**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA**

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 78172 of 2018

(Arising out of Order-in-Appeal No. KOL/CUS(A/P)/AA/966/2018 dated 21.05.2018 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. SVF Entertainment Private Limited **: Appellant**
Siraj-Ud-Udola Sarani,
Suite 508, 6, Waterloo Street,
Kolkata – 700 069

VERSUS

Commissioner of Customs (Import) **: Respondent**
Air Cargo Complex, NSCBI Airport,
Kolkata – 700 052

APPEARANCE:

Shri Jay Bohra, Advocate,
For the Appellant

Shri Tariq Sulaiman, Authorized Representative,
Shri Ashwini Kr. Choudhary, Authorized Representative,
For the Respondent

CORAM:

**HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)**

FINAL ORDER NO. 75710 / 2026

DATE OF HEARING / DECISION: 10.06.2026

ORDER: [PER SHRI ASHOK JINDAL]

The appellant is in appeal against the impugned order whereby the assessment of the Bills of Entry as done by the lower authority by adopting RSP based duty assessment as per Notification No. 49/2008-C.E.(N.T.) dated 24.12.2008 (Sl. No. 97), consideration of freight value at 20% of FOB value, consideration of insurance value at 1.125% of FOB value and rejection of the prayer for amendment of the Bills of Entry, have been upheld by the Ld. Commissioner (Appeals).

2. The facts of the case are that M/s. SVF Entertainment Private Limited (hereinafter referred to as "the appellant") having its office at Siraj-ud-Udola Sarani, Suite 508, 6 waterloo Street Kolkata – 700 069 and holder of IEC No. 0207026912 is inter-alia engaged in the import of digital projectors falling under Tariff heading 85286900. The digital projectors so imported by the appellant were not meant for outright sale and the same were installed in various cinema halls in various regions of West Bengal on "Right to Use" basis along with other equipment such as UPS, Computer, Server, Cables, etc.

3. The appellant, during the month of April 2010, imported Ray Photon Nano Projectors from Delta International China Under Bill of Entry No. 604988 dated 06.04.2010 and Optoma DLP Projectors from Optoma Corporation, Taipei, Taiwan under Bill of Entry No. 605307 dated 08.04.2010.

4. While assessing the aforesaid Bills of Entry, the Ld. Appraiser adopted an arbitrary basis for valuation and assumed the MRP of the imported projectors to be three times their FOB value. The Appraiser further presumed the insurance component at 1.125% of the FOB value and, in respect of Bill of Entry No. 604988, assumed freight at 20% of the FOB value. The values so adopted are significantly higher than the actual costs incurred by the appellant. Owing to urgent business requirements, the appellant cleared the goods on payment on excess duty, insurance and freight charges. It is also pertinent to note that the Clearing Agent did not possess complete knowledge to properly assess and facilitate clearance of such goods.

5. The appellant filed a refund claim on 21.04.2010 before the Ld. Assistant Commissioner of Customs, Appraising Refund Section for claiming refund of excess duty paid. However, vide its Order-in-Original No. 47/11ACRS dated 15.03.2011, the refund application was rejected by the Assistant Commissioner on the ground that the unless the assessment of Bill of Entry is challenged and set aside by a higher forum the refund is not maintainable.

6. Being aggrieved by the Order-in-Original No. 47/11ACRS dated 15.03.2011, the appellant preferred an appeal before the Ld. Commissioner of Customs (Appeal) on 12.05.2011. The Ld. Commissioner of Customs (Appeal) vide its Order-in-Appeal No. KOL/CUS/CKP/209/2011 dated 13.07.2011 set aside the impugned order with a direction that refund claim of the appellant shall be taken up for disposal only after the decision of the assessing officer regarding amendment of bill of entry is terms of Section 149 of the Act is rendered.

7. The appellant filed an application for amendment in the bills of entry in terms of Section 149 of the Act on 05th January 2011. The Deputy Commissioner of Customs (Import), Air Cargo Complex, NSCBI Airport, Kolkata / adjudication authority vide Office Order bearing F. No. S60(Misc.)-93/2013-CCI dated 22.08.2013 rejected the Appellant's application for amendment of the Bill of Entry on the alleged ground that the imported goods are classifiable under CTH 85286900 which attracts RSP based assessment in terms of Sl. No. 97 of Notification No. 49/2008-CE (NT) dated 24.12.2008.

7.1. Being aggrieved by the above Order-in-Original, the appellant preferred an appeal bearing appeal F. No. S5-667/CUS(APPG)/KOL(AP)/2013 before the Ld. Commissioner of Customs (Appeal) regarding amendment in bill of entries. The Ld. Commissioner of Customs (Appeal) vide Order-in-Appeal No. KOL/CUS/(A/P)/AA/966/2018 dated 21.05.2018 (hereinafter referred to as "impugned order") rejected the request for amendment under Section 149 of the Act.

7.2. Against the said order, the appellant is before us.

8. The Ld. Counsel appearing on behalf of the appellant has made various submissions in support of his contentions, which can inter alia be summarized as follows: -

A. <u>The authorities have erroneously considered RSP/MRP Value instead of Transaction Value for the purpose of computing Countervailing Duty.</u>

(i) The appellant states that the customs authorities have erroneously without authority of law assessed and computed CVD on RSP/MRP basis instead of Transaction Value. In this regard, it has been submitted that the Projectors so imported by the appellant were not intended for Retail sale but were intended to be leased / let out to various cinema halls on "Right to Use" basis. The appellant was in possession of such "Right to Use" Agreements entered with various cinema hall owners entered prior to the imports which would clearly go on to show that the projectors imported by the appellant were not mean for sale.

(ii) The Proviso to Section 3(2) of the Customs Tariff Act, 1975 prescribes two mandatory conditions for levy of CVD on RSP basis, namely that the goods must be required to declare RSP on the package under the Legal Metrology Act, 2011 and must be notified under Section 4A(1) of the Central Excise Act, 1944. However, in the present case, the very first condition itself is not satisfied as the imported goods are not intended for retail sale and, therefore, there is no requirement to declare RSP on the package. Reliance in this regard is placed on the decision in the case of *M/s Bharti Telemedia Ltd. Vs. Commissioner of Customs (Import), Nhava Sheva [2016 (331) E.L.T. 138 (Tri. -Mumbai)]*, wherein it has been held that goods not meant for retail sale cannot be valued on RSP basis, and therefore adoption of RSP/MRP for computation of CVD is wholly erroneous and unsustainable in law.

(iii) Reliance is also placed on *UFO Moviez India Ltd. Vs. Commissioner of Customs (ACC & Imports), Mumbai [2018 (4) TMI 923 – CESTAT MUMBAI)],* wherein the facts are identical to the present case, as the assessee in the instant case had imported Digital Video Projectors which were leased to theatre owners for exhibition of films while retaining ownership and earning lease rentals, as is the case with the appellant in the instant matter. The Tribunal, in the above case, relying upon *M/s Bharti Telemedia Ltd. Vs. Commissioner of Customs (Import), Nhava*

Sheva [2016 (331) E.L.T. 138 (Tri. -Mumbai)], held that CVD on RSP basis is not applicable where the imported goods are not intended for retail sale.

(iv) Further, reliance in this regard is also placed on the following judgements:

- *UFO Moviez India Ltd. Vs. Commissioner of Customs Mumbai III [2018 (6) TMI 1017 - CESTAT MUMBAI]*
- *Tata Play Limited Vs. Commissioner of Customs (Import), Nhava Sheva, Raigad [2023 (7) TMI 268 - CESTAT MUMBAI]*
- *M/s. Tata Sky Limited Vs. The Commissioner of Customs [2019 (10) TMI 1562 - CESTAT CHENNAI]*
- *Bharati Airtel Ltd. Vs. State of Karnataka [2010 (256) E.L.T. 529 (Kar.)]*
- *Sun Direct Tv Pvt. Ltd. Vs. CC (Sea), Chennai [2009 (243) E.L.T. 705 (Tri.-Chennai)]*

(v) Therefore, in light of the above submissions, it is submitted that since the imported goods are not intended for retail sale, CVD cannot be computed on RSP basis and ought to be determined on transaction value. Accordingly, the Bills of Entry ought to be amended on the basis of the Right to Use agreements which were in possession of the appellant at the time of imports of projectors.

B. <u>Without prejudice to the above and in any event, the RSP of the projectors imported by the appellant should have been determined by taking recourse to the value of identical goods imported during the same period and the same could not have been arbitrarily assumed to be thrice the FOB value of the imported goods</u>

(i) Without prejudice to the submissions made hereinabove, the appellant submits that even if the RSP value is to be considered for the purpose of determining CVD on the imported goods, the same must be applied consistently and uniformly for identical goods imported during the same period.

(ii) That the appellant has been importing the said projectors for the past two years, during which more than ten Bills of Entry have been assessed by the Department, and in all such cases except the present one, the authorities have consistently accepted the RSP/MRP declared by the appellant. The RSPs taken by the Department in the past is as under:

- <u>Ray Photon Nano Projectors</u>

Bill of Entry No. 586773 dated 09.12.2009 and Bill of Entry No. 590758 dated 06.01.2010, wherein the Department accepted the declared RSP/MRP of Rs. 3,62,500/- for assessment purposes. However, in the present case, the Department has arbitrarily adopted the RSP/MRP as Rs. 6,33,420/-, which is almost thrice the FOB value.

- Optima Projectors

Bill of Entry No. 575165 dated 22.09.2009 and Bill of Entry No. 574887 dated 19.09.2009, wherein the Department accepted the declared RSP/MRP of Rs. 1,00,000/- for assessment purposes. However, in the present case, the Department has arbitrarily adopted the RSP/MRP as Rs. 2,47,860/-, which is almost thrice the FOB value.

(iii) Rule 4 of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007 conspicuously provides that the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued. Reliance in this regard is placed by the appellant on the judgement of the Tribunal at Chennai in the case of *Sonmulla & Sons vs. CC, Trichy [2009 (242) E.L.T. 243]* where MRP value of contemporaneous imports was taken for ascertaining the value of imported goods. Therefore, amendment under Section 149 ibid. ought to have been allowed considering the RSP of identical goods imported by the appellant in the past inasmuch as data of imports was available both with the Department as well as the appellant.

(iv) Deviation from the consistent past practice of the authorities by disregarding the MRP consistently taken in the past for identical goods imported by the appellant, in the absence of any change in facts or law, is arbitrary, discriminatory and unsustainable in law. Reliance in this regard is placed on the judgment of the Hon'ble Apex Court in the case of *Gira Enterprises Vs. CC, Ahmedabad [2014 (307) E.L.T. 209 (S.C.)].*

(v) The appellant also enclosed calculation sheets demonstrating the excess duty paid by it by comparing the duty levied in the Bill of Entry based on the arbitrarily enhanced RSP adopted by the authorities with the duty correctly payable on the basis of the MRP declared by the appellant for the same projectors during the same period.

C. The authorities have erroneously adopted Freight at 20% of the FOB value instead of considering the actual freight incurred, thereby incorrectly determining the assessable value

(i) It is submitted that the authorities, without taking into account the actual freight incurred by the appellant for the import of goods under BOE No. 604988, have erroneously adopted the freight value at 20% of the FOB value of the imported, in terms of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

(ii) Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 permits adoption of freight at 20% of the FOB value only where the actual cost of freight is not ascertainable. In the present case, the appellant had duly furnished the invoices along with the airwaybill copy reflecting the actual freight incurred to the tune of Rs. 2,23,790, which was readily determinable and forms part of the record. Therefore, the action of the authorities in disregarding the said documentary evidence and erroneously adopting freight at 20% of the FOB value goods (i.e. Rs. 10,55,700/-) is contrary to the statutory provisions and unsustainable in law, and the actual freight cost incurred by the appellant ought to be accepted for the purpose of valuation. In that event, the amendment u/s 149 ibid in respect of the freight component ought to have been allowed as copies of such invoices was in possession of the appellant at the time of import.

(iii) Reliance in above regard is placed on the judgment of the Hon'ble Supreme Court in *Wipro Ltd. Vs. Assistant Collector of Customs [2015 (319) E.L.T. 177 (S.C.)],* wherein it has been held that where the actual cost is ascertainable, the same must be adopted for valuation, and only in the absence of such actual cost can a notional or deemed value be applied. Subsequently, the review petition was dismissed by the Division Bench of Hon'ble Supreme Court in *Assistant Collector Vs. Wipro Ltd. [2016 (337) E.L.T. A138 (S.C.)]*

D. The authorities have erroneously adopted Insurance at 1.125% of the FOB value instead of considering the actual cost of insurance incurred, thereby incorrectly determining the assessable value

(i) It is submitted that the authorities, without taking into account the actual cost of insurance incurred by the appellant for the import of goods for both the bills of entry, the authorities have erroneously adopted the insurance value to be 1.125% of the FOB value of the imported goods in terms of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The submissions made supra would apply even in case of insurance.

(ii) The appellant also submits that the Insurance documents duly reflects the actual cost of insurance of Rs. 7,759/- for Bill of Entry No. 604988 and Rs. 1,265/- for Bill of Entry No. 605307/-. The appellant submitted a copy of the said Insurance documents at the time of filing the refund application on 21.04.2010 as well as while filing the application for amendment of the Bill of Entry on 05.01.2011. However, the authorities have erroneously disregarded the said documentary evidence and instead adopted value of insurance at 1.125% of the FOB value, i.e., Rs. 59,383.13/- for Bill of Entry No. 604988 and Rs. 9,682.03/- for Bill of Entry No. 605307, resulting in an unwarranted enhancement of value of insurance by Rs. 60,041.16/-.

(iii) In light of the above, the appellant contends that both the Bills of Entry are liable to be amended u/s 149 ibid on the basis of contemporaneous documents existing at the time of import, as the erroneous adoption of insurance cost at 1.125% of the FOB value has led to an artificial and unwarranted enhancement of the assessable value of the imported goods.

E. <u>Amendment under Section 149 of the Customs Act, 1962 can be allowed on the basis of all the documents that were Contemporaneous at the time of import.</u>

(i) That amendment under Section 149 of the Customs Act, 1962 is permissible on the basis of documentary evidence contemporaneous with the import, i.e., documents which were in existence at the time of clearance of the goods. Accordingly, where the documents were in possession of the importer at the time of import and their genuineness is not disputed by the Customs authorities, amendment cannot be denied.

(ii) Reliance in this regard is placed on the following Judgments of various High Courts and Tribunal:

- *Hewlett Packard Enterprise India (P.) Ltd. Vs. Jt. Commr. of Cus., Chennai [2021 (375) E.L.T. 488 (Mad.)]*
- *Hindustan Unilever Vs. Union of India [2021 (377) ELT 4 (Mad.)]*
- *M/s. Harris and Menuk Chemicals Pvt. Ltd Vs. The Asst. Commissioner of Customs [WP No. 37599 OF 2025]*
- *Dimension Data India Pvt. Ltd. Vs. Commissioner of Customs [2021 (376) E.L.T. 192 (Bom.)]*
- *Mohit Overseas Vs. The CC & Anr. [2016 (335) E.L.T. 18 (Del.)]*
- *M/s. Sainest Tubes Pvt Ltd Vs. C.C. - Ahmedabad [2020 (3) TMI 493 - CESTAT AHMEDABAD]*
- *Commr. of Cus., C. Ex. & S.T., Noida Vs. Samsung India Electronics Pvt. Ltd. [2018 (360) E.L.T. 91 (Tri. - All.)]*

(iii) In the instant case, amendment was sought on the basis of agreements, invoice and other documents which were in possession of the appellant at the time of import, genuineness of which have not been doubted. In that event, denial of amendment is bad-in-law.

F. <u>Under Section 149 of the Customs Act, 1962, Bills of Entry can be amended at any time, as there is no prescribed statutory time limit for filing such an application</u>

(i) It is pointed out that Section 149 of the Customs Act, 1962 prescribes no limitation period for seeking amendment of a Bill of Entry. The absence of any time restriction reflects clear legislative intent to permit amendment whenever required, subject to fulfilment of statutory conditions. Reliance in this regard is placed on the following judgment:

- *Sony India Pvt. Ltd. Vs. Union of India and another [2022 (379) E.L.T. 588 (Telangana)]– Affirmed in Supreme Court in the Case of Union of India Vs. Sony India Pvt. Ltd. [2023 (385) E.L.T. 93 (S.C.)]*
- *CCE, Nhava Sheva Vs. Crest Chemicals [2009 (244) E.L.T. 361 (Tri. - Mumbai)]*

G. An appeal and amendment are two separate causes of action and are independent of each other under the Customs Act.

(i) That the remedy of appeal under Section 128 of the Act and the remedy of amendment under Section 149 of the Act are fundamentally distinct and operate in separate legal domains. An appeal is a substantive adjudicatory remedy intended to challenge the legality, validity, or correctness of an assessment or adjudication order passed by the customs authorities. In contrast, an amendment under Section 149 is a procedural facilitative mechanism designed to ensure that the Bill of Entry correctly reflects the true and contemporaneous facts of import, based on documentary evidence existing at the time of clearance. The scope, purpose, and legal effect of both remedies are entirely different and cannot be interchanged or conflated.

(ii) It is further submitted that the exercise or availability of one remedy does not extinguish, override, or curtail the other. The statutory right of the Appellant to seek amendment under Section 149 remains independent and continues to subsist irrespective of the fact whether an appeal has been filed, is pending, or has been adjudicated. The outcome of appellate proceedings cannot be used as a ground to deny or restrict the statutory entitlement for amendment, as Section 149 does not impose any such condition or limitation. Any interpretation to the contrary would defeat the legislative intent and render the provision redundant.

(iii) Therefore, it is submitted that the remedies of appeal under Section 128 of the Act and amendment under Section 149 of the Act are independent and operate in distinctly. Accordingly, the rejection of the appellant's request for amendment on grounds unrelated to Section 149 is legally unsustainable. It is therefore prayed that the amendment of the Bills of Entry be allowed in accordance with law.

9. On the other hand, the Ld. Authorized Representatives of the Revenue appearing before us have supported the impugned order.

10. Heard the parties and considered their submissions.

11. After hearing the parties, we find that the following issues emerge: -

(a) Whether the authorities below have erroneously considered the RSP / MRP value for determination of the assessable value to demand Countervailing Duty (CVD) from the appellant, or not.

(b) Whether adopting freight value at 20% of the FOB value of the goods is justified or not.

(c) Whether adopting insurance value at 1.125% of the FOB value of the goods is correct or not.

<u>Issue (a): Whether the authorities below have erroneously considered the RSP / MRP value for determination of the assessable value to demand Countervailing Duty (CVD) from the appellant, or not.</u>

12. We find that the appellant has imported the goods in question at the transaction value. It is a fact that the Projectors so imported by the appellant were not intended for sale, but intended to be leased / let out to various cinema hall on "Right to Use" basis, in terms of "Right to Use" Agreements entered into by the appellant with the various cinema hall owners. As the basic condition of putting the RSP on the goods in question has not been satisfied, it is clear that the said goods were not intended for retail sale. The goods not being intended for retail sale, RSP is not required to be declared on the said goods. Therefore, we hold that duty is payable by the appellant on the transaction value.

12.1. The said issue has been examined by the Tribunal in the case of *UFO Moviez India Ltd. Vs. Commissioner of Customs (ACC & Imports), Mumbai [2018 (4) TMI 923 – CESTAT MUMBAI)]* wherein it was observed as under: -

> *"5. We have carefully considered the submissions made by both sides. We find that the fact of the case, which is not in dispute, is the appellant imported Digital Video Set, which can be used only for displaying the movie in the theater. The same is not sold in the retail market. The arrangement of providing the Digital Video Projectors to the Theater owners under Lease Agreement and the lease rental is charged under the agreement. An identical fact is involved in the case of Bharti Telemedia Ltd. (supra). In our view, the facts of the present case is more or less similar to the fact of the Bharti Telemedia Ltd. case as in both the cases lease rental equipment has been provided to the customer's premises. Therefore, the ratio of the decision of*

Bharti Telemedia is directly applicable, wherein the definition of sale in the Legal Metrology (Packaged Commodities) Act (earlier Standards of Weights and Measures Act, 1976) has been considered. Therefore, the argument made by the learned AR is of no use as the entire argument made by him has been already considered by this Tribunal in the case of Bharti Telemedia Ltd. (supra). The relevant portion of this Tribunal's decision in Bharti Telemedia Ltd. (supra) is reproduced below: -

6. We have carefully considered the submissions made by both sides.

7. The issue is to be examined with reference to the legal provisions. The countervailing duty i.e. CVD, as it is commonly referred to, is levied under Section 3(2) of the Customs Tariff Act, 1975. The dispute centers around the proviso to Section 3(2) which states that :

Provided that in case of an article imported into India

(a) in relation to which it is required, under the provisions of the Legal Metrology Act, 2009 (1 of 2010) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such articles; and

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

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

The proviso above states that in certain cases the CVD shall be levied on the basis of retail sale price declared on the imported packages. It is clear that 2 conditions have to be met for CVD to be levied on the basis of RSP, namely :

(1) Under Legal Metrology Act it should be required to declare on the package the retail sale price (RSP);

(2) The imported goods must be specified in the notification issued under Section 4A(1) of the Central Excise Act, 1944.

Only if these two conditions are satisfied, the CVD will be payable on the value equal to the retail sale price less the amount of abatement prescribed. In the case at hand it is undisputed that the second condition is met. Whether the first condition is met or not needs to be decided by examining the relevant provisions of the Legal Metrology Act. The relevant provisions are reproduced below :

Legal Metrology Act

Section 2

"(r) "sale", with its grammatical variations and cognate expressions, means transfer of property in any weight, measure or other goods by one person to another for cash or for deferred payment or for any other valuable consideration and includes a transfer of any weight, measure or other goods on the hire-purchase system or any other system of payment by instalments, but does not include a mortgage or hypothecation of, or a charge or pledge on, such weight, measure or other goods;"

The Legal Metrology (Packaged Commodities) Rules, 2011

(k) "retail package" means the packages which are intended for retail sale to the ultimate consumer for the purpose of consumption of the commodity contained therein and includes the imported packages :

Provided that for the purposes of this clause, the expression "ultimate consumer" shall not include industrial or institutional consumers;

(l) "retail sale", in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales shops, agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer;

(m) "retail sale price" means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and the price shall be printed on the package in the manner given below :

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

The retail sale price is defined above as the maximum price at which retail package may be sold. And retail package means packages which are intended for retail sale to the ultimate consumer. In other words the retail price will be required to be declared on the package only if it is intended for retail sale. The ld. Counsels have contended that there is no sale at all. They have referred to the definition of "sale" under the Legal Metrology Act, and emphasized that unless there is transfer of property it cannot be said that sale has taken place. It is seen from the definition that there should be a transfer of property for any consideration or there should be a transfer on the hire-purchase system or by any system of payment by any instalments. We find in the present case that there is no transfer of property or hire-purchase system involved nor there is a system of payment by instalments. Thus there appears to be no sale in the use of the Set Top Box by the ultimate consumer. The ld. AR referred to the definition of sale in the Central Sales Tax Act, 1956 which reads as :

"(g) Sale, with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes …….

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;"

It is seen that the definition of sale in the CST Act has a much wider coverage and it includes the transfer of right to use any goods. But we see no reason to import the definition of sale from another statute when CVD is to be levied on the basis of the

Legal Metrology Act, read with the Central Excise Act. Reliance is correctly placed by the ld. Counsel on the judgment of the Supreme Court in the case of Geo Miller & Co. v. State of Madhya Pradesh [Manu/SC/0491/2004]. In this case concerning the Madhya Pradesh Entry Tax Act, the Hon'ble Supreme Court was dealing with the definition of sale whose scope is enlarged by Art. 366(29A) by including transfer of goods in the "execution of works contract". Nevertheless the Apex Court held that the intention of the legislature in excluding "execution of works contract" from the definition of "sale" in the Madhya Pradesh Act is manifest and this clearly reflects in the letter of law. Apart from this judgment, we find Section 3 of the Legal Metrology Act clearly provides that in case of inconsistency with the provisions of any other Act, the provisions of the Legal Metrology Act, will prevail. Therefore, it is beyond doubt that the definition of "sale" which ought to be considered in the present case before us is the definition stated in the Legal Metrology Act.

7.1 This leads us to examine the facts with reference to that part of definition of sale which requires that there should be transfer of property. That is, whether on the basis of evidence it can be established that there is transfer of property in the transactions between the appellant and the ultimate subscriber of DTH Service. The appellants have put forth various pieces of evidence in this regard. They have referred to the agreements with their service provider, distributor as well as with the ultimate consumers. None of the agreements speak of transfer of property of STBs. They have also referred to the declaration on the subscriber application form (SAF) filled by the subscriber which clearly indicates that the title to the goods, namely STBs, remains with the appellants. The ld. AR argued that while signing the SAF, the subscriber doesn't put a remark against any of the options i.e. the options of sale or hire-purchase or rental. According to him such a contract involving the transactions becomes void in terms of the Indian Contract Act as the consumer is not aware of what he has agreed to in the SAF. We are not inclined to go into the details of the Contract Act for the reason that there is enough evidence to indicate that there is no sale involved in the transaction. We find that the STBs are shown as capital assets in the books of accounts/Balance sheets and depreciation is claimed by them. The

CPEs including STBs are capitalized on activation of the same. It has also been shown that VAT authorities of Maharashtra and Bihar have held that the supply of STBs does not constitute sale. We find the ld. AR's comments strange when he states that the expenses shown as capitalization of assets should have been treated as misc. expenses. There is no authority in law to compel the appellant to do so. It is, thus, clear to us that there is no transfer of property.

7.2 Only because the imported packages conformed to the Notification RE/44/2000 issued by DGFT in relation to Packaged Commodities does not necessarily mean that the MRP is required to be declared. Conforming to the notification may imply various other requirements such as weight of package. This is observed by us after seeing the various provisions of the Legal Metrology Act and the Packaged Commodities Rules. It has been stressed by the ld. Counsels that far from there being actual sale, the STBs are not even intended for sale. Under Rule 2(k), retail package is a package intended for retail sale. We have shown there is no sale. Therefore we cannot appreciate how, in the face of all evidence to the contrary, Revenue can still consider that there has been sale of STBs. We are supported in our view by the decision of the Hon'ble High Court of Karnataka in the case of Bharati Airtel Ltd. [MANU/KA/0011/2010 = 2010 (256) E.L.T. 520 (Ker.)] in which it was held that "the emphasis under the provisions of the Act and the Rules is in respect of commodities which are intended for sale, by themselves. Though the commodities in question are displayed in packed form they are not meant for sale by themselves. It is always coupled with or incidental to the subscriber availing the services provided by the petitioner. Further, as there is clearly an agreement by the subscriber to surrender the devices on termination of the contract, it cannot be said that there is any element of sale involved. The suggestion on behalf of the respondents that the petitioner has devised a way to include the cost of the device into the service charges that are imposed, cannot be accepted as a finding of fact without there being an adjudication in this regard."

7.3 Revenue has adduced no evidence whatsoever to show that the cost of STBs is being passed on as service charges. In the absence of any credible evidence, we reject the contention of Revenue that *the appellants have devised a way to build the cost of the STBs into the service charges. We find the case at hand quite similar to the transactions of SIM Cards for Cellular Phones. The Hon'ble Supreme Court in the case of Idea Mobile Communication Ltd. (supra) held that "The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards which on its own but without the service would hardly have any value at all. Thus, it is established from the records and facts of this case that the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. The Sales Tax authority understood the aforesaid position that no element of sale is involved in the present transaction." In the supply of STBs too there is no sale, only service is being provided.*

8. We find a direct judgment on the issue at hand in the case of Sun Direct TV Pvt. Ltd. (supra). However, we have chosen to analyze the issue threadbare as both sides have put forth various points on facts as well as law which are required to be addressed in a comprehensive manner. We do not agree with the reliance placed by the ld. AR in the cases of Dish TV India and Reliance Communication (supra). These cases related to the periods prior to 1-4-2012 when Dish TV showed transfer of STBs on rental basis as reflected in the invoices. VAT was also paid thereon. It was in that context that the Tribunal came to the conclusion that VAT was paid and there was a 'deemed sale' in the context of "right to use" as enshrined in Article 366(29A) of the Constitution. Therefore, the Tribunal held that since sale was involved, refund of SAD is admissible under the Customs Notification which provided for exemption from SAD on the condition that the goods are imported for subsequent sale which is to be evidenced by payment of appropriate sales tax or VAT.

9. An issue raised by the ld. AR is with regard to TRAI Regulations. According to Revenue, TRAI Regulations mandate that the subscribers must be given an option for outright purchase or hire-purchase or rent. It is rightly contended by the ld. Counsel that TRAI Regulations do not expressly prohibit the provision of service under any other Scheme. However it is our considered view that notwithstanding the TRAI Regulations, the statutory provisions of the Legal Metrology Act cannot be ignored. We have discussed these provisions in some detail above to come to the conclusion that there is no sale of the STBs. Whether TRAI guidelines are followed or not is a matter to be determined by the appropriate authorities. Here we are concerned only with the application of the Customs Tariff Act, Central Excise Act and the Legal Metrology Act which is specifically referred to in Section 3(2) of the Customs Act. It is under these Acts that we have to determine whether RSP based assessment is warranted or not. Therefore on this point Revenue has no case.

9.1 Another argument put forth by Revenue is that because the transaction between the service provider and the customer has a warranty clause, therefore it can be said that the goods have been sold and the property does not remain with the service provider. This argument does not appeal to us because warranty is normally provided in the delivery of services too and not in the delivery of goods alone. And in the present case what is provided is delivery of service. The allegation by Revenue that the cost of STBs is recovered through service charges is belied by the fact that the duty paid in terms of Section 4 of the Central Excise Act would be more than the duty payable under Section 4A considering that, in the latter case, refund of SAD would be admissible. The counsels submitted calculation charts to evidence this point and Revenue does not counter the same.

9.2 The ld. Counsel for Bharti Telemedia also contended that there is no mechanism for determining duty under Section 4A if MRP is not printed on the packages. As we have already decided that there is no sale in the present case, we do not find it necessary to go into this contention.

10. Both sides relied heavily on the Hon'ble Supreme Court judgment in the case of Jayanti Food

Processing (P) Ltd. v. Commissioner of Central Excise [2007 (215) E.L.T. 327 (S.C.)]. We have carefully gone through this judgment. While dealing with the case of free supply by Pepsi of KITKAT Chocolates (which are sold by KITKAT to Pepsi) along with a Pepsi bottle, the Hon'ble Court accepted the argument that contract of supply of Chocolates was for the purpose of advertisement of a particular product of the particular industry, and it would get covered within the expression "servicing any industry" to get exemption from applicability of the PC Rules. The relevant provision of Rule 34 reads as:

"34. Exemptions in respect of certain packages. - Nothing contained in these rules shall apply to any package containing a commodity if, -

(a) The marking on the package unambiguously indicates that it has been specially packed for the exclusive use of any industry as a raw material or for the purpose of servicing any industry, mine or quarry".

It is demonstrated by the ld. Counsel of Bharti that the imported goods bear following declaration.

"Not meant for retail sale, specially packed for the purpose of serving DTH industries. STB shall remain property of Bharti Telemedia Limited".

Therefore in the present case too as the goods are meant for servicing the DTH industry, they would get covered by the exemption clause in Rule 34.

10.1 We also note that the same Apex Court judgment at para 29 stated that :

"It was then suggested that the free gift by Pepsi to its customers would amount to distribution and would, therefore, be amounting to "retail sale" and the package of KITKAT would be "retail package". However, what is material is the definition of "retail sale price". The requirement of Rule 6(1)(f) is specific. It requires the retail sale price of the package be printed or displayed on the package. If there is no sale involved of the package, there would be no question of Rule 6(1)(f) being attracted. There is a clear indication in the definition of "retail sale price" as provided in Rule 2(r) which clearly explains that the MRP means the maximum price at which the commodity in packaged form "may be sold" to the ultimate consumer. Thus, the definition of "sale" in

Section 2(v) of the SWM Act becomes relevant. Therefore, unless there is an element of sale, as contemplated in Section 2(v), Rule 6(1)(f) will not be attracted and thus such package would not be governed under the provisions of SWM(PC) Rules which would clearly take such package out of the restricted arena of Section 4A(1) of the Act and would put it in the broader arena of Section 4 of the Act."

Rule 6(1)(f) which is now Rule 6(1)(e), requires every package to bear the retail sale price. Applying the ratio of the above judgment we see in the present case also, as there is no sale involved, Rule 6(1)(e) is not attracted. Therefore the imported packages would not be governed by the provisions of LMA (PC Rules) and would not be assessable to duty on RSP basis.

10.2 Ld. AR has not appreciated the Hon'ble Supreme Court judgment above in its proper perspective. In the said judgment it was held that : "We are not in a position to accept the arguments of learned Counsel that merely because there is a bulk sale to DoT, MTNL and BSNL, the assessment should be under Section 4 of the Act. We again mention it at the cost of repetition that the nature of sale is not important, what is important is the requirement of printing the MRP on the packages. It was not and indeed cannot be disputed that these telephones are also sold in the retail market in the same form and the same package and there is requirement of printing the MRP on each package of the Push Button Telephone." The vital part missed by the ld. AR in the present case is that it has not been established that there is any sale. Therefore he cannot rely on the above judgment in which there was bulk sale to MTNL/BSNL. Further Court also held that "When a "retail package" containing any commodity is produced, distributed, displayed, delivered or stored for sale for consumption by an individual or group of individual, it would be a "retail package". In this case, admittedly, DOT, MTNL and BSNL provided these instruments, after they have purchased the instruments, to the individual customers, though not by way of a "sale" but for their use." The present case is clearly distinguishable because the importers are not selling Set Top Boxes either to the dealer or to the customer whereas in the case of Jayanti Food Processing (P) Ltd. the telephones were sold to

MTNL/BSNL. And the telephones had MRP printed on them which is not so in the present case of STBs.

10.3 We would like to mention that judgments may be relied on the basis of facts and circumstances obtaining in the cases being adjudicated. The judgments have to be applied in the context in which they are delivered otherwise it will result in chaos. The case of Jayanti Food Processing (P) Ltd. when relied upon in the proper context clearly favours the appellants.

11. During the course of arguments it emerged that Dish TV had recovered damages from the subscribers in case a Set Top Box is damaged. In such cases the replacement box is sold to the subscriber at a cost. Therefore in such cases, as an element of sale is involved, CVD would be payable under Section 4A of the Act. Accordingly, it is ordered that assessment be done and duty be paid on MRP basis in such cases.

12. In view of the findings in paras 7 to 10 above, we hold that the Set Top Boxes imported by the appellants are not leviable to CVD on RSP/MRP basis in terms of Section 4A of the Central Excise Act except for the Set Top Boxes actually sold as held in para 11 above.

6. From the above finding of the Tribunal, it can be seen that the facts in the present case is identical to the aforesaid judgment. Therefore, following the judicial discipline, we follow the decision given in the above case. Accordingly, the impugned order does not sustain. Hence, the same is set aside. The appeal is allowed."

12.2. In view of the discussion hereinabove and by relying on the decision of the Tribunal in the case of *UFO Moviez India Ltd. (supra),* we hold that the appellant is required to pay duty on the transaction value and not on RSP. In view thereof, the enhancement of assessable value by the ld. adjudicating authority is found to be incorrect and hence, the same is set aside.

Issue (b): Whether adopting freight value at 20% of the FOB value of the goods is justified or not.

13. We find that in the present case, the appellant has paid freight charges on actual basis and thus, the enhancement of freight value by adopting the same at 20% of the FOB value of the goods is not correct. In fact, in terms of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, if no actual value of freight charges are available, only then and only in that condition can the value of freight be adopted at 20% of the FOB value. Since the actual freight values are available, in such circumstances, the enhancement of freight value at 20% of the FOB value is not justified. Therefore, the said enhancement is set aside.

Issue (c): Whether adopting insurance value at 1.125% of the FOB value of the goods is correct or not.

14. The ld. adjudicating authority has also taken the insurance value at 1.125% of the FOB value whereas the actual cost of insurance incurred by the appellant was available on record. If the same is available on record, then, in terms of Rule 10 of the Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the actual cost paid for insurance is to be treated as the value of insurance charges. In view of this, we find that the enhancement of insurance value by adopting the same at 1.125% of the FOB value is not correct. Therefore, the said enhancement is set aside.

15. In view of the above considerations, we hold that the amendment of the Bills of Entry under Section 149 of the Customs Act, 1962 stands allowed and the appellant shall be entitled to benefits consequent thereto.

16. In the result, we set aside the impugned order and allow the appeal, with consequential relief.

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

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd