**(2015) 11 CESTAT CK 0001**

**In the Customs, Excise And Service Tax Appellate Tribunal**

**Case No :** Customs Appeal No. 50868 Of 2015

M/s Richemont India Pvt. Limited APPELLANT

Vs

CC, New Delhi RESPONDENT

**Date of Decision :** 04-11-2015

**Acts Referred:**

Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 — Rule 2(2), 3, 3(b), 4, 9, 10, 10(1)(c), 10(1)(e), 10(2), 12
Customs Act, 1962 — Section 18

**Citation :** (2015) 11 CESTAT CK 0001

**Hon'ble Judges :** G. Raghuram, J;R. K. Singh, Technical Member

**Bench :** Division Bench

**Advocate :** N. Venkatraman, R. Murlidharan, Dheeraj Srivastava, Amresh Jain

**Final Decision :** Allowed

## Judgement

1. Appeal has been filed against Order-in-original No. SVB/CUS/45/DRPK/2013 dated 30.10.2013 in terms of which the transaction value declared

by the importer in the import invoice in respect of imports made from M/s. Richemont Dubai (FZE) was rejected and value was ordered to be re-

determined by loading the transaction value by 12.5% in terms of Rule 4 of the Customs Valuation Rules, 2007 on the ground that the transaction

value was influenced as the supplier and the appellant were related persons.

2. The appellant has contended that:

(i) The imports were made under a Distributorship Agreement with Richemont Dubai.

(ii) It concedes that the supplier was related person and therefore Revenue was justified in having a reasonable doubt about the declared value.

(iii) The loading has been ordered on the ground that the price charged by the supplier from the independent parties was 12.5% higher than the price

charged from the appellant. However, in the table given in para 6 and 14 of the impugned order, it is nowhere indicated whether the price charged

from the retail importers was in relation to the imports around the same time and at the same level and for the identical goods.

(iv) The imports made by the retailers (the price paid by whom was compared with the price charged from the appellant) were in the range of about

29 to 48 watches per year while the imports made by the appellant were 1859 watches in the year 2012-13 and 2398 watches during 2013-14 which

shows that the level of imports were vastly different and hence not comparable.

(v) The role of a distributor is substantially different and the distributor is also required I expected to arrange marketing, distribution & domestic

logistics, advertising & promotion and keep stock of goods. It cited the judgments in the cases of Komet Precision Tolls India Pvt. Limited vs. CC -

2009 (245) ELT 737 (Tri. Bang.), CC vs. Hewlett Packard Limited - 1999 (108) ELT 221 (Tri. Mad.) to support the proposition that to compare the

value with the value of contemporaneous imports adjustment has to be made on account of difference is commercial level and quantity imported which

has not been done in the present case.

(vi) The expenses made by the appellant on marketing, distribution and advertising are post- importation expenses and therefore are not includible in

the assessable value. The appellant showed that these post import expenses actually amounted to 12.5% which showed that the transaction value was

not influenced by the relationship.

(vii) The appellant has incurred expenses considering the business requirement in India. Out of Rs.8.32 crores of such expenses, Rs.3.28 crores were

accounted for by amount reimbursed by the appellant to the foreign supplier as these expenses were incurred by the foreign supplier on the appellant's

behalf to promote sale of its products in India. As these expenses were reimbursed by the appellant they cannot be considered as consideration

towards the imported goods.

(viii) The appellant was not obliged to incur these expenses in terms of distribution agreement with overseas supplier and therefore these were not

incurred as a condition of sale. It cited the judgments in the cases of Union of India vs. Mahindra & Mahindra Limited - 1995 (76) ELT 481 (SC,) CC vs. Toyota Kirloskar Motor Pvt. Ltd. - 2007 (213) ELT 4 (SC) and CC vs. Essar Steel Ltd. - 2015 (319) ELT 202 (SC )to support the proposition that

post import expenses cannot be included in the value of the imported goods.

3. Ld. DR on the other hand stated that as per the distribution agreement the appellant was required to undertake to employ such commercial methods

as shall enhance the prestige, integrity and market situation of the products and it was also required to submit to the supplier for approval its marketing

and communication budget for the following year which shall include detailed promotion public relations and media plan which showed that the

expense on marketing and sales promotion etc. was a condition of sale and therefore, such expenses are includible in the assessable value in terms of

Rule 10(1)(c) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. As has been indicated, such expenses came to

about 12.5% of the total value of imports. Ld. DR cited the case of Matsushita Television and Audio (I) Limited vs. CC - 2007 (211) ELT 200 (SC) to

support the proposition that payment of continuing royalty was a condition of sale and includible in the assessable value.

4. We have considered the contentions of both sides. At the very outset, it is pertinent to note that the appellant has conceded that the appellant and

the supplier being related persons and Revenue was justified in having reason to doubt the truth or accuracy of the value declared. In terms of Rule 12

of the Customs Valuation (Determination of Value of Imported Goods) Rule, 2007, this is sufficient to allow determination of value as per Rules 4

(onwards) of the said Valuation Rules.

5. Both sides argued at length about includibility/ non includibility of the expenses on advertising and sales promotion etc. made by the appellant in the

assessable value. Both sides submitted several judgments in support of their respective contentions. While the appellant asserted that such expenses

were not a condition of sale and were post import expenses and therefore not includible in the assessable value as per Rule 10(1)(c) of the said Rules,

Id. DR forcefully argued to the contrary. We, however find that the primary adjudicating authority has not invoked Rule 10(1)(c) and 10(1)(e) for

loading the declared value. Indeed, it is seen that in the discussion and finding portion of the impugned order the Commissioner formulated the issue to

be decided in this case as under:

 

(i) Whether the Importer and the Foreign Supplier are related persons in terms of Rule 2(2) of the Valuation Rules, 2007

(ii) Whether the transactions between the Importer and the Foreign Supplier are influenced by such relationship and

(iii) Whether any addition on account of payment of royalty, technical know-how fee, interest etc. made by the Importer to the Foreign

Supplier is required to be made to the assessable value of the goods imported by the Importer from the Foreign Supplier under Rule 10 of

the Valuation Rules, 2007.

But in the remaining discussion and finding portion, nowhere the Commissioner invoked Rule 10 for the purpose of loading the value. As a matter of

fact, as is evident from the ""order portion"" of the impugned order the transaction value has been loaded by 12.5% (only) in terms of Rule 4 of CVR,

2007. Therefore, we do not think it necessary or relevant to dwell on the aspect whether the expenses on advertisement and sales promotion etc.

incurred by the appellant are includible in the assessable value in terms of Rule 10 because the adjudicating authority has not invoked the Rule 10 for

loading the declared value.

6. As the loading has been determined by the adjudicating authority (only) in terms of Rule 4 of the CVR, 2007 it is useful to reproduce the said rule

below:

Rule 4. Transaction value of identical goods.- (1) (a) Subject to the provisions of rule 3, the value of imported goods shall be the

transaction value of identical goods sold for export to India and imported at or about the same time as the goods being value:

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

(b) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same

quantity as the goods being valued shall be used to determine the value of imported goods.

(c) Where no sale referred to in clause (b) of sub-rule (1), is found, the transaction value of identical goods sold at a different commercial

level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the

reasonableness and accuracy of the. adjustments, whether such adjustment leads to an mcrease or decrease m the value.

(2) Where the costs and charges referred to in sub-rule (2) of rule 10 of these rules are included in the transaction value of identical goods,

an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical

goods in question arising from differences in distances and means of transport.

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

value of imported goods.

We find that in para 23 of the impugned order, the Commissioner has categorically noted that ""NIDB data in respect of contemporaneous imports

of identical/ similar goods was scrutinized; however, no data for similar/ identical goods of any other brand or company were available on

the DOV website"".

Rule 4 requires that in applying this Rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same

quantity as the goods being valued shall be used to determine value of imported goods and where no sale referred to in clause (b) of sub-rule (I) is

found the transaction value of identical goods sold at a different commercial level or in different quantities or both is required to be adjusted to take

account of the difference attributable to the commercial level or to the quantity or both and such adjustments is required to be made on the basis of

demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments. The appellant has been able to demonstrate

that as a distributor its imports were at a different commercial level and in much larger quantity compared to the imports made by the individual

retailers. From the tables given in paras 7 and 14 of the adjudication order used to arrive at the finding that the price declared by the appellant was

12.5% lower when the price paid by individual retailers, we find that there is not even a whisper as to what were the commercial levels or quantities

involved in respect of invoice dated 22.11.2011 for imported goods by some unrelated importer and invoice dated 12.12.2012 for imports made by the appellant. These two invoices have been mentioned in the said tables. Thus, the comparison of price per piece on the basis of these two invoices to

infer that the price paid by appellant was 12.5% lower due to relationship is obviously invalid and not in accordance with the requirements of Rule 4 of

the CVR, 2007. Further, the prices were compared only for two models of watches and simple extrapolation thereof to all other models of watches for

the purpose of revising their values upwards does not have any legal basis for sustainability. The appellant has argued, and reasonably so, that the

margin of 12.5% vis-a-vis the price for direct sales to independent retailers is not an unreasonable margin to be given to a distributor. However, we

are not particularly on that aspect; we are only concerned with the determination whether loading has been done in conformity with the requirements

of Rules 4 of CVR, 2007. We find that even in the limited comparison (for only 2 models of watches) as given in tables in paras 7 and 14 of the

impugned order for the purpose of loading the value by 12.5% there is complete disregard of the requirement of adjustment to be made for differences

in commercial levels as well as in the quantity of goods imported and therefore, we do not find the loading of 12.5% to be in conformity with the

requirements of Rule 4 of the CVR. This conclusion is supported by CEST AT decision in the case of Hewlett Packard Ltd. (supra) wherein it was

inter-alia held as under:

.... In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value

of the goods being valued, closely approximates to one of the following values ascertained at or about the same time- the transaction value

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

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

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

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels,

quantity levels, adjustments in accordance with the provisions of Rule 9 of these rules and cost incurred by the seller in sales in which he

and the buyer are not related;

A plain reading of the above provisions shows that when the value of contemporaneous imports are to be considered vis-a-vis imports by related persons, then in view of the proviso to sub-rule 3(b), due account has to be taken of demonstrated difference in commercial levels,

quantity levels and adjustments in accordance with the provisions of Rule 9. Now the facts of this case are undisputed regarding the

contemporaneous imports at higher price cited by revenue. However, learned Advocate for the appellant has seriously contended that the

levels, both commercial and of quantity, in the two imports are very widely different. We find great merit in this argument, because it would

be totally illogical to compare the value of 5 pieces of goods imported directly by consumers for actual use whose cumulative value is only

Rs. 7.5 lakhs with imports of similar goods running into hundreds of crores on 300 or more Bills of Entry per month by HPL. (para 21).

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

7. Regarding the contention of Id. DR that the appellant was required to incur expenses on advertisement, sale and promotion etc. as per the

distribution agreement and such expenses also tum out to be 12.5% which was the discount given to the appellant vis-a-vis the price charged from the

independent retailers and therefore the loading is justified, we find that distribution agreement does not specify any amounts which are required to be

so spent and the approval to be obtained for incurring expenses cannot be read to mean that the exporter had the right to dictate as to how much

amount the appellant was required to spend in these areas. Further, such sales promotion I advertisement cannot be said to be for the benefit of

exporter alone inasmuch as the appellant also would get the benefit thereof and therefore to treat this entire amount as additional consideration for

import of goods in order to arrive at the loading factor is not sustainable. But as stated earlier, we are only concerned with Rule 4 of CVR, 2007

(which the adjudicating authority has used for loading the value) and not with Rule IO thereof while the contention of Id. DR falls within the ambit of

Rule 10 (which has not been used by the adjudicating authority to arrive at loading) and for this reason it is not necessary to discuss this contention of

Id. DR or for that matter the contention of the appellant that expenses incurred were not incurred as condition of sale of goods and so the judgments

cited by both sides regarding inclusion (or otherwise) of the expenses incurred by the appellant in the assessable value in terms of Rule 10 do not remain germane to the issue.

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

appeal is allowed.

 