CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85502 OF 2014

[Arising out of Order-in-Original No: MUM-CUSTM-PAX-COM-009- 13-14 dated 12th November 2013 passed by the Commissioner of Customs, CSI Airport, Mumbai.]

Disney Broadcasting India Pvt Limited
4th Floor, Peninsula Tower-1, Peninsula Corporate Park
GK Marg, Lower Parel, Mumbai - 400013 … ***Appellant***

versus

Commissioner of Customs
CSI Airport
Awas Corporate Point, Makwana Lane Andheri Kurla Road, Andheri East, Mumbai - 400099 ***…Respondent***

APPEARANCE:

Shri Prasad Paranjape and Shri Rishin Gala, Advocate for the appellant

Shri DS Maan, Joint Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85898/2025

DATE OF HEARING: 02/12/2024
DATE OF DECISION: 02/06/2025

PER: C J MATHEW

This appeal of M/s Disney Broadcasting India Pvt Limited (erstwhile M/s United Home Entertainment Pvt Ltd), who came to be fastened with duty liability, consequent upon enhancement of assessable value of ₹ 1,17,22,019, to be recovered under section 28 of Customs Act, 1962, along with applicable interest under section 28AA of Customs Act, 1962, on ‘beta tapes’ valued at ₹ 3,40,97,050 between June 2007 and October 2008 challenges re-assessment by recourse to rule 10(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 besides penalty of like amount under section 114A of Customs Act, 1962.

2. According to Learned Counsel for the appellant, the ‘beta tapes’ are procured from licencees located outside India which, sometimes, were subjected to further upgradation in India and that, in accordance with normal trade practice, ‘beta tapes’, imported through courier, was charged to duty according to the terms of payment to the overseas supplier that may or may not include ‘licence fee’ which was limited to the price when the royalty was payable on further sales in India. He contended that, in the light of factual distinguishment, inclusion of fees thereon did not fall within the ambit of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

3. According to Learned Authorized Representative, several licence agreement existed for one or more serials contained in the ‘beta tapes’ procured by the importer. It was further contended that

the enhancement, corresponding to US $ 8,43,417 not included in assessable value for reasons of contract, was established on interpretation of fees for ‘right to use’ as tantamount to sale, by drawing upon article 366(29A) of the Constitution, and coupled with rule 9A and 9B of Income-tax Rules, 1962 on permissible deductions from ‘short life’ of films enabling qualificate as ‘sale’ which parents saddling of fees payable as arising from ‘condition of sale’ which empowers jurisdiction.

4. The limited issue in this dispute is the applicability of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, emanating from

> *‘14. Valuation of goods.*
>
> *(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods,*
>
> *xxxx*
>
> *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:’*

of Customs Act, 1962, to consideration incorporated in agreement between buyer and seller to be enforceable on a stipulated occurrence and such stipulation being condition of sale.

5. Value has been sought to be enhanced under the authority of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 flowing from the provisioning in rule 3(1) therein which enables conformity with

> *'(1)….*
>
> *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:…'*

in section 14 of Customs Act, 1962 in pursuance of which

> *'(1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods.-*
>
> *xxxx*
>
> *(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'*

is to be applied and contingent upon

> *'(3)* ***Determination of the method of valuation. -*** *(1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10;'*

A harmonious construct of these provisions enables perception of legislative intent to include such payments that are, directly or indirectly, to the benefit of the seller if not already included, or demonstrated to be so on challenge by customs officers, in the price for sale of the goods and as condition of sale. This 'adjustment' to value is neither 'surrogate value', which is operated in yet another manner by demonstrated relationship lacking any pretence of price not having been influence or by lack of, or unconvincing, response to notice of doubt about truth or accuracy of 'declared value', as authorized by rule 3(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, nor 'substitute value' representing the price actually paid and under-reported using fraudulent means including documents.

6. Adjustment in value is a legacy of the frailty of 'value', necessarily to be hyphenated with assessment when rates of duty are not 'specific', and benchmarked as price contracted for sale which may not resonate with the importer as, for accountal, being inclusive of, and extending even by amortization, of recompense for services. Though the constitutional assignment of authority for duties of customs, in the Seventh Schedule, is restricted to goods, the measure of tax, impliedly, should include costs of services connected with the sale that is merely deferred from mutual convenience for payment. It is addition of price connected with sale attributable to imports without illegitimizing price paid for the goods by resorting to use of illicit channels for payment and not alleged to have been redacted from the price. Generally, the mechanics of such adjustment is devoid of facts that prompt confiscation and penalties as consequence. This is corollary to price being, unquestionably, *consensus ad idem* in the agreement to buy and sell and the deeming fiction, as set out in section 14 of Customs Act, 1962, from days of yore for invisible, and merely attributable, 'costs and services' to be included in 'transaction value' for assessment and which, in turn, is described around 'price' for the limited purpose of levy. It is additionally corollary to ascertainment of 'condition of sale' and the rigidity attached to its evaluation from the changed circumstances of tax regime since that was incorporated in the context of 'taxable event' as it then was. Such

provision existed as far back as the Customs Valuation Rules, 1963 and continued in the next two editions of 1988 and 2007 with appropriate refinement. It was during the currency of the intermediate regime that 'tax on services' was legislated and, only well into its dying days, did the range of the tax spread to cover especially 'post-importation service' in relation to goods. Enactment of Finance Act, 1994 and Goods and Service Tax Act, 2017, provisioning for mandated levy on rendering or supply of services in India did not exclude imported goods from its coverage or services procured from abroad and overlap of 'import' in both could not, for having been triggered by identical event, subject the same consideration to tax twice without grievous injury to the integrity of the boundaries of tax vested in the Union. We do not, for a moment, suggest that such 'services' attributable to imported goods are consequently rescinded or that primacy be accorded to domestic levy; our positing is that rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 needs to be strictly construed with no scope for flexibility at time of import that may have the effect of overlap in tax collection and, consequently, that 'condition of sale' must not be inferred but determined to exist both in the contractual arrangement and by the factual matrix peculiar to each import.

7. The presumption against implied repeal has the effect of two statutes operating simultaneously on the same consideration and both

chargeable on import.

8. The law pertaining to duties on import is restricted to commodities and valuation is only a measure for the purpose of determination of the tax. Determination of tax under Finance Act, 1994 arises on the value of the service upon import in terms of section 66A of Finance Act, 1994 and in terms of taxable territory as set out in Place of Provision of Services Rules, 201. There is, thus, a clear delineation which, in the face of deeming fiction for the purpose of proviso to section 14 of Customs Act, 1962 cannot be so stretched as to bring in other deeming fictions related to sale for the purpose of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Disposal of the show cause notice insofar as the proposals therein for enhancement of value have not taken the legal delineation *supra* for consideration is questionable. In the absence of a clear finding on fact in the light of law as set out *supra*, we are unable to endorse the findings or decide on its incorrectness. It would, therefore, be appropriate to set aside the impugned order and remand the matter back to the original authority for a decision on the legality of such inclusion, bearing in mind the decision of the Hon'ble Supreme Court in *Commissioner of Customs, Excise, New Delhi v. Living Media India Ltd [2011 (271) ELT 3 (SC)]* that

> *'32. The issue that arises for our consideration is therefore appears to be answered by the aforesaid decision*

in Associated Cements Companies Ltd. (supra). In the said decision this Court had stated clearly that if a pre-recorded music cassette or a popular film or musical score is imported into India, duty will necessarily have to be charged on the value of the final product. As per Rule 9, in determining the transaction value there has to be added to the price actually paid or payable for the imported goods, royalties and the license fees related to the imported goods that the buyer is required to pay, directly' or 'indirectly, as a condition of sale of goods. Therefore, when pre-recorded music cassette is imported as against the blank cassette, definitely its value goes up in the market which is in addition to its value and therefore duty shall have to be charged on the value of the final product. Therefore, there can be no dispute with regard to the fact that value of the royalty paid is to be included in the transaction value.

33. In all these cases, there is no dispute that the cassettes under question are brought to India as pre-recorded cassettes which carry the music or song of an artist. There is an agreement existing in all the matters that royalty payment is towards money to be paid to artists and producers who had produced such cassettes. Such royalty becomes due and payable as soon as cassettes are distributed and sold and therefore, such royalty becomes payable on the entire records shipped less records returned. It could therefore, be concluded that the payment of royalty was a condition of sale. Counsel appearing for the Respondent relied upon the commentary on the GATT Customs Valuation Code. We failed to see as to how the aforesaid commentary on the GATT Customs Valuation Code could be said to be applicable to the facts of the present case. The specific sections and the rules quoted hereinbefore are themselves very clear and *unambiguous. We are required only to give interpretation of the same and apply the same to the facts of the present case.'*

9. Accordingly, the impugned order is set aside and the matter remanded to the original authority for fresh decision.

(Order pronounced in the open court on 02/06/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*