become related and in the said decision, it was also held that though Suzuki Motor Corporation and Maruti Udhyog were related persons, because there was no mutuality of interest, therefore, relationship by itself would not preclude the acceptance of the transaction value. We, therefore, find that the ratio of the decision in that case clearly applies to the facts of the present case also.*
>
> *(iii) We proceed to consider the provisions of Rule 4(3)(b) which reads as follows :-*
> *In a sale between related persons, the transaction value shall be accepted,*
> *whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time -*
> *(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;*
> *(ii) the deductive value for identical goods or similar goods;*
> *(iii) the computed value for identical goods or similar goods.*
> *Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of Rule 9 of these rules and cost incurred by the seller in sales in which he and the buyer are not related;*
> *A Plain reading of the above provisions shows that when the value of contemporaneous imports are to be considered vis-a-vis imports by related persons, then in view of the proviso to sub-rule 3(b), due account has to be taken of demonstrated difference in commercial levels, quantity levels and adjustments in accordance with the provisions of Rule 9. Now the facts of this case are undisputed regarding the contemporaneous imports at higher price cited by revenue. However,*

learned Advocate for the appellant has seriously contended that the levels, both commercial and of quantity, in the two imports are very widely different. We find great merit in this argument, because it would be totally illogical to compare the value of 5 pieces of goods imported directly by consumers for actual use whose cumulative value is only Rs. 7.5 Lakhs with imports of similar goods running into hundreds of Crores on 300 or more Bills of Entry per month by HPI. We find that this issue is clearly decided in the case of Atco Industries as reported in 1992 (57) E.L.T. 654, wherein, it has been held that higher discounts due to big order of 104 sets is not unreasonable and, therefore, under-valuation has not been established. Learned Advocate for appellants has further argued in this context that the differing levels of quantity are also connected with the commercial level between these two imports being compared by the revenue. This is because HPI as the sole dealers of HP USA in India are a different class of buyers than an actual consumer importing one or few pieces for his own actual use. We find great merit in this argument because, whereas, an individual consumer imports one or few pieces of the goods for his actual use, the imports made by HPI are not for their actual use but for stock and sale. It is well settled law that an actual user buyer is a different class of buyer from a buyer buying for the purpose of stock and sale. We, therefore, find that as per the said proviso, one cannot brush away the difference in levels on both these counts i.e. quantity as well as commercial, between the imports cited by the revenue and the merits by HPI. The learned Advocate has clearly explained the marketing policy of HP USA for this class of buyers worldwide i.e. to say, that every fully owned subsidiary of HP USA in any country in the world where it is present, is regarded by them as a different class of buyer when compared with an individual importer who imports for his own consumption as an actual user. The logic underlying this marketing policy is simple and transparent. This logic is that when such a subsidiary (like HPI) imports for stock and sale, they incur a certain amount of expenditure in this process of trading which would include items like maintaining their sales team, advertising, and above all rendering free of cost warranty service during the warranty period. It is a salient fact that the last of these activities also requires that HPI would have to always maintain a basic minimum level of spares and consumables which are required to service these products during the warranty period, which also involves additional cost. None of these costs are incurred by the individual importer who imports for his own consumption or actual use. It is, therefore, clear that the commercial levels between the two imports is as distinct as North Pole is to South Pole. Learned Advocate for the appellants further submits that the marketing policy of HP USA, applicable worldwide, in consideration of these costs involved at this commercial level, and any further consideration of the much higher quantity levels involved in these transactions over a period of time as compared to solitary imports of a few pieces by individual importers for own use, gives these stock and sale buyers two kinds of deductions on their list price. It is not disputed even by revenue that these deductions are not uniformly available globally to all such subsidiaries, throughout the world. It is also not disputed that the level of these deductions are not known in advance. Hence, on these two counts, clearly this price reduction is given during the ordinary course of international trade and is clearly at arms length, in fact totally transparent. This we accept. Having done so, we further proceed to examine the reasonability of the quantum of this price reduction made available by HP USA through this marketing policy. It is not disputed that the total reduction available is on account of the Indian Companies cost of selling as discussed above plus a meagre 10% of this selling cost as margin of profit for them. The cost of selling incurred by HPI has been quantified and certified by Chartered Accountants and has been submitted by the appellants at the original stage itself. Reacting to this, the revenue has not led any evidence to show that there is any manipulation or factual inaccuracy involved in this. They are, therefore, to be accepted to be good and fair evidence. A further addition of 10% to this cost as their profits in India, we most humbly consider to be a very fair proposition and totally in line with both international business considerations as well as domestic business considerations in India. While coming to this conclusion, we are also guided by the fact that many a times the Tribunal has upheld adding of 10% national profit while considering the valuation of the goods captively consumed. In this connection, we also take note of the decision of this Tribunal on the case of Pepsi Foods as reported in 1990 (64) E.L.T. 426, wherein, it has been held that a sole marketeer does not introduce mutuality of interest. In a similar vein, an earlier judgment of the Hon'ble Apex Court is also noted in the case of Atic Industries - 1984 (17) E.L.T. 323 (S.C.). Similarly, in 1992 (59) E.L.T. 220 (Bom.), it was again held that holding and subsidiary companies, though related, this relationship being specifically provided for by statute, do not ipso facto introduce the mutuality of interest. We also note that in the case

of Elecon as reported in 1989 (41) E.L.T. 589, the Hon'ble Tribunal had held that sales by subsidiary companies to holding companies on declared assessable value are acceptable unless it is shown clearly that the said price has been affected by this relationship. We also note that the Hon'ble Supreme Court had dismissed the department's appeal in the case of Maruti Udhyog discussed earlier, as reported in 1989 (22) ECR 482 (S.C.). Since what we are considering as mutuality is "mutuality of interest in the business of each other", we agree with the contention of the learned Advocate for the appellants that decisions by various Hon'ble Courts and the Tribunal under the Central Excise Act, for the limited purpose of interpretation of these words and phrases would normally apply in customs cases.

(iv) In view of the fore-going discussions, we find that the price at which the goods have been imported under this marketing policy, are in conformity with the provisions of Rule 4(3)(a). We do not agree with the Revenue's contention that Rule 4 does not apply.

(v) On this point, we also considered learned SDR's contention that the impugned Order-in-Appeal has not correctly applied the provisions of Rule 9(1)(a)(i). This provision reads as follows :

9. 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 cost and services, 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;

On a plain reading of the above, provides that commissions and brokerage are includable if they are incurred by the buyers. Perhaps, the learned SDR was of the opinion that the aforesaid discussed price reduction is covered by the words and phrases "commissions and brokerage" as contained therein and, therefore, was to be added to the declared value of these goods. We cannot agree to this proposition. Brokerage is paid either by the buyer or by the seller or both to a third party viz., the broker. There is no evidence in this case that any third party is involved in these imports, excepts the foreign exporter and the Indian importer. Similarly, commissions, which are clearly distinct from discounts, are again payable only to a third party, which in this case does not exist on facts. Therefore, there is no question of the learned Commissioner in the impugned Order-in-Appeal having not considered the provisions of the aforesaid sub-rule as affecting the transaction value. The impugned Order-in-Appeal does not suffer from any infirmity on this count.

(vi) At this stage, we now proceed to consider the interpretative notes to these Valuation Rules.

22*. Since we have held above Rule 4 is applicable in this case, therefore, it is but correct to also examine whether the interpretative notes to Rule 4 support this decision or otherwise. The explanation of the words and phrases "price actually paid or payable" includes the following :-*

"Activities undertaken by the buyer on his own account, other than those for which an adjustment is provided in Rule 9, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the value of imported goods".

On a plain reading of these notes, it is clear that activities of stock and sale which are undertaken by HPI on its own account, are not to be considered to be an indirect payment to the seller, even though they might be regarded as constituting some benefit to the seller. In other words, by undertaking sales promotion activities and by rendering customer services with respect to the goods imported, even if HPI are rendering benefit to HP USA, inasmuch as they satisfy customers and the good-will obtained therefrom leads to increase sales of these products in India and, therefore, it is beneficial both to HPI and HP USA, the same is not to be considered as an indirect payment by HPI to HP USA. The note clearly lays down that, therefore, the cost of such activities shall not be added to the price actually paid or payable in determining the value of imported goods. But this is precisely what the department wants to do and they want to load the transaction value declared by HPI with the reduction given by HP USA therein, taking into account these post importation activities of HPI. Clearly this kind of loading the transaction value is, therefore, hit by above note to Rule 4. It also sets at rest any doubt on the conclusion that merely because both HPI and HP USA prosper and share this prosperity, therefore, this introduces a mutuality of interest of atleast an indirect method of payment by HPI to HP USA. As per the aforesaid notes, this is not considered as correct legal proposition.

23. *We also note that it is clearly provided in the notes to Rule 4(2)(b) that the activities relating to the marketing of the imported goods by the buyer on his own*

account shall not result in reduction of the transaction value. Therefore, in this case also merely because HPI aggressively markets the goods imported from HP USA, on this ground alone the transaction value declared by HPI cannot be rejected. Note 1 to Rule 4(3) explains that Rule 4(3)(a) and 4(3)(b) provides different means of establishing the acceptability of a transaction value. It further provides that under Rule 4(3)(a) where the proper officer of customs carries a doubt that the price declared may have been affected the relationship between the importer and exporter, he should examine all relevant aspects of the transaction including the way in which the buyer and seller organise their commercial relations and the way in which the price in question was arrived at in order to determine whether the relationship influenced the price. In the discussions above, we have carefully considered the marketing policy adopted by HP USA vis-a-vis HPI in view of these explanatory notes. And doing so, we have found that since in this case the price is declared to ensure recovery of all the cost incurred by HPI plus a profit, therefore, we have found that the price has not been influenced. This approach is clearly consistent with the following explanatory note to Rule 4(3)(a) :-

"As a further example, where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time (e.g., on a annual basis) in sales of goods of the same class or kind, this would demonstrate that the price had not been influenced."

Therefore, we find that our discussions above are clearly supported by these explanatory notes because we have held that the actual cost of stock and sale activities of HPI on its own account plus 10% margin of profit thereon does not constitute an unfair practise.

24. *In view of the fact that Rule 4(3)(a) applies in this case, therefore, there is no question of going further to Rules 5, 6, 7 or 8. The revenue's contention, therefore, that Rule 4 to 7 would not apply is, in view of the above discussions, not acceptable.*

25*. This leaves us to consider the last ground on which the revenue based their appeal viz., that since the appellant had accepted the earlier SVB Circular for a number of years, it is not open in law for them to now appeal against the loading of the assessable value after a passage of some time. We are not in a position to accept this contention at all because it is very clear that the principle of res judicata normally does not apply in taxation matters in such cases. This has been laid down in the case of West Coast Paper Mills as reported in 1984 (16) E.L.T. 91 as also in the case of Swaraj Mazda reported in 1995 (77) E.L.T. 505. Therefore, we are of the view that merely because the appellants did not appeal against the Assistant Commissioner's Order dated 11-2-1992, their right to come-up in appeal against a subsequent order dated 5-8-1996 is not in any way blocked, particularly because it is nobody's case that the appeal is not in time or that there is a lack of jurisdiction. The order dated 11-2-1992 which they had not contested was based under a different set of circumstances. The order currently under dispute is on different set of circumstances, and one of them is that the quantum of shareholding has changed between HP USA and HPI. In view of these discussions, we cannot accept this ground of appeal also."*

10.7 In the present case before us, there is no specific discount offered to the local entity which was not available to independent buyers, and thus the decision given by the Tribunal in the case Varian India Pvt. Ltd., (supra) is distinguishable and cannot be applied to the present case having different set of facts.

"*In terms of Rule 9(1)(a)(i) of the Customs Valuation Rules, 1988, the commission and brokerage except buying commission will be added to the invoice value. In this case whatever called discount is nothing but commission not available to third party, which is quite clear from the clauses of the agreement. Hence the same is includible in invoice value. The case laws cited by the appellant are not relevant in this case, since appellant failed to submit the details of commission received by the appellant from Varian Inc., USA in respect of orders produced for Varian Inc. by the appellant from other buyers in India."*

11. In view of the foregoing discussions and analysis, and on the basis of the orders passed by the Tribunal and the judgement of the Hon'ble Supreme Court, we conclude that the impugned order cannot be sustained on merits.

12. In the result, by setting aside the impugned order dated 25.03.2013, we allow the appeal in favour of the appellants with consequential relief, if any.

(Operative part of the order pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

SM