C/MA/20478/2015,
C/1932, 1933 to 1938/2012,
C/2199/2012

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 1932 of 2012

Customs Miscellaneous Application No. 20478 of 2015

(Arising out of Order-in-Original No. 02/2012 dated 30.03.2012 passed by the Commissioner of Customs, Bangalore.)

M/s. HP India Sales Private Ltd.,
(M/s. HPISPL)
No. 24, Salarpuria Arena,
Hosur Road, Adugodi,
Bangalore – 560 030. .....**Appellant(s)**

VERSUS

Commissioner of Customs, Bangalore
Central Revenue Building,
P.B. No. 5400, Queens Road,
Bangalore – 560 001. .....**Respondent(s)**

WITH

(1). Customs Appeal No. 1933 of 2012 (Mr. S. Srinath, M/s. HP India Sales Private Ltd.)

(2). Customs Appeal No. 1934 of 2012 (Mr. D. Saikumar, Manager (Finance), M/s. HP India Sales Private Ltd.)

(3). Customs Appeal No. 1935 of 2012 (Mr. N.V.P. Tendulkar, Controller (Financial Accounting & Reporting), M/s. HP India Sales Private Ltd.)

(4).Customs Appeal No. 1936 of 2012 (Mr. B.S. Ravishankar, Manager, Global Trade Operations, M/s. HP India Sales Private Ltd.)

(5). Customs Appeal No. 1937 of 2012 (Mr.Deepak Kanti Bhowmick, Global Trade Operations Manager, M/s. HP India Sales Private Ltd.)

(6). Customs Appeal No. 1938 of 2012 (Mr. Manoj Bavle, Tax Manager, M/s. HP India Sales Private Ltd.)

AND

(7). Customs Appeal No. 2199 of 2012
(Commissioner of Customs Vs. M/s. HP India Sales Private Ltd.)
(Arising out of Order-in-Original No. 02/2012 dated 30.03.2012 passed by the Commissioner of Customs, Bangalore.)

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C/MA/20478/2015,
C/1932, 1933 to 1938/2012,
C/2199/2012

APPEARANCE:

Mr. V. Lakshmi Kumaran with Mr. Vasudevan, Mr. Rachit Jain, Ms. Purvi Asati, Ms. Ashwini Nag Mr. Harshdeep Khurana, Ms. Vaishavi Nair and Ms. Aditi Sharma Advocates for the Assessee-Appellants
Mr. PRV Ramanan, Special Counsel (AR) for the Revenue

CORAM:
HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

Final Order No. 20766 to 20773 /2026

Date of Hearing: 16.12.2025
Date of Decision: 06.05.2026

DR. D.M. MISRA

These appeals are filed against Order-in-Original No.02/2012 dated 30.03.2012 passed by the Commissioner of Customs, Bangalore. Also, the appellant had filed a miscellaneous application seeking to include two documents on record viz. Addendum No.1 to Distribution Agreement dated 01.11.2005 and Intercompany Product Distribution Agreement dated 01.11.2012. Learned advocate for the appellant fairly submitted that these documents were not part of the appeal paper book filed initially and also not submitted before the adjudicating authority; however, these documents have some relevance and the same may be allowed to be placed on record and be considered on merit during the course of hearing. Learned Special Counsel for the Revenue, after going through these documents, has not raised any objection for its admission and consideration. Consequently, these two documents are taken on record. Miscellaneous application is allowed.

2.1. Briefly stated the facts of the case are that the appellant, M/s. HP India Sales Private Ltd.,(M/s. HPISPL) is a Company incorporated in India and wholly owned subsidiary of M/s. Hewlett-Packard Company, USA (HPUSA, for short). They are engaged in

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the imports, trading, distribution and sale of information technology (IT) products like computers, laptops, printers, scanner, servers etc., during the relevant period. The products imported by the appellant are broadly categorised under: (i) Imaging and Printing Group (IPG) (printers, scanners, etc.,) (ii) Personal System Groups (PSG)(Desktop computers, laptops etc. and (iii) Technology Solution Group (Industry Standard servers, network storage solutions etc.). They import products from USA, China, European countries etc., on Inter-Company (IC) transfer-cum-sale basis. They sell the imported products in India through approved Channel Partners-cum-Distributors, resellers, system integrators etc. The imports are made for stock and sale on their own account as well as for warranty replacement. They also import spare parts through IC transfer-cum-sale mainly for warranty purposes and sometimes, these are traded in the local markets. The goods are mainly imported through Air Cargo Complexes at Mumbai, Delhi, Bangalore, Chennai and Kolkata; sea ports at Nhava Sheva and Chennai; ICDs at Bangalore and Tughlakhabad. The appellants are registered with Special Valuation Branch (SVB), Chennai Customs since the imports from various HP entities were considered to be related party transactions.

2.2. On the basis of intelligence that the appellant was evading payment of customs duty by resorting to undervaluation of their goods, investigation was initiated by DRI by searching various business premises connected with the appellant on 24.09.2008 and records were seized during search operations and also the goods lying at certain premises were seized under Mahazar/ Panchanamas. After detailed scrutiny of the records retrieved and statements recorded during the course of investigation, a total of 19 show-cause notices were issued, of which 8 show-cause notices pertain to imports made through different Airports /Sea ports during the period 01.11.2004 to 19.03.2009 and 11(eleven) show-cause notices were issued proposing confiscation of the goods seized from various premises. A total differential duty of Rs.1,473 crores was

demanded with interest and penalty for the said period along with proposal for penalty on individuals. All these show-cause notices were initially answerable to the respective Commissioners of Customs having jurisdiction over the ports or places wherefrom the imported products were cleared /seized; but later CBEC issued Notification No.63/2010-Cus(NT) dated 07.07.2010 appointing Commissioner of Customs, Bangalore as the common adjudicating authority for all the show-cause notices issued. On adjudication, the learned Commissioner has reduced the demand to Rs. 925,40,04,110/-; imposed penalty of equal amount Rs. 925,40,04,110/- under Section 114A, and Rs. 50,02,00,000/- under Section 114AA of the Customs Act, 1962 on the appellant company; personal penalty of Rs.26.20 lakhs against Mr. S. Srinath; of Rs.15.90 lakhs against Mr. D. Saikumar; of Rs.26.20 lakhs against Mr. NVP Tendulkar; of Rs.26.20 lakhs against Mr. B.S. Ravishankar; of Rs.26.20 lakhs against Mr. Deepak Kanti Bhowmick; of Rs.15.90 lakhs against Mr. Manoj Bavle under Section 112(a) of the Customs Act, 1962 were imposed; directed confiscation of the seized goods from various locations released provisionally with an option to redeem the same on payment of fine of Rs. 29,11,91,000/. Hence the appeals. Revenue has also filed an Appeal No. C/2199/2012 challenging that part of the order where the Commissioner has dropped the demand.

3.1. At the outset, the learned advocate for the appellant providing a brief background has submitted that the appellant is a company incorporated in India under the Companies Act, 1956 and wholly owned by HPUSA. They are, *inter alia*, engaged in the business of import and resale of IT products like computers, laptops, printers, servers etc. He has submitted that bulk of the products imported by the appellant, since are IT products, attract 'nil' Basic Customs Duty (BCD); thus, only Rs.9.36 crores out of the total differential duty confirmed by the learned Commissioner i.e. Rs.921.98 crores pertains to BCD and the remaining differential duty confirmed i.e.

Rs.912.62 (approx..) pertains to Countervailing Duty (CVD) and Special Additional Duty (SAD). For import and local sale of HP products, the appellant was appointed as non-exclusive limited risk distributor of HP products in India under the Distribution Agreements dated 01.11.2005 with HPUSA. The majority of the products imported by the appellant were supplied by HP Singapore which was operating as Distribution Centre for the Asia Pacific Region. The products supplied by HP Singapore were either billed directly to the appellant or through HP Switzerland, which was called as Rebiller Entity for the Region. The products are physically shipped to the appellant either directly from HP factories (including third party Original Design Manufacturers) or through HP Singapore but the billing for the same is either done directly to the appellant by HP Singapore or through HP Switzerland i.e. through the Rebiller Entity. The appellant sells the imported goods to the end-customers in India directly or through channel partners. The appellant mainly follows Inter-Company (IC) Pricing Policy as per Clause 9 and 11 of the Distribution Agreement which stipulates the pricing of products sold by various HP entities to the appellant. Referring to Clause 9 of the Distribution Agreement, he has submitted that it deals with 'Compensation' to the Distributor which is in consonance with inter-company transfer pricing methodology, also known as "Return on Value Added Cost" (ROVAC, for short). In terms of the said ROVAC pricing policy, the appellant as a distributor is compensated on arm's length basis of its cost i.e value-added costs (VAC) and non-value added costs (Non-VAC) and reasonable return on the value added costs. It is achieved by adjusting the discounts offered by the HP entities to the appellant from the list price of the products. He has submitted that similar distribution agreements were entered with other sale entities in almost 100 countries across the world. He has submitted that the import price determined using ROVAC principle is in consonance with the underlying principle of arm's length price under Transfer Pricing Policy and satisfying the

Transaction Net Margin Method (TNMN) of Transfer Pricing which has been accepted in other countries.

3.2. Further explaining the ROVAC principle, he has submitted that the price to a sales entity is based on the net resale price which the sales entity expects to realise on the sale of its products. The net resale price realised for the imported goods in the country of importation is the starting point for determining the value for the goods imported. Thus, the importing HP entity purchases the product from the selling HP entity at a price which will enable the importing entity to meet all its costs + a ROVAC determined profit on the specified cost upon resale of such product. This specified cost for this purpose are referred to as Value Added Costs (VAC). As per the HP Policy, the sales entities are entitled to get 10% till 2005 or 8% from 2006 onwards during the relevant period on such VAC as their reasonable return (profit). ROVAC Policy objectives applies to the entity as a whole covering its total operations of sales and support and not for individual transactions. The sales entity provides the integrated functions of selling, pre-sales support and post-sales service, necessary to promote and sustain sales of HP products.

3.3. Referring to Clause 11 of the Distributor Agreement, the learned advocate has submitted that as per the ROVAC Policy, the products must be sold to the appellant at a discount from the list price, so that the appellant could recover all its costs and earn a reasonable profit so as to achieve the target of 8% / 10% ROVAC for the year as a whole on overall basis. He has submitted that list price is an internal concept followed by HP for each of its products. Normally, they determine a Local Currency List Price (LCP), specific to each country, for each product. Further, when the said LCP is converted to any other currency by applying the currency conversion rates, it is known as Converted Local Currency Price (CLCP). The LCPs / CLCPs is an estimated target base price at which the products are to be sold in the retail market of the imported

country after discounts. The said List Price is fixed after taking into account various factors such as competitors' prices in the local market, HP's brand value etc. It is merely a notional base price and the real transactions may not be actually taken place at such price. As a matter of fact, the products are sold after offering huge discounts on the said LCPs. The LCP is generally built up from the net realisation expected from the sale of product to the retail customers, marked up by the discount offered to the customers. The distributors and retailers of HP got discounts from the List Price which in turn offered discounts from the List Price while selling the products to end-customers. The Inter-Company transfer price (import price) is expressed in terms of CLCP less purchasing /funding /inter-company discounts. The funding discounts are calculated as percentage of CLCP in order to arrive at the requisite net inter-company transfer price which will enable recovery of all costs and ROVAC.

3.4. Further explaining the concept of Reference Price (RP), he has submitted that RP is another base price used by HP for Inter-Company pricing, other than CLCP. RP is set as a global base price for each product and remains the same throughout the world. RP is not country-specific and is in USD. He has submitted that RP is used as base price (instead of CLCP) for the internal use orders and IC OEM orders (factory to factory) as in the case of internal use and IC OEM orders, the products in question do not get resold to trade customers in the same form. In case of Internal use orders, the products are meant for use within the buying HP entity for its operations. Similarly, in case of IC OEM orders, the products are meant for integrated into or combined with another product manufactured by the factory (buying entity). Hence, in both these cases, the products are not meant for resale in the same form, to trade customers. RP is also used as base price for sales from factory entity to distribution centers as the CLCP (which is country specific) at which the product is sold is not known at the time factory entity

sells to a distribution center, as the final destination (country) of the products may not be known.

3.5. The learned advocate has further submitted that a proceeding was initiated by Special Valuation Branch (SVB) in the year 1996 rejecting the HP's inter-company pricing policy based on ROVAC and an order enhancing the customs invoice value of the products to the extent of the selling commission received by the appellant in respect of direct 3rd party imports was passed. The said order was challenged before the Ld. Commissioner (Appeals) which was decided in their favour. The Revenue's Appeal against the said Order was rejected by CEGAT. The order of CEGAT was accepted by the Department and thereafter periodical reviews by SVB, Chennai were conducted and the ROVAC pricing policy has been accepted.

3.6 He has further submitted that in 2002, HP acquired Compaq Computer Corporation on a worldwide basis resulting to merger of the Compaq Computer with HPUSA. As the said incident of merger was communicated by the appellant to SVB, Chennai and informed that amalgamated entity would follow HP's pre-merger inter-company pricing policy for imported products, except for certain items where Compaq's computed cost policy would apply.

4.1 Assailing the impugned order, the learned advocate has submitted that the declared import price is not influenced by the relationship between the parties and is in accordance with provisions of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 /2007 (Customs Valuation Rules for short).

4.2 He has submitted that the issue in the present case is, the sellers and buyers are related persons in terms of Rule 2(2) of the Valuation Rules. Further, he has submitted that as per the Interpretative Note of the CVR, where the price is adequate to ensure recovery of all costs + profit margin which is representative of the firm's overall profit realised over a period of time, e.g. on an

annual basis, in sale of the goods of the same class or kind, would demonstrate that the price is not influenced by the relation. The basic principles used by HP in arriving at the transfer price to one of the group companies as the appellant is the same as used when dealing with 3rd party independent distributors. The pricing logic is used not only when sales entities like the appellant dealing with the independent 3rd party distributors but also in a situation when HP Singapore or HP Hong Kong sells the products to 3rd party distributors directly in countries like Bangladesh, Sri Lanka, Pakistan etc., where HP does not have its own subsidiary company. The HP's primary selling model is via a distributor /reseller channel and this model works on the fundamental principle of each unit in the supply chain being compensated for its costs and an assured return as they neither control the costs of the product (as that is controlled by the factory) nor the selling price of the product (which is market determined). The ROVAC pricing policy followed by the HP in determining the import price is supported by an example provided at para 589 of the Commentary on the GATT Customs Valuation Code by Saul L. Shermon. Further, he has submitted that the pricing policy based on ROVAC principle enshrines the principles of deductive value method provided under Rule 7 of the Customs Valuation Rules, which provides for certain deductions in terms of general expenses and profits from the net sales realisation in India so as to arrive at the assessable value. Thus, the declared import price of the product by the appellant in terms of the HP ROVAC pricing policy is in line with Rule 3(3)(a) read with the deductive principles enshrined in Rule 7 of CVRs. Further, he has submitted that this principle has already been accepted by the CEGAT in the appellant's own case and the inter-company transfer pricing policy has also been accepted under Income Tax law.

4.3 It is his argument that during the relevant period, the rates of Corporate Income Tax and the Dividend Distribution Tax applicable to the appellant in India were very high as compared to the rate of

customs duty applicable on the imported products. Thus, even if they lowered customs duty resulting into higher profit, it would have resulted in payment of higher income tax on excess profit at higher rate. Therefore, the said scenario under Income Tax indicate that the relationship between the appellant and its group companies did not influence the import price of the produces; hence the declared transaction values be accepted. In support, they referred to the Commentary at Para 589 of Saul L. Shermon.

4.4 Further, he has submitted that a comparison between the indent and non-indent transactions would demonstrate that the transaction between the group entities and the appellant is at arm's length.

4.5 Learned advocate has further submitted that the trade discounts allowed to buyers in India is a permissible deduction to arrive at the assessable value of the imported goods. He has submitted that the net resale price of a product less the costs (VAC and other cost) and ROVAC forms the basis for arriving at the inter-company import price. The IC transfer price (import price) is expressed in terms of CLCP less purchasing /funding /IC discounts. The funding discounts are calculated as percentage of CLCP in order to arrive at the requisite net IC transfer price which enables recovery of all costs and ROVAC. It is his contention that even though the Commissioner agreed with the ROVAC pricing principle but objected to its implementation in India and recorded different view about the treatment of the discounts / expenses in the ROVAC computation. The trade discounts disputed by the learned Commissioner which contribute major portion of the demand are : (i) Special Negotiated Discount, (ii) Price Protection discount, (iii) End of Life Discount, (iv) Cooperative Partner Marketing Discounts and (v) Influencer Fees. The learned Commissioner rejected these discounts observing that the trade discounts offered by the appellant to buyers in India should be known at the time of import

and be indicated in the invoice. This is because there is a special relationship between the discounts offered locally by the appellant with that of the import transactions. Accordingly, there is no need to apply the test of eligibility of the discounts offered locally, as abatements at the import level. The learned Commissioner has further held the view that only some of the trade discounts offered by the appellant to its buyers were allowable discounts and others to be considered as ineligible trade discounts and not to be deducted from the gross sales revenue in the ROVAC computation. Accordingly, the learned Commissioner recomputed the assessable value of the imported products.

4.6 Rebutting the findings of the learned Commissioner on various discounts held to be inadmissible, the learned advocate has submitted that denying abatements on certain discounts is unsustainable in law. He has submitted that the starting point for computing the IC transfer price based on ROVAC would be the price realised by the appellant upon resale of the imported products in India. From the said resale price, all post-importation expenses and reasonable profits are deducted to arrive at the import price (IC transfer price). The resale price of the import products in India would be the net sale price realised by the appellant i.e. gross sales (list price) less the trade discounts offered by the appellant to the buyers. In such scenario, scrutiny of admissibility of such discounts as deductions /expenses in arriving at the customs value does not arise at all. The foundation of deduction methodology under Rule 7 of the CVR is the net actual realisation from the sale of the imported product post-importation in India and not any arbitrarily arrived at deemed realisation. All general expenses in connection with sale of the imported products are liable to be deducted from the resale price to arrive at the deducted customs value. All heads of expenditure covered by trade discounts in any case qualify as general expenses in connection with the sale of imported products in India even if the same is strictly in the nature of discounts.

Therefore, the discussion by the learned Commissioner in the impugned order on each type of discount is inconsequential and the tests conducted by the learned Commissioner is contrary to the principle of law laid down in the following cases:-

I. Bombay Tyre International [1984 (17) ELT 329 (SC)]
II. Madras Rubber Factory [1995(77) ELT 433 (SC)]
III. Metal Box India Ltd. Vs. CCE [1995(75) ELT 449 (SC)]
IV. Voltas Ltd. [1977 ELT J177]
V. Gujarat State Fertilisers Co. Ltd. Vs. UOI [1980(6) ELT 397 (Guj.)]
VI. Dy.CST Vs. Advani Oerlikon (Private) Ltd. [1976 (37) STC 1 (Kerala High Court)]
VII. Mirah Exports Pvt. Ltd. Vs. CCU [1998(98) ELT 3 (SC)]
VIII. Eicher Tractors Ltd. Vs. CCE [2000(122) ELT 321 (SC)]

4.7 Further he has submitted that the learned Commissioner has wrongly assumed the list price to be ordinary competitive price and the discounts offered from such list price to be abnormal reductions.

4.8 Explaining the nature of discounts disallowed by the learned Commissioner, he has submitted that

(i) Special Negotiated Discount:- the nomenclature 'Special Negotiated Discount' is not be interpreted in a sense that it is offered only to a special class of customers. The fact that special negotiated discounts were offered to totally unrelated and independent customer like CBEC, Government of India clearly shows that these discounts were not restricted to some special class of buyers or customers.

(ii) Price Protection Discount: – the policy of offering price protection is well known to the trade and agreed between the appellant and the buyer. The actual quantum of price protection discount may vary depending on the price reduction done by the appellant.

(iii) End of Life Discount:– it is agreed and known at the time of sale of goods by the appellant to channel partners and therefore should be allowed.

(iv) Cooperative Marketing Expenses:– It is just like sales goal attainment incentives. Cooperative partner marketing policy is also known and agreed upon in advance between appellant and channel partners though the actual quantum and eligibility get determined at the end of the period.

(v) Influencer Fees:– The Department has already allowed deduction towards field selling expenses along with ROVAC margin while arriving at the Customs value. Therefore, there is no reason to disallow the influencer fee which is similar in nature. The influencer fee that was paid to the channel partners (in transactions where such channel partner is not per se buying and reselling) was recorded as trade discount (reduction from gross sales) in the books of accounts of the appellant. Such accounting treatment basically means that the appellant did not receive any ROVAC on such influencer fee.

(vi) Sales Type Lease Trade Discount:– This discount is given on goods sold on lease basis and should be allowed as it is agreed and known at the time of sale of goods.

(vii) Trade Discount on Miscellaneous sales:– The fact that these discounts are given on miscellaneous sales does not mean that these discounts are not uniformly available to all customers at all commercial levels. The nomenclature of the discount only denotes the manner in which these discounts are recorded.

(viii) Trade Discount on Support and Services:– These discounts are given on software portion embedded on the goods being sold which were agreed and known at the time of sale of goods by the appellant.

4.9 Even if some of the trade discounts like Cooperative Marketing Expenses and Influencer Fees are said to be strictly not in the nature of discounts but the same are admissible as part of post-importation selling and marketing expenses in arriving at the value

in terms of Rule 7 of the CVR, 2007. Further, he has submitted that disallowance of deductions towards trade discounts would result in including a notional amount in the resale price of products, which never came into the coffers of the appellant and such approach will also result in treating the list price itself as the notional resale price forming basis of arriving at the deduction value. It is not permitted in the CVRs in view of the principles laid down in the cases of Eicher Tractors ltd. Vs. CCE [2000(122) ELT 321 (SC)] and Sara Electro Acoustics Pvt. Ltd. Vs. CCU [2009(240) ELT 448 (Tri. Del.)]

4.10 Further, the learned advocate has submitted that it is a well settled principle of law that Revenue authorities cannot step into the shoes of a businessman to decide the expenditure that the businessman ought to have incurred or the quantum of expenditure that can be incurred, which is the prerogative of the businessman to decide the expenditure required for furthering the business. In support, he has referred to the judgment in the case of CIT Vs. Walchand & Co. [(1967) 3 SCR 214 (SC)].

4.11. He has further submitted that averaging of trade discounts is permissible as there is no bar in the CVR against averaging of expenses like trade discounts for the purpose of claiming deduction from the resale price in India to arrive at the assessable value. The concept of averaging expenses or deductions is well accepted by the courts. In support, he placed reliance in the following cases:-

I. LSR Speciality Oil P. Ltd. Vs. CCE, Belapur [2015(324) ELT 582 (Tri. Mumbai)]
II. Collector of Customs Vs. India Polyfibres Ltd. [1988(38) ELT 517 (Tr.)]
III. Essar Steel India Ltd. Vs. CCE, Raipur [2017(345) ELT 139 (Tri. Del.)]

5.1 The learned advocate has further submitted that even though the learned Commissioner in the impugned order allowed deduction on account of customs duties, customs brokerage and fees in calculating the assessable value being post-importation expenses,

he did not consider the same for the computation of ROVAC margin of 10% / 8%. It is their contention that the appellant had imported the IT products on CIF (Cost, Insurance and Freight) or DDU (Delivered Duty Unpaid) basis and discharged applicable duties on the CIF / DDU value in the invoices. In addition, the appellant also incurred certain post-importation expenses of customs fees and brokerage connected with the import of the goods. These elements viz. customs duties and customs fees / brokerage incurred by the appellant forms part of the VAC in terms of the internal HP ROVAC pricing policy. Accordingly, these expenses were claimed as deduction from the net sales revenue of the appellant in the ROVAC computation. Referring to Clause 9 of the Distribution Agreement entered between the appellant and HPUSA, he has submitted that the appellant in its capacity as a distributor responsible for selling, servicing, supporting and distributing HP products and services in India. The appellant is to be compensated for costs associated with these functions in accordance with the inter-company pricing policies. The compensation is generally realised by the appellant through their receipt of 'Purchasing Discount' i.e. a discount on the price at which HP products are purchased from HP's headquarters. The purpose of Purchasing Discount is to allow the appellant to recover its VAC and to earn a reasonable margin of profit on such costs. According to the inter-company pricing policy, VAC eligible for ROVAC based compensation include expenses relating to field selling, field marketing, administrative functions, warranty services, after-sales support and trading relating expenses. The trading expenses include costs such as freight, export /import services, duties and import taxes, local transportation and delivery charges incurred in supplying products to trade customers. Therefore, customs duties, customs fees and brokerage paid by the appellant definitely form part of the VAC. These are post-importation expenses; accordingly deductible from the assessable value in accordance with Rule 7 of the CVR, 2007.

5.2 Further referring to the Interpretative Note to Rule 3 of CVR, 2007, it is submitted that even in a situation where price charged for the imported goods is on Delivery Duty Paid (DDP) basis wherein the liability to pay customs duty is on the seller or exporter, the customs duty payable in India is allowable to be deducted from such DDP price. It is to ensure that all post-importation costs including customs duty not to form part of the assessable value. Even if the assessment is based on Rule 9 of the CVR 2007, the customs duty payable in India by all means is required to be deducted and cannot form part of the assessable value. It is their contention that once it is accepted that the customs duty paid on imported goods is deductible in computing the assessable value held to be forming part of the VAC, the ROVAC margin of 10% / 8% of customs duty ought to have been allowed automatically. The 10% / 8% target ROVAC margin is arrived at on a benchmark study carried out by the global transfer pricing team of HP at the worldwide level. It is consistently applied and calculated across the world to all the sales entities of HP. It is not permissible to the Customs Department in India to say that they would accept the ROVAC percentage but not the cost base on which the said margins are calculated. If the cost base changes, then the target margins (benchmark margins) will also undergo a change to bring parity and ensure proper comparison. In other words, if the cost base is reduced by excluding customs duty, then the benchmark margins will not be 10% / 8% but higher. He has submitted that in the show-cause notice issued by the DRI relating to spare parts, deduction of customs duty and also ROVAC on customs duty has been allowed. Therefore, the learned Commissioner has erred in not allowing customs duty to be forming a part of the VAC and allow 10% / 8% on ROVAC. Further, they have submitted that averaging customs duty for the purpose of claiming deduction from the resale price in India to arrive at the assessable value has been acknowledged and accepted by various Courts.

5.3 Also they have submitted that in any case, the appellant are entitled to the cum-duty benefit of the revised assessable value. It is their contention that in the indirect tax law, there is a strong presumption that the amount collected from any person consists of a duty component in it as an indirect tax, the person liable to pay tax and collect the same from other person. In support, they have referred to the judgment of the Larger Bench of the Tribunal in the case of UOI Vs. Sri Chakra Tyres Ltd. [1999(108) ELT 361 (Tri. LB)], which has been later affirmed by Hon'ble Supreme Court reported at 2002(142) ELT A279 (SC).

6.1 Assailing the impugned order denying deduction on account of warranty services in respect of products sold in India, the learned advocate has submitted that no separate compensation was received by the appellant towards warranty expenses over and above the funding discounts either by way of reimbursement or otherwise. In terms of the ROVAC inter-company pricing policy, the selling price of the products to the appellant is done in such a way that as a distributor of the products, the appellant are compensated on arm's length basis of its costs i.e. VAC and non-VAC and reasonable return on the VAC. The costs relating to warranty form part of the VAC incurred by the appellant in terms of the ROVAC pricing policy and included for the purpose of computation of 10% / 8% of ROVAC margin. In the notice, it was proposed to deny deduction alleging that the warranty cost was compensated by HPUSA through funding discount; hence, not borne by the appellant; therefore, should form part of the value of the goods imported. Referring to Clause 13 of the Distribution Agreement, it is submitted that the appellant was under an obligation either to perform by itself or get it performed on its own behalf all warranty obligations for HP products in India. Further, clause 9 of the Distribution Agreement also provides that compensation is to be provided in the funding discount for all costs incurred for servicing, supporting, distributing etc. Therefore, a combined reading of Clauses 13 and 9 of the

Distribution Agreement and HP ROVAC inter-company pricing policy, it is clear that warranty services provided by the appellant form part of the VAC. Also, since it is in the nature of post-importation expenses, eligible for reduction in computing the import value of the goods following deductive methods under Rule 7 of CVR 2007. In the present case, since the appellant is undertaking warranty obligation on its own account and neither they have made payment to overseas HP entities on account of warranty charges as a condition of sale of its products nor the appellant is paying an amount to 3rd party to satisfy the obligations of the supplier; therefore, the warranty expenses cannot be included in the assessable value. In support of the said argument, they referred to the Commentary on the GATT Customs Valuation Code by Saul L. Sherman (pages 75-76) and the judgment of the Tribunal in their own case reported as CC, Chennai Vs. Hewlett Packard Ltd. [1999(108) ELT 221 (Tri.)].

6.2 Also, they have submitted that the learned Commissioner has wrongly interpreted para 5(a) /para 6-8 of the Commentary 20.1 of the Technical Committee on Customs Valuation of the WCO. It is submitted that their case is covered under para 5(b) and para 9 of the Commentary i.e. warranty undertaken by the buyer and not by para 5(a) and para 6-8 of the Commentary i.e. warranty undertaken by the seller. It is submitted that once the transaction value has been rejected by the learned Commissioner and the assessable value is arrived form the list price of the products for resale in India which is inclusive of costs including warranty and since the appellant does not recover any amount over and above the sale price from the customers towards warranty, disallowance of warranty costs which is a post-importation expenses, hence to add the same to import value is unwarranted.

7.1. Assailing the impugned order which confirmed inclusion of freight and insurance charges under Rule 10(2) of the CVRs, it is

submitted that the appellant had imported products from its group companies on incoterm on CIF / DDU basis. Thus, the prices charged by the supplying entities to the appellant on the invoices and declared by the appellant to the Customs, were the prices for delivery at the time and place of importation, customs duty was paid on the CIF value as indicated in the invoices, adding of freight charges is incorrect. Undisputedly, international freight was paid by the supplying entities directly to the freight forwarders like DHL, KWE and suppliers did not recovery any amount over and above the invoice amount from the appellant towards international freight. It is their contention that the learned Commissioner has misinterpreted Clause 11 of the Distribution Agreement in holding that invoice value was exclusive of freight and it is to be separately added to the customs value. Clause 11 envisaged two types of transaction viz. (a) FOB prices and (b) DDU / CIF prices. If the invoices clearly indicated terms of supply or price to be CIF / DDU basis, then Clause of the said Agreement would not operate and the terms of such invoices only would prevail. It is an admitted fact that the appellant has not paid any amount over and above the invoice price to the supplier; therefore, additional freight charges being not incurred by the appellant, addition of 20% notional freight to the value of the imported goods is unsustainable in law. Further, they have submitted that the findings of the learned Commissioner that in case of every CIF transaction, the importer would be required to provide information regarding the actual international freight and insurance is commercially impossible and against the internationally accepted practice and hence, unsustainable in law. In support, they have referred the following judgments:-

I. Ispat Industries Ltd. Vs. CC, Mumbai [2006(202) ELT 561 (SC)]
II. Menon Technical Services Private Ltd. Vs. CCU [2010(249) ELT 383 (Tri. Chennai)]
III. CC(Pre.), Jamnagar Vs. Hindustan Copper Ltd. [2016(331) ELT 99 (Tri. Ahmd.)]
IV. UOI Vs. Mohit Minerals P. Ltd. [2022(61) GSTL 257 (SC)]

V. (v)JBN Apparels Pvt. Ltd. Vs. CC, New Delhi ICD TKD [2025(3) TMI 514 – CESTAT NEW DELHI]

7.2 Further, they have submitted that HPUSA has taken a global insurance policy and the said policy, inter alia, covers movements of products /parts among HP entities worldwide. The premium for the entire policy is paid by the HPUSA to the insurance company. The cost of insurance is initially paid by the Global Risk Management (GRM), an arm of HPUSA and allocated to the Global Business Units (GBUs) on a monthly basis according to a particular ratio. The premium paid by HPUSA are allocated to the rebilling (CR entity) on monthly basis. The said costs are recovered by the CR from the sales entities like the appellant as part of their resale price of products /parts. The appellant does not pay any amount on account of insurance cost to rebilling entity or any other insurance policy. Therefore, when the goods are imported by the appellant on CIF / DDU basis which constitute an all inclusive single value, there is no scope for any further addition under Rule 10(2) of the CVRs.

8. Learned advocate for the appellant assailing the abatement of 30% discount + SRFR discount allowed on the CLCP under the impugned order in arriving at the customs value in respect of SRFR products has submitted that as a distributor of various products, the appellant imported different models of HP branded inkjet as well as laser jet computer printers and resale the same to various independent and 3rd party buyers in India. Also, as a distributor of the printers, the appellant undertook support services in respect of such products during warranty period which includes providing free service and replacement of parts. Beyond the warranty period, the services of extended warranty are provided to customers who opt for the same which are comprehensive in nature covering both service and replacement of parts. During the warranty period, the appellant normally repairs the printer by replacing the defective parts or components; however, in case of certain category of printers, the appellant adopted a different scheme known as Supply

Chain Replenishment Fulfillment and Reinvention (SRFR). The SRFR program undertakes replacement of main portion of the printer which is stripped-down version of the normal printer. The SRFR unit does not have paper tray, power supplies, ink cartridges, driver software CD, manual etc. Since, the customer already possesses these accessories when they receive the regular printers at the time of its purchase, the customer would be able to use the SRFR replacement unit along with the other accessories available with them. The value of the imported SRFR products is arrived at by taking into consideration CLCP of the regular product less inter-company funding discount as applicable to regular product less SRFR discount (towards the value of missing accessories and parts). During the relevant period, the funding discount is applied to the SRFR products as the same is applied to the regular products. Even though in the show-cause notice, it is proposed to allow only SRFR discount, the learned Commissioner has held that the appellant are entitled to the standard discount of 30%. The learned advocate has submitted that the appellant are entitled to the regular funding discount + SRFR discount whereas the learned Commissioner has allowed at standard discount of 30% from CLCP without any legal basis which is not only arbitrary but also contravention of the principles laid down in the valuation rules. He has submitted that the transaction value of regular printers cannot be taken as the CLCP, it is for the simple reason that the regular printers were never imported at CLCP but CLCP less funding discount. Therefore, the appellant had correctly valued the SRFR units in terms of the principles laid down under Rule 5 of CVRs i.e. transaction value of similar goods which is transaction value of regular printer subject to deduction on account of value of missing parts and accessories. The only ground recorded in the impugned order in disallowing the funding discount is that the SRFR units were not meant for sale but for replacement during warranty period. It is their contention that

discounts disallowed for valuation of free samples and goods meant for consumption held to be incorrect in the following judgments:-

I. Griffon Laboratories Pvt. Ltd. Vs. State of Maharashtra [1988 (36) ELT 7 (Bom.)] affirmed by the Division Bench in 1992(58) ELT 36 (Bom.)
II. Dharamsi Morarji Chemical Co. Ltd. Vs. UOI [1980(6) ELT 454 (Bom.)
III. Medly Pharmaceuticals Ltd. Vs. CCE [2011(263) ELT 641 (SC)]

9.1. Assailing the order on the issue of confirming differential duty demand relating to MRP based assessment of the imported products, learned advocate has submitted that by amending Notification No.05/2008-CE(NT) dated 24.01.2008 to Notification No.02/2006-CE(NT) dated 01.03.2006, computers, computer parts and accessories, laptops etc., were brought within the scope of MRP based assessment for the purpose of CVD and accordingly, the appellant has started discharging CVD on the declared MRP of the imported products. The appellant had followed a structured process for declaring the MRP in the Bills of Entry at the time of import. The applicable MRP was communicated by the business units (like PSG, IPG) to both the overseas factories responsible for affixing MRP labels and the Customs Operations Team in India responsible for filing Bill of Entry. Thus, in case of products liable to MRP based assessment, they were declaring the applicable MRP on the Bills of Entry based on the communication received from concerned business units. Considering the volume of imports and the individual packages imported in each shipment, it was practically impossible to physically verify each package at the time of import. Therefore, the appellant adopted the practice of declaring the MRP in the Bill of Entry based on the list communicated by the concerned business unit finance teams and appropriate duty was paid on that basis. After clearance, the packages were transported to the appellant's warehouses which were managed under logistics agreements with DHL Danzas Lemuir Pvt. Ltd. which covered services of DHIL including verification of MRP labels affixed on the import package

and its correctness. DHL was responsible for relabelling in cases such as promo-bundling, rework of damaged cartons and sticker application etc.; none of which for altering the MRP. There are certain instances where labelling /stickering activity was undertaken in the warehouse and there was no intention to alter the MRP already affixed on the products. For example:

Reasons for undertaking labelling /stickering in warehouse are:

'INR' shown in the price instead of 'Rs.'
Size of display of the screen shown in 'inches' instead of 'cm'.
Name of the place mentioned incorrectly.
MRP did not carry the text 'inclusive of all taxes'.
Decimals missing on MRP label.
Part Nos. appearing on the labels.
Re-boxing of damaged cartons
Missing MRP label.

9.2 He has further submitted that the volume of relabelling activity was minimal compared to the volume of overall goods handled and in most cases, the activities were administrative in nature, aimed at ensuring regulatory compliance and customer-specific requirements. Further, he has submitted that in isolated cases, errors in MRP values were identified and they chose to sell the products at or below the MRP of the products or re-export the same. At no point of time, the MRP labels were altered subsequent to import to increase the declared value.

9.3 Assailing the finding of the learned Commissioner that the MRP declared by the appellant be rejected and CLCP should be adopted as the correct MRP, the learned advocate has submitted that fixation of the MRP is exclusive prerogative of the manufacturer /importer and not for the Department. It is his contention that as long as the manufacturer /importer does not sell the product at a price higher than the declared MRP, the basis for fixation of MRP or the MRP itself cannot be questioned by the Department. In support, he referred to the judgment in the case of Amtrex Hitach Appliances Ltd. Vs. CCE, Vapi [2009(236) ELT 203 (Tri. Ahmd.)]. Further, he

has submitted that the CLCP and MRP are two different concepts; CLCP is purely internal pricing mechanism adopted by the HP for internal accounting and marketing purposes. It is not a statutory declaration nor affixed on the product, and not disclosed to retail customers, whereas MRP is a statutory declaration mandated under Rule 6 of the Packaged Commodities Rules, 1977 and affixed on the packages and legally recognised price cap for sales to ultimate consumer. Further, as per Section 4A of the Central Excise Act, 1944 which applies to imports by virtue of Section 3(1) of the Customs Tariff Act,1975 clearly lays down that assessment for CVD purpose must be based on the MRP declared on the packages and not on internal pricing mechanism such as CLCP and list price. Further, he has submitted that there is no single instance whereby the Department could establish that the products were actually sold at a price exceeding the MRP affixed on the packages. He has submitted that the appellant has regularly circulated Suggested Retail Price (SRP) lists to channel partners recommending sale price below MRP. This fact establishes the claim of the appellant that products were never intended to be sold above MRP. He has submitted that even assuming without admitting that the products were sold above MRP, then also the demand of differential duty cannot be sustainable in law in view of the judgment of Hon'ble Supreme Court in the case of ITC Ltd. Vs. CCE [(2004) 7 SCC 591] and in the following cases:-

I. Hindustan Coca-Cola Beverages Pvt. Ltd. Vs. CCE [2006(199) ELT 718]
II. Videocon International Ltd. Vs. CCE [2004(167) ELT 33 (Tri. Mum.)]
III. Kripal Drinks Vs. CCE [2004(173) ELT 96 (Tri. Kol.)]

9.4 Further he has submitted that the Customs authorities lack jurisdiction to demand differential duty as alteration of MRP results into manufacture in view of Section 2(f)(iii) of the Central Excise Act, 1944, which prescribes that processes such as packing, repacking, labelling, relabelling, declaration or alteration of MRP, or

any treatment to render the product marketable amount to manufacture. Further, analysing the provisions of Section 4A of the Central Excise Act, 1944 and Section 3(2) of the Customs Tariff Act, he has submitted that there is no provision under the Customs Act or Customs Tariff Act or rules made thereunder which empowers the Customs authorities to determine or alter the declared MRP of imported goods. Therefore, the learned Commissioner cannot resort to provisions of Section 4A of Central Excise Act, 1944 or the provisions of Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 framed under Section 4A in order to question the correctness of the declared MRP or to redetermine the declared MRP. In support, he has referred to the judgment in the case of ABB Ltd. Vs. CC (272) 706 (Tri. Bang.)]. Further, they have submitted that during the initial phase of implementation of MRP based assessment for certain products, inadvertent errors in declaration of MRP in the Bills of Entry vis-à-vis the actual MRP declared on the package came to the notice of the appellant which resulted in both excess and short-payment of CVD which has been later explained in detail during the course of investigation through letter dated 20.11.2008 along with quantification of duty short-paid is also enclosed. Out of the total 76,003 line items of imports which were subject to MRP based assessment, the error result occurred in declaration of lower MRP in 75 line items, which is 0.1% of the total and the differential duty is hardly 0.07% which is very negligible.

10.1 Assailing the impugned order that there has been perpetual overfunding or underfunding in respect of the imported transaction, the learned advocate has submitted that as per the ROVAC policy, a target of ROVAC return i.e. 10% / 8% of the VAC sought to be achieved and periodical review are undertaken and necessary changes are effected to the inter-company discounts for achieving the said target. However, in spite of best efforts, sometimes, the sales entity may not earn exact the target rate of return by the end of the year, due to various factors beyond the control of the pricing

team. This fact was duly disclosed by the appellant to the SVB authorities as part of their submissions made in the proceeding leading to SVB order dated 05.08.1996. Also, a certificate dated 17.02.1995 issued by PWC, USA was submitted to the authorities which clearly states that transfer prices to HP India are structured to cover the costs of labour, material, overhead, other expense and allow a profit element. Also, it is clearly stated that profit achieved will vary depending upon the particular product.

10.2 He has submitted that when the sales entity earns profit in excess of the target, it is called overfunding; whereas if the profit earned lower than the target, it is called underfunded. As a matter of policy, targeted ROVAC return is required to be achieved by the appellant after taking into account all its operations, for the entity as a whole. Accordingly, initially the ROVAC results were being computed and monitored for the company as a whole and ROVAC results for the company as a whole do not show any reason for rejection of declared customs value. However, in the present case, the ROVAC return as alleged to be computed for each funding type and on a quarterly basis, the appellant undertook the exercise of re-computation of the ROVAC results for the business of inter-company purchase and resale of HP products on a standalone basis. They have submitted the summary of the result of such analysis to the department, whereby it revealed underfunding for Financial Year 2006, FY 2007 and FY 2009 and overfunding for the FY 2005 and FY 2008. It is contended that if the entire period covered in the present case is considered, there was an underfunding of USD 113.5 Million (approximately Rs.511 crores). Further, if the overfunding is also considered for the year, then the amount of overfunding translates to approximately 2.22% of the total import value of Rs.12,630 crores during the period. Further, they have submitted that introduction of MRP based assessment for CVD purposes for bulk of the imported products (printers and notebooks) from January 2008

onwards also reduced the impact in terms of differential duty on account of overfunding.

10.3 Further, the learned advocate has submitted that the methodology adopted in the impugned order to determine the ROVAC results funding type-wise and quarter-wise is arbitrary and without any basis. He has submitted that the appellant as a sales entity is required to earn a reasonable return on all its transactions. The objective is not to make the target return on each and every product or each and every transaction. Depending on the market dynamics and cost structure, they could make more profits on certain products in comparison to others. The objective, as limited risk distributor, the appellant must be able to recover all its costs and able to earn reasonable profit on all the transactions taken together. Therefore, monitoring or achieving of ROVAC return for each of the funding types separately is neither laid down in the HP policy nor practically or commercially viable. Also, there is no basis to compute the overfunding / underfunding on a quarterly basis.

10.4 Further, referring to the Interpretative Note to Rule 3(3)(a) of the CVR, it is submitted that the illustration referred therein mentions about recovery of profit realised over a representative period of time i.e. on an annual basis. Usually, a firm's overall profitability is reviewed over a period of one year which is supposed to cover an entire business cycle and is also generally accepted as the accounting period worldwide. Therefore, the HP's policy also requires achievement of ROVAC target on annual basis. Besides, the computation of overfunding / underfunding by the Department is by applying a method /formula is not in consonance with the ROVAC policy of the appellant. Further, they have submitted that the learned Commissioner has travelled beyond the scope of the show-cause notice; hence, the impugned order is bad in law.

11. The learned advocate has submitted that the learned Commissioner in the impugned order confirmed demand invoking

extended period of limitation which is unsustainable in law. The appellant has disclosed all the facts to the SVB and in the earlier round of litigation, CEGAT, New Delhi has accepted the pricing policy followed by the HP. In the earlier SVB proceedings initiated in the year 1992 and 1996, the representative agreement dated 01.01.1989 and Distribution Agreement dated 01.11.1994 were duly considered by the SVB authorities and Commissioner (Appeals) in their orders. A study of the representative agreement and Distribution Agreement would clearly show that appellant was acting as an Indent Agent for direct sales made by HP, Hong Kong to customers in India and receiving remuneration (commission) expressed as percentage of sale price under the Representative Agreement. Further, the appellant was importing /purchasing products from HP, Hong Kong in the capacity of distributor for stock and sale under the Distribution Agreement. The entire proceeding before SVB in 1996 was relating to import of products by the appellant for stock and further sale in India (trading) and it is only with respect to such transactions, appellant had approached SVB for examination of the inter-company import price. The terms of the Distribution Agreement dated 01.11.1994 and subsequent Distribution Agreements dated 01.11.2002 and 01.11.2005 were materially same. Therefore, allegation of suppression or misstatement or misdeclaration on the part of the appellant is not sustainable in law and entire demand is barred by limitation.

12. Further, challenging the Order-in-Original confirming demand of differential additional duty (CVD and Special Additional Duty (SAD) under the provisions of Section 3(1) and 3(5) of the Customs Tariff Act, 1975, it is submitted that in absence of any substantive provisions under Section 3(8) of the Customs Tariff Act as was in force during the relevant period for charging interest, the demand of interest under Section 28AB of the Customs Act is not sustainable in law with regard to short-payment of CVD and SAD levied under Sections 3(1) and 3(5) of the Customs Tariff Act, respectively.

13. It is submitted that imposition of penalties on the appellant under Section 114A and 114AA and on the individuals under Section 112 is also not sustainable on the same basis. Besides, the provisions relating to confiscation of goods under Section 111(m) of the Customs Act is also not sustainable with regard to demand of CVD and SAD as there was no substantive provision under Section 3(8) of the Customs Tariff Act on short-paid CVD and SAD. In support, they referred to the judgment in the following cases:-

i. Collector of Central Excise Vs. Orient Fabrics Pvt. Ltd. [2003(158) ELT 545 (SC)]
ii. Pioneer Silk Mills Pvt. Ltd. Vs. UOI [1995(80) ELT 507 (Del.) – maintained in UOI Vs. Pioneer Silk Mills Pvt. Ltd. [2002(145) ELT A74 (SC).
iii. J.K. Synthetics Ltd. Vs. Commercial Tax Officer [(1994) 1 SCC 276]
iv. Mahindra & Mahindra Limited Vs. UOI [2022(10) TMI 2022]

14. Further, they have submitted that Finance (No.2) Act, 2024 dated 16.07.2024 inserted various amendments which borrowed the provisions of Customs Act and Central Excise Act. Section 106 of the Finance Act, 1994 substituted Section 3(12) of the Customs Tariff Act and has specifically borrowed provisions of Customs Act relating to assessment, non-levy, short-levy, interest, offences, penalties, recoveries etc. The amendment is effective from the date of enactment of the Finance Act 2024 i.e. 16.08.2024 and not given retrospective effect. In support, they referred to the judgment in the case of Chandra Sekhar Jha Vs. UOI [2022(380) ELT 130 (SC)] and State of Rajasthan Vs. Trilok Ram [(2019) 10 SCC 383].

14.1 Thus, imports made prior to the substitution of Section 3(12) from the existence of Section 3(8), no interest or penalties can be imposed in respect of CVD and SAD. In support, they placed reliance in the following cases:-

i. A.R. Sulphonates Private Limited Vs. UOI [2025(4) TMI 578 – Bombay High Court]
ii. Mahindra & Mahindra Limited Vs. UOI [2022(10) TMI 2022]

15. Learned Advocate has further submitted that under Notification No. 89/1982-Cus. dated 25.03.1982 issued under Section 25 of the Customs Act, 1962, on an article on being imported into India is exempted from payment of additional duty of Customs. Once additional duty of customs on imported goods equal to excise duty is paid, all other duties levied under Section 3 including SAD is exempt said to have been exempted under this notification. It is submitted that in view of the clear and unambiguous language of the said notification, once additional duty of customs on imported goods equal to excise duty (CVD) is paid, all other duties leviable under Section 3 of the Customs Tariff Act, 1975 including SAD is exempt under the said notification. In the Finance Act, 2005, Section 3 of the Customs Tariff Act, 1975 was substituted and re-casted. Section 3(5) of the Tariff Act, 1975 levied @ 4% to counterbalance sales tax, value added tax, local tax or any other charges leviable on alike article on its sale, purchase or transportation in India. Pursuant to the said provision, SAD was introduced vide Notification No.19/2005-Cus dated 01.03.2005 which was superseded by Notification No.19/2006-Cus. dated 01.03.2006 which levied SAD @ 4% on all goods covered under the First Schedule to the Tariff Act. He has submitted that with the introduction of levy of SAD under Section 3(5) of the Tariff Act, the earlier Notification No.89/1982 has not been amended, which continues to exempt all other duties levied under Section 3 of the Tariff Act even today. Therefore, once an importer discharges CVD on the imported goods, all other duties levied under Section 3 would automatically stand exempted.

16. The learned Advocate has further submitted that statements of various individuals recorded during the course of investigation are not admissible as evidence without conducting examination of the said witnesses first by the adjudicating authority. It is submitted that Section 138B was inserted in the Customs Act by an amendment made in the year 1973. The objectives and reasons of

insertion of Section 138B clarifies that the said section provides relevancy of statements which are not made before a court in certain circumstances. It further stated that such statements are also relevant for Departmental adjudication proceedings. Thus, it becomes *sin qua non* to follow the mandate of Section 138B for relying upon any statement in adjudication proceedings. It is further submitted that Section 9D of the Central Excise Act, 1944 and Section 138B of the Customs Act are in *pari materia*. Therefore, the judgment delivered on Section 9D is squarely applicable to the facts of the present case. In support, they referred to the following judgments:-

i. J&K Cigarettes Ltd. Vs. Collector [2009(242) ELT 189(Del.)]
ii. CCE, Meerut-I Vs. Parmarth Iron Pvt. Ltd. [2010(260) ELT 514 (All.)]
iii. Jindal Drugs Pvt. Ltd. Vs. UOI [6(340) ELT 67 (P&H)]
iv. Surya Wires (P) Ltd. Vs. Commissioner (CGST) [2025) SCC Online CESTAT 989]

17.1 Further assailing the impugned order, the learned advocate for the appellant has submitted that inconsistencies and incongruencies in the order would make the same unsustainable in law. He has submitted that though the learned Commissioner in the impugned order not disputed the ROVAC pricing policy adopted by the appellant but objected to the implementation of the said policy in India by the appellant. He has submitted that the denial of deductions of various elements from the IC import price as held in the impugned order and the revised values arrived at by the Commissioner, would result in perennial losses to the appellant and the Appellant would be incapable of even recovering the import price, customs duty and other post importation expenses and reasonable profit. Further, it is argued that the revised assessable value determined in the impugned order is so illogical and absurd that the said value is much more than the total revenue earned by the appellant by way of resale of the imported products in India during the relevant period. The revised assessable value suggested

by the learned Commissioner are astronomically high and impossible for any importer to be able to import the products at such high prices and resale the same in India at reasonable profit. Thus, the revised values confirmed in the impugned order are not in accordance with the ROVAC objective of enabling the appellant to earn reasonable profit; hence, not acceptable.

17.2 Further, he has submitted that the methodology adopted in the impugned order is not in consistent with the principles laid down in Rule 7 of the CVR 2007 i.e. deductive methodology which allows the assessable value to be deduced from the resale price in India after offering various deductions and in no stretch of imagination can be higher than the net resale price in India. Further, he has submitted that the incidence of cumulative direct tax payable by the appellant during the period 2005-2009 is much higher than the maximum customs duty rates payable upon importation; thus, it defies all logic to suggest that the appellant had undervalued the imported products to save customs duty. Further referring to the Commentary on the GATT Customs Valuation Code by Saul L. Shermon, he has submitted that overall circumstances be examined including the liability of income tax to answer the question whether the transaction value declared is acceptable. Further, he has submitted that the import prices of indent customers is much lower than the IC import prices of the products imported by the appellant from the overseas entities which indicates that the imported prices by the appellant are at arm's length transaction value; hence, acceptable under Rule 3(3)(a) of the CVR, 2007. Referring to a comparison of indent customer import price and that of the import IC price chargeable to the appellant by the overseas HP entities, he has submitted that the indent 3rd parties were importing the products at much lower prices than the IC price of the appellant once the basic level of trade adjustment is considered. In such circumstances, there cannot be undervaluation on the part of the appellant.

17.3 It is also submitted that there are computation errors in calculating the revised assessable value and the differential duty, inasmuch as handling charge of 1% have been wrongly added to the recomputed value which is based on the deductive principles prescribed under Rule 7 of the CVR 2007. The computed assessable value as per the said rule is for the calculation of customs duty and there is no need to add further 1% towards handling charges. It is his contention that in any case, addition of 1% on notional basis cannot be made under Rule 10(2)(b) in view of the judgment of the Hon'ble Supreme Court in the case of Wipro Ltd. Vs. Asst. Collector of Customs [2015(319) ELT 177 (SC)]. Further, he has submitted that in computing the IC funding discounts from the list price, the learned Commissioner has totally ignored the Non-VAC cost (other than trade discounts) in the said formula. These Non-VAC costs are also in the nature of post-importation cost incurred by the appellant and hence have to be considered in allowing IC discounts. Thus, the calculation is incorrect to the extent it does not take into account the Non-VAC costs incurred by the appellant. The learned Commissioner in respect of the customs duties held that these are in the nature of Non-VAC incurred post-importation and accordingly allowed the same for deduction but erred in not allowing deduction towards other Non-VAC costs which are also in the nature of post-importation cost. Thus, the Commissioner's finding is contradictory in not considering other Non-VAC costs in the computation of revised discounts.

17.4 Further, the learned advocate has submitted that after rejecting the transaction values, the learned Commissioner has adopted Rule 9 of the CVR in computing the revised assessable value and the differential duty payable on such imported goods. He has submitted that wherever the revised assessable value is higher or equal to the declared assessable value, the differential duty demand confirmed by the Commissioner is the aggregate of differential duty allegedly payable on this but not adjusted the

excess duty paid on these transactions /line item alone. Further, where the revised assessable value is lower than or equal to the declared assessable value, the learned Commissioner ignored these line items /transactions assuming the revised assessable value, revised duty /differential duty is to be 'zero'; without adjusting the excess duty paid on these transactions against the alleged short duty paid on other transactions where the revised assessable value is higher. They have submitted that even though the customs duty is an indirect tax and transaction specific, it is well established principle that excess duty paid on certain clearances may be adjusted against short payment of duty against other clearances. In support, referred to the following judgments:-

i. CCE, Hyderabad Vs. Divya Enterprises Ltd. [2003(153) ELT 497 (SC)]
ii. Vinir Engineering Pvt. Ltd. Vs. CCE, Bangalore [2004(168) ELT 34 (Tri. Bang.)]
iii. Bajaj Tempo Vs. CCE, Pune [2004(172) ELT 473 (Tri. Mum.)]
iv. Tiltrod Chem Pvt. Ltd. Vs. CCE, Bangalore [2011(264) ELT 306 (Tri. Bang.)]

18.1 *Per contra*, the learned Special Counsel for the Revenue, reiterating the impugned order, has submitted that even though Special Valuation Branch (SVB) commencing from 1996 have dealt with the value of the goods imported by appellant which later reached Tribunal and an order was passed on 10.07.1998 and accepted by the Department; but the present investigation revealed that during the period from May 2005 to April 2009, the HP entities supplying goods to appellant had been frequently overstating the deductions called 'Funding discounts' from the List Prices, which had an effect of lowering the 'invoice values' and in turn the assessable values of imported products. He has submitted that the documentary and oral evidence confirmed that the appellant had suppressed several material facts and did not make full disclosure about the application of the ROVAC policy in the Indian context and several particulars, such as, method of determination of local list price, quantum of deductions, nature of discounts, overfunding,

which had a bearing on the valuation of products imported. Further he has submitted that as explained by the employees of the appellant, the consolidated amount of 'Funding discounts' indicated on the invoices, shown as deductions from the LP, was the aggregate of the following elements: VAC, ROVAC at 8% of VAC, 14 types of discounts, Estimated Customs duty on average basis, Estimated Customs charges, Warranty Costs, Freight on notional basis and above all unexplained deductions. This is totally contrary to the averments made by the appellant before the CEGAT in the decision cited above that the Invoice values were based on 'List price minus Value added Costs [VAC] by HPISPL+ 10 % Return on such costs [ROVAC].

18.2. It is submitted that the amounts representing – unexplained and unsubstantiated deductions, amounts relating to 9 out of the 14 types of discounts claimed, estimated Customs duty on average basis, estimated Customs charges, Warranty Costs and Freight on notional basis cannot be regarded as admissible abatements /deductions to arrive at the Customs value. He has submitted that the appellant was fully aware that the deductions i.e. 'Funding Discounts' (FDs), factored into the invoices raised on them by the various HP entities were far in excess of the deductions on account of VAC and ROVAC. They were also aware that some of the elements of deductions were not authorized under 'HP Pricing and Financial Policy'. Further, FDs were worked out on the basis of the expenditure estimates provided by appellant for the earlier period; amounts of deductions for the succeeding period were arrived at by the pricing team of HPUSA, who were the final authority for determining the pricing and funding discounts pattern /amounts with reference to various transactions of the appellant. These facts were never disclosed before the SVB, Chennai-Customs and also the variety of deductions included in the invoice prices not declared to the Customs. He has submitted that appellant and HPUSA have wilfully undervalued the said imports by suppressing the fact of

huge deductions being given, by overstating the discounts while indicating on the 'Customs invoices' the 'net invoice prices' of various products and by suppressing several facts as brought out by the present investigation. The deductions claimed as FDs in the instances under consideration now, covering about 1,20,273 Bills of entry filed during Nov 2004 to 19.03.2009, were far in excess of the discounts indicated to Indian Customs as also to the IRS, USA. Therefore, these acts of commission and omission clearly attracted the rider to the Review Orders of SVB i.e. any suppression or misdeclaration affecting the invoice value, which shall be dealt with appropriately under the procedure as and when noticed.

18.3. He has also submitted that there are other significant factors which render the net prices shown on the 'Customs invoices' raised on appellant by the other HP entities as not reflecting true transaction values. These factors are as follows:

(a) Admittedly, the pricing methodology adopted viz., Resale minus Method, is as per the Organisation for Economic Co-operation and Development (OECD) guidelines on Transfer pricing.These guidelines are formulated for income /corporate tax purposes and are applied on aggregate basis. This methodology cannot be readily applied to valuation for Customs purposes. Firstly, the application of these principles is for the entity as a whole on annual basis and not for each individual transaction, which is the basis of valuation under Customs law inasmuch as transaction value has to be determined for each transaction. Secondly, under the methodology adopted by the HP entities, the price to a sales entity is based on the resale price which the importing sales entity expects to realize on the sale of its products. Therefore, the resale price of the imported goods in the country of importation is the starting point for arriving at the value at which the said goods will be imported. Appellant claimed that the method adopted by them to arrive at the transaction value followed the principles enshrined in the 'Deductive value method'

under Rule 8 of the CVR, 1988 and Rule 7 of CVR, 2007. But this method finds application only when the methods laid down in the preceding Rules of CVR cannot be applied for any reason. Besides, while arriving at the net prices indicated on the 'Customs invoices', appellant has applied only some of the principles of 'Deductive value method' which suited them. The effect is a mix of concepts, which satisfied neither the Transaction Value (TV) method nor the Deductive Value (DV) method.

(b) The basic requirement for accepting any price indicated on the invoice as transaction value is that such a sale should be in the ordinary course of trade under fully competitive conditions. In the case of sales to appellant by other HP entities, inasmuch as appellant cannot trade in any goods other than HP products, such sales can never be under fully competitive conditions. Given the fact that the basis of net invoice prices is the prices that they may obtain in the country of importation, it is a tacit admission on the part of HP Entities that such prices are independent of the costs of manufacture and are not governed by normal and ordinary course of trade. Thus, the transaction value method cannot be applied to the imports made by appellant from other HP entities.

(c) The starting Base price is itself based on the customer price estimated by the buying HP entity and has no relationship whatsoever to the internationally traded prices. It is also seen that in many instances, the prices are estimated without any purchase orders backing such sales.

(d) The deductions claimed by HP entities and appellant are estimates /projections and there is no visibility as to the way it is arrived at. These deductions are derived estimates and are based on the information provided by the buying entity (i.e. appellant in this case) for an earlier period. For example, the quantum of discounts in a particular quarter is arrived at taking note of factors that were reported and quantified for the preceding quarter. The discount

shown on any 'Customs invoice' did not reflect the discount actually given by the selling HP entity for that particular transaction. It had no nexus with the goods being valued.

18.4. Further, he has submitted that several elements of discounts / reductions are either abnormal or are in the nature of special discounts limited to exclusive agents. Deductions relating to freight, Customs duty, Customs charges and warranty costs are also not admissible given the fact that in none of the submissions made earlier before SVB of Chennai Customs they had declared that the discounts claimed now were on account of these factors. If, as claimed, such discounts are factored in the net prices, appellant ought to have disclosed the same to the Customs instead of availing of abatements on their own. In such circumstances, appellant's declaration that there was no change in the pricing policy and methodology adopted by the HP entities, amounted to misstatement, without disclosing the changes made in arriving at the net invoice prices. Therefore, the net prices indicated on the Customs invoices raised on appellant by other HP entities cannot be regarded as transaction values as contemplated under Rule 4 of CVR, 1988 or under Section 14 of Customs Act, 1962 read with Rules 3 and 12 of CVR, 2007

18.5. It is his contention that the appellant has all along misrepresented to the CEGAT /Department that all costs plus profit of appellant, which is representative of its overall profit realized over a representative period of time (e.g. on an annual basis) in sales of goods of the same class or kind, would demonstrate that the price had not been influenced. The CEGAT, accepted this argument and concluded that the prices declared by the appellant were not influenced by the relationship between the HP entities as the same were based on 'functional costs plus reasonable profits'.

18.6. Supporting the order of the adjudicating authority, he has submitted that CEGAT was not presented with the correct purport of

the Rule 4(3)(a) / 3(3)(a) and Rule 7 of CVR, 2007 and the relevant Interpretative Notes. In the impugned order, Commissioner has rightly pointed out that the expression 'to ensure recovery of all costs' appearing in Rule 4(3)(a) / 3(3)(a) refers to the costs of the seller and the expression 'profit which is representative of the firm's overall profit realized over a period of time (e.g. annual basis) in sales of goods of the same class or kind" refers only to the overall profits of the selling firm in the sales of imported goods and not to the resale of the same goods by the importer.

18.7. Further referring to the commentary of Mr. Saul L. Sherman and Mr. Hinrich Glashoff in the book titled 'Customs Valuation', which has been relied upon by the learned Commissioner in the impugned order, he has submitted that in this case, HP entity located abroad and not appellant; it is former's costs, plus a profit which is representative of the firm's overall profit realized over a period of time (e.g. annual basis) in sales of goods of the same class or kind, that is to be compared with the price.

18.8. Rebutting to the appellant's claim on the same commentary, he has submitted that from the recital given in the example therein, it is seen that it can be considered only when there is no industry practice or the exporter sells exclusively to the related importer or where no cost or profit figures of the exporter have been furnished to Customs. Firstly, in the instant case, there is a Reference Price for the goods as they leave the factory, which reflects the product cost and profit that accrues to the factory. Secondly, Level 'A' invoices raised by the DC at Singapore on the HQ at Switzerland would show the price representing the seller's cost i.e. RP + other costs, and ROVAC applicable to the DC. Normally, in the course of international trade, selling price charged by the DC on the appellant ought to have been equal to: RP + other costs + ROVAC applicable to the DC. Reliance placed on the example is, therefore, not well founded. Even otherwise, the facts of the present case could entail rejection of

Transaction Value (TV) in terms of Rule 4(2),(a),(b) and (c) and Rule10A till 13.09.2007 and thereafter under Rule12 of CVR, 2007.

18.9. Further, he has submitted that in view of the facts and circumstances that has come to the knowledge of the Department, it would not be appropriate to apply the provisions of interpretative note to the Customs valuation of imported goods by the appellant for the following reasons:-

a) All the products dealt with by appellant are grouped under different category of Funding Types (FTs) having different cost structures; the goods imported are not of the same class or kind and hence, the concept of Customs valuation identifying HP's overall profit over a representative period of time could not be made applicable.

b) In arriving at the firm's representative profit for the purpose of the DV method, the sale of imported goods of the same class or kind has to be taken and the service-related costs and revenue has to be excluded. In the instant case, appellant has taken into consideration costs and revenue related to manufacturing activity, service/support related activity like AMC, Carepacks, unsold inventory held by local channel partners /system integrators etc., in the computation of funding discount. Therefore, the firm's profit cannot be taken as bench mark to determine the reasonableness in recovery of all costs plus profit in arriving at the Customs value of imported goods.

c) The three BUs viz., IPG, PSG and TSG of appellant have individualistic way of reporting their net revenue, costs and net margins achieved over a period of time to the HP management and therefore this segment-wise break-up of net revenue and costs has a separate bearing independent of appellant's overall profit. The overall profit of appellant having a direct bearing on the direct tax front, which is calculated on annualized basis, appears to be inappropriate in so far as it relates to determination of Customs

value which is akin to transaction by transaction of each of the individual BUs imports.

d) The value-added costs (VAC) are essentially estimates based on past data applied in respect of the goods that would be imported by appellant in future. The VAC, which are estimates arrived by applying ratios, averages and percentages in calculation, is being deducted from the list price in arriving at the Customs value. Further, the reporting period under Indian GAAP and US GAAP are also different. The books of accounts are maintained by appellant for the purpose of US GAAP only and the adjustments to Indian GAAP is made from such books of accounts may not represent the fair reporting of appellant's profits over a period of time for the purposes of arriving at Customs value. Therefore, taking the annualized profit as reported in the appellant's books of account for Indian GAAP purposes would not appear to reflect the true picture of appellant's profit in relation to their sale of imported goods.

e) The nature of business activity undertaken by appellant is so diverse as to include manufacturing, trading, support and services. Therefore, the application of normal pricing practices of any industry to be made applicable to the import transactions of appellant appears to be inappropriate and /or irrational.

f) As per the Distributor agreement w.e.f 01.11.2005 (also earlier Distributor agreement) appellant had been appointed as a non-exclusive distributor for all HP products manufactured or distributed by HP, HP factories and the Hqrs. However, it is observed that all the orders of the third-party customers of HP products (also known as indent orders) in India have to be routed through appellant, who were, for all practical purposes, exclusive agents for the sale of all HP products.

g) The comparison of net revenue, VAC etc., provided by the controllership of appellant as per ROVAC review calculation vis-à-vis

the figures provided by the individual BUs throws up contradictory figures in respect of PSG BU (covering FT 6B) and TSG BU (covering FTs 5A & 5B). However, in respect of IPG BU (covering FTs 6A, 6C & 6D) though there is some difference, the same is not as huge compared to other two BUs.

h) From the various other agreements viz., Misc. Services Agreements w.e.f 01.11.2005 and also w.e.f 01.11.2006, General Services Agreements, Cost Reimbursement Agreements etc., entered by appellant with other HP entities world-wide, it appears that the exhibits attached to these agreements relate to the service such as IT support service, Logistic services, Relocation services, Travel services, work force services which are common to all the above agreements. The agreements, *inter alia*, contain a key feature wherein the payment is made by appellant to other HP entities as part of the direct and indirect costs relating to cost of sales viz., the imported goods sold by other HP entities to appellant. Therefore, these payments made by appellant are with regard to IC goods imported by them. It appears that these common elements are built into it only with a view for transferring the money by appellant to other HP entities world-wide.

18.10. Further, he has submitted that the appellant availed of special procedures for accredited importers and invariably their declarations were accepted and examination of goods were waived on account of their special status. As per CVR, 1988 /2007, however, it is mandatory for the goods imported into India to be vouched by a proper declaration with regard to the manner of arriving at the Customs value. Besides, discounts which are materially known at the time of import are alone allowed to be deducted; thus, retroactive discounts are not allowed to be abated as per the Advisory Opinion 15.1 of the Technical Committee on Customs Valuation. In the case of appellant, no proper and full disclosure was made to the Customs in respect of all the elements of

discounts. The appellant have adopted Stock funding discount model to all their imports in as much as they were never aware of the discounts likely to be passed onto their customers in India. They had not adhered to this principle and thereby suppressed vital information to the Customs department with a view to undervaluing goods imported by them. Therefore, the reopening of all the customs duty assessments by redetermination of assessable values in respect of imports of finished products, undertaken by appellant from other HP entities during the period from Nov 2004 to 19th March 2009 is fully justified. Further, the non-disclosure of several material particulars to SVB and the mis-declaration in the Bs/E clearly constitute a deliberate default warranting review of the SVB orders on account of suppression and mis-declaration affecting the invoice value. The suppression and misdeclaration as above entails invoking of extended period of limitation.

19. Supporting the finding of the learned adjudicating authority, the learned Special Counsel has submitted that HP's internal pricing policy has not been followed by the appellant for the purpose of determination of the value of the goods imported by them during the relevant period, which has been duly recorded by the adjudicating authority.

i) In the context of imports of products by HPI, serious discrepancies and aberrations, which have distorted the declared value of such products, have been noticed. The Global Vice President Shri. Ramesh Viswanathan, in the meeting held in the presence of the then DGDRI on 18.09.2009, stated, *inter alia* that they have noticed certain aberrations in implementing the ROVAC policy and that they would be reviewing the entire ROVAC calculations as per law and consequently revamp the discount setting process. Later one more meeting was held on 25th November 2009 in the presence of DGDRI wherein HPI had accepted that they could not complete the review of their entire ROVAC calculation and accordingly committed not to

raise the issue of limitation of time in judicial or quasi-judicial forum for the period from November 2004 to March 2009 by identifying themselves on the ethical values of HP's global policy. Thus, it is clear that the review conducted by HPI as a result of the investigation initiated by the DRI and the revelations there from point to the fact that the information relating to the nature, method and actual implementation of HP's product pricing policy including ROVAC review computation, which was not disclosed to the Customs Department at any point of time, had indeed a significant impact on the Customs values of goods imported into India.

ii) As per ROVAC policy *"Funding discount given at the sales entity < Funding discount given at the Hqrs. (rebiller) entity< Funding discount given at the distribution center < Funding discount given at the factory of HP".* It was observed through sample calculation that the value of the same goods as consigned to HQ entity from the DC is having lesser IC discount when compared to same goods consigned to SO entity (i.e. HPI) from their HQ entity. It is further seen that during April 05 to Oct 08 (sample period) the net billings from the HP's Singapore DC to Switzerland HQ was USD 1,326,931,064 (which is also referred to as billings to Level A entity) whereas the net billings during the same period for the same goods from HP's Switzerland HQ to India SO is USD 1,057,843,390 (which is also referred to as billings to Level B entity). The net difference in value is USD 269,087,674 involving Customs duty of Rs. 194.72 Crores as given by HPI vide their letter dated 23.01.2009 (Refer page Nos 294 to 298 of RUD-SOF). HPI's explanation to this situation is that the IC discounts given to HQ is based on the average discounts given to various SOs and hence, IC discounts of some of the SOs could be more and others could be less than the IC discounts given to HQ. Therefore, both Level A>Level B and Level A<Level B can exist under the ROVAC policy. But the crux of the issue is whether the same consignment can bear different discounts. Which discount is the right one to apply? This

discordance raises a fundamental question whether provisions of Customs valuation should be tailored to be in line with ROVAC policy or it should be the reverse.

iii) The learned Commissioner has rightly taken the view that the declaration of different discount percentages on Level A and Level B invoices for the same consignment indicates serious distortion in the discount structure, which has adversely affected the value declared to the Customs in India due to deviations from and aberrations in the application of their own Intercompany pricing policy.

iv) While compensating HPI for costs relating to warranty, by HP overseas, is not objectionable, taking abatement for the same for customs valuation purposes is not legally correct as warranty costs are an attribute of the product and the same cannot be unbundled from the import price. Abatements availed of in respect of special negotiated discounts, other discounts, based on averages, or at least 10% /8% Return thereon are also, in principle, not permissible as per CVR, 1988 /2007.

v) HPI never provided data relating to Reference Price for each product (except for some sample invoices in 2008). As a result, the aspects of funding discounts and under /over funding could never be effectively analysed.

vi) The ROVAC review computations were never subjected to audit. In the absence of any plausible explanation for the same, one is led to believe that HPI did not want to be exposed, on account of mismatches and aberrations in the application of the policy as also deviations from the policy.

20. Responding to the question whether values declared by the appellant on the Bills of Entry as transaction value in the light of decision of Tribunal, the learned Special Counsel has submitted that all along, the appellant has been representing that the cost referred to in the Interpretative Note to Rule 4(3)(a) / 3(3)(a) would

correspond to their own costs and the profit would correspond to their ROVAC of 10% or 8% which is a clear misrepresentation of facts so as to attract the applicability of Rule 4(3)(a) / 3(3)(a) of the Customs Valuation Rules. The appellant ought to have resorted to Deductive Valuation method prescribed under Rule 7 of CVR in full and they cannot borrow concepts and principles from here and there to suit their convenience. He has submitted that as emphasised earlier, the appellant has not disclosed full and accurate details relating to customs value; what they declared to the customs was the net price without mentioning the abatements on account of funding discounts on the list price, it is a deliberate act of suppression. Further, responding to the argument that the selling price of the products by the HP entities comply with the norms of transfer prices under the Direct Tax regimes and such prices be accepted for customs purpose also, he has submitted that the standards applied by Direct Tax authorities and by Customs authorities stand in different footing, because Customs authorities require to determine value of the imported goods at a given time, whereas the Direct Tax authorities look at the business over a period, retrospectively and may under certain conditions accept on equalisation higher price or sale price within the said period. Therefore, the values declared by the appellant in the Bills of Entry cannot be acceptable not withstanding to the principles laid down by CEGAT, deciding the cases earlier in a different set of circumstances.

21. On the issue of admissibility of evidences in the form of statements recorded under Section 108 of the Customs Act from various persons by the DRI, he has submitted that about 150 statements were recorded from more than 40 individuals who were mostly employees of the appellant or its group entities, few exception to recording statement relating to freight forwarders. All these statements were taken relating to and having connection with the documents submitted by the appellant in response to the summons issued to the said persons and collecting information

concerning to those documents which form core of the evidence in establishing the case. None of the statements is inculpatory in nature and not retracted. More over no complaint from the appellant were received that any of the said witnesses was influenced by any threat or coercion or duress. The show-cause notices were issued in April 2010 and all these statements were annexed to the show-cause notice. The adjudication proceedings were completed by 31.03.2012 and during the course of hearing, the appellant did not raise any objection or argument about the procedure of examination of the witnesses to be followed by the adjudicating authority though Section 138B was enacted in 1973 and the judgment rendered by the Hon'ble Delhi High Court in the case of J&K Cigarettes Ltd. Vs. Collector [2009(242) ELT 189 (Del.)] relied upon by the appellant was delivered on 28.08.2009. On the other hand, through their application dated 07.01.2012, the appellant sought cross-examination of only four witnesses which was allowed to the appellant. Subsequently, they have requested to examine four more persons and their examination was conducted through replies by mail to the question raised by the counsel. Thus effectively, the process of examination and cross-examination of the said witnesses were gone through during the adjudication proceedings. He has submitted that the judgments referred to by the learned advocate for the appellant viz. Paramath Iron (All.); Jindal Drugs (P&H), G-Tech Industries (P&H), Ambika International (P&H), Hi-Tech Abrasives (Chhattisgarh) and HIM Logistics (Del.)] relate to denial of cross-examination of specified persons and since delivered in different circumstances not applicable to the present case. Further, he has submitted that the jurisdictional Karnataka High Court in the case of Commissioner of Customs, Bangalore Vs. Jyothi C. Jain and oth. [2025(9) TMI 1225 – Karnataka High Court] held that Section 138B is not applicable to the Departmental proceedings and the judgment of the jurisdictional High Court finding is binding on the Tribunal. In support, he referred to the judgment of Five Member

Larger Bench of this Tribunal in the case of Collector of Customs & Central Excise, Chandigarh Vs. Kashmir Conductors [1997(96) ELT 257 (Tri.), which was followed by the Three Member Larger Bench of this Tribunal in the case of JK Tyre & Industries Ltd. Vs. Asst. Commissioner of Central Excise, Mysore [2016(340) ELT 193 (Tri. LB)]

22.1 On the issue of denial of discounts /abatements from the CLCP to arrive at the net price declared as assessable value of the imported goods, he has submitted that it is necessary to understand the basic features of the pricing and discount setting methodology adopted by HP entities in general and by the appellant in particular. Referring to the reply relating to inter-company pricing policy referred to as ROVAC pricing policy mentioned by the appellant, he has submitted that all the costs incurred by the sales office i.e. the appellant are not funded by the direct fund transfer but by deduction of the price of the products sold and the whole process of setting of the inter-company price and working out the discounts is based on estimates and forecasts, averaging, and the use of past data to derive future rates. Above all, there is no visibility about the calculations and the adjustments required to be made. What is more, the nexus with the actual transaction i.e. the goods being valued, is totally absent. He has further submitted that at the time of import, as it transpires, it is not known what discounts would be ultimately allowed on the products in question and what quantum would that be. The type of buyers would also be not known at this stage. All the same, the discounts claimed as abatements by appellant are related to deductions from LCP, allowed in the past on sales of identical or similar goods in the domestic market. In all, deductions from LCP, were claimed by appellant in respect of 14 types of discounts. Out of these, the SCN itself has accepted that 5 types of discounts can be taken as admissible deductions. Further, the adjudicating authority has allowed deduction from declared price in respect 4 other types of discounts. As for the remaining 5 types of

discounts, the adjudicating authority has held that 'Special negotiated discounts', 'Price Protection discount', 'End of Life-Trade Sales Discounts, 'Cooperative Partner marketing fee discount', 'Influencer fee', are not eligible as deductions from the Base Price to arrive at the assessable value. To allow a discount to be deducted from the declared price, the adjudicating authority had observed that (i) the discount should be genuinely known at the time of import; (ii) the discount should be indicated on the invoice at the time of import; (iii) the discount given at the time of import is normal; and (iv) the discount given at the time of import is uniformly available to all buyers at the same commercial level.

22.2 Further on the issue of admissibility of Special Negotiated Discounts, he has submitted that 'special negotiated discounts' are given to a 'specified end user' (not all end users) who had negotiated or bargained with the supplier (appellant). However, the wordings 'if passed through a channel partner' would indicate that even when the products are sold by appellant and are held in stock of the channel partners, the negotiation held by the specified end customer with HPISPL will entail them for 'special negotiated discount' through the channel partner route. Therefore, in such a situation, it is also presumed that the channel partner will sell the goods to the specified end user from their inventory also (goods already bought from HPISPL for stocking & sale) at the negotiated price and can later claim credit from appellant. This clearly indicates the retroactive nature of the discounts apart from the fact that such discounts are conditional and not available to all customers. According to the adjudicating authority, the wording of the last phrase also indicates an indirect control of appellant over the channel partners in the sale of HP products. Further, the **EIFFEL** invoices, which alone contains details of base prices (LCP) and funding discounts deducted therefrom (as distinct from the **Athena**-Customs invoice), indicate the funding discounts as a consolidated amount as applicable to the funding type of the product covered

therein. It does not indicate the break-up showing the deductions that relate to abnormal /special discounts, warranty costs, customs duty, customs brokerage and fees and international freight and insurance. Thus, at the point of import, there is no possibility of knowing the amount of special negotiated discounts and other discounts; appellant had applied the special negotiated discounts only when they sold the goods in the domestic market over a period of time. Further, he has submitted that standard discounts etc. which are normally admissible and the preference of given additional /special discounts at varying rates extended to customers of the same class being not normal; they are special in nature and hence not admissible since the varied rates could not have factored in the base price of the imported products. On similar lines, the learned adjudicating authority has rightly rejected the Price Protect Discount, End of Life-Trade Sales Discount, Cooperative Partner Marketing Trade Discount and Influencer Fee Trade Discount.

22.3 Referring to the judgment of the Hon'ble Supreme Court in the case of Eicher Tractors Ltd. Vs. CCE, Mumbai [2000(122) ELT 321 (SC)], the learned Special Counsel has submitted that reading the said judgment, it is clear that abatement in respect of discounts special to a particular customer as distinct from discounts available to all customers can be disallowed. He has submitted that even where discounts given are found to be heavy, abatement can be disallowed in respect thereof, only if it is shown that such discounts are not available to all customers. From the said judgment, it follows that apart from availability of discounts to all, thus implying uniformity, the quantum of discounts, even if heavy, being available to any body, is a criteria relevant to accord abatement.

22.4. The learned Special Counsel has also distinguished the judgment in the case of Mirah Exports Pvt. Ltd. Vs. CCU [1998(98) ELT 3 (SC)] arguing that normal practice of giving discounts i.e., Contractual agreement discounts, Sales goal attainment discounts,

Promotions trade discounts etc., were all allowed and only the special discounts and other retroactive discounts were proposed to be disallowed in the SCN. However, in the present case, Special discounts were given for strategic reasons for specified goods, limited by time and also limited to a specified end customer if passed through a channel partner. Therefore, there is only limitation, exceptions and conditions in allowing the said discount which makes it special and 'not normal' from all angles and hence does not support the case of the appellant. Similarly, the judgment in the case of CCU Vs. Aggarwal Industries Ltd. [2011(272) ELT 641 (SC)] is not applicable to the facts of the present case. Also, he has submitted that the cited judgment in the case of Bayer India Ltd. [2006(198) ELT 240 (Tri. Mum.)] is also not applicable to the facts of the present case since the quantum of imports made by Bayer India was about three times more than that of M/s. Indofil and import price of Bayer India was sought to be compared with M/s. Indofil even though there was a huge quantity variation of imports made by both the entities.

22.5 Further, rebutting the argument of the appellant that if the discounts are disallowed, they qualify for general expenses and be admissible as deductions, he has submitted that accounting treatment given by the appellant towards the discounts is distinctly different from the treatment accorded to the other general expenses. Hence asking Customs to treat the discounts as part of general expenses is not correct. Even in the CVR, 2007, there is no specific reference to treat the discounts as part of general expenses except in the case of local taxes. Further, he has submitted that in the present case, the Base price is derived from the targeted sale price in domestic market. The actual sale price is not known at the time of import and whether they would get the benefit of reductions other than the standard /normal discount is also not known. Furthermore, rejection of abnormal discount and abnormal reductions from price were specifically provided for in the CVR, while

such a provision is conspicuously absent in the C Ex. Valuation provisions.

23. Rebutting the claim of the appellant that warranty costs form part of the VAC as part of the ROVAC policy and includable in the computation of 10% / 8% of the ROVAC margin, he has submitted that warranty costs are very much a part of the list price and hence no abatement of the same as part of funding discount is admissible. It is Revenue's argument that warranty is an attribute of the product and hence it enriches its value. As per HP's Marketing Policy, while explaining the concept of Converted Local Currency Price (CLCP), it is unambiguously clear that the warranty costs are billed into the price of the export goods sold by the HP distributor to the appellant and the same cannot be separated for customs purposes only. Also, referring to the Sherman and Glashoff's book on Customs Valuation, learned Special Counsel has submitted that cost of reimbursement relating to warranty ought not be reduced from the price. Further, the costs on account of warranty charges are accruing back (indirect costs) to the selling entity and therefore should form part of the transaction value. It is his argument that just because the appellant performs warranty obligations, it cannot be said that the import prices or the CLCP or the list price should be extended to the cost incurred by the appellant. Hence, the price cannot be adjusted downward to the extent of cost incurred by the appellant on the consideration that the costs of performance of warranty obligations are compensated by the parent company. Besides as per the HP's Customs Manual, warranty costs are built into the price and ought not to be unbundled from the customs value. Thus, as per the policy of HPUSA, reference price is the ex-factory price which invariably includes warranty costs, there could be no reason for the appellant to abate the same from the CLCP to arrive at the customs value. Referring to clauses 4, 10 and 13 of the Distributor Agreement, the learned Special Counsel has submitted that the distributor himself performs all warranty obligations or have the said obligations

performed on its behalf, all in consideration of the compensation provided to him through the IC pricing policies as per clause 9 of the said agreement. Further clause 10 clearly states that pursuant to this agreement and HP's IC pricing policies, the majority of the risks related to the manufacture, sales, service, support and distribution of HP products and services which includes warranty obligation – are ultimately borne by the HP factories. This clearly indicates that the warranty obligation performed by HPI is at the behest of the selling entity of HP and therefore to its benefit. Thus, the selling entity directly bears the cost and undertakes the risk of warranty, the provision of which is reflected in the price. The argument that HPI's case is covered by Para 5 (b) read with Paras 9 of the WCO Commentary is not well founded. Thus, the deductions availed of by the appellant from the CLCP, by way of funding discounts, insofar as they relate to warranty costs are concerned, is not correct and proper. Such costs should be added to the declared value to arrive at the correct assessable value of the products under import.

24.1 Reiterating the finding of the learned Commissioner relating to adding of international freight charges and insurance to the declared value and responding to the argument of the learned advocate for the appellant that since the supplying entities have raised invoices on DDU /CIF bases, clause 11 would not operate and the terms of such invoice would prevail; supplying entities have paid international freight directly to the freight forwarders but not recovered from the appellant and insurance costs in terms of Global Insurance Policy are recovered by the billing entities from sales entities, the learned Special Counsel, referring to the statement of Mr. Scott Paul Mckenzie, has submitted that initially in his statement he has averred that (i) since the freight and insurance were actuals borne by the supplier / shipper at the time of export to India, they would not form part of the list price and they were not elements of funding discounts; (ii) the price /value indicated in the Customs invoice was purely the value of the goods arrived at after deduction of funding

discounts from the list price and was exclusive of freight and insurance. Even though the statement was later clarified by letter dated 20.01.2010, he has stated that the price indicated on the invoice always inclusive of insurance and international freight but he did not change his statement that the freight and insurance were actuals borne by the supplier /shipper at the time of export to India and that they would not form part of the CLCP and were not elements of funding discounts. Thus, it is clear that international freight and insurance paid by the supplier /shipper at the time of export to India alone were actuals. Further, the said elements forming part of IC pricing was with reference to the funding types while actuals were with reference to individual products. He has further submitted that at no stage, appellant has been able to demonstrate that international freight and insurance in actuals that has been included in the LCP and in turn in the import price declared to the Customs. Further, he has submitted that LCP is itself a target sale price estimated on the basis of market conditions, past data etc. Admittedly, while arriving at the LCP, funding discounts and other elements of cost including freight and insurance are worked out on average basis for each of the Funding types. Actual freight and insurance could never have been factored in the list price because of the time gap. Invariably, the amount of actual freight would be known much after the CLCP is fixed, as usually, the CLCP remains constant for about 3 months and during this period the actual freight amounts would be paid by the supplying entities depending on several factors while the CLCP remains the same. Thus, CLCP could not have included the actual freight relating to each consignment, which would be known only at the time export by the supplying entity. Also, he has argued that the supplying HP entities have paid actual international freight directly to the freight forwarders and this amount has not been paid by HPI separately to the said entities; hence, there is no question of inclusion of notional (20%) freight in the value of imported goods. In the instant case,

the supplying entities are also HP entities and are governed by the ROVAC policy, which ensures that every HP entity involved in the chain of transactions is adequately compensated for their costs and provided with return thereon. Therefore, non-payment of the actual freight amount to the supplying HP entities, by HPI, cannot be the reason for holding that the amount that may have been included in the CLCP was the actual international freight. There is no question of applying a deeming fiction in this regard.

24.2 The learned Special Counsel has submitted that since the invoice is declared to be on DDU/CIF basis, there is no scope or requirement to separately identify /quantify the elements of international freight and insurance where the certain amounts are already included in the 'single all-inclusive price'. This would mean that if the Customs invoice is on DDU/CIF basis, it should be accepted as representing international freight and insurance in actuals. Thus, even if only Re.1 is included as international freight and insurance in the so called 'single all-inclusive price', it should be accepted as 'actuals' according to this argument. In effect, what the appellant wants is mandatory acceptance of the invoice in so far as international freight and insurance is concerned, when it is on DDU/CIF basis. There is no provision either in Section 14 or the CVR to that effect. Acceptance of this argument would, therefore, be totally without legal sanction. In the instant case, investigations have shown that actual international freight and insurance could not have been known at the stage of fixing the CLCP and would not in any case be equal to the amounts of international freight and insurance forming part of the CLCP. Besides, HPI has not been able to demonstrate that international freight and insurance is ascertainable. This fact cannot be ignored.

24.3 Further, referring to Section 14 of the Customs Act, 1962, the learned Special Counsel has submitted that when the element of price for the purpose of arriving at transaction value is the actual

price paid or payable, the addition of cost in the form of freight and insurance cannot be on the basis of notional values. Rule 10(2) of CVR, 2007 does not envisage a bundled CIF value or DDU price in determining the transaction value. Each cost element of freight, insurance, loading and unloading charges and handling charges associated with the delivery of goods to the place of importation are separately mentioned in the rule thereby ascribing to the actual values meant for determination of transaction value. Rule 10(3) of CVR, 2007 also makes it explicit that any addition including the cost of transportation and insurance shall be made on objective and quantifiable data. Therefore, any assumption or notional value of transportation or insurance based on INCOTERMS alone cannot be the basis for determining the customs transaction value.

24.4. Supporting the inclusion of notional i.e. 20% notional freight in the value of imported goods in terms of proviso to Rule 10(2) of CVR, 2007, he has submitted that the Revenue is aware that the said notional rate is applicable only on the FOB price for each consignment. The Appellant alone would be able to provide the required data /information in this regard. In the absence of such data /information, there is no other alternative but to accept the proposal in the SCN, which has been confirmed in the impugned order. This submission is equally applicable to the notional addition of insurance amount in terms of the above rule stated, supra.

25. Reiterating the findings of the learned adjudicating authority on the issue of determination of assessable value on 'Supply Chain Replenishment Fulfilment and Reinvention (SRFR) products under residual method i.e. Rule 8 /Rule 9 of CVR, 1988 /2007, in adopting the CLCP of the regular product, he has submitted that the said action on the part of the Commissioner is justified. Rebutting the argument of the appellant that SRFR products would satisfy the definition of similar goods and its valuation be adopted applying provisions of Rule 5 /6 of the CVR, he has submitted that this

argument is indeed specious as it is accepted fact that SRFR products are incomplete since some parts and accessories are not present and functionally it is not on equal terms with the regular products. He has submitted that the 'net import price' for the regular product was arrived at on the basis of CLCP less deductions on account of funding discounts. Hence, taking CLCP as the Base price for determining the assessable value of SRFR products and allowing deductions for missing parts cannot be faulted. The learned Commissioner has gone further and allowed deduction of normal discount which was available to the regular product. Since the funding discount allowed to the original product was the combination of IC discount plus trade discount and further, special discounts, all the in-country costs including the Customs duty was being reimbursed by the supplier or other HP entities, Appellant was eligible at best for only normal trade discount as available to the regular unit. Also he has submitted that where the funding discounts include several elements that are not in the nature of trade discounts, giving full deduction is illogical too. In fact, at Page 5 of Compilation No.6, featuring the Commentary by Sherman and Glashoff, it is observed that there is no authoritative answer available to the problem of valuing free warranty replacements and the answer should be governed by local customs practices. Further he has submitted that the judgments of physician's samples and captive consumption of goods by applying the provisions of Central Excise Valuation are not applicable to the facts of the present case and the unique nature of funding discounts.

26.1 On the issue of misdeclaration and undervaluation of MRP based imported goods, he has submitted that pursuant to the investigation by the DRI, it revealed that the appellant has changed the MRP stickers or modified the prices and other details affixed on the imported goods in the warehouses. Also, it revealed that MRPs declared on the imported goods were less than the list prices of the goods, which was basis for actual negotiation with the customers of

appellant and sale of goods. Due to widespread modification of the MRP stickers, through their letter dated 20.11.2008, appellant had quantified the differential duty and paid the same. Admittedly, there were about 75 instances during the period 02.02.2008 to 10.11.2008 where the MRP declared on the product was more than the MRP declared in the Bills of entry and about 34 instances during the period from 03.03.2008 to 06.09.2008 where MRP declared on the product was less than the MRP declared in the Bills of Entry. They have paid duty of Rs.41,41,821/-.

26.2. Referring to the provisions of Section 4A(1) and (2) of Central Excise Act, 1944, learned Special Counsel has submitted that another significant point to be noted is that the valuation of goods subject to MRP based assessment is not governed by section 14 and CVR. In respect of such assessment, value is deemed to be the 'Retail Sale Price' (RSP) less such amount of abatement, if any, from such RSP in terms of proviso to section 3(2) of Customs Tariff Act, 1975. Notifications issued under section 4A (1) and (2) of CEA,1944 specify the description of the goods covered under this method and the amount of abatement from the RSP. It follows naturally that RSP as defined as per the provisions of section 4A ibid, would be the relevant base price for the purposes of assessing ACD in such cases. RSP is defined in section 4A as "the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers and all charges towards advertisement, delivery, packing, forwarding and the like and price is the sole consideration for such sale". Abatements as per the notification take note of the elements included in the definition of 'Retail price', (which corresponds to the definition as per SW & M Act) under section 4A of the Central Excise Act. Further, abatement is specified as a percentage of the RSP. The net effect of the above provisions is that the RSP in question has to be necessarily the base price with reference to the goods being valued.

Deductions from the CLCP as per the ROVAC pricing policy are not relevant for the purpose of assessment. Further, the law envisages that the base price ought to include all the specified elements and the abatements are to be taken only from this base price. At the time of import, CLCP is only base price that is known. Appellant itself does not know at what price the goods would be sold by them to dealers and other customers and what would be the maximum price at which it may be sold to the ultimate consumer. The net import price declared on the customs invoice cannot be the RSP because it has been arrived at after deducting funding discounts, which include many of the elements referred to earlier. CLCP represents the targeted sale price of the product upon resale by appellant and any MRP between CLCP and Net price would also have some deductions forming part of the elements included in the definition referred to above. Thus, CLCP is the only correct base price which can be taken as RSP.

27. Learned Special Counsel for the respondent, criticising the impugned order and reiterating the grounds of appeal filed by the Revenue against reduction duty demand to the tune of Rs.436.65 crores by extending abatement of the component representing customs duty factored in the import list price to arrive at the revised assessable value, has submitted that the appellant was not fully justified in claiming abatement in respect of overall customs duty as a component of funding discount to be deducted from the list price and that of finalisation of assessment based on such claim is not justified. He has submitted that the following factors were not considered by the learned Commissioner while allowing abatement from the customs duty and customs fees:-

(i) Fourth proviso to Para 11 of the Distribution Agreement clearly states that all prices charged by HQ or HP factories to distributors were exclusive of duties, freight, transportation etc.

(ii) Both level A and Level B invoices depicted same LP; hence, possibility of including /factoring the Indian Customs duty in the said LP did not arise since there was no uniformity in import duty rates at Singapore, Switzerland and India. Therefore, if LP did not include import duties, the same could not be abated from the LP.

(iii) At no point of time, appellant were able to demonstrate the fixing of CLCP from the LCP and the quantum of actual customs duty or actual freight in the list price.

(iv) The conclusion of the learned Commissioner that the import LP is an all-inclusive price and should factor in the customs duties was not found to be always correct. From the study of the sample data-flow in r/o IC products imported by HPI during June 2008 giving the RP and the CLCP for the same part nos., there is price variation in the prices of the imported products during the same time as mentioned in the show-cause notice.

28. Further, he has submitted that from the duty liability statement, worked out with the assistance of appellant, as a sequel to learned Commissioner’s decision to allow abatement in respect of deductions claimed under customs duties, it is seen that total import duties taken for calculating abatement was Rs. 2494.27 Cr., whereas 'Total import duties paid' was Rs. 2327.88 Cr, the difference being Rs. 166.38 Cr. This shows that the abatement claimed was way different from the actual duty paid. This has resulted in overfunding and undervaluation of products. Further, in about 22436 lines of data, the redetermined value after factoring in the customs duty abatement was found to be Rs. 94.62 Cr. while the value declared to the Customs was Rs.102.89 Cr. Overall, the acceptance of abatement on account of import duties as arrived at by HPI does not fit in with the provisions of Section 14 and the CVR, which have always had 'actual value' as the underlying principle.

29. Reiterating the findings of the adjudicating authority on the issue of overfunding, he has submitted that in the written submissions of the appellant, at Page 4, a Table has been shown and it is contended that from FY 2005 to FY 2009 (first half year) there was underfunding for 3 years and overfunding for 2 years and the net underfunding was Rs. 511 Cr. for the whole period. If overfunding alone is taken it came to Rs. 281 Cr. Considering the volume of imports, it is argued, that this amount is within tolerable limits. This line of argument totally ignores that assessment under Customs law is with reference to the goods under import; periodical assessment after balancing excess payments and short payments is not envisaged under Customs law. There is a separate provision to claim refunds in case of excess payments just as short payments become a subject matter of a demand. Balancing of the two is not provided in law. Where overfunding has been noticed, undoubtedly, the value of subject goods has been lowered to that extent. The methodology adopted in the SCN cannot, therefore, be faulted.

30. Responding to the argument of the appellant that there are inconsistencies and incongruencies in the impugned order, the learned Special Counsel has submitted the following:-

i. Firstly, it is argued that ROVAC objective will never be met if import pricing is undertaken as per the impugned order. The import pricing adopted in the impugned order ought to be seen in the backdrop of the whole process of setting the IC price and working out the discounts by the HP group. There is no denying the fact that the ROVAC methodology, though acceptable for the purpose of 'Transfer Pricing' in transactions between related entities, is based on estimates and forecasts, averaging, and the use of past data to derive future rates. Above all, there is no visibility about the calculations and the adjustments required to be made. What is more, the nexus with the actual transaction involving the goods being valued is totally absent. In principle, on a correct and legal

interpretation of the Customs Valuation law the deductions availed of by HPI are not sustainable since they are not based on actuals. The fact that the ROVAC objective will never be met if import pricing is undertaken as per the impugned order is no criterion to hold that the revision in the assessable value based on correct application of the principles enshrined in the statute is wrong. The submission that the revised values confirmed in the impugned order are not in accordance with ROVAC objective of enabling HP to earn reasonable profit totally lacks merit since what is being sought is reading down of the provisions of Section 14 and CVRs to enable HPI to meet the ROVAC objective. Legally, it is not permissible.

ii. Secondly, it is argued that the incidence of cumulative direct taxes payable in India is much higher than cumulative Customs duties payable upon importation and this situation creates a strong presumption against any suspicion of undervaluation of imported goods. One should indeed be naïve to believe that where the incidence of direct taxes is high assessees would not resort to undervaluation of goods especially imported goods. Evasion of indirect taxes, including customs duties enables an assessee /importer to price his products at a level lower than his competitors and increase his turnover. Where MNCs are involved, it would enrich foreign parent companies and result in flowback. Hence, the purported strong presumption against even suspicion of undervaluation has no basis whatsoever.

iii. Thirdly, it is argued that import prices of indent customers were much lower than corresponding IC import prices of HP. To substantiate this submission some Tables containing comparative aggregate information have been provided in written submissions. The correctness of the figures therein has not been certified by appellant's Chartered Accountants. Nor has the same been filed under an affidavit. Hence, it should not be admitted and given credence to. Further, it is submitted that the divergence in import

prices for indent purchasers and the redetermined values for appellant is on account of grave discrepancies in the availment of deductions. The mismatch between the requirements under the Customs valuation law and the pricing and discount setting policy and the claim that the values declared to Customs represent transaction value is the reason for re-determination of values. If appellant had resorted in full to the Deductive Value method, after initial provisional assessment actual values would have been available and assessments could have been completed based on actual values. Obviously, this was intentionally not done as it would have meant making true disclosures about the nature of discounts and actual expenses.

31. On the issue of applicability of interest, penalty and confiscation provisions to demand CVD and SAD, learned Special Counsel, reiterating the findings of the learned Commissioner and referring to the expression provided in Section 3(8) of the Customs Tariff Act, 1975, has submitted that wordings 'including' and the word 'duty' assumes paramount importance. Since the word 'duty' is mentioned and also that the provisions of Customs Act, 1962 applies therein, the obvious inference is that all matters connecting duty in the Customs Act, 1962 squarely applies to the duty levied and collected under the Customs Tariff Act, 1975. Since the penalty leviable under the Customs Act, 1962 links it with 'duty' evaded, the Ld. Commissioner has held that the penalties leviable under Customs Act has direct link with the duties evaded under the Customs Tariff Act, 1975 and therefore all the penal provisions as applicable to Customs Act, 1962 squarely applies to the Customs Tariff Act, 1975.

32. On the question of applicability of interest in the case of ACD, relying on the judgment of the Hon'ble High Court of Bombay in the case of Union of India Vs. Valecha Engineering Ltd reported in 2010(249) E.L.T 167(Bom), the adjudicating authority has held that

the said judgment would squarely apply to the present case and accordingly, interest becomes payable on the differential duty determined in terms of this order. Also supporting the impugned order, wherein the adjudicating authority referred to the decision of Supreme Court in the case of M/s. Guljag Industries Vs. Commercial Taxes Officer on 03.08.2007 in Appeal (Civil) 5197 of 2005. In the instant case also, appellant had in their possession the EIFFEL invoices showing the funding discount. However, in the Bills of Entry in the specified columns 'Discount rate' and 'Discount amount' the same are shown as 'zero'. It is submitted that Section 111(m) makes no reference to duty simpliciter it is with reference to goods, which do not correspond in respect of value or any other particulars with the entry made under Section 46 of the Act, hence, adjudging the goods to be liable to confiscation is perfectly legal. Further, in view of the positive act of misdeclaration and the fact that duty is not a material factor, imposition of penalty under sections 112 and 114AA of Customs Act, 1962 also justified. The learned Commissioner has relied on the decision of the Constitution Bench of the Apex Court in the case of C.A. Abraham Vs. Income Tax Officer, Kotayam reported in 1961 (2) S.C.R 765. In the said case, it was observed by the Hon'ble Supreme Court that penalty is regarded as an additional tax imposed upon a person in view of his dishonest or contumacious conduct. It was, therefore, held that the words "assessment, levy and collection" would also cover proceedings under which penalty could also be levied. In the instant case, further, the chargeability of the CVD under Section 3 (1) of Customs Tariff Act, 1975 as 'duty of Customs' is not questioned and therefore, the payment of additional duty of Customs (CVD), which is in addition to the BCD chargeable under Section 12 of Customs Act, 1962, the consequence of penalty as applicable to the provisions of Customs Act, 1962 should invariably apply. Therefore, the penalty in this case has to be regarded only as an additional tax imposed due to the dishonest conduct of appellant. The

Commissioner has taken the view that wherever the CVD is payable on such imports in addition to BCD (paid or payable or otherwise exempt), the penalty and also interest is imposable under the provisions of Customs Act, 1962. In view of the above, the Ld. Commissioner has held that the contention of appellant is not legally sustainable.

33. On the issue of applicability of Notification No. 89/1982 dated 25.03.1982, he has submitted that Additional duty of customs was initially introduced as Section 2A of the Indian Tariff Act, 1934. It was then known as countervailing duty. Under Section 3 of Central Excise Tariff Act, 1975, the same levy, came to be levied as additional duty equal to excise duty for the time being in force on a like article if produced or manufactured in India. During the period from 1979 to 1980, in the case of viscose staple fibre the excise duty on domestic viscose fibre was more than the ACD on imported viscose fibre and the two rates were fixed one under Rule 8(1) of Central Excise Rules and another under section 25(1) of Customs Act, 1962. In the judgment rendered by the Gujarat High Court, on 19.08.1981 in the case of Navjivan Mills Co. Ltd., [1982 (10) ELT 155 (Guj)] the validity of both notifications was upheld. However, Government felt that it was necessary to conform to the basic requirement that the duty be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. It was to ensure such conformity the aforesaid notification was issued. This is the context of this notification. Rebutting the argument advanced by the learned advocate for the appellant, the learned Special Counsel has submitted that:

a) ACD and SAD operate in spheres of their own. Section 3(5) is a measure to counterbalance the sales tax, value added tax, local tax and other charges for the time being leviable on a like on its sale, purchase or transportation. The notification invoking the said section and levying SAD is issued having regard to the sales tax, value

added tax, local tax and other charges for the time being leviable on a like on its sale, purchase or transportation. It is not linked to any particular levy or its rate. Besides, this levy has nothing to do with excise duty.

b) In 1982, only ACD equal to the excise duty was leviable. Neither the levy under section 3(3) nor 3(5) was in existence. Therefore, Notification No. 89/1982 could not have referred to any levy other than excise duty. This notification is relevant only for section 3(1). When it was issued the legislature could not have envisaged the levies under sub-sections (3) and (5) and that the notification should apply to the said levies as well.

c) The statutory provisions as above are to be read harmoniously so that none of the provisions is rendered non-est. If the situation so warrants the principle of purposive interpretation of the statute ought to be applied. In this context, the following words of BLACKSTONE are worth recalling:

> *"The most fair and rational method for interpreting a statute is by exploring the intention of the legislature through the most natural and probable signs which are "either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law".*

Merely looking at the text is not sufficient, the context in which the text was brought in, is equally important. Thus, the aforesaid Notification No. 89/1982 ought not to be interpreted in such a way that renders the levy of SAD that came into effect 23 years later, a nullity.

34. Heard both sides at length and perused the records.

35. The principal issue involved in the present case revolves around the determination of the assessable value of various IT products viz. computers, laptops, printers, servers etc. imported by the appellant, as a limited risk distributor, from its 100% Holding Company HPUSA under Distribution Agreement executed from time

to time during the period from 01.11.2004 to 19.12.2009, under Section 14 of the Customs Act,1962 read with Customs Valuation Rules,1988/2007 as was applicable during the said period.

36. It is the claim of the Appellant that the net price declared in the respective Bills of entry is the true Transaction Value, uninfluenced by the relationship with their Holding Company HPUSA. They follow an inter-company pricing methodology described as "Return on Value Added Cost" (ROVAC), whereby the transfer price of imported goods is determined by applying discounts(Funding Discount) to a localized list price(CLCP) so as to enable recovery of value-added costs and stipulated return @ 10%/8% to the Appellant thereon. The appellant has asserted that such pricing policy is consistent with arm's length principles and has been accepted in earlier proceedings by the Special Valuation Branch (SVB) as well as by the Tribunal.

37. The Revenue, however, does not dispute the ROVAC framework policy per se, but contests the manner of its implementation during the relevant period which according to them is not in conformity with Customs Valuation provisions, hence the declared transaction value cannot be accepted. The case of the department, as reflected in the show cause notices, confirmed in the impugned Order and its submissions during the hearing is that the goods manufactured in HP,USA are delivered to the appellant through the Distribution Centre at Singapore. The distribution centre at Singapore though despatch the goods directly to the Appellant in India, the Billing is done through their rebilling entity at Switzerland. Two sets of invoices are maintained viz. Eiffel invoice & Athena Invoice. The Level A(Eiffel) invoices raised by Singapore Distribution centre on the Switzerland re-biller entity reflects the gross price less the discounts allowed from the said price, where as, the Level B(Athena) Invoice raised by the Switzerland re-biller entity on the Appellant submitted to the Customs department along with

Bill of Entry for payment of customs duty reflects the net price only, declaring the discount in the Bill of Entry as 'zero'. It is Revenue's claim that the funding discounts applied by the overseas HP entities(reflected in the Eiffel invoices) to arrive at the net price(Athena invoices) declared to Customs were overstated and included elements which were neither disclosed to customs department nor permissible as deductions for the purpose of customs valuation under the relevant Rules; hence, there is suppression of facts and thus the value of the imported goods declared by the Appellant is not acceptable as true transaction value being marred with their inter-se relationship and hence liable to be rejected under Rule 10A/Rule 12 and the assessable value needs to be determined under Rule 8/9 of the CVR,1988/2007 in the circumstances of the case. It is also the Revenue's argument that these facts were neither brought before SVB nor CEGAT during the earlier proceedings, but now came to the notice of the department as a result of DRI investigation, hence, the SVB Orders/ CEGAT judgment are not applicable to the present case, accordingly the transaction value declared is liable for rejection.

38. Before analysing the rival claims on merits of the case, it is essential to address the preliminary objections raised by the appellant during the hearing viz. (i) the methods of valuation now questioned by the DRI has already been considered and settled by this Tribunal by order dated 10.07.1998 in their own case, and subsequently followed in SVB orders passed from time to time, hence raising the same issue again is bad in law; and (ii) the statements of various persons recorded under Section 108 of CA,1962 cannot be relied upon as the provisions of Section 138B have not been complied with.

39. On the first objection, we find that initially the matter was adjudicated by the Special Valuation Branch (SVB) on 05.08.1996

observing that the net price charged by the overseas related entity to the appellant be loaded with the commission amount included in the gross price charged by the overseas entity to other third party purchasers/indent sales effected through the Appellant. The SVB analysing the agreements between the overseas entity and the appellant dated 01.11.1989 as amended by agreement dated 01.11.1994 relating to goods for stock and sale observed as follows:-

> 14.2 There is no dispute that the stock and sale goods are invoiced at distributor net price for the imports made by the Indian company M/s. HPI Ltd. In terms of Rule 9(1)(a)(i) the selling commission is to be added whether the importer is a related party or un-related party. In this case M/s. HPI Ltd., is a related party to the foreign suppliers. The various contentions that the goods are supplied at arms length pricing policy cannot be accepted in view of the fact that there is a pricing policy exists for the distributors namely Distributor Net Price for the distributors and gross prices for direct imports by third parties. The gross prices are inclusive of the selling commission whereas the distributor net prices are exclusive of the selling commission. In terms of the Rule 9(1)(a)(i) the selling commission have to be added to the assessable value. Therefore, their contentions for zero loading is not acceptable.

The appellant aggrieved by the said order challenged it before the learned Commissioner(Appeals), who allowed their appeal holding that the commission on indent sale cannot be loaded to the net import price declared by the Appellant. On Revenue's Appeal, the Tribunal, inter-alia, analysing the issues raised upheld the Order of the Ld. Commissioner(Appeals). The learned advocate heavily relied on the following observation of the Tribunal:

> 21. … … … 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. … … …"

Further, it is held by the Tribunal that commission allowed from the gross price on indent sale cannot be added to the distributor's net price under Rule 9(1)(a)(i) of the CVR,1988. Para 23 of the said order reads as follows:-

"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 practice.

40. The learned advocate has argued that aforesaid order of the Tribunal wasn't challenged by the department and hence attained finality. Also, the pricing policy followed by the appellant time and again has been subjected to periodical review by SVB, Chennai and consistently orders were passed accepting the said pricing policy and the Order of the Tribunal. Thus, the impugned order reopening the assessments already finalised based on the SVB/CEGAT's Order is illegal and without justification.

41. The Department, on the other hand, contended that the appellant's net price arrived at after heavy funding discounts with reference to CLCP while declaring the assessable value for their imports and never made true and full disclosure about the said Funding discounts & deductions on account of other factors in their

declarations to the department; hence the admissibility of said Funding discounts could never be the subject matter of scrutiny/adjudication by SVB or Appellate authorities i.e. Ld. Commissioner(appeals) or CEGAT. In the earlier proceeding the question before the authorities/CEGAT was whether the Commission earned by the appellant on Indent sales to third party buyers/purchasers be loaded to the their(Distributor's) net price for stock and sale traded goods Imported by them. Besides, the merger with Compaq, subsequent agreements entered in 2002 and 2005, the complex nature of fixation of CLCP, devolution of funding discount based on global/regional averages and the Country Specific adjustments(CSAs), etc. were never disclosed to SVB and CEGAT, hence no deliberation could be made on these issues. Hence, Revenue is justified in reopening the assessments.

42. We find that even though CEGAT in its order referred to the ROVAC pricing policy followed by the appellant and commented that the same is reasonable and did not influence transaction value with related overseas supplier HPUSA, however, it is in the context of the facts of the said case brought before them, that is, whether indent commission be loaded to the net import price of the Appellant for stock and sale goods. Further, after the said Judgment was passed fresh agreements have been entered; the investigation carried out by DRI brought on surface some new facts like maintenance of two sets of invoices viz. Level A(Eiffel) & Level B (Athena) invoices, Funding discounts shown in the Eiffel invoices but only net price declared to customs in the Athena invoices, composition of Funding discounts, various deductions from the price, overfunding and underfunding, MRP related issues etc.. In these circumstances, it is quite necessary and also relevant to re-examine the gamut of issues in the light of the fresh developments pursuant DRI investigation including the fact whether the ROVAC pricing policy adopted by the Appellant has influenced the transaction value with

the related overseas seller or otherwise. It is settled principle of law that a cautious approach should be adopted in following the ratio of case as a slightest change in facts may alter the binding force of the precedent. The Hon'ble Supreme Court in the case of Collector of Central Excise, Calcutta vs. Alnoori Tobacco Products2004 (170) ELT 135 (SC), and later followed in Escorts Ltd. vs. CCE, Delhi-II2004 (173) ELT 113 (SC) laid down the principles as follows:

> **"11.** Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd.* v. *Horton* (1951 AC 737 at p. 761), Lord Mac Dermot observed :
>
> > "The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."
>
> **12.** In *Home Office* v. *Dorset Yacht Co.* [1970 (2) All ER 294] Lord Reid said, "Lord Atkin's speech…… is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in *Herrington* v. *British Railways Board* [1972 (2) WLR 537] Lord Morris said :
>
> > "There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case. "
>
> **13.** Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

14. The following words of Lord Denning in the matter of applying precedents have become *locus classicus :*

> "Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.''

43. As far as the second objection is concerned, the learned advocate has submitted that statement of 47 people were relied upon and mentioned in the show-cause notice, of which the adjudicating authority has referred to statements of 27 people. From the said 27 witnesses, 8 people were cross-examined by the appellant during the course of personal hearing. Interpreting the provisions of Section 138B of Customs Act, 1962, it is their contention that it is mandatory to follow the procedure laid down under the said Section 138B whose statements were recorded under Section 108 of the Act i.e. (i) the person who made the statement during the course of inquiry has to be examined as a witness first in the case before the adjudicating authority; and (ii) thereafter, the adjudicating authority to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice or otherwise. In support, they have referred to the judgment in the cases of J&K Cigarettes Ltd. Vs. Collector [2009(242) ELT 189 (Del.); CCE, Meerut-I Vs. Parmarth Iron Pvt. Ltd. [2010(260) ELT 514 (All.)]; Jindal Drugs Pvt. Ltd. Vs. UOI [2016(340) ELT 67 (P&H); G-Tech Industries Vs. UOI [2016(339) ELT 209 (P&H)] and Surya Wires (P) Ltd. Vs. Commissioner [2025 SCC OnLine CESTAT 989]. Resisting the said argument, the Special Counsel for the Revenue has submitted that around 150 statements were recorded under Section 108 of CA,1962 and the show-cause notices were issued in the year April

2010. All these statements were annexed to the show-cause notice and the adjudicating proceedings were completed on 31.03.2012. He has further submitted that during the course of hearing before the adjudicating authority, the appellant has never raised any objection alleging non-compliance with the procedure of accepting evidences of witnesses to be followed by subjecting them first to examination in-chief, thereafter cross-examination, if requested, and hence raising such objections at this stage should not be accepted. He has further submitted that besides, the statements recorded under Section 108 of the Customs Act, 1962 had never been retracted by any of the witnesses, hence admissible in evidence. In support, he referred to the judgment in the case of Commissioner of CGST and CE, Howrah Vs. Ashirwad Foundries Pvt. Ltd. [(2023) 4 Centax 265 (Cal.)]. Further, he has submitted that the jurisdictional High Court in the case of Commissioner of Customs, Bangalore Vs. Jyothi Jain & Ors. 2025(9)TMI-1525-Karnataka High court observed that Section 138B of the Customs Act, 1962 is not applicable to the Departmental adjudications. The said judgment is binding on this Tribunal being an Order of the jurisdictional High Court as opined by the Larger Bench of this Tribunal in the case of Collector of Customs & Central Excise, Chandigarh Vs. Kashmir Conductors 1997(96)ELT257(Tri-LB) and endorsed by another Larger Bench in the case of JK Tyre & Industries Vs. Asst. Commissioner of Central Excise, Mysore 2016 (340) ELT 193(LB).

44. We are of the view that the contention of the appellant against admitting the oral evidence in the form of statements recorded under Section 108 of CA,1962 cannot be accepted at this stage, inasmuch as the appellant had participated in the adjudication proceedings by subjecting certain witnesses to cross-examination without raising any objection about conducting first their examination-in-chief, and thereafter for cross-examination;

also, not raised objection about the admissibility of evidence of other witnesses who have not been called for examination-in-chief/cross-examination. Hence, their submission not to accept the statements as evidence of the witnesses for the purpose of deciding the appeal filed against the impugned order, at this juncture, for not following the procedure of conducting examination-in-chief first and thereafter admitting the same as evidence is devoid of merit, hence cannot be accepted. Also, we find that the impugned Order does not rest its finding only on the statements of various persons recorded during the course of investigation, but also on scrutiny and analysis of voluminous documentary evidence as referred to in passing the Order which are relied upon and enclosed with the show cause Notice issued to the Appellant. Besides, the jurisdictional Karnataka High Court in Jyothi Jain's case (supra) held that Section 138B of the Customs Act, 1962 is not applicable to Departmental proceedings. The said judgment of the Jurisdictional High court is binding on this Tribunal by virtue of Larger Bench decision in Kashmira Conductor's case and JK Tyres' case(supra).

45. Now coming to the merits of the case, for better understanding, the principal issue can broadly be sub-divided into two parts, that is, whether:

(i) the declared Transaction Value of the goods imported by the Appellant from their related seller HP USA, be acceptable under Rule 4(3)(a)/3(3)(a) or liable for rejection under Rule10A/12 of the CVR,1988/2007, as applicable during the disputed period;

(ii) if the declared value is liable for rejection under Rule 10A/12 of the said Rules, then what is the appropriate method of determination of the assessable value of the said goods.

46. Before analysing the facts of the case in search of answer

to above issues, it is necessary to reproduce and analyse the relevant Valuation Provisions of the Customs Act,1962 and the corresponding Rules made thereunder limited to the said purpose.

Provisions of the Customs Act, 1962 (prior to amendment in 2007)

SECTION 14. Valuation of goods for purposes of assessment.- (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where –

(a) the seller and the buyer have no interest in the business of each other; or

(b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or offer for sale

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill or bill of export, as the case may be, is presented under section 50

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of his behalf.] imported goods shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1) or sub-section (1A), if the Board is satisfied that it is necessary or expedient so to do it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

(3) For the purposes of this section -

(a) "rate of exchange" means the rate of exchange -

(i) determined by the 3[Board], or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

[(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and

clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999);.

Provisions of the Customs Act, 1962 (post amendment in 2007)

SECTION 14. Valuation of goods. - (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

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

Provided further that the rules made in this behalf 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:
Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation. --For the purposes of this section--
(a) "rate of exchange" means the rate of exchange—

(i) determined by the Board, or
(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

47. A Plain reading of the aforesaid provisions reveal that Section 14(1) of the Customs Act, 1962, till it is amended, laid down emphasis on a 'deemed value' stating to be a 'price' at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation in the course of international trade; and one of the conditions was that the seller and the buyer are not to be related persons. The said provision has been amended w.e.f. 10.10.2007 which instead of deemed value, concept of 'transaction value' has been introduced in Section 14; it lays down that the imported goods shall be the 'transaction value' of such goods i.e. to say, the price actually paid or payable for the goods when sold for export to India for delivery and at the time of importation where the buyer and seller of the goods are not related and the price is the sole consideration for sale. Under Class (ii) of the second proviso, it is laid down that when there is no sale or the buyer and seller are related or price is not the sole consideration for sale the value shall be determined in accordance with the Valuation Rules made thereunder.

48. The relevant provisions of Customs Valuation Rules, 1988 / 2007 are reproduced below:

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988

In exercise of the powers conferred by Section 156 of the Customs Act, 1962 (52 of 1962), read with Section 22 of the General Clauses Act, 1897 (10 of 1897), and in supersession of the Customs Valuation Rules, 1963 except as respect things done or omitted to be done before such supersession, the Central Government hereby makes the following rules, namely:

1. Short title, commencement and application. … … …

2. Definitions.
(1) In these rules, unless the context otherwise requires,–
(a) "computed value" means the value of imported goods determined in accordance with rule 7A of these rules;

(aa) "deductive value" means the value determined in accordance with rule 7 of these rules;]

(b) to (e) … …

(f) "transaction value" means the value determined in accordance with Rule 4 of these rules.

(2) … … …

3. Determination of the method of valuation.
For the purpose of these rules,–
(i) subject to rules 9 and 10A, the value of imported goods shall be the transaction value;
(ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules.]

4. Transaction value.
(1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.

(2) The transaction value of imported goods under sub-rule (1) above shall be accepted:
Provided that–
(a) the sale is in the ordinary course of trade under fully competitive conditions;
(b) the sale does not involve any abnormal discount or reduction from the ordinary competitive price;
(c) the sale does not involve special discounts limited to exclusive agents;
(d) objective and quantifiable data exist with regard to the adjustments re- quired to be made, under the provisions of rule 9, to the transaction value;
(e) 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;
(f) the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;

(g) no part of the proceeds of any subsequently 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 9 of these rules; and

(h) 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 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;

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

5. Transaction value of identical goods…. … …

6. Transaction value of similar goods. … … …

6A. Determination of value when transaction value is not available. … …

7. Deductive value. (1) Subject to the provisions of Rule 3 of these rules, if the goods being valued or identical or similar imported goods are sold in India, in the condition as imported at or about the time at which the declaration for determination of value is presented, the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions:

(i) either the commission usually paid or agreed to be paid or the additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind;

(ii) the usual costs of transport and insurance and associated costs incurred within India;
(iii) the customs duties and other taxes payable in India by reason of importation or sale of the goods.

(2) If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, the value of imported goods shall, subject otherwise to the provisions of sub-rule (1) of this rule, be based on the unit price at which the imported goods or identical or similar imported goods are sold in India, at the earliest date after importation but before the expiry of ninety days after such importation.
(3) (a) If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India.

(b) In such determination, due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (iii) of sub-rule (1) of this rule.

7A. Computed value. ... .

8. Residual method. –(1) Subject to the provisions of Rule 3 of these rules, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) and on the basis of data available in India.
(2) No value shall be determined under the provisions of this rule on the basis of–
(i) the selling price in India of the goods produced in India;
(ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;
(iii) the price of the goods on the domestic market of the country of exportation;
(iiia) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 7A.
(iv) the price of the goods for the export to a country other than India;
(v) minimum customs values; or
(vi) arbitrary or fictitious values.

9. Cost and services. ... ...

10. Declaration by the importer. ... .

10A. Rejection of declared value. --- (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 value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 4.
(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).

11. … ……
12. …. ….

Customs Valuation (Determination of Value of Imported Goods) Rules, 2007
Rule 1. Short title, commencement and application.- … … …
Rule 2. Definitions.-
(1) In these rules, unless the context otherwise requires, -
(a) "computed value" means the value of imported goods determined in accordance with rule 8.
(b) "deductive value" means the value determined in accordance with rule 7.
(c) to (f) … … ….
(g) "transaction value" means the value referred to in sub-section (1) of section 14 of the Customs Act, 1962;
(2) For the purpose of these rules, persons shall be deemed to be "related" only if -
(i) they are officers or directors of one another's businesses;
(ii) they are legally recognised partners in business;
(iii) they are employer and employee;
(iv) any person directly or indirectly owns, controls or holds five per cent or more of the outstanding
voting stock or shares of both of them;
(v) one of them directly or indirectly controls the other;
(vi) both of them are directly or indirectly controlled by a third person;
(vii) together they directly or indirectly control a third person; or
(viii) they are members of the same family.
Explanation I. - The term "person" also includes legal persons.
Explanation II. - Persons who are associated in the business of one another in that one is the sole agent or sole

distributor or sole concessionaire, howsoever described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.

Rule 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;

(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.

Rule 4. Transaction value of identical goods. - ... ...

Rule 5. Transaction value of similar goods.- ... .

Rule 6. Determination of value where value can not be determined under rules 3, 4 and 5.- ... ...

Rule 7. Deductive value.- ... ...

Rule 8. Computed value.- ... ...

Rule 9. Residual method.- (1) Subject to the provisions of rule 3, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India;

Provided that the value so determined shall not exceed the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade, when the seller or buyer has no interest in the business of other and price is the sole consideration for the sale or offer for sale.

(2) No value shall be determined under the provisions of" this rule on the basis of -

(i) the selling price in India of the goods produced in India;

(ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;

(iii) the price of the goods on the domestic market of the country of exportation;

(iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 8;

(v) the price of the goods for the export to a country other than India;

(vi) minimum customs values; or

(vii) arbitrary or fictitious values.

Rule 10.Cost and services. -... ... .

Rule 11. Declaration by the importer. - ... ...

Rule 12. Rejection of declared value. - (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).

Explanation.-(1) For the removal of doubts, it is hereby declared that:-

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents.

Rule 13. Interpretative notes.- … … …

49. Under the CVR, 1988, Rule 3 lays down that the value of the imported goods be the 'transaction value' and in the event the transaction value cannot be determined, the value shall be determined proceeding sequentially from Rule 5 to 8 of the said Rules. Rule 4(2)(h) prescribes that the transaction value shall be accepted if the buyer and seller are not related; where the buyer and seller are related, the transaction value is acceptable for Customs purposes under the provisions of sub-rule (3) of the said Rules. Clause (a) of sub-rule(3) prescribed that where 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. Clause (b) of sub-rule(3) further lays down that 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 values ascertained at or about the same time; (i) the transaction value of identical or of similar goods, in sales to unrelated buyers in India; (ii) the deductive value for identical goods or similar goods and (iii) the computed value for identical goods or similar goods. It further prescribes that while applying comparative method, due account should be given to difference in commercial levels, quantity levels, adjustments and in accordance with provisions of Rule 9 of CVR and cost incurred by the seller in sales in which he and the buyer are not related.

50. The new Customs Valuation Rules, 2007 made effective from 10.10.2007 defines transaction value at Rule 2(g) as referred to in Section 14 of the Customs Act, 1962. Rule 3 of the said Rules prescribes that value of imported goods shall be the transaction value adjusted in accordance with sub-section (1) with provisions of Rule 10; however, it is made subject to Rule 12 of the said Rules. Sub-rule (2) prescribes the circumstances where a transaction value shall be accepted. Under Clause (iii) of the said sub-rule says that the transaction value shall be accepted where the buyer and seller are not related, for Customs purposes under provisions of sub-rule (3) of the said Rules Clause (a) of sub-rule (3) prescribes 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; clause (b) of the said sub-rule(3) lays down that 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 values ascertained at or about the same time narrated under the said sub-rule viz. (i), the transaction value of identical goods or similar goods, in sales to unrelated buyers in India; (ii) the

deductive value for identical goods or similar goods and (iii) the computed value for identical goods or similar goods. The proviso lays down that in determining the values by comparative methods, due account should be taken of the difference in commercial levels, quantity levels etc. in accordance with provisions of Rule 10 and cost incurred by the seller in sales in which the buyer and seller are not related.

51. Now, to answer the issue, whether the value declared by the Appellant is acceptable as transaction value under Rule 4(3)(a)/3(3)(a) of CVR,1988/2007, it is necessary to understand in a simpler way the business model of the Appellant. We find that the Appellant had three Business Units(BUs) viz. (i)Imaging and Printing Group(IPG)-Ink Jet, Laser Printers, tonner cartridges, etc.(ii) Personal Systems Group(PSG)-Desktop Computers, Laptops, etc and (iii)Technology solutions Group(TSG)-Industry standard Servers, Network Storage solutions, etc.. These BUs had different product Lines(PL) grouped into six product Funding Types(FT). The FTs for each BU as per their classification are termed: for IPG- 6A,6C, 6D, for PSG-6B and for TSG-5A,5B. The purchase/funding discounts are dynamic in nature, periodically changed and subject to periodical review of the costs/expenses incurred in the country. This review related to 3 types of orders viz. (i) stock & demo order (ii) Resale Order and (iii) internal use order. These Order types had different funding discount structures. However, the Appellant has adopted Funding Discount as applicable to stock & demo order to other types of Orders also. During the relevant period the Funding discounts allowed to the appellant from the CLCP for the respective products by their related overseas supplier HPUSA ranged between 44% to 83%.

52. As mentioned earlier it is the contention of the appellant that they adopt ROVAC pricing policy in determining the import price declared to the Customs which ensures that the Appellant is able to recover all costs (VAC plus NONVAC) and earn a reasonable

profit margin i.e. around 10%/8%. Referring to Note 3 to rule 3(3)(a), it is submitted that where the price is adequate to ensure recovery of all costs plus a profit margin which is representative of the firm's overall profit realised over a representative period of time(e.g. on an annual basis) in sale of goods of the same class or kind, it would demonstrate that the price has not been influenced. Also, referring to the Example cited at para 588 of page 193 of the Commentary on the GATT Customs Valuation Code by Saul L Shermon, it is submitted that the said example is applicable to the ROVAC policy followed by HP for determining the import price. Therefore, the pricing policy adopted by the appellant for arriving at the declared import price is fully compliant with the provisions of GATT Valuation Code as well as the Customs Valuation Rules in India. Besides, the pricing policy based on ROVAC principle enshrines the principles of deductive value method prescribed under rule 7 of the Customs Valuation rules, which provides for certain deductions in terms of general expenses and profits from the net sale realization price in India so as to arrive at the assessable value. Also, the ROVAC principle in determining the Transaction value was earlier considered by CEGAT and accepted. It is also argued by the appellant that the intercompany pricing policy has been accepted under the income tax law. Further, it is stated that the rate of Corporate income tax in India being higher than the Customs duty, hence there is no reason to evade customs duty by lowering the transaction value. Thus, it is vehemently argued that taking overall circumstances, the value declared by them is the true transaction value and acceptable under Rule 4(3)(a)/3(3)(a) of CVR,1988/2007.

53. The revenue's argument is that the funding discount allowed to the appellant from the CLCP during the relevant period is abnormally high; reflected only in their Eiffel invoices but not disclosed in their Athena invoices submitted to customs; also the funding discounts comprises of certain discounts, deductions viz.

estimated customs duty on average basis, estimated customs brokerage charges, warranty costs and Freight on notional basis as revealed during the course of investigation by DRI, not disclosed earlier before CEGAT or SVB, are in principle not admissible as per customs valuations provisions. Hence, the ROVAC policy adopted by the Appellant per se is though acceptable, but its implementation is not in consonance with Customs Valuation provisions. The funding discounts was shown as a consolidated amount in the Athena invoices without indicating the breakup showing the deductions that relate to abnormal/special discounts, warranty costs customs duty, customs brokerage and fees an international freight an insurance. It is also argued that the resale- minus method adopted by the appellant is as per the organization for Economic Cooperation and development (OECD) guidelines on transfer pricing. This guidelines are formulated for income/corporate tax purposes and are applied on aggregate basis. The said methodology cannot be readily applied to customs valuation as this principle is for the entity as a whole on annual basis and not for each individual transaction, which is the basis for valuation under customs law where transaction value has to be determined for each transaction of the imported goods. Also, under the said methodology the price to a sales entity is based on the resale price which the importing sales entity expects to realise on the sale of its product. Therefore, the resale price of the imported goods in the country of importation is the starting point for arriving at the assessable value at which the goods were to be imported and has no relationship whatsoever to the internationally traded prices. The value declared to customs is thus influenced by the relation with the overseas seller HPUSA. Therefore, the declared transaction value under Rule 4(3)(a)/3(3)(a) is not acceptable and liable for rejection under rule 10A/12 of CVR,1988/2007.

54. To consider the arguments advanced by both sides, it is necessary to understand the pricing policy(ROVAC) adopted by the appellant in arriving at the transaction value declared for

assessment purpose. The ROVAC policy and related terminology used are outlined in their Accounting Financial Manual(AFM) are as below:

GLOBAL REFERENCE PRICE

A global reference price expressed in U.S. dollars must be established for each new product/service. Exceptions are custom products/services for which the price will be established for each quotation and take account of customer specifications, cost estimation and market competitive conditions. Global reference price is the basis for worldwide internal transfer pricing used to value products/ services that are sold from one HP legal entity to another HP legal entity. Global reference price is also a basis for local currency and export price.

Global reference price needs to take account of current and future administration, manufacturing, research and development investment, royalty, sales, service delivery, travel, warranty and allocated costs, and a reasonable profit. Global reference price also needs to take account of a worldwide average trade discount, such as demo/used product discounts, promotional discounts, purchase agreement discounts and special negotiated discounts.

LOCAL CURRENCY PRICE

Local currency price (LCP) must be established for each new product/service in every country where the product/service will be specifically market price by an HP subsidiary. Market pricing is the setting of a product/ service price based on local market competitive conditions. LCP (quantity 1 price) is a fully delivered price that is delivered duty paid (DDU). Shipping and handling charges may be listed separately on HP's invoice when not included in the products price.

As an alternative to setting a specific market LCP for each new product/service, a percent uplift or down lift for a product/ service family or an individual product/service can be used as a multiplier to calculate LCP.

Global reference price* percent uplift(or down lift)* currency exchange rate= local currency price

Converted Local Currency Price(CLCP)

The IC prices for all transactions involved in the distribution and delivery of a product to a final trade customer are based on the published trade prices of that product. This is referred to as the "List Price". Trade prices for products are published in the local price lists in each country where offered for sale. The price for a product in each country is normally

> stated in that country's local currency and is referred to as the "Local Currency Price" (LCP). For IC pricing purposes, the LCP for a specific country is further converted from a price in local currency to a price in U.S. dollars called a "Converted Local Currency Price" (CLCP), using a pricing rate applicable at the time the IC order is entered. The pricing rate is the exchange rate established by HP Treasury procedures (based on forward coverage) which is used as the currency conversion rate between LCP and U.S. dollars for international sales transactions. Pricing rates are reviewed and communicated every quarter by Corporate Treasury.
>
> **HP's Intercompany Sale of Product Pricing Policies**
>
> HP uses different distribution channels or "field entities" to move products from factories to trade customers. Field entities include distribution centers (DCs), headquarters operations (HQs) and sales offices (SOs). The objective of HP's intercompany (IC) pricing policy is to compensate each field entity for its costs plus a return on its value-added costs (based on US GAAP results). The return on value-added costs is determined by reference to the return unrelated parties with similar functions and risks would expect to earn (i.e. an "arm's length" return). **Within HP, this objective of cost-plus funding is commonly referred to as "Return on Value-Added Costs" or "ROVAC.(**emphasis supplied)

55. The meaning and scope of Reference price(RP), CLP, CLCP and Intercompany(IC) sale of product pricing policy is self explanatory. The Appellant has submitted that HP’s method of determining the net price on sales of products from one HP entity to another is a form of base price less discount called as list less method. Either the Reference Price(RP) or the CLCP is used as base price for IC pricing. The IC prices for all transactions involved in distribution and delivery of a product to final trade customer, that is, resale order and stock orders are based on the published trade prices of that product. This is referred to as the List price. Trade prices for products are published in the local price list in each country is stated as LCP and further converted to US dollars called as CLCP using the exchange rate as applicable at the time of the IC order is entered. Thus, CLCP is specific to a particular country. Funding discount is deducted from the CLCP to determine the net IC price. All IC discounts used on resale, stock/ demo orders are calculated and applied to the gross CLCP of the product. Therefore,

when a product is imported for being resold in the same condition, the starting point (base price) used is the CLCP pertaining to the country of importation in which the product is meant to be resold. The reference price as a base price is not used in the present case for determination of IC price.

56. The ROVAC pricing policy is designed for the purpose of fixing intercompany prices with an objective to ensure reasonable profit margin, after meeting out all expenses in selling the goods by sales office or distributors. Also, it is the objective that the return on value added cost be comparable to the return which an unrelated party would expect to earn with similar functions and risk i.e. an arm's length return. The Revenue as mentioned earlier in principle does not dispute the ROVAC pricing policy of HP, but questions its implementation in Indian context. It is argued that the Appellant neither follows transaction value method nor the Deductive method fully, but it is in effect a mixture of concepts, in determining the value of the imported goods, hence not acceptable.

57. The question thus arises is, whether ensuring return of 8%/10% profit margin by adjusting/passing certain provisional/unascertainable discounts from the gross CLCP in arriving at the net price for stock and demo products, declared to the customs at the time and place of importation, is in accordance with Customs Valuation principles and be accepted as true transaction value uninfluenced by the relation or other relevant factors/circumstances required to be examined to test the correctness of the declared Transaction value.

58. Commenting on the principles of determination of value in related transaction in the book 'Commentary on the GATT Customs Valuation Code by Saul L. Shermon' at para 553 page 185 it is explained:

> "Of all the situations which may lead to a rejection of transaction value, the one which will arise most frequently in practice, and one

> which receives the most careful and thoughtful treatment in the code, is the situation where the buyer and the seller are related to each other.
>
> …….
>
> A simple, typical case to which this provision would apply involves a manufacturing company which has a wholly owned subsidiary to handle the sale of its product in an important foreign market. Because the seller controls the buyer, customs may fear that the price is affected by the relationship. The owner of the parent company is indirectly also the owner of the subsidiary and he may be just as happy for the subsidiary to get the benefit of a lower price as for the parent to receive the benefit of a higher price. Where the parent is the importer and the subsidiary abroad does the manufacturing, there may be much or more concern about the possibility of an unduly low price. In fact, as will be seen below, there are many pressures at work to prevent such price distortion in most cases, but there will be no doubt be some cases in which the price is distorted as a result of the relationship.
>
> The problem thus becomes one of determining whether in the case of the particular goods being valued the price between the parties (referred to as a transfer price when the parties are related) has been distorted. The question is the more difficult to answer because there is no single price which is right or normal against which to measure a related parties price to determine whether it has been distorted. To answer this question, the second paragraph of article 1 lays down two tests- the general test is to examine all of the circumstances surrounding the sale, and the narrow test is to see whether the price (as adjusted pursuant to Article 8) closely approximate the customs value in certain other sales of identical or similar goods

59. Thus, in a related person transaction, to allay the general apprehension of Customs department that a low price is being charged by the Overseas supplier to their related subsidiary in the country of import, two tests could be applied viz. 'the Circumstances surrounding the sale', or a 'test value' where the price after adjustment of profit and general expenses in the country of import nearer to the customs value on sale of similar or identical goods .

60. In the said commentary in discussing the 'circumstances surrounding the sale' the example at para 584 of page 192 reads as:

> Example: The importer is a wholly owned subsidiary of the exporter, whose products the importer distributes on an exclusive basis. The parties have adopted a pricing formula, ensuring the manufacturer

> is set percentage return on capital employed in production, plus direct manufacturing costs. The formula was designed to avoid difficulties with the tax authorities. Customs accepts the formula as a fair basis of pricing. The importer undertakes to inform customs if and when they stop using the pricing formula. There is no need for customs to reexamine under article 1.2(a) the circumstance surrounding particular transactions.

In the present case no such pricing formula setting a percentage of return to the overseas manufacturer on capital employed in production plus direct manufacturing cost has been submitted to the Customs Authorities by the Appellant. Even though, the appellant had a Reference pricing policy, which is defined in their AFM reproduced as above, and adopted for determination of Customs Value for imported parts, but never submitted to the customs or is used as the base price for determination of the Transaction value for imported products. The price declared to the customs is arrived at applying the list-less method.

61. In the said book the author at para 586 of page 192, commented that when Customs does not accept the related transaction value, there are three ways to examine the same. It is stated :

> "The note next talks about some of the 'relevant aspects of the transaction' which customs 'should be prepared to examine'. These include the way in which the buyer and seller organize their commercial relations in general, and in particular 'the way in which the price in question was arrived at'. The test is satisfied if it appears that the parties buy from and sell to each other, as if they were not related. Finally, the note suggests three ways in which it can be shown that the parties deal as though they were not related:
>
> - they act in a manner consistent with the normal pricing practices of the industry….;or
> - the seller acts as he does in setting his prices to unrelated buyers; or
> - the price is shown to cover all of the seller's costs, plus a profit which is representative of the firm's overall profit realized over a representative period of time (e.g., on an annual basis) in sales of goods of the same class or kind."

62. The aforesaid opinion of the author is in consonance with the Interpretative Note to Rule 4(3)(a) at sub-note 3 of CVR,1988

and Note to Rule 3(3)(a) at sub-note 3 of CVR,2007. From the said Notes it is clear that what is relevant to examine, so as to ascertain whether the Transaction value is influenced by the relationship, inter alia, it is the seller's cost and profit realised over a representative period of time, e.g. on an annual basis and it is no way connected with the buyer's selling costs and profit. Thus, the appellant's argument that adopting the ROVAC policy, earning of a reasonable profit, around 8%/10% of the value added cost(VAC) by the Appellant would fulfill the test of the circumstances surrounding the sale is not in conformity with the above Notes for interpretation of Customs Valuation Rules. Also, transfer pricing methodology i.e. List less method followed as per the guidelines formulated by OECD is basically designed for direct tax laws i.e. Income/corporate Tax, where the object of tax is the profit/earning of the business entity in the country of operation. Hence, compliance with the said objective of direct tax levy cannot by itself be construed as compliance of customs valuation laws, which is transaction based, irrespective of the circumstance where the overall tax liability of direct taxes over a period of time(e.g. in a year) is more than customs duty attracted over the same period. The other two tests are also not found to be positive from the finding of the Commissioner as the Appellant could not demonstrate that the seller acted in accordance with normal practice of the International Trade and the seller is applying same methodology in settling price to unrelated buyer, even though it is claimed by the Appellant.

63. The Appellant in support of their argument referred to the Example at para 589 in page 193 of the said Customs Valuation Code which reads as:

> *Example: The importer shows that his resale price in the country of importation is governed by the price charged by the leading domestic producer. The importer has always needed and received an 18 per cent markup on landed cost to cover his expenses and profit. The expenses show nothing unusual, and. the profit of about 8 per cent does*

> *not appear to be excessive. The price in the present transaction was arrived at by deducting 15.25 per cent from the prevailing market price on the second commercial level (which corresponds with a markup of 18 per cent on landed cost). TV should be found acceptable, even though there is no industry practice and the exporter sells only to the related importer and no cost or profit figures of the exporter have been furnished to Customs."*

A plain reading of the aforesaid example, in our view, cannot be made applicable to the present case as the circumstance referred therein is totally different, in as much as, in the instant case the Appellant has not presented the price charged by any leading domestic manufacturer in India; secondly, the landed cost of the imported goods has not been disclosed to the Customs department. On the contrary, the declared net price(transaction value) in the Level 'B'(Athena) Invoices declared to the Customs is arrived at after deducting a percentage of Funding discount from the CLCP.

64. The Circumstances under which the declared transaction value could be rejected has been prescribed at Rule 10A/12 of the CVR1988/2007. The said provision has been interpreted by a three Member Bench of the Honourable Supreme Court in the case of Century Metal Recycling Pvt. Ltd. Vs. UOI 2019 (367) ELT 3(SC). Their Lordships observed as:

> **14.** Rule 12, which as noticed above enjoys primacy and pivotal position, applies where the proper officer has reason to doubt the truth or accuracy of the value declared for the imported goods. It envisages a two-step verification and examination exercise. At the first instance, the proper officer must ask and call upon the importer to furnish further information including documents to justify the declared transactional value. The proper officer may thereafter accept the transactional value as declared. However, where the proper officer is not satisfied and has reasonable doubt about the truth or accuracy of the value so declared, it is deemed that the transactional value of such imported goods cannot be determined under the provision of sub-rule (1) of Rule 3 of the 2007 Rules. Clause (iii) of Explanation to Rule 12 states that the proper officer can on 'certain reasons' raise doubts about the truth or accuracy of declared value. 'Certain reasons' would include conditions specified in clauses (a) to (f) i.e. higher value of identical similar goods of comparable quantities in a comparable transaction, abnormal discount or abnormal deduction from ordinary competitive prices, sales involving the special prices,

misdeclaration on parameters such as description, quality, quantity, country of origin, year of manufacture or production, non-declaration of parameters such as brand and grade etc. and fraudulent or manipulated documents. Grounds mentioned in (a) to (f) however are not exhaustive of 'certain reasons' to raise doubt about the truth or accuracy of the declared value. Clause (ii) to Explanation states that the declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after enquiry in consultation with the importers. Clause (i) to the Explanation states that Rule 12 does not provide a method of determination of value but provides the procedure or mechanism in cases where declared value can be rejected when there is a reasonable doubt that the declared transaction value does not represent the actual transaction value. In such cases the transaction value is to be sequentially determined in accordance with Rules 4 to 9 of the 2007 Rules.

Sub-rule (2) of Rule 12 stipulates that on request of an importer, the proper officer shall intimate to the importer in writing the grounds, i.e. the reason for doubting the truth or accuracy of the value declared in relation to the imported goods. Further, the proper officer shall provide a reasonable opportunity of being heard to the importer before he makes the valuation in the form of final decision under sub-rule (1).

15. The requirements of Rule 12, therefore, can be summarised as under :

(a) The proper officer should have reasonable doubt as to the transactional value on account of truth or accuracy of the value declared in relation to the imported goods.

(b) Proper officer must ask the importer of such goods further information which may include documents or evidence;

(c) On receiving such information or in the absence of response from the importer, the proper officer has to apply his mind and decide whether or not reasonable doubt as to the truth or accuracy of the value so declared persists.

(d) When the proper officer does not have reasonable doubt, the goods are cleared on the declared value.

(e) When the doubt persists, sub-rule (1) to Rule 3 is not applicable and transaction value is determined in terms of Rules 4 to 9 of the 2007 Rules.

(f) The proper officer can raise doubts as to the truth or accuracy of the declared value on 'certain reasons' which could include the grounds specified in clauses (a) to (f) in clause (iii) of the Explanation.

(g) The proper officer, on a request made by the importer, has to furnish and intimate to the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to the imported goods. Thus, the proper officer has to record reasons in writing which have to be communicated when requested.

(h) The importer has to be given opportunity of hearing before the proper officer finally decides the transactional value in terms of Rules 4 to 9 of the 2007 Rules.

16. Proper officer can therefore reject the declared

> transactional value based on 'certain reasons' to doubt the truth or accuracy of the declared value in which event the proper officer is entitled to make assessment as per Rules 4 to 9 of the 2007 Rules. What is meant by the expression "grounds for doubting the truth or accuracy of the value declared" has been explained and elucidated in clause (iii) of Explanation appended to Rule 12 which sets out some of the conditions when the 'reason to doubt' exists. **The instances mentioned in clauses (a) to (f) are not exhaustive but are inclusive for there could be other instances when the proper officer could reasonably doubt the accuracy or truth of the value declared**.(emphasis supplied)
>
> **17.** The choice of words deployed in Rule 12 of the 2007 Rules are significant and of much consequence. The Legislature, we must agree, has not used the expression "reason to believe" or "satisfaction" or such other positive terms as a pre-condition on the part of the proper officer. The expression "reason to believe" which would have required the proper officer to refer to facts and figures to show existence of positive belief on the undervaluation or lower declaration of the transaction value. The expression "reason to doubt" as a sequitur would require a different threshold and examination. It cannot be equated with the requirements of positive reasons to believe, for the word 'doubt' refers to un-certainty and irresolution reflecting suspicion and apprehension. However, this doubt must be reasonable i.e. have a degree of objectivity and basis/foundation for the suspicion must be based on 'certain reasons'.

65. We find the commissioner in the impugned Order, after analysing evidence on record observed that the value declared by the appellant of the goods imported from the related supplier cannot be accepted as true transaction value uninfluenced with their relationship, under Rule 4(3)(a)/3(3)(a) of CVR being not in consonance with Customs Valuation provisions. He has reasoned as :

> "54.3 On a close examination, however, I find that Rules 4(3)(a) and (b) or 3(3)(a) and (b) provide different means of establishing the acceptability of a transaction value in sale involving related persons, as in the present case. Rules 4(3)(a)/ 3(3)(a) envisages the examination of the circumstances surrounding the sale of imported goods to enable the Customs to decide whether the relationship has influenced the price. This rule does not contemplate looking beyond the stage of sale by the seller to the buyer-importer. In the relevant Interpretative Notes, a few examples of circumstances surrounding the sale have been provided as guidelines. All the examples are in fact seller centric and they relate to sales of goods of the same class or kind as the goods being valued. The sales of goods alluded to in this example are sales by the seller and not sales by the buyer after import. Further, the

reference here is not to the goods being valued.

.....

54.8 However, I find that HPI (HPISPL) has all along been wrongly representing that the costs referred to in the Int. Note to Rule 4(3)(a) /3(3)(a) would correspond to their own costs (i.e importer's costs) and the profit would correspond to their ROVAC of 10% or 8%. This to my mind is clear misrepresentation of facts to gain the application of Rule 4(3)(a) /3(3)(a) in their case. As per their own policy the base price is CLCP, which is the post import list price of the imported goods being valued and when deductions are claimed there from, HPISPL ought to have resorted to the application of Rule 7 in full. Under the law they cannot borrow concepts and principles from here and there and according to their convenience, and say that the requirements of law have been broadly met. Only Rule 8 permits flexible adoption of reasonable means consistent with the valuation provisions as a whole. Hence, the argument that the declared value should be accepted as transaction value since the pricing policy follows the essence of the Deductive value method enshrined in Rule 7 of CVR, the same is in line with Rule 4(3)(a) /3(3)(a) and Rule 7 of CVR read with Interpretative Notes holds no water. This leads me to conclude that the values declared by HPI/HPISPL cannot be regarded as conforming to the Interpretative Note to Rule 4(3)(a) /3(3)(a).

66. We do not see any apparent error in the reasoning of the Commissioner; also in view of the facts discussed above i.e. maintenance of two sets of invoices viz. Eiffel and Athena invoices, non-disclosure of Funding discounts ranging from 44% to 83% from CLCP in the Athena invoices, inadmissibility of certain discounts and abatements from the Funding discount are the circumstances revealed as a result of DRI investigation, which can be accepted as reasonable grounds to doubt the correctness of Transaction value with related seller, being not based on mere apprehensions, suspicions, etc., hence its rejection under Rule 10A/12 of CVR,1988/2007 is in accordance with law.

67. Consequent to rejection of the declared transaction value, under Rule 10A/12 of CVR,1988/2007, as per clause(i) of Explanation to the said Rule, which only provides for the mechanism and procedure for rejection of declared value, and does not provide for the procedure or the method of valuation, the value shall be determined by proceeding sequentially in accordance with Rules 5 to

8 of CVR,1988 or Rules 4 to 9 of CVR,2007. This principle has been also laid by the Hon'ble Supreme Court in the context of of CVR,1988 in Eicher Motors' case:

> **12.** Rule 4(1) speaks of *the* transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). "Payable" in the context of the language of Rule 4(1) must, therefore, be read as referring to "*the* particular transaction" and payability in respect of *the* transaction envisages a situation where payment of price may be deferred.
>
> **13.** That Rule 4 is limited to the transaction in question is also supported by the provisions of the other Rules each of which provide for alternate modes of valuation and allow evidence of value of goods other than those under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 "using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India." If the phrase 'the transaction value' used in Rule 4 were not limited to the particular transaction then the other Rules which refer to other transactions and data would become redundant.
>
> **14.** It is only when *the* transaction value under Rule 4 is rejected, then under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules. Conversely if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules.

68. Both Appellant as well as Revenue during the course of hearing have fairly submitted that during the relevant period neither identical nor similar goods were being sold to unrelated buyers in India at or about the time at which the declaration for value of the imported goods is presented, hence, the value cannot be determined under Rule 5/6 or Rule 4/5 of CVR,1988/2007, as the case may be. Thus, proceeding sequentially the value is to be determined as per

the Deductive Value(DDU) method prescribed under Rule 7 of CVR1988/2007.

69. The deductive method under Rule 7 of CVR is based on the resale price of the identical or similar goods or the goods imported by the importer in the country of importation at or about the same time at which the declaration for determination of value of the imported goods is presented, in the greatest aggregate quantity, to persons who are not related to the importer. Statutory deductions allowed from the selling price as mentioned under the said Rule are: Commissions and profits and general expenses in selling the goods in India, cost of transportation and insurance incurred in India and customs duties and other taxes payable by the importer in India by reason of importation or sale of the goods in India. The said Rule 7 is reproduced as below:

> **7. Deductive value.** — (1) Subject to the provisions of rule 3, if the goods being valued or identical or similar imported goods are sold in India, in the condition as imported at or about the time at which the declaration for determination of value is presented, the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions : —
>
> (i) either the commission usually paid or agreed to be paid or the additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind;
>
> (ii) the usual costs of transport and insurance and associated costs incurred within India;
>
> (iii) the customs duties and other taxes payable in India by reason of importation or sale of the goods.

(2) If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, the value of imported goods shall, subject otherwise to the provisions of sub-rule (1), be based on the unit price at which the imported goods or identical or similar imported goods are sold in India, at the earliest date after importation but before the expiry of ninety days after such importation.	
(3) (a)	If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be

		based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India.
	(b)	In such determination, due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (iii) of sub-rule (1).

70. In the present case, Local currency price(LCP) is fixed based on local market condition which is claimed to be a fully delivered price on sale of the goods in the country of importation i.e. India. The sale price is then converted into dollar terms called CLCP from which the funding discount is deducted. It is the contention of the Department that the appellant has not adopted the deductive method in its letter and spirit, inasmuch as the declared net price has been arrived at after deducting the funding discount from CLCP which is an estimated price worked out on past data, past market trends, global/regional averages, adjusted periodically by CSA(country specific Adjusters). It has no relation to the current imports or discounts given on current import in the course of resale of the products. The actual resale price at which the appellant sells the goods to its channel partners at first commercial level has not been submitted to the department. Hence, the deductive method, which rests on the price at which the imported goods or identical or similar goods are sold in greatest aggregate quantity to unrelated buyer since not available, Rule 7 cannot be fully made applicable in determining the transaction value. Thus, after rejecting the transaction value declared, the assessable value of the imported goods is to be determined under Rule 8/9 broadly by adopting the principles of Deductive Value method under Rule 7 of CVR 1988/2007.

71. The learned Commissioner in the impugned order has observed that to arrive at the import price declared to the Customs, the local currency price is converted into Dollar terms less the Funding Discount. The Funding discount is indicated in the Level A

(Eiffel) invoice as the total amount arrived at by a consolidated percentage of CLCP. He has observed that the import prices are shown in the Customs invoices as DDU or CIF. The funding discount is stated to be (i) aggregate of trade discounts offered to the customers, (ii) value added costs(VAC); (ii) non-VAC and (iv) ROVAC @ 8% or 10% of VAC, but no break-up among these elements in the aggregate percentage is furnished by the appellant. The ROVAC review submitted to the IC pricing team by the appellant in filing the ROVAC template provides full details of discounts given to domestic sales and expenses booked under various heads viz. warranty, trade expenses which includes Customs duties and Customer brokerage. In absence of break-up of funding discount, the learned Commissioner proceeded to re-determine the declared customs value by disallowing certain ineligible discounts, warranty costs, but allowed customs duties, customs fees and brokerage as deductible expenses; added the cost of Transportation and insurance to the said value. He has observed as follows:-

> 67.6 In effect, the redetermination of Customs value begins with CLCP. The net resale price is derived as CLCP minus eligible trade discounts. From this resale price, eligible VAC, Non-VAC and 8% or 10% return on eligible VAC are deducted as admissible reductions/ abatements. The funding discount is, thus, re-determined taking into account the eligibility of the subject deductions to be abated as part of funding discount. To arrive at the Customs value with respect to each B/E, however, the declared net invoice price is the starting point. To this price, the amount of ineligible trade discounts (9 types), the amount of ineligible VAC(Warranty Costs, Customs duties, Customs brokerage fees) amounts and ROVAC of 8% or 10% thereon are added. [Other elements viz., actual freight, insurance @ 1.125 of C & F and handling charges are also added. These aspects are dealt with elsewhere in the order.

72. Before analysing the deductibility of Trade discounts, other discounts, abatements from the CLCP, as reflected in the Level A invoice (Eiffel) invoice, to arrive at the net price shown in the Level B (Athena) invoices declared to the Customs, the scope and meaning of the IC discounts, also called as Funding/ Purchase discounts as narrated in the AFM needs to stated which reads as below:

> **IC discounts**, are the mechanism used to manage the legal

funding of field entities and they are developed in reverse order of the entities involved. The IC discounts given on the sale of product to a SO must provide the appropriate gross margin to allow the SO to recover its costs plus ROVAC return. The IC discounts given to the HQ must allow the HQ to recover its costs plus ROVAC return, taking into account the funding that it provides to the SO. The IC discounts given to the DC must allow the DC to recover its costs plus ROVAC return, taking into account the funding it provides to the HQ and SO. In other words, IC discounts are developed in a cascading manner from the SO back to the supplying factory.

Legal Funding of International Sales Offices :-

International sales offices (SOs) engage in marketing, sales, distribution, service and support activities. The intercompany (IC) funding model applicable to SOs is ROVAC. The value-added costs of a SO to be funded under ROVAC include field selling costs, field marketing costs, administrative expenses, warranty, service/support costs, and trading expenses. Non-value added costs (eg: materials-related costs, cash/trade discounts, and billed-in expenses) are also funded but the SOs do not receive a mark-up on such costs.

The IC price at which a SO purchases product is equal to the base price of the product minus discounts (trade and/or IC) established as a percentage of such base price. The base price for products purchased by SOs is the Converted Local Currency Price (CLCP). IC discounts are used to manage the legal funding of the SOs.

The two main categories of SO IC discounts are Resale and Stock/Demo discounts. The majority of IC purchases made by SOs are to fulfill open orders from trade customers and the Resale IC discount applies to such purchases. The IC price for resale purchases is equal to CLCP less the actual trade discount given to the trade customer less the Resale IC discount. However, when SOs purchase products to be held in inventory before resale to trade customers (ie. "stock" or "demo" purchases), the ultimate trade discount is not known at the time of the purchase. In these situations, the IC price is equal to CLCP less the Stock/Demo discount. Stock/Demo discounts are computed to include funding for average trade discounts.

Standard SO discounts for Resale and Stock/Demo purchases are established at the beginning of each fiscal year for Europe and "Rest of World" (ROW) which includes Asia-Pacific, Latin America and Canada. The standard SO discounts for Europe apply to all SOs in Europe. The standard SO discounts for ROW apply to all SOs in the ROW. These standard IC discounts are also set by Funding Type (FT) which is a grouping of Product Lines with similar selling and distribution costs. The objective is for each individual SO to achieve an arm's length return on its value-added costs. Since the standard SO discounts represent

> a regional average, "Country-Specific Adjustors" (CSAs) are used to adjust the standard SO discounts for each SO to take into account variations in costs and revenues. If the targeted level of ROVAC funding cannot be achieved through the use of standard SO discounts, a CSA (either positive or negative) will be implemented and adjusted throughout the year to achieve the ROVAC profit objective. The same CSA applies to all FTs.

73. The Funding discount in the present case relates to Stock and Demo sales. The objective of the funding discount is to compensate(fund) each of the field entities involved in the distribution chain for the said entities functional costs plus a reasonable profit(ROVAC) on those costs. The IC discounts are developed in a reverse manner from the sales office backward to the supplying factory. The purpose of the Funding discounts also reflected in the Distribution Agreement dated 01.11.2005 reads as below:

> **Clause 9. COMPENSATION**
>
> Distributor will perform the functions of selling, servicing, supporting and distributing HP Products and Services that are sold to Distributor's customers. Decisions related to appropriate levels of product promotion, advertising, channels of distribution, and Distributor's selling costs are made under the responsibility of HP Factories..
>
> Principally through HP's intercompany ("IC") pricing policies, Distributor shall receive compensation from HP Factories, through the Headquarters, for the costs of selling, servicing, supporting and distributing HP Products and Services. Such compensation will in most cases be realized by Distributor when Distributor purchases HP Products from the Headquarters at a discount (hereinafter referred to as "Purchasing Discount") and then resells HP Products to trade customers at a higher price. **The goal in calculating the Purchasing Discount is to enable Distributor to recover its relevant value-added costs, plus earn an arm's length return on those value-added costs (hereinafter referred to as "ROVAC")**. Distributor may also receive additional compensation from and/or repay excess compensation to Headquarters or HP Factories in order to achieve ROVAC**.(emphasis supplied**)
>
> **Clause 11. PRICES**
>
> Headquarters or the HP Factories, as the case may be, shall sell HP Products to Distributor at prices contained in the Price List converted to U.S. Dollars, where applicable, less the purchasing discounts. Headquarters or the HP Factories shall,

in some cases, sell HP Products to Distributor at prices based on a cost plus a markup.

Unless otherwise indicated, all prices charged by Headquarters or the HP Factories to Distributor are inclusive of costs incurred by Headquarters or the HP Factories on behalf of the Distributor. These costs include, but are not limited to, generic IT, software, financial services operations, treasury, Enterprise Workforce Development (EWD), and global HR functions.

If applicable, HP, HP Factories and Headquarters shall invoice the Distributor, as a separate line item, on amount charged by the supplier in order to recover costs such as, but not limited to, freight, duties, special handling and insurance or to reflect specific local factors such as, but not limited to, local market conditions, exchange rate fluctuations and an appropriate division of profit.

Unless otherwise indicated in the quotation, acknowledgment or invoice, all prices charged by Headquarters or the HP Factories to Distributor are exclusive of freight, duties, transportation, insurance, shipping, storage, handling, demurrage or similar charges, value-added or other taxes. Such items, where applicable, shall be separately invoiced to the Distributor. Any special inspection services requested by Distributor shall be for its account.

The Purchasing Discounts will include both a trade and IC discount component. The IC discounts are documented in Table A which can be found on the HP Corporate Tax website. Revisions to Table A shall be posted to this website or communicated among the Parties through electronic mail or similar medium and incorporated herein by reference.

HP, HP Factories and Headquarters reserve the right to change prices published in the Price List and shall not incur any liability to Distributor as a result of such modification. HP, HP Factories and Headquarters shall notify Distributor promptly of price changes and Distributor will be compensated for such price changes through corrective adjustments, transactional or lump sum, or through the ROVAC compensation mechanism.

The Funding discount for each BU wise during the relevant period deducted from the CLCP are as below:

MONTH	ACTUAL FUNDING DISCOUNTS APPLIED TO LIST PRICE					
	FT5A	FT5B	FT6A	FT6B	FT6C	FT6D
Nov-04	66	49	48	50	44	47
Dec-04	74	57	56	58	52	55
Jan-05	74	57	56	58	52	55

Feb-05	82	65	64	66	60	63
Mar-05	82	65	64	66	60	63
Apr-05	82	65	64	66	60	63
May-05	82	65	64	66	60	63
Jun-05	82	65	64	66	60	63
Jul-05	79	62	61	63	57	60
Aug-05	77	60	59	61	55	58
Sep-05	75	58	57	59	53	56
Oct-05	75	58	57	59	53	56
Nov-05	77	60	59	61	55	58
Dec-05	75	58	57	59	53	56
Jan-06	75	58	57	59	53	56
Feb-06	74	57	56	58	52	55
Mar-06	74	57	56	58	52	55
Apr-06	73	56	55	57	51	54
May-06	73	56	55	57	51	54
Jun-06	73	56	55	57	51	54
Jul-06	73	56	55	57	51	54
Aug-06	73	56	55	57	51	54
Sep-06	73	56	55	57	51	54
Oct-06	73	56	55	57	51	54
Nov-06	75	58	57	59	53	56
Dec-06	75	58	57	59	53	56
Jan-07	75	58	57	59	53	56
Feb-07	75	58	57	59	53	56
Mar-07	75	58	57	59	53	56
Apr-07	73	56	55	57	51	54
May-07	73	56	55	57	51	54
Jun-07	73	56	55	57	49	54
Jul-07	71	54	53	55	49	52
Aug-07	71	54	53	55	49	52
Sep-07	71	54	53	55	49	52
Oct-07	71	54	53	55	50	52
Nov-07	73	56	54	59	50	62
Dec-07	73	56	54	59	50	62
Jan-08	73	56	54	59	50	62
Feb-08	73	56	54	59	50	62
Mar-08	78	61	59	64	55	67
Apr-08	78	61	59	64	55	67
May-08	78	61	59	64	55	67
Jun-08	83	66	64	69	60	72
Jul-08	83	66	64	69	60	72
Aug-08	83	66	64	69	60	72

Sep-08	83	66	64	69	60	72
Oct-08	79	62	60	65	56	68
Nov-08	83	66	64	69	60	72
Dec-08	83	66	64	69	60	72
Jan-09	83	66	64	69	60	72
Feb-09	83	66	64	69	60	72
Mar-09	83	66	64	69	60	72

74. As mentioned earlier the Funding Discounts which includes Trade discounts & other discounts passed by the Appellant on sale to the unrelated buyer at the first commercial level in India also comprises of expenses like warranty costs, Customs duty, customs brokerage fees etc. The learned Commissioner has analysed Nine different types of discounts viz. (1) Special negotiated discounts(3104 of AFM) (2) Price protection discount (3106 of AFM) (3) Cooperative Partner Marketing discount (3107 of AFM) (4) End of life discount (3109 of AFM) (5) Influencer fee discount (3112 of AFM) (6) other trade discount (residual discount- 3113 of AFM) (7) Trade discount on Misc Sales (3190 of AFM), (8) Trade discount on support & services (3199 of AFM) and (9) Sales type lease trade discount (3111 of AFM), applying the criteria of eligibility alleged at para 8.4 of the SCN i.e.(i) whether a discount is genuinely known and indicated in the invoice at the time of importation of the goods into the country; and (ii) whether the discount is normal (i.e. not abnormal) and is uniformly available to all customers at the same commercial level. Applying the said tests, internal pricing policy of the Appellant disallowed Special Negotiated Discounts, Price Protection discount, Cooperative Partner Marketing discount, End of Life Trade sales discount, and Influencer fee trade discount.

75. The nerve chord of the dispute revolves around the 'Funding Discount' which has been deducted from the CLCP, in arriving at the net price declared in the invoices(Athena) submitted to

customs. As mentioned above, the Funding Discount broadly comprises: (i) aggregate of standard discounts and other trade discounts offered to the customers by the Appellant (ii) value added costs(VAC); (iii) non-VAC and (iv) ROVAC @ 8% or 10% of VAC. The objective of the Funding Discount is to compensate the SO(sales office) for the expenses incurred in the distribution of the imported goods and to earn a reasonable margin of 8% to 10% on the Value Added Costs(VAC).

76. The contention of the appellant is that for computing IC transfer price based on ROVAC method (Deductive method) a local estimated sale price on the basis of previous data is arrived at that would be realised by the appellant upon resale of the products in India. From this resale price, all post-importation expenses and reasonable profits are deducted to arrive at the import price. Thus, the resale price of imported products in India would be the net sales price realised by the appellant i.e. gross sales (list price) less trade discount offered by the appellant to the buyer. In such a scenario, the question of examining the admissibility of such discounts does not arise at all. Hence, the whole of the Funding discount deducted from the CLCP is admissible. It is also contended that under Rule 7 of CVR, to arrive at the customs value, it is the net actual realisation from sale of the imported product post importation in India and not any arbitrarily arrived at deemed realization. All general expenses in connection with sale of imported products are liable to be deducted from the resale price to arrive at the deductive customs value. All heads of expenditure covered by 'trade discounts' could in any case qualify as general expenses in connection with sale of imported products in India, even if the same is strictly in the nature of discounts. The denial of such discounts is contrary to the principle of law laid down by the Hon'ble Supreme Court in various judgements. Alternatively, it is also argued that the conditions referred to in para 8.1 of the SCN has been complied with, in as much as the trade discounts are known between the seller (the appellant) and

the buyer (channel partners or end users) before sale of the products; it is deducted to arrive at the net resale price shown in the trade invoice itself raised at the time of sale; the trade discounts are uniformly available to all buyers at the same commercial level even though the rate or quantum of discounts may vary from customer to customer or transaction to transaction based on various commercial consideration.

77. In examining the admissibility of the different discounts in question, allowed by the appellant to its customers after importation of goods, the learned Commissioner has analysed the internal Accounting policy of the appellant and also the admissibility of discount from the perspective of the provisions of the Customs Act, 1962 and also applying the tests mentioned in the SCN observed that discounts viz. Special Negotiated Discounts, Price Protection discount, Cooperative Partner Marketing discount, End of Life Trade sales discount, Influencer fee trade discount and other discounts are inadmissible being given much after the import and are retroactive in nature. This is stated while denying the deduction of the 'Special Negotiated discount' as :

> "70.5 In a nutshell, I find that HPISPL, having all along followed the unique 'stock funding model' for all customers, the stock funding discount applied to arrive at import prices could not have been on the basis that the trade customers were known at the time of import. Therefore, if firm orders or customers are not known at the time of import of products, there cannot be any means to know the end price of the product sold to the customers. If the sale of products as such to any specified customer is not known, there cannot be any special negotiated discount applicable or known to be deducted from the list price of the product. Therefore, I hold that the deduction of special negotiated discounts from the competitive list price is clearly arbitrary and legally unsustainable.

78. As mentioned above the re-determination of value in the present case has been resorted to under Rule 8/9 adopting the deductive method principle enshrined under Rule 7 of CVR. In the deductive method, under Sub-rule (1) the starting point for arriving

at the assessable value is the selling price of the goods imported or identical or similar goods at or about the same time of importation of the goods valued; under sub-rule (2) it is laid down that the goods imported or identical or similar goods are not sold at or about the same time of importation, then the price at which the imported goods or identical or similar goods sold at the earliest date of importation but before expiry of Ninety days after such importation.

79. In the present case since the actual price of the imported goods or identical goods or similar goods sold at or about the same time of importation or within ninety days from the date of importation are not available, the local List Price(LP) converted into dollar (CLCP) has to be considered as the deemed sale price at which the goods are sold; the starting point for determination of the deductive value under Rule 7 read with rule 8/9, that is, the price at which imported goods are deemed to be sold at or about the same time of importation but not later than ninety days from the date of importation. The Appellant's objection to adopt the said List Price for the purpose of determining the deductive value does not merit consideration as the burden of submission of the said data rests on them. Also, the Appellant has never submitted the Reference price(RP), though available for each product, to justify their stance that the related transaction value is not influenced by relation, and further in absence of import of identical or similar goods; thus the only option available is to consider the List price as the deemed sale price for the purpose of determination of assessable value .

80. Even though there is no specific mention about the deduction of the Trade discounts offered from the price at which the imported goods are sold in India under the deductive method, however, what is relevant for determination of value is not the gross price(list price) but the net price after allowing admissible trade discounts from the said price, before unloading the same with

post importation general expenses laid down at clause (i) (ii) and (iii) of the said Rule and profit. However, the admissibility of the said Trade discounts as deduction from the gross price depends on its nature and whether could be known at the time and place of importation of the goods.

81. At the cost of repetition, it is necessary to reiterate that for determination of value Under the deductive method, time and place of importation plays a significant role. As laid down under section 14 of CA,1962, the value of the goods imported is the 'transaction value' of the goods, when sold for export to India for delivery 'at the time and place of importation' subject to other conditions prescribed under the said provision, is an important factor to be considered for determination of value of imported goods. The same principle is also adopted under the deductive method in Rule 7 of CVR,2007.

82. In the 'Commentary on the GATT Customs Valuation Code by Saul L. Shermon' at Para 680 to 684 of page 212 on the scope of Deductive value method explained the role of 'time of sale' as:

> **"c) TIME OF RESALE**
>
> The resale transactions must take place 'at or about the time of the importation of the goods being valued. Article 5.1 (a). The resale may have been concluded before or after the importation of the goods being valued.
>
> One of the reasons for allowing resale prices for identical and similar products to be applied was to avoid, as far as possible, any delay of valuation until the imported goods being valued are resold. This is especially true when the goods being valued go into an inventory while earlier arrival are being taken out of inventory and sold at or about the time of the present importation. Thus, the term at or about the same time; should not interpreted too narrowly. Where there is a stability of market and price conditions there should be no reason to reject resale prices which are, e.g. a month old.
>
> But if there are none at or about that time, sales 'at the

earliest date after the importation of the goods being valued but before the expiration of ninety days after such importation shall be used. Article 5.1 (b). Thus the later sales acceptable under Article 5.1 (b) can only be used if it is impossible to find applicable unit prices on the basis of Art.5.1 (a).

In our view the date of concluding the sales contract, rather than the date of delivery, should be decisive, so that the delivery date may extend beyond the 90 day period. The timing provisions quoted above suggest that the earliest transaction is to be taken, at least if there is none around the date of importation. But Article 5 also requires a determination of the unit price at which the goods are resold 'in the greatest aggregate quantity' (see 686 at seq. below), and for this purpose a reasonably representative set of sales is obviously desirable.

In practice, it would seem that Customs should go as far into the 90-day period as is necessary to obtain what appears to be a representative sample and should permit the importer to furnish evidence of additional sales if they suggest that a different price applies to the greatest aggregate volume of sales. This is what the Note means when it says:

For the purposes of Article 5.1 (b), the earliest date shall be the date by which sales of the imported goods or of identical or similar imported goods are made in sufficient quantity to establish the unit price.

83. In Interpreting the deductive method under Rule 7 the expression, viz. "imported at or about the time at which declaration for determination of value is presented'' must be given due weightage. The deductive method is a backward calculation of the assessable value of the goods imported taking into consideration the resale price of the identical or similar or the same goods in the country of importation. The forward calculation, on the other hand, is the transaction value of the goods also rests on the factor 'at the time and place of importation'. Thus, the common thread running through both these principles for determination of value of imported goods depends on the factor 'time and place of importation'. Under sub-rule(2) of Rule 7 it is specifically laid down that the value be determined based on price at which the imported goods being valued or identical or similar goods sold earliest to the date of

importation, but in any case not before the expiry of Ninety days. To give effect to the formula for determination of value enumerated under Rule 7 each of the expression employed thereunder has to be read harmoniously and conjointly.

84. The principle of interpretation of the expressions used in determination of the real value under Section 30 of Sea Customs Act, 1878 reached before the their Lordships of Privy Council in the case of Vacuum Oil Company Vs. Secretary of State [1978(2) ELT (J260) (P.C)]. In the said case, their Lordships interpreting Section 30 (a) and (b) of the said Act, emphasised the use of each expression used in the said provision in understanding and determining the 'real value' of the goods for the purpose of customs duty under the said Act. The appellants, therein have imported lubricating oils from their principal at America in bulk quantities of 42 Gallons barrels and drums. The imported oil were transported to the appellant's warehouse at Bombay. All oils are disposed directly to the consumers and never to dealers, whether for the purpose of resale or otherwise. The smallest quantities supplied in a case of 8 gallons directly to the consumers and in the event the consumer enters into a contract to take all his requirements from the appellant for a year, allowed a discount from 2.5 to 15% according to the quantity purchased in the year; 30 days credit period is allowed but a special discount for cash payment within 10 days is also allowed. They filed Bills of Entry declaring its value resorting to Section 30(b) in absence of a 'wholesale cash price' less 'trade discount' at the time and place of importation as cost price of the oil (FOB), New York + a small manufacturing profit + freight, insurance and loading charges. This was the basis of value accepted by the Customs till March 1923. In these factual backdrops, the Department proposed to determine the assessable value under Section 30(a) of the Customs Act considering retail sale to customers directly as wholesale cash price less trade discount for which the goods of the like kind and quality are sold or capable of being sold at the time

and place of importation. The Trial judge interpreting the term "wholesale" which is used in connection with 'trade discount' and cash price decreed that the goods cannot be assessed under Section 30(a) of the Sea Customs Act, 1878. On appeal, to the division Bench of their Lordships of Bombay High Court held that the sales made to the consumers from warehouse in bulk quantity associated with discount satisfies the term 'wholesale sale' , trade discount' and 'cash price' and accordingly the assessment could be done under Section 30(a) of the Sea Customs Act, 1878. On second Appeal to Privy council, interpreting the true scope of the expression " a wholesale cash price less trade discount for which goods of the like kind and quality sold at the time and place of importation", their Lordships disagreed with the view expressed by the Division Bench of Bombay court as the said expression should be interpreted as a whole. It is observed as:-

> **12.** Sections 29 and 30 are sections of a taxing Act not to be pressed against the taxpayer beyond their plain intendment, and taken as a whole, as their Lordships read them, they seem to disclose on the part of the legislature when describing the price which is to represent the "real value" of the goods to be taxed a definite purpose to define a price-conservative in its every aspect and free in particular from any loading for any post importation charges incurred in relation to the goods. The price is to be a price for goods, as they are both at the "time" and "place" of importation. It is to be a "cash price" that is to say, a price free from any augmentation for credit or other advantage allowed to a buyer it is to be a net price, that is to say, it is a price "less trade discount". And this last expression, supplemented by these other indications confirms in their Lordships' view the conclusion that the words "wholesale price" are used in the section in contradistinction to a ``retail price" and that only on the ground that such is a well recognized meaning of the words but because their association with the words "trade discount" indicates that sales to the trade are those in contemplation, and also because only by attaching that meaning to the word is the "wholesale" price relieved of the loading representing post importation expenses, which as a matter of business, must always be charged to the consumer, and which in the other words of the section already alluded to are so carefully eliminated. If the question of construction had to be determined solely by reason of the presence of the word "cash" in the definition

> their lordships would have been in agreement with the Chief Justice. But that is to by no means the case.
>
> **13.** Their Lordships accordingly reach the conclusion that in no sense can the price charged to consumers for the machinery oils imported by the appellants be regarded as such a whole sale cash price" as is described in the Act, nor is it in their judgment possible by further inquiry to extract any such price from any other available material. Indeed the Act as their Lordships read it does not invite any such further inquiry. The wholesale cash price primarily in view is, they cannot doubt, that price current for staple articles, the amount of which if not a subject of daily publication in the press is easily ascertainable in appropriate trade circles. Their Lordships do not find in the section any sufficient indication that the alternative basis of assessment indicated in S. 30(b) is only to be a "dernier resort". For the great bulk of dutiable goods in their infinite variety it must, they feel satisfied, be the only available basis. And in their Lordships' judgment it is the basis on which there oils of the appellants must be charged to duty.

85. Therefore, all the expressions used for determination of value has to be read harmoniously giving due weightage to each of the expressions in the implementation of the methodology prescribed under Rule 7 of the CVR 1988/2007 including the expression 'at the time and place of importation'. In the show-cause notice as well as in the impugned Order, the learned Commissioner while dealing with the admissibility of discounts applied two criteria i.e. whether discount is genuinely known and indicated in the invoice at the time of importation of goods into the country; and secondly whether the discount is normal (i.e. not abnormal) and is uniformly available to all the buyers at the same commercial level. The objection of the appellant is that no such criteria has been prescribed under the Customs Valuation provisions; hence, cannot be applied to test for allowing the trade discounts/special discounts from the gross selling price(CLCP). In our opinion, even though specifically these conditions are not mentioned anywhere under the Valuation Rules, but in view of the above discussion relating to criterion of 'the time and place of importation' mentioned under Section 14 of Central Excise 1962 read with Rule 7 of CVR 2007, it is clear that the discounts which are eligible for deduction from the gross price,

ought not to be known at the time and place of importation; indication of the discount in the import invoices makes it clear that the same are disclosed at the time of import. The second criteria that the discount is normal as 'abnormal discounts' are always considered to be inadmissible and a ground for rejection of the transaction value under Rule 12 of the Customs Valuation Rules. Uniformly available to all buyers in India is to ascertain whether nature of the discount is made known to the buyers at the time and place of importation and not left to be determined much after the time and place of importation. Hence, the said criteria cannot be considered as contrary to the principles of Customs Valuation but to be read harmoniously in the circumstances of the present case, where the objective is ascertain the assessable value in related transaction by analysing the Funding discount (44% to 83%) allowed from the CLCP.

86. The learned advocate for the appellant has also referred to the judgment of the Hon'ble Supreme Court in the case of Mirah Exports Pvt. Ltd. (supra) and Eicher Tractors Pvt. Ltd. (supra) in support of their argument that quantum of discounts more than 50% / 70% respectively are considered to be normal discounts and held to be admissible. In our view, the said judgments may not be applicable to the present case inasmuch as the judgments were passed before the transaction value regime and also concerned to transactions between independent sellers/buyers and not a related transaction as in the present case.

87. The learned advocate has also argued referring to the judgment of the Hon'ble Supreme Court in the case of CIT Vs Walchand and Co. [(1967)3 SCR 214] that Revenue authorities cannot step into the shoes of a businessman to decide the nature of expenditure that the businessman ought to incur; quantum of expenditure that will be incurred which is solely prerogative of the businessman. We are of the view that the said principle cannot be

made appliable to the present circumstance of the case, inasmuch as the scrutiny of admissibility of the discounts claimed from the gross price(CLCP) under the deductive method for determination of the assessable value and in turn customs duty, cannot be construed that the appellant is prevented from passing such discounts to the customers; but the result is no customs duty benefit can be extended for adopting the marketing strategy of advancing such discounts much after import of the goods, in some cases even after one year from the time of importation.

88. The nature of these discounts narrated in their Accounting and Financial Manual (AFM) against the Topic No.760 are reproduced as below:

(1)Special Negotiated Discounts- Trade Sales Discounts(A/C 3104)

"To record customer and deal specific trade discounts associated with large volume or other strategic opportunities, negotiated as incremental to standard contractual discounts. These discounts are typically limited to a specified time period for a set of products in specified volumes, and if passed through a channel partner, limited to sales made to a specified end-user"

(2) The Price Protection discount (A/C 3106)

"To record list price or discount adjustments to trade sales for price protection on eligible channel inventory"

(3) End of life- trade sales discounts (A/C 3109):

" Discount granted to channel partners, resellers or retailers when a product is still active on the price list, but approaching obsolescence."

(4) Co-op Partner Marketing, Trade Sales Discounts (A/c 3107)

"To record discounts or other payments made to channel partners, resellers and retailers for funding of various partner-led marketing initiatives such as coop advertising, marketing development, and other demand generation related activities that qualify for contra revenue classification (as opposed to operating expense)."

(5)Influencer fees Discount (A/c No. 3112) :

"Influencer Fees: To record commission-type payments made to partners, including 2nd and 3rd tier resellers, distributors, system integrators, and value-added resellers, for the referral of

sales opportunities to HP. If the Influencer is not a reseller of HP products, but is paid a fee for influencing the sale of HP products, the amount is recorded as a Field Selling operating expense in account 4690, Miscellaneous Expenses."

(6) Sales Type Lease Trade Discount (A/c No.3111)To record trade discounts on sales type leases recorded in account 3011. Use of this account is restricted to the EIFFEL enterprise booking system.

(7) Other Trade Sales Discounts (A/c No.3113)

Other trade sales discounts for sales of product that cannot be properly categorized in account 3102 through account 3110, including brand, sponsorship, and Marketing/Alliance agreements that result in payments to partners or customers that must be categorized as contra revenue per Topics 5030 & 6511.

This account should also be used to record the amortization of intangible assets when the amortization should be recorded as contra revenue. The amortization method must be reviewed by EFR, Tax & Legal departments before being put into effect.

Refer to Topic 6511, Marketing and Alliance Agreements, for additional information.

(8) Trade Discounts on Miscellaneous Sales (A/c No.3190)

To record discounts on sales recorded in account 3090, Trade Sales, Miscellaneous.

(9) Trade Discounts on Support and Services (A/c No.3199)

To record approved discounts granted to customers on the sale of trade support and services.

89. The learned commissioner analysing the nature of these discounts as stated above and explained by Shri D. Saikumar, Manager-Finance in his statement dated 11.01.2010 observed that these discounts are neither known nor could be known to the customers at the time and place of import, since decided and passed to the customer much after the time of import, retroactive in nature; accordingly, following the opinion of Technical Committee on Customs Valuation (set up in the World Customs Organization) held that these discounts are not normal discounts given to all the customer on an uniform criteria, but dependent on special circumstances, negotiations, etc. so as to be eligible for the same,

hence are abnormal discounts, consequently not allowable to be deducted from the List price(CLCP). However, in contrast, advancing the reason for allowing deduction of Standard Discounts(A/c 3108) from the List price it is accepted by the department starting that since it could be known at the time and place of import being allowed adopting uniform criteria to all the customers, not an abnormal discount, hence qualify to be deducted from the List price in determining the value.

90. The Appellant assailed the said finding as mentioned earlier arguing that these discounts are part of the Funding discounts since agreed between the Appellant and HPUSA, known at the time and place of import, hence cannot be denied. We do not see merit in the said argument as the present exercise of determination of value under Rule 7 read with Ruel 8/9 of CVR is resorted to after rejecting the Transaction value declared by the Appellant for the reasons stated above. Needless to emphasize, the relevance of determination of deductibility of discount from the List price at which the imported goods or identical or similar goods sold by the Appellant in India at the first commercial level at or about the time of import is to arrive at the net selling price and to proceed further in considering the abatements viz. commissions, profit and general expenses, local transport charges, customs duty, etc. to arrive at the assessable value. So the selling price at the first commercial level between Appellant and the customers in India are relevant and not the transaction between the Appellant and HPUSA. Therefore, the criteria of admissibility of discounts to be examined between the Appellant and the customers at the first commercial level applying the condition at or about the time of import.

91. The learned advocate for the appellant also referring to the Commentary relating to discounts provided in the Customs Valuation Commentary on the GATT Customs Valuation Code by Saul L. Sherman and Hinrich Glashoff at para 114 (page 78) submitted that

all the discounts are admissible. On going through the said Commentary, it can be inferred that in explaining the scope of transaction value, the price in the transaction is relevant, not the pattern or pricing structure nor at a market and also how the price is arrived between the parties are not the decisive factors. It is accepted or rejected on the ground enumerated for rejection of the transaction value. It is said that if a price is expressed as a list price of DM 200 per dozen less a discount of 15%, then 'the price' for the purposes of transaction value is DM170 per dozen, not DM 200 per dozen. In that context, it is expressed that whether the discount is offered to others or it was offered to others without any discount. Thus, discount could be recognized without being freely offered to everyone.

91. Also in the said Commentary, it is mentioned at para 115 and 116 as follows:-

> 115 A discount (or price increase) freely agreed upon after the date of valuation in principle does not affect the customs value retroactively (see 131); but:
>
> -- a price increase agreed upon before valuation is dutiable and must be disclosed;
> -- a price reduction (or increase) reflecting that quantity or quality turns out to be below (or above) what the contract called for must be disclosed and should lead to an adjustment, since it now appears that the goods (not the price) were not what Customs and the parties had thought they were;
> -- a price reduction (or increase) should be reflected in the customs value if it is based on a formula or provision agreed upon before importation.
>
> 116 Of course the discount must not be the remuneration for other goods. services or rights which the seller obtains from the buyer, but it must be granted as part of the same transaction. Then it does not matter what the reason is for the discount (e.g., adaptation to market prices, to commercial level of the buyer, incentive for expansion of sales in the future). But there are two discounts which require a particular discussion here, i.e. cash dis-counts and quantity discounts.

92. The aforesaid principles of admissibility of discount from the declared price are relating to a transaction where the seller and buyer are not related. Where the buyer and seller are related and the transaction value is rejected under Rule 12 of the CVR 1988/2007, the value has to be determined following the deductive method from the selling price in the country of importation. Even though there is no mention in the said rule about deducting discounts given by the importer to the Indian buyers in selling the imported goods at first commercial level, the net price is arrived after deducting the admissible discounts. In the present case, the discounts which are admissible have been allowed from the CLCP. Besides, in the aforesaid Commentary, the author has discussed the discounts viz. cash discount and quantity discount which in the present case has not been disallowed.

93. It is also vehemently argued by the Appellant referring to various judicial pronouncements that all these discounts in question are held to be admissible as Trade Discounts under Section 4 of Central Excise Act,1944 in determining the value under the said provision. The learned advocate for the appellant heavily relied upon on the clarificatory judgment of the Hon'ble Supreme Court in Bombay Tyres International Pvt. Ltd. case [1984(17) ELT 329 (SC)]. However to understand the context of the said clarificatory judgment, it is necessary to refer to the main judgment of the Hon'ble Supreme Court in Bombay Tyres International Pvt. Ltd. reported at 1983(14) ELT 1896 (SC)]. To analyse the said argument, relevant provisions of Central Excise Act,1944 concerning valuation of goods under the said Act before and after amendment in 1973 and in particular relating to deductibility of Trade discount need to reproduced which reads as:

Old Section 4:

"**4. Determination of value for the purposes of duty.** - Where, under this Act, any article is chargeable with duty at a rate

dependent on the value of the article, such value shall be deemed to be -

(a) ……..

(b) …….

Explanation. - In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid."

Amended Section 4:

"**4. Valuation of excisable goods for purposes of charging of duty of excise** - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that -

(i) ……..

(ii) ……

(iii)

(b)…….

(2) …….

(3) ……

(4) For the purposes of this section -

(a) …….

(b) "place of removal" means -

(i) a factory or any other place or premises of production or manufacture of the excisable goods; or

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty,

from where such goods are removed;

(c) …….

(d) "value", in relation to any excisable goods, -

(i) ……

(ii) does not include the amount of the duty of excise, sales tax and other taxes, in any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale;

94. To appreciate the ratio laid down by the Hon'ble Supreme Court in the first Bombay Tyres International Pvt. Ltd.'s case, it is necessary to read the relevant portion of the said order, which is reproduced as below:-

> **48.** At the outset, we must make it clear that the contentions in this regard on behalf of the assessees proceeds on two broad bases. The first is that to determine the value of an excisable article, all expenses must be excluded which do not enter into the formula of manufacturing cost plus manufacturing profit. This follows from the principal plank of the assessees' case that the "value" must be confined to the manufacturing cost, and the manufacturing profit. For, it is said, that if the deductions claimed are allowed, the price would be brought down to the conceptual value. All post-manufacturing expenses are claimed from that perspective and within that context. The other basis on which the claim proceeds, is that the price at the factory gate and the price at a depot outside the factory gate are identical.
>
> **49.** We shall now examine the claim. It is apparent that for purposes of determining the "value", broadly speaking both the old Section 4(a) and the new Section 4(1)(a) speak of the price for sale in the course of wholesale trade of an article for delivery at the time and place of removal, namely, the factory gate. Where the price contemplated under the old Section 4(a) or under the new Section 4(1)(a) is not ascertainable, the price is determined under the old Section 4(b) or the new Section 4(1)(b). Now, the price of an article is related to its value (using this term in a general sense), and into that value how poured several component, including those which have enriched its value and given to the article is marketability in the trade. Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely after-sales service and marketing and selling organisation expenses including advertisement expenses cannot be deducted. It will be noted that advertisement expenses, marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery.

95. A plain reading of the aforesaid observation makes it clear that in response to the argument that the assessable value of the manufactured goods in all cases be a conceptual value limited to the

manufacturing cost and manufacturing profit, not loaded with post-manufacturing expenses / post-removable expenses, their Lordships held at para 49 that all expenses that enrich the value till the date and time of clearance from the factory or the depots, excluding the cost of transportation and insurance for transferring the goods from the factory to the place of delivery, be part of the assessable value. Since the deductibility of the trade discount in detail could not be discussed in the said judgment, in the clarificatory judgment, the circumstances under which trade discounts as defined under the definition of 'value' be deductible narrated in the subsequent judgment dated 14.11.1983 / 15.11.1983 as below:

> As a result of further arguments in regard to certain specific matters on which our judgment dated 7th October, 1983 was not specific, we pass the following:
>
> ORDER
>
> 1. *Trade Discounts*. - Discounts allowed in the Trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such Trade Discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price.

96. Therefore, reading both the judgments, it can easily be discerned that the principle of the deductibility of trade discount has to be read as mentioned in the Explanation under old Section 4 and the meaning of 'value' under the amended Section. In contrast, there is no mention of 'trade discount nor any definition of 'trade discount' under Customs Valuation provisions; therefore while determining the customs value adopting deductive method prescribed under Rule 7 of the CVR 1988/2007, the principles laid down in the said judgment cannot be applicable to the present case.

97. The appellant has also referred to the judgment in the case of Metal Box India Ltd. (supra), which is also not applicable to the facts of the present case. In the said case, the goods were manufactured

by the assessee as per the requirement of individual customers and the supplies were made to such customers against negotiated prices which are mentioned in the contract; they have filed price list in Part-II(meant for different class of buyers) as was in force during the relevant time for sales to M/s. Ponds (I) Limited under a contract treating the customer M/s. Ponds (I) Ltd. as a "class of buyer". In that context, their Lordships held that since 90% of the product has been lifted by Ponds (I) Ltd., trade discount to the extent of 50% from the contract price cannot be disallowed. Hence, the discounts allowed to a class of buyer under a contract price as per second proviso to Section 4(a) of CEA,1944 cannot be generalised and made applicable to the present case.

98. Similarly, the judgment cited by the appellant in the case of Madras Rubber Factory Ltd. (supra), their Lordships confronted with the issue whether 1% turn-over discount and year ending discount could be allowed as discount from the price. Taking note of the finding of the original authority on facts that such discounts are known and understood prior to the time of removal of the goods and common in the trade, even though quantified later, held to be admissible. All these discounts were considered as deductible in finalizing the assessment which was initially made provisional as the quantum of such discount could be ascertained only after a period of time. The circumstances under which the discounts held admissible in cited central excise cases, thus cannot be made applicable to the facts of the present case, when the nature of such discounts are not known at the time and place of importation of the goods, but decided subsequently, hence, cannot be allowed to be deducted from the deemed sale i.e. list price (CLCP) in arriving at the net price.

99. The next issue for consideration is: abatements on account of commissions, profits and general expenses, cost of transportation and insurance and customs duties, customs brokerage and other

taxes payable in India by reason of importation and sale of the goods as laid down under Rule 7 of CVR.

100. It is the claim of the appellant that the warranty obligation is undertaken by the appellant on its own account and the appellant is neither making payment to overseas HP entities towards such warranty charges as a condition of sale of the products nor the appellant is paying any amount to 3rd party to satisfy obligation of suppliers. Further, referring to Interpretative Note to Rule 3 of CVR and Commentary on GATT Customs Valuation Code (Pages 75, 76), they have submitted that activities undertaken by the buyer on its own account are not considered to be an indirect payment to the seller even though by the said activity both seller and buyer are benefitted. The cost of such activities cannot be added to the price actually paid or payable in determining the Transaction value of the goods. Therefore, warranty expenses are not includible in the assessable value of the imported products. Also, referring to para 5(b) read with para 6-8 of the WCO Commentary of 20.1 of Warranty charges, they have submitted that warranty expenses being incurred by them for providing the warranty services be treated as post-importation expenses and hence, deductible from the net price. The learned Commissioner in the impugned order referring to various abatements recorded during the course of investigation, Distribution Agreement dated 01.11.2005 particularly Clause 9, 10 and 13; also, the HP Customs Valuation Manual Topic No. 5050 of AFM and HP marketing policy held that warranty costs are included in the product price; hence, cannot be considered as post-importation expenses and allowed to be deducted.

101. The issue for consideration is whether warranty charges are in the nature of post-importation expenses admissible as a deduction under the scope of general expenses in connection with the sale of imported goods prescribed under Rule 7 of CVR. In the Commentary on Customs Valuation, what deduction is covered

under Rule 7 has been narrated at para 710 (page 218), which reads as below:-

> The deduction 'for profit and general expenses' will cover the importer's entire markup, since the general expenses category is intended to cover all overhead and selling expenses (except such direct expenses as are specifically covered by the provisions which follow, dealing with transportation and handling charges, duties and taxes, etc.). As will be seen in the discussion of Computed Value below (759 et. seq.), the term 'general expenses' is essentially intended to differentiate manufacturing expenses from other expenses which are deemed 'general'. Since the importer in the situation we are discussing buys and resells goods manufactured by someone else, he has no manufacturing expenses. Accordingly, all of his expenses, being selling expenses, are deductible in calculating DDV - so long as they are properly attributable to the merchandise or the resale transactions in question under the applicable GAAP. A few specific points should be mentioned in this connection:

102. Referring to the Commentary at para 104 (page 75, 76) on Customs Valuation, it is submitted by the appellant that advertising, warranty cost and similar expenses cannot be added to the transaction value if paid for by the importer even if he is obliged to make the expenses under the agreement with the seller, which benefits both buyer and seller. It is the argument of the learned Special Counsel for the Revenue that the provision of warranty has already been included in the product price and on a conjoined reading of clause 4, 10, 13 of the Distribution agreement, the distributor shall himself perform all warranty obligations, or have the obligations performed on its behalf and for the said purposes, consideration has been provided to him through IC pricing policies as per clause 9 of the said agreement, and also under clause 10, all risks including warranty obligation are ultimately borne by HP factory, hence not deductible .

103. The reference by the learned advocate to the Commentary at page 75 & 76 needs to be understood in the context it was expressed. Thus, reading the same along with para 109 & 110 (pages 75 & 76) it will make the position clear; which reads as:

> While the foregoing discussion has spoken primarily in terms of advertising costs, the same principles apply equally to other marketing costs, such as the cost of providing protection to the customer under a warranty. To the extent that the warranty is provided to the customer by the manufacturer or exporter, presumably that cost is covered by the selling price to the importer, for the manufacturer-exporter cannot recover it otherwise (unless he charges the customer directly and the warranty or service agreement is optional).
>
> **Being in the price, it is dutiable, but there is no addition to be made to the price.**
>
> The same is true where the manufacturer-exporter reimburses part of the warranty cost to the importer the cost of the reimbursement is presumably already covered by the original price, and neither an addition to nor-a reduction in the price is called for in arriving at TV. **(emphasis supplied)**

Analysing the aforesaid comments, it is clear that when the warranty cost is already built into the manufacturer-exporter's price, it cannot again be added to the transaction value even though the said warranty charges are reimbursed by the exporter – manufacturer and provision of warranty service is incorporated in the sales/distributor agreement with the importer.

104. The appellant has claimed that in the Technical Committee on Customs Valuation, World Customs Organisation (WCO) comments under Commentary 20.1 relating to Warranty Charges, out of the two situations referred under para 5, the present case falls under clause (b); hence, the warranty charges be deducted from the price. The Special Counsel for the Revenue, on the other hand, submitted that reading paragraphs 5, 6, 7, and 8 and the Commentary on the GATT Customs Valuation Code by Saul L. Sherman, it would be clear that once the warranty charges are inbuilt in the product cost even though the same is executed indirectly through the distributor, its cost cannot be deducted under the deductive method. To understand the implication of warranty cost, the relevant portion of the said Commentary needs to be reproduced as below:-

> 4. The Explanatory Note mentioned in paragraph 2 (b) above defines the term "warranty" as follows:

"Warranty is a form of guarantee on goods, such as motor vehicles and electrical appliances, which covers costs of correcting defects (parts and labour) or replacement subject to certain conditions being met by the warranty holder. If those conditions are not met, warranty can be voided. Warranty covers hidden defects in the goods, i.e. defects which should not exist and which prevent the use of the goods or reduce their usefulness."

5. Basically, two situations arise:

(a) The seller directly or indirectly bears the cost and undertakes the risk of warranty, the

(b) the buyer directly or indirectly bears the cost and undertakes the risk of warranty and the provision of which is reflected in the price for the goods takes this into account.

Warranty undertaken by the seller

6 Difficulties in the treatment of warranty charges under the Agreement should not arise if the warranty is included in the unit price of goods. When the seller provides a warranty to a customer, the seller will take this into account when pricing the goods. Any extra cost attributable to the warranty will be part of the price and will be paid as a condition of the sale. In this case, the Agreement does not allow any deduction, and the cost of the warranty is part of the transaction value even if it is distinguished from the price actually paid or payable for the goods.

Where the seller imposes warranty on the buyer, the seller may choose to invoice the warranty separately from the goods. In such a case, the warranty cost nevertheless remains a condition of the sale for exportation and is considered part of the price actually paid or payable, i.e. the total payment.

8. If the seller contracts to transfer warranty risk to a third party, it may appear that the transaction has been split. That the seller has entered into a contract with the third party indicates that any warranty risk undertaken by the third party is at the behest of the seller and therefore to his benefit. The price actually paid or payable is defined in the Interpretative Note to Article 1 as the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. This definition is further amplified in paragraph 7 of Annex III, which states that the price actually paid or payable includes all 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. Consequently, where the seller requires the buyer to make a payment to a third party with whom the seller has contracted to provide warranty cover,

> the payment must be included in the transaction value of the imported goods. The same would also be true where warranty cover is provided by other parties related to the seller.
>
> Warranty undertaken by the buyer
> 9. As stated in paragraph 5(b), there may be cases where the buyer may decide to bear the cost of warranty on his own account. In these circumstances, any payments, or other costs incurred by the buyer for warranty, are not part of the price actually paid or payable by application of the Interpretative Note to Article 1, since this is an activity undertaken by the buyer on his own account.

The aforesaid Commentary has to be read in the context of the present case. In the aforesaid example, the seller and buyer are considered as independent entities and the transaction between them is not a related person transaction. In the said scenario, it has been opined that in the event the buyer decides to bear cost of warranty on their own account cannot form part of the transaction value. In the present case, warranty cost is already inbuilt in the reference price and as discussed below in their own internal accounting / valuation policy, the same cannot be unbundled. Therefore, the appellant's case falls under the category described at clause 5(a) instead of clause 5(b) of the aforesaid Commentary as claimed by the appellant.

105. On going through their reference price reproduced as above it includes warranty costs and also their HP valuation manual referred to by the Commissioner it reveals that warranty cost is already included in the RP considering the same as manufacturing cost and hence not to be unbundled from the said price.

> "(vii) Services, Construction, Maintenance, etc., services provided after importation of the goods are excluded from the TV of the goods for duty purpose provided they are clearly distinguishable from the value of the goods. It is for reason also that warranty services that are normally bundled with a product not unbundled from the Customs value"

Also in their marketing policy, warranty service is considered as a part of the product, which reads as:

> F. Warranty and Bundled Services.
> "Warranty is an attribute of the product. Warranty is included in the local currency price (LCP) for products marketed by HP Subsidiary and in the export price for products marketed by an international distributor.

In view of the above evidences, in the present case since the warranty charges are already included in the product price, the same cannot be treated as a post-importation expenses in selling the goods in Indian market by the appellant; hence, cannot be abated from the price as general expenses under Rule 7 of the CVR 1988/2007.

106. The learned advocate referring to the Addendum to Distribution Agreement and Intercompany Product Distribution Agreement dated 01.11.2012 enclosed with the Miscellaneous Application, submitted that through the said documents the appellant sought to clarify certain clauses misinterpreted by the learned Commissioner while passing the impugned order, particularly the expression 'on its behalf' used in clause 13 of the Distribution Agreement dated 01.11.2005. In the Addendum, it is clarified that warranty expenses incurred by each Distributor shall form part of its value added costs and the same will be taken into account for computing the compensation, by way of Purchasing Discounts, under Section 9 of the Distributor Agreement. This change in phraseology of Clause 13 in absence of any change to the meaning of reference price and HP valuation provision and HP's marketing policy, the warranty cost continues to be a part of the product price; hence, expenses incurred by the appellant in rendering warranty services cannot be deducted from the List Price (CLCP).

107. On the issue of deductibility of the customs duty, brokerage and fees under Rule 7 of CVR, we find that the learned Commissioner in the impugned order has observed that these expenses as post-importation expenses and allowed to be deducted

from the CLCP in arriving at the assessable value. Deduction of the said expenses specifically mentioned under clause (iii) of Rule 7 of CVR, hence, we do not find any discrepancy in the said finding of the learned Commissioner. However, the Commissioner has not allowed to include these expenses in the VAC for calculating the ROVAC observing that customs duty constitute an element of cost and cannot be regarded as value added costs; accordingly, in calculating the ROVAC @ 10% / 8%, customs duty cannot be considered. The learned advocate for the appellant has submitted that in the demand notice issued by the DRI relating to import of parts, deductions in respect of the customs duty, being VAC accordingly ROVAC @ 10% /8% from the price was allowed. We do not find substance in the observation of the learned Commissioner for the simple reason that once the customs duty and customs brokerage fees have been considered as a part of general expenses being post-importation charges under Rule 7, then non-inclusion of the said expenses in computing ROVAC would be contrary to the principles of valuation.

108. The Revenue has filed appeal against allowing the deductions of customs duties, brokerage and fees from the price for arriving at the value. The Revenue's argument is that the appellant could not have factored the customs duty for the CLCP inasmuch as CLCP is a market driven price; therefore, it cannot be said with certainty that it factored import duties, international freight etc. as in the case of reference price. The learned Commissioner has, on the other hand analysing the issues in detail, held that CLCP is a fully delivered price and in arriving the assessable value adopting deductive method the customs duty ought to be excluded as an expenses from the fully delivered price. Such a reasoning of the Commissioner cannot be disturbed on the basis of assumptions and presumptions. Therefore, we do not find merit in the argument of the Revenue that customs duty, fees and brokerage cannot form part of the CLCP, which has been considered as a fully delivered

price. However, in calculating the duty abatement, the Revenue has submitted that the import duty taken as Rs.2494.26 crores whereas actual duty paid was Rs. 2327.88 crores leaving a difference of Rs.166.38 crores which has been taken in excess to arrive at the abatement to be given towards factorisation of import duty. This ground has not been specifically answered by the appellant in the written submissions and needs to be verified by the adjudicating authority.

109. On the issue of addition of international freight charges and insurance to the price, in the impugned order, the learned Commissioner has directed to add international freight charges and insurance to the CLCP under Rule 10(2) of the CVR, 1988/2007, observing as follows:_

> 103. I am of the view that some amount towards freight and insurance may have been factored in the invoice since the import price is arrived at based on LCP. Whether this amount represented the actual cost of transportation and actual insurance relatable to the goods being valued is not substantiated by HPISPL. But the fact remains that there is no visibility as to the quantum thereof in the import invoice. Some of the employees of HPISPL even stated that what was factored was 'estimated freight' and estimated insurance based on global insurance agreement. Given this situation, I am not in a position to treat the import invoices as on 'CIF basis' under the Indian Customs valuation rules. Further, HPISPL have stated that they had adopted the principle of deductive methodology. If it is so, they ought to demonstrate the quantum of freight and insurance factored in the import invoices. I find that all the pricing information are closely held by the parent company of HPISPL and even during the PH proceedings they were not in a position to substantiate the averment that the invoice prices include actual cost of transportation and actual insurance relatable to the goods being valued. Further, the case law relied upon by HPISPL does not support their arguments given the peculiar facts and circumstances of this case. Accordingly, I uphold the charges relating to freight and insurance, as detailed in the SCNs, since the Customs valuation rules recognize addition of only the actual cost of transportation and actual insurance relatable to the goods being valued.

110. The appellant had claimed that the import being on CIF basis indicated into invoices, the transport and insurance charges

being borne by the exporter; therefore, adding the transport charges i.e. international freight and insurance, is contrary to the principles of law laid down by the Hon'ble Supreme Court in the case of UOI Vs. Mohit Minerals Pvt. Ltd. [2022(61) GST 251 (SC)]. Further, it is submitted that once the transaction value is rejected and value is determined under deductive method, resorting to Rule 10(2) is bad in law.

The said Rule 10(2) of the CVR is reproduced below:-

> **10. 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) ... ...
>
> (2) For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, and shall include -
>
> (a) the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods to the place of importation;
>
> (b) the cost of insurance to the place of importation :
>
> **Provided** that where the cost referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods :
>
> **Provided** further that where the free on board value of the goods is not ascertainable but the sum of free on board value of the goods and the cost referred to in clause (b) is ascertainable, the cost referred to in clause (a) shall be twenty per cent of such sum :
>
> **Provided** also that where the cost referred to in clause (b) is not ascertainable, such cost shall be 1.125% of free on board value of the goods :
>
> **Provided** also that where the free on board value of the goods is not ascertainable but the sum of free on board value of the goods and the cost referred to in clause (a) is ascertainable, the cost referred to in clause (b) shall be 1.125% of such sum :
>
> … …
>
> … …

111. We find that in the present case, after rejection of the transaction value, deductive method as per Rule 7 of CVR has been adopted in determining the assessable value of the imported goods.

The CLCP is considered as the fully duty delivered price by the appellant on its sale to customers at the first commercial level in India. Since the international freight and insurance are already part of the fully duty delivered price, no further amount on account of freight and insurance is required to be added as laid down under Rule 10(2) when the value is determined adopting deductive method principle under Rule 7 of CVR 1988/2007. Thus, the Commissioner's order adding international freight and insurance resorting to Rule 10(2) of the CVR which prescribed addition of the cost of transportation and insurance to the transaction value incurred by the buyer if not included, to the value arrived at by adopting the deductive method, cannot be sustained.

112. The next issue relates to determination of value of SRFR (Supply Chain Replenishment Fulfillment and Reinvention) products. These products are imported free of cost to meet warranty obligations by the appellant. The SRFR products are stripped down version of low end printers without having certain parts / accessories such as power cords, printer trays, cartridges etc. Assessable value of these products were arrived at from the List price of the regular products less funding discount applicable to the regular products and also additional SRFR discount. The learned Commissioner has determined the valuation of SRFR products resorting to Rule 8/9 of CVR 1988/2007 and allowed standard discount to the extent of 30% against the funding discount claimed observing as follows:-

> 106.2 In the instant case, the material characteristics of SRFR goods differ from the original traded goods; the description and the part, no. also vary. Further CESTAT South Zonal Bench in the case of Refex Refrigerants Ltd Vs CC. (Seaport-Import), Chennai reported in 2009(248)E.L.T 579 (Tri-Chennai) has approved the valuation of the goods under residual method when the value was misdeclared. In view of this, valuation of SRFR goods can be determined only under residual method i.e., Rule 8/9 of CVR, 1988/2007 since the value has been undervalued Therefore, by applying Rule 8/9 of CVR, 1988/2007, the valuation method akin to similar

> goods methodology under Rule 6/5 of CVR, 1988/2007 should be made applicable in this case. Since the funding discount is the combination of IC discount plus trade discount and further, all the incountry costs including the Customs duty was being reimbursed by the supplier or other HP entities, HPISPL may be eligible for only normal trade discount as applicable to the regular unit. I find that when this method of valuation is made applicable it would meet the ends of justice.
>
> 106.3 I find that the product printers are grouped under IPG BU. The finance manager of IPG BU in his statement dated 15-9-2009 (page 1452 of RUD to SOF) has stated that the contractual and standard trade discount for IPG as a whole is 30%. Therefore, I am of the view that an abatement equal to trade discount of 30% plus SRFR discount could be allowed on the CLCP of corresponding regular product of which the SRFR is a stripped down version, in arriving at the Customs value of the SRFR goods. The duty quantification of differential duty has to be re-worked based on my findings as above, and the same would be part of the final order on the subject.

113. We do not find merit in restricting the discount to 30% in the case of SRFR products; therefore, whatever discounts are held admissible to regular products from the price discussed as above, the same are also admissible to SRFR products in addition to SRFR discount already allowed by the Department.

114. On the issue of MRP based valuation of the imported goods, we find that w.e.f. 25.01.2008, IT products imported by the appellant became liable to MRP based assessment for the purpose of levy of additional customs duty. Section 3(2) of the Customs Tariff Act, 1975 provides for assessment of additional customs duty in accordance with sub-section (2) of Section 4A. Accordingly, the appellant declared the MRP of the respective imported products in their Bills of Entry and discharged duty after availing abatement from the MRPs as prescribed under Notification No.05/2008-CE(NT) dated 24.1.2008 issued under Section 4A of CEA,1944.

115. In the impugned order the learned Commissioner comparing the list price taken for valuation purpose and the MRP declared for determination of additional customs duty under Section 3(2) of the Customs Tariff Act, 1975 read with Section 4A of CEA

1944 vis-a-vis the abatement claimed from MRP observed that both in respect of non-MRP products and MRP products same list price formed the base price as shown in the invoice. But a lower price was declared in case of MRP based goods mainly to derive benefit of lower customs duty, therefore, he reasoned that the List price(CLCP) ought to have been declared as MRP. He has observed as follows:-

> 128.1 It was noticed that HPISPL was putting MRP on the boxes and paying the Additional duty of Customs on the MRP declared in the Bills of Entry only for Customs purposes. For the local sale in the market, they are using the list price as the base price and giving discounts on the same to arrive at the Customer net prices. This is evidenced as per the illustration given at SOF at para 13.3 (ix). Therefore, I find that there is dichotomy in the stand taken by the HPISPL wherein for actual local sale in the market, the list price is used as the basis and when it comes to the correct declaration of MRP in the Bill of Entry, the arbitrarily derived MRP is used, so that the import consignment suffers lesser Additional duty of Customs in the process.

116. The appellants responded to the said findings of the Commissioner; they have submitted that the imported goods were never sold at a higher price than the declared MRP; hence, the MRP declared on the packages of products cannot be questioned by the Department. CLCP and MRP are two different concepts, the former is directed as an international pricing mechanism for marketing purposes, not a statutory requirement and hence not affixed on the products; it is not disclosed to the retail consumers; whereas MRP is the price declared under Rule 6 of the Packaged Commodities Rules, 1977 read with Standards of Weights and Measures Act, 1976 which is affixed on the packages meant for sales to the ultimate consumers. Further, they have submitted that the products sold after applying discounts on CLCP, the net selling price was always below the declared MRP.

117. We find merit in the argument of the appellant inasmuch as reading the scope of CLCP reproduced above, it says that these prices are meant for all transaction involved in the distribution and delivery of a product to a final trade customer based on the

published rate price of those products. The trade prices for products are published in the local price list in each country where it is offered for sale. In determining the assessable value, after rejecting their transaction value, deductive method under Rule 7 of CVR has been adopted. LCP (CLCP) has been considered as the price at which the imported goods are deemed to be sold at first commercial level, the basis for determination of the assessable value of the imported goods. Thus, LCP (CLCP) has not been considered as the price meant for retail consumers but it is the price at the first commercial level. Therefore, statutory requirement of declaration of MRP on the packages of the imported goods in compliance with Rule 6 of the Packaged Commodities Rules, 1977 read with Standards of Weights and Measures Act, 1976 cannot be equated with LCP(CLCP), hence the list price cannot considered as MRP under Notification No. No.05/2008-CE(NT) dated 24.1.2008.

118. On the issue of alteration of MRP during the period January and February 2008 in the warehouse of the appellant, we find that the explanation furnished by the appellant that after the introduction of the MRP, there was lot of confusion about its implementation to the large volume of products imported by the Appellant; also miscommunication between the appellant and the Customs operation in India and the overseas business units like PSG and IPG contributed to the errors in its implementation. Given the volume of imports and the individual packages being imported in each shipment, it was impractical to verify each package at the time of import. Therefore, the appellant adopted the practice of declaring MRP in the BoE based on the list communicated by the concerned BU finance teams in USA and duty was paid accordingly. Post clearance, the packages were transported to the appellant's warehouse which were managed by the Logistics Team of the appellant. There was some relabelling activity of the packages carried out in the warehouse which was not with intention to alter the MRP but purely administrative in nature aimed at ensuring

regulatory compliance and customers specific requirement. They have submitted that they themselves have addressed such errors occurred in declaration of MRP in 75 line items against total of 76,003 line items, which is 0.1% of the total items and in terms of differential duty it is hardly 0.07%. they have discharged the short payment of duty due to said error which was around Rs.41.00 lakhs. The explanation furnished by the appellant seems to be reasonable in changing the MRP stickers in the initial days of the introduction of MRP considering the circumstances and volume of the products imported; where the percentage of error is insignificant . Hence, it cannot be construed that such change of stickers as an intentional alteration in the declared MRP to discharge lower duty. Besides, the differential duty has already been discharged by the appellant on detection of the said error.

118. On the issue of overfunding, we find that a target ROVAC return of 10% / 8% on the VAC is considered by the appellant as arm's length return; hence claimed to satisfy the principles of valuation under the Customs law. On investigation by the Department, it revealed that the ROVAC return fluctuates and in certain period, it had exceeded the target return and in some period, below the target return, which is described as 'overfunding' or 'underfunding' in respect of the import transaction over a period of time. It is alleged that during the relevant period (2004 – 2009), there is an overfunding of USD 355.24 mn (Rs. 1598 crores approx..) and USD 137.69 mn (Rs.619.18 crores – approx..) as underfunding. The appellant assailing the finding of the adjudicating authority submitted that the results of recomputaion of ROVAC during the Financial Year 2005-2009 (upto 1st half year). It is contented that there was overfunding only for the years 2005-2008 whereas underfunding for the remaining period i.e. 2006-2007 and 2009 (1st half-year) totalling to underfunding of USD113.50 M (Rs.511 crores approx.). It is their argument that the difference

between the figures arrived at by the learned Commissioner in the impugned order is due to miscalculation of the overfunding / underfunding during the relevant period. The Department has wrongly calculated overfunding / underfunding on a quarterly basis whereas the profitability of a firm is normally calculated over of period of time (ie. Annual basis). Therefore, their contention that the methodology adopted by the DRI is unsustainable and consequentially, the demand is also not sustainable. We are of the opinion that after rejecting the transaction value declared by the appellant being influenced by their relationship, the method of determination of assessable value is held to be under Rule 7 (Deductive Method) read with Rule 8/9 of CVR 1988 / 2007. The appellant's argument that once they reached the targeted ROVAC return 8% /10% which is arm's length return satisfies the criteria of accepting the transaction value being not influenced by the relationship, since rejected as per the above discussion, being not in consonance with the CVRs, the issue of overfunding / underfunding would only reflect the circumstances that the ROVAC method has not been implemented strictly as per their financial policy; but not relevant to ascertain the correct assessable value and inturn the differential duty. The actual profit earned by the appellant in the respective year is relevant in determining the assessable value under the deductive method as per Rule 7 of CVR.

119. On the issue of applicability of exemption Notification No.89/1982-Cus dated 25.03.1982 to SAD, the appellant's contention is that after introduction of SAD in 2005 vide Section 3(5), Notification No.89/1982 was not amended; therefore, the appellant are entitled to the benefit of the said Notification. Once they discharged CVD on the imported goods, then all other duties levied under Section 3 of the Customs Tariff Act would stand exempted. Rebutting the said argument, the learned Special Counsel for the Department has submitted that as laid down by the Hon'ble Supreme Court in the case of Commissioner of Customs

(Import), Mumbai Vs. Dilip Kumar & Company [2018 (361) E.L.T. 577 (S.C.)], an exemption notification has to be strictly construed and in case any ambiguity, the issue be decided in favour of the Revenue. Further, he has submitted that Additional Customs Duty and SAD operate in their own sphere and in 1982 only ACD equal to the excise duty was leviable and neither the levy under Section 3(3) nor 3(5) was in existence; therefore Notification no.89/1982-Cus dated 25.03.1982 cannot be referred to any levy other than excise duty. We find merit in the contention of the learned Special Counsel inasmuch as the said Notification No.89/1982 was issued in the year 1982 keeping in mind the circumstances as was sought to be addressed i.e. once additional duty of customs on imported goods equal to excise duty is paid, the other duties are exempted. Since SAD was introduced in the year 2005 while issuing the said Notification, it could not be visualised about exemption from SAD. Therefore, the appellant's contention that SAD is exempted by the said Notification is unsustainable. Besides, in view of the ratio of judgment of the Hon'ble Supreme Court in Dilip Kumar & Co.'s case, in the event any ambiguity in the exemption notification, it is to be decided in favour of the Revenue. It is held as:

> **52.** To sum up, we answer the reference holding as under -
> (1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.
> (2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.
> (3) The ratio in *Sun Export* case (supra) is not correct and all the decisions which took similar view as in *Sun Export* case (supra) stands overruled.

120. On the issue of limitation, the appellant assailing the impugned order on the issue of confirming demand invoking extended period of limitation prescribed under Section 28(4) of the Customs Act stated that all disclosures were made by them before Special Valuation Branch (SVB), Commissioner(Appeals) and CEGAT

in the earlier round of litigation; their pricing policy has been accepted by CEGAT; thus, they have disclosed the full facts to the Department; hence, allegation of misdeclaration or suppression of facts on the part of the appellant cannot be sustained. Also, they have argued that the Representation Agreement dated 01.11.1989 and Distribution Agreement dated 01.11.1994 were duly considered by the authorities earlier and the same are more or less similar to the subsequent agreements dated 01.11.2002 and 01.11.2005. Therefore, the allegation of suppression or misstatement on the part of the appellant is not sustainable. The learned Special Counsel for the Department responding to the argument of the appellant has submitted that during the course of investigation by the DRI, statements of various employees have been recorded and other documentary evidences were retrieved from the appellant revealed that appellant during the period May 2005 to April 2009 frequently overstated the deductions called as funding discounts from the list prices which had the effect of lowering the invoice value and in turn the assessable value. Further, analysing the statements and material facts, the learned Special Counsel has submitted that the appellant had not made full disclosure about the application of ROVAC policy in the Indian context such as the method of determination of local list price, quantum of deductions, nature of discounts, overfunding etc., which had bearing on the valuation of the imported products. Further, the concept of existence of rebilling entity came into the knowledge of the Department as a result of investigation which were never brought to the notice of the SVB and also before CEGAT. The Level A (EIFFEL) and Level B (Athena) invoices raised were also not brought to the notice of the Department which marked wide deviation in the invoicing and pricing pattern. Further, non-mentioning of 'funding discount rate', 'discount amount' in the Bill of Entry, instead declaring the discount column as '0' led to the positive act of misdeclaration on the part of the appellant. Raising Level A and Level B invoices for the same

transaction which was material to ascertain the relative price of the distributor and the rebilling entity, also having a bearing on the price declared by the appellant, was never submitted to the Customs at any point of time. It is submitted that earlier before the CEGAT, the issue was of loading of sales commission amount up to 20% for the products imported by the appellant in contrast to indent sales, whereas in the present case, the cumulative funding discount was up to 82% of the CLCP, a fact was never disclosed to the Customs Department. Further in the EIFFEL and Athena invoices, only the Product Line (PL) indicated without mentioning the funding type, list price, funding discount etc. We find force in the contention of the learned Special Counsel for the Revenue as the said submissions are duly supported by documentary as well oral evidences discussed by the learned Commissioner in the impugned order. As discussed above, we reached a conclusion that the facts and circumstances of the present case revealed post-DRI investigation are different from the facts considered by the CEGAT, even though broadly the ROVAC policy was argued before the Tribunal and the judgment was passed holding that loading of indent commission to the net distributor's price declared by the appellant for assessment, is in accordance with the principles of valuation and accordingly such loading was considered to be bad in law and the declared related transaction value was accepted. There is a difference between Level A and Level B invoices not disclosed to the department. Consequent to the investigation by the DRI, it revealed that the pricing pattern of the appellant; Level A invoices (EIFFEL invoices) first raised on the rebiller entity i.e. Switzerland who in turn raise the Level B (Athena) invoices on the appellant reflecting only the net price submitted to the Customs. The difference in disclosure between EIFFEL invoices and Athena invoices is the funding discount which comprises of trade discount and other discounts, VAC and ROVAC, which were never disclosed to the Customs. It is also not in dispute that the funding discount (M90) declared only in EIFFEL invoices ranged between

44% to 83% during the relevant period and the transaction is a related person transaction. Therefore, the appellant has not made a true and full disclosure of the pricing pattern either before the SVB or in the earlier proceedings before CEGAT; therefore, the allegation of suppression of facts, misdeclaration by the Department is in accordance with law, hence invocation of extended period in confirming the demand is sustainable.

121. On the issue of applicability of penal provisions, confiscation and levy of interest, to the major portion of demand which relates to CVD/SAD, the appellant had submitted that the CVD/SAD are levied under Section 3(1) and 3(5) of the Customs Tariff Act, 1975. The duty defined under Section 2(5) of the Customs Act 1962 and dutiable goods defined under Section 2(14) is only to levy of customs duty (i.e. BCD) under Section 12 of the Customs Act since the provisions of levy of interest, imposition of penalties and confiscation under Section 28AB, Sections 114A and Section 114AA and Section 111(m) have not been borrowed under the Customs Tariff Act, therefore demand of interest, confiscation and imposition of penalty cannot be sustainable.

122. The relevant provisions of Customs Act, 1962 are as below:-

> Section 2(14) —dutiable goods means any goods which are chargeable to duty and on which duty has not been paid;
>
> Section 2(15) —duty means a duty of customs leviable under this Act;

Section 3(12) of the Customs Tariff Act, 1975 reads as follows:-

> Section 3(12) - The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to the duties leviable under that Act.

123. It is their argument that the issue is no more *res integra* and covered by the judgement of the Hon'ble Bombay High Court in the case of Mahindra & Mahindra Limited Vs. UOI (supra) which has been upheld by the Hon'ble Supreme Court and Review Petition filed later was dismissed by the Supreme Court vide order dated 09.01.2024. The learned advocate for the appellant fairly submitted that the same was not before the learned adjudicating authority. We find that the Hon'ble Bombay High Court in Mahindra & Mahindra's case, after analysing the relevant provisions of Customs Act and Customs Tariff Act on the applicability of penal provisions and interest to levy of CVD/SAD, held as follows:-

> **26.** Sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 does not provide for any interest or penalty. Neither Section 90 of the Finance Act, 2000 provides for the same. Therefore, no interest and penalty can be levied on the portion of payment pertaining to surcharge, CVD and SAD.
> We must also note that sub-section (8) of Section 9A of the Customs Tariff Act, 1975, prior to the 2004 amendment, did not include interest and penalties. By Section 76 of Finance (No.2) Act, 2004, the words in sub-section (8) of Section 9 of the Customs Tariff Act, 1975 "relating to non levy, short levy, refunds and appeals" were replaced with "relating to, the date for determination of rate of duty, non levy, short levy, refunds, interest, appeals, offences and penalties". No such amendment to include interest and penalty was inserted in sub-section (6) of Section 3 or sub-section (4) of Section 3A of the Customs Tariff Act, 1975. Therefore, the intention of the legislature was very clear that it wanted to include interest and penalties only with regard to anti-dumping duty on dumped articles and not for CVD, *i.e.,* levy of additional duty equal to excise duty and SAD, *i.e.,*, special additional duty. No such insertion or amendment was made in Section 90 of the Finance Act, 2000 relating to surcharge. Therefore, interest and penalty cannot be levied on the portion of demand pertaining to surcharge under section 90 of the Finance Act, 2000 or additional duty of customs under section 3 or special additional duty of customs under the Customs Tariff Act, 1975.
> **27.** Sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 makes applicable to the duty chargeable under section 3 and Section 3A the provisions of the Customs Act, 1962 and the rules and regulations made thereunder including those relating to drawbacks, refunds, exemptions from duties so far as it applies to Section 3 and so far as Section 3A is concerned, it is

relating to non levy, short levy, refunds and appeals. Similarly, sub-section (4) of the Finance Act, 2000 makes applicable the provisions of the Customs Act and the rules and regulations thereunder in relation to the levy and collection of surcharge. Both sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 or sub-section (4) of the Finance Act, 2000 make no reference to interest or penalty. There is no substantive provision in Section 3 or Section 3A under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 requiring payment of penalty or interest. There is, therefore, no substantive provision which obliges a party to pay interest or penalty on CVD, *i.e.,* the additional duty equal to excise duty or SAD, *i.e.,* special additional duty to be levied at a rate having regard to the maximum sales tax or local tax or any other charges leviable on a like article or surcharge to be levied under the Finance Act, 2000.

28. A perusal of sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 show that the breach of the provisions has not been made penal or an offence. It only provides for application of the procedural provisions of the Customs Act, 1962 and the rules and regulations made thereunder so far as it apply to the duty chargeable under section 3 or Section 3A of the Customs Tariff Act, 1975 or levy and collection under section 90 of the Finance Act, 2000. As stated earlier, if penalty or interest has to be levied on CVD or SAD or surcharge, the authority has to be specific and explicit and expressly provided. The Customs Tariff Act, 1975 provides for additional customs duty and special additional duty but creates no liability for penalty or interest for additional duty or special additional duty. Likewise the Finance Act, 2000 under section 90. That being so imposing penalty or interest on additional duty and special additional duty or surcharge which is not connected to the basic customs duty is unwarranted or without authority of law.

29. Further the Customs Act, 1962 under section 28 provides for recovery of dues and under section 28AB provides for interest on delayed payment of duty. Both are separate provisions and in our view, the incorporating provisions would apply only to the duty leviable under the Customs Act and not interest on delayed payment of duty or penalty because as time and again Courts have held that taxing statute have to be incorporated strictly and tax can be imposed only when the language of the statute expressly provided for it. The authority has to be provided specifically, explicitly and expressly. Moreover, CVD, SAD and surcharge are in addition to the basic customs duty. Sub-section (5) of Section 3 and sub-section (3) of Section 3A of Customs Tariff Act, 1975 provide that the duty chargeable under the said sections will be in addition to any other duty imposed under the Customs Tariff Act, 1975 or any other law for the time being in force. Sub-section (3) of Section 90 of the Finance Act, 2000 say the surcharge shall be in addition to any duties of customs under

> the Customs Act or under any other law for the time being in force.
>
> 30 to 36 … …… …
> **37.** In view of the above, imposing interest and penalty on the portion of demand pertaining to surcharge or additional duty of customs or special additional duty of customs is incorrect and without jurisdiction.

Following the aforesaid judgment, we are of the view that imposition of penalty, confiscation of the goods seized and levy of interest as far as the demand relating to CVD/SAD concerned, the same cannot be sustained. However, levy of interest on the amount of BCD payable as per Section 28AB of Customs Act, 1962 cannot be faulted. Since the BCD payable has been confirmed invoking suppression of fact, accordingly interest under section 28AA and penalty under Section 114A of Customs Act, 1962 equivalent to BCD are also payable; penalty under section 114AA is set aside.

124. The learned Commissioner besides imposing penalty on the appellant-company also imposed penalty on other individual appellants working in different capacities during the relevant period under Section 112(a) of the Customs Act, 1962. The appellants in their submissions emphasised that they have carried out the pricing policy followed by the appellant and they do not have any personal interest for incorrect implementation of the pricing policy in determination of the assessable value of the products. The pricing policy is formulated at head quarter level and they were only executing the policy, hence imposing personal penalty on each of them alleging aiding and abetting to the incorrect determination of assessable value resulting in short payment of duty is bad in law. We find substance in the argument of the individual employees that the pricing policy formulated at the headquarter level was ultimately implemented by them without deriving any personal benefit out of implementation; nor suppressed any facts in their personal level exposing them to penal actions. Therefore, penalty imposed on the

individual employees does not merit to be sustained and consequently, liable to be set aside.

125. Our findings/conclusions and directions are summarized as below:-

i. Rejection of the declared transaction value in the impugned order under Rule 10A / 12 of the CVR 1988/2007 is upheld.

ii. On rejection of the transaction value, the assessable value be determined adopting the principles of deductive method prescribed under Rule 7 read with Rules 8/9 of CVR 1988/2007. In implementing the deductive method read with residuary method, first the admissible discounts be deducted from the gross CLCP to arrive at the net sales price; general expenses viz. customs duty, customs brokerage and fees and the mark-up/profit earned by the appellant on sale of the imported goods during a Financial Year are to be deducted, except the warranty charges, to arrive at the assessable value.

iii. The cost of freight and insurance as prescribed under Rule 10(2) cannot be added to the determined value under Rule 7 read with Rule 10A/12 of CVR 1988/2007.

iv. Goods assessed on MRP basis, List Price (CLCP) declared by the appellant on such goods cannot be considered as MRP; accordingly differential duty confirmed in the impugned order on the differential price between CLCP and MRP cannot be sustained.

v. The additional quantity discounts also to be allowed in addition to the standard discount of 30% allowed in the impugned order by the learned Commissioner in the case of SRFR products;

vi. The assessable value be redetermined as mentioned above and consequently, the differential duty relating

to Basic Customs Duty (BCD), Additional Customs Duty (CVD) & Special Additional Duty (SAD) are to be calculated accordingly for the disputed period; interest on BCD is leviable under Section 28AA of Customs Act, 1962, but not on CVD/SAD.

vii. Penalty relating to CVD/SAD portion of the demand cannot be imposed; Penalty of equivalent to BCD amount under Section 114A of the Customs Act, 1962 is imposable and penalty under Section 114AA of the Customs Act, 1962 is set aside;

viii. Confiscation of the goods directed under Section 111(m) of Customs Act, 1962 are set aside;

ix. Penalty on individuals-employees imposed under Section 112(a) of the Customs Act, 1962 are set aside;

x. Revenue's appeal to the extent of verification of the error in the quantum of customs duty deduction is allowed by way of remand to the adjudicating authority for the purpose of verification.

126. In the result, the impugned order is modified to the extent mentioned above. Appeal No. C/1932/2012 filed by M/s. HP India Sales Pvt. Ltd. and Revenue's appeal No. C/2199/2012 are disposed of on the above terms. Appeals No. C/1933 to 1938/2012 filed by the individual Appellants are allowed. Customs Miscellaneous Application No. 20478 of 2015 filed by the assessee also gets disposed of.

(Order pronounced in Open Court on 06.05.2026)

(D.M. MISRA)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

Raja…