

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH,
COURT NO. I

CUSTOMS APPEAL NO. 50203 OF 2021

[Arising out of the Order-in-Original No. 29-2020-UG-PRINCIPAL COMMISSIONER dated 29/07/2020 passed by The Principal Commissioner, Customs (Import), New Delhi.]

M/s Hewlett Packard Sales Pvt. Limited

Appellant

Plot No. 24, Slarpuria Arena,
Hosur Road, Adugodi,
Bangalore 560030

Versus

**Principal Commissioner of Customs
ACC (Import) Commissionerate**

Respondent

New Custom House,
New Delhi 110037

**WITH
CUSTOMS APPEAL NO. 50204 OF 2021**

[Arising out of the Order-in-Original No. 29-2020-UG-PRINCIPAL COMMISSIONER dated 29/07/2020 passed by The Principal Commissioner, Customs (Import), New Delhi.]

Shri V. Sridharan,

Appellant

No. 24, Slarpuria Arena,
Hosur Road, Adugodi,
Bangalore 560030

Versus

**Principal Commissioner of Customs
ACC (Import) Commissionerate**

Respondent

New Custom House,
New Delhi 110037

**WITH
CUSTOMS APPEAL NO. 50205 OF 2021**

[Arising out of the Order-in-Original No. 29-2020-UG-PRINCIPAL COMMISSIONER dated 29/07/2020 passed by The Principal Commissioner, Customs (Import), New Delhi.]

Shri B.S. Ravishankar,

Appellant

No. 24, Slarpuria Arena,
Hosur Road, Adugodi,
Bangalore 560030

Versus

**Principal Commissioner of Customs
ACC (Import) Commissionerate**

Respondent

New Custom House,
New Delhi 110037

APPEARANCE:

For HP India, V. Sridharan and BS Ravishankar - Shri V. Lakshmikumaran, learned counsel assisted by Ms. Rubel Bareja and Shri Anurag Kapur

For Revenue- Shri Mihir Ranjan, Special Counsel

AND

CUSTOMS APPEAL NO. 51175 OF 2020

[Arising out of the Order-in-Original No. 29-2020-UG-PRINCIPAL COMMISSIONER dated 29/07/2020 passed by The Principal Commissioner, Customs (Import), New Delhi.]

**Principal Commissioner of Customs
ACC (Import) Commissionerate**

New Custom House,
New Delhi 110037

Appellant

Versus

M/s Hewlett Packard Sales Pvt. Limited

Plot No. 24, Slarpuria Arena,
Hosur Road, Adugodi,
Bangalore 560030

Respondent

APPEARANCE:

For Revenue- Shri Mihir Ranjan, Special Counsel

For HP India, V. Sridharan and BS Ravishankar - Shri V. Lakshmikumaran, learned counsel assisted by Ms. Rubel Bareja and Shri Anurag Kapur for the respondent

CORAM:

HON'BLE JUSTICE MR. DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50860-50863/2025

DATE OF HEARING : 21.05.2025

DATE OF DECISION: 06.06.2025

P.V. SUBBA RAO

The order-in-original dated 29.7.2020 passed by the Principal Commissioner¹ deciding the proposals made in two show cause notices² both dated 25.5.2010 issued by the Directorate General of Revenue Intelligence³ is assailed in these four appeals by M/s. HP India Sales Private Limited⁴ and its

1. impugned order

2. SCN

3. DRI

4. HP India

employees Shri V. Sridharan and Shri B.S. Ravishankar as well as by the Revenue.

2. In the impugned order, the Principal Commissioner confirmed the demand of duty with interest on HP India, held the seized goods to be liable for confiscation under section 111(m) of the Act and imposed redemption fine of Rs. 1,50,00,000/- under section 125 of the Act and imposed penalty on HP India under section 114A of the Act. He also imposed penalties under section 112 (a) of the Act on Shri Sridharan and Shri Ravishankar. However, he refrained from imposing penalties under section 112 and 114AA on HP and on Shri Venkata R K Nakkina, Plant head of HP India under section 112(a) of the Act.

3. **Customs appeal 50203/2021** has been filed by HP India to assail the confirmation of demand of Rs. 23,98,72,726/- on it under the proviso to section 28(1) of the Customs Act, 1962⁵, imposition of redemption fine of Rs. 1,50,00,000/- under section 125 of the Act and penalty of Rs. 23,72,726/- under section 114A of the Act.

4. **Customs appeal 50204/2021** has been filed by Shri V. Sridharan to assail the penalty of Rs. 50,00,000/- imposed on him under section 112(a) of the Act.

5. **Customs appeal 50205/2021** has been filed by Shri B S Ravishankar to assail the penalty of Rs. 50,00,000/- imposed on him under section 112(a) of the Act.

6. **Customs appeal 51175/2020** has been filed by the Revenue asserting that in the facts of the case, the Principal Commissioner should have also imposed penalty on HP India under section 114AA of the Act and on Shri Venkata R K Nakkina, Plant head of HP India under section 112 of Act.

7. The undisputed facts of the case are that during the relevant period, HP India manufactured laptops and desktops in its factory in Pant Nagar, Uttarakhand and sold them with pre-loaded Windows operating system. It's parent company, HP, USA had entered into an agreement with Microsoft, USA for the Windows OS which allowed various subsidiaries of HP including HP India to download the Windows OS and pre-install it in the laptops and desktops. This download itself does not involve any physical movement of goods and hence Customs duty is not relevant for this purpose.

8. If the computer crashes, the Windows OS would be lost along with other software. HP India provided a Quick Recovery (QR) CD to the buyers of the computers so that they could reinstall the OS and other software. The QR CDs had the Windows OS and other software required to recover the desktop or laptop and get it operational and running. Learned counsel for the appellants submits that bulk buyers of the desktops/laptops often want fewer QR CDs than the number of computers which they bought. HP India does not charge its customers separately for the QR CD; it is provided along with the laptop/desktop.

9. HP India imported the QR CDs from M/s Mentor Media Ltd., Singapore⁶ and cleared them under various Bills of Entry declaring its transaction value as the value of the CD. This value included only the cost of blank CD and some cost for copying the software. It did not include the value of the software which the CD contained.

10. The case of the Revenue is that the value of the CD is not the same as the blank CD plus a little towards the cost of copying the software and it should also include the cost of the software which it contains.

11. The case of HP India is that it declared whatever transaction price it had paid to Mentor. It did not pay anything extra for the CD or to anyone else including Microsoft USA as a condition of sale by Mentor. As per the Agreement between HP, USA and Microsoft, it had to pay, and it paid only for downloading the software. The agreement also allowed HP to copy the Windows OS in QR CDs without paying anything extra. Therefore, the only cost of the CD to HP India was what it had paid to Mentor and it declared this price in the Bills of Entry and paid duty on it.

12. HP India has been filing Bills of Entry and clearing the QR CDs as per its declarations. The officers of DRI, Bengaluru receiving intelligence that the CDs were undervalued and full

6. Mentor

duty on them had not been paid, initiated an investigation. They searched the factory of HP India and seized QR CDs worth Rs. 7,12,33,603/- but later released them provisionally. DRI recorded statements of various persons, completed its investigation and issued two SCNs both dated 25.5.2010- the first proposing confiscation of the seized goods and imposition of penalty under section 112 of the Act and the second proposing recovery of differential duty under the proviso to section 28(1) of the Act on all CDs which HP had imported from 5.2.2007 to 25.6.2009. The proposals in both these SCNs were decided by the impugned order.

13. We have heard Shri V. Lakshmikumaran, learned counsel for the appellants assisted by Ms. Rubel Bareja and Shri Anurag Kapur and Shri Mihir Ranjan, learned special counsel for the Revenue and perused the records.

Submissions of HP India, Shri Sridharan and Shri Ravishankar

14. Shri V. Lakshmikumaran, learned counsel for appellants- HP India, Sridharan and Ravishankar made the following submissions:

- (i) The value of the QR CDs cannot be re-determined by adding the royalty amount attributable to the OS pre-installed in the computer system under HP's licence agreement with Microsoft. In the impugned order, the transaction value was rejected and the value was re-determined under Rule 8 of the Customs (Determination of value of imported goods) Rules,

- 1988⁷ and Rule 9 of the Customs (Determination of value of imported goods) Rules, 2007⁸.
- (ii) The transaction value under section 14 of the Act is the price actually paid or payable for the goods for delivery at the time and place of importation where the buyer and seller are not related and the price is the sole consideration for sale.
 - (iii) HP India had declared the price accordingly. There is no allegation that the seller and HP India were related or that any additional amount was paid to the seller. There is also no finding that any amount was paid to anyone as a condition of sale by the seller to HP India.
 - (iv) The value of the imported goods shall be the transaction value as per section 14(1) of the Act and Rule 4 of the 1988 Rules (before 2007) and Rule 3 of the 2007 Rules (from 2007).
 - (v) The transaction value can, however, be rejected under Rule 10A of the 1988 Rules or Rule 12 of the 2007 Rules and if the transaction value is rejected, the price must be determined by comparison (Rule 5 and 6 of the 1988 Rules and Rules 4 and 5 of the 2007 Rules), by Deduction (Rule 7 of 1988 Rules and Rule 7 of the 2007 Rules), by computation (Rule 7A of the 1988 Rules and Rule 8 of the 2007 Rules) or through residual method (Rule 8 of the 1988 Rules or Rule 9 of the 2007 Rules).
 - (vi) In this case, the buyer and seller are not related and it is undisputed that price was the sole consideration for sale.
 - (vii) The department included an intrinsic value of the software in the CD which is erroneous.
 - (viii) The royalty attributed to the pre-installed software cannot be added to the value of the QR CD.
 - (ix) Only the price paid or payable for the imported goods should be considered for determining the value. Reliance is placed on **Eicher Tractors Ltd., Haryana versus Commissioner of Customs, Mumbai⁹** and **Ravindra Chandra Paul vs Commissioner of Customs (Prev)¹⁰**.
 - (x) Even if value paid for pre-installed software is includible, it cannot be done under Rule 9(1) (c) of the 1988 Rules or Rule 10(1) (c) of the 2007 Rules.
 - (xi) What cannot be done directly under Rule 9(1) (c) of the 1988 Rules or Rule 10(1) (c) of the 2007 Rules cannot be done indirectly under Rule 8 of the 1988 Rules or Rule 9 of the 2007 Rules.
 - (xii) The software imported on QR CDs is not goods and hence is not liable to Customs duty. Reliance placed in

7. 1988 Rules

8. 2007 Rules

9. (2001) 1 SCC 315

10. (2007) 3 SCC 93

the impugned order on **Tata Consultancy Services** versus **State of Andhra Pradesh**¹¹ is misplaced as that judgment was in the context of levy of sales tax. The QR CDs imported by the appellant do not qualify as goods because they are only a backup copy and these are not accompanied by any licence.

- (xiii) The demand is barred by limitation and therefore, extended period of limitation was wrongly invoked in the case.
- (xiv) Without prejudice to the above submissions, what is in dispute is the Additional duty of Customs under section 3(1) of the Customs Tariff Act, 1975. Some provisions of the Customs Act were made applicable to the additional duty of customs by section 3(8) of the Customs Tariff Act. These do not include the provisions of interest, fine, penalty and confiscation. Reliance is placed on the judgment of Bombay High Court in **Mahindra & Mahindra Ltd. vs UOI**¹² upheld by the Supreme Court¹³.
- (xv) Without prejudice to the above submissions, the quantification of demand is incorrect and it needs to be recomputed considering the notification no. 20/2006-Cus dated 1.3.2006.
- (xvi) In view of the above, all three appeals may be allowed and the impugned order may be set aside.

Submissions of the Revenue

15. Shri Mihir Ranjan learned special counsel for the appellant vehemently supported the impugned order and submitted as follows:

- (i) The impugned order is correct and proper and needs to be upheld except to the extent that no penalty under section 114AA was imposed on HP India and no penalty under section 112 was imposed on Shri Nakkina; hence the Revenue's appeal.
- (ii) The Commissioner did not impose any penalty on HP India under section 114AA holding that penalty under section 114AA is impossible only on a person for any fault in his personal capacity. There is nothing in the section to suggest that it can only be imposed on individuals. The Commissioner did not cite any authority to hold that penalty can only be imposed on individuals under section 114AA.

11. 2004 (178) ELT 22 (SC)

12. (2023) 3 Centax 261 (Bom.)

13. 2023(386) ELT 11 (SC)

- (iii) Shri Nakkina was the plant head of HP India and he was aware of all the imports of QR CDs which contained the original OS and he was also involved in the use of these CDs. The wilful and fraudulent undervaluation and mis-declaration could not have happened if he had exercised due diligence at the right time. Therefore, penalty should have been imposed on him under section 112.
- (iv) The goods were described by the appellant in the Bills of Entry as:
 - (a) 483886-001/KIT, DVD ROM Vista Business 32 SPIEN (Software) for use in factory production; and
 - (b) 459522-B23/Kti, CD ROM HP BACKUP & RESTORE VISTA (SOFTWARE) FOR USE IN FACTORY PRODUCTION.
- (v) There is no dispute that the appellant did not import blank CDs but imported CDs containing the original operating systems, drivers and application software.
- (vi) As per condition in para 2(e)(ii) of the license agreement between Microsoft and HP, HP has to distribute to each customer's system with at least one recovery solution which can be a hard disk recovery system, recovery media or both.
- (vii) At the time of import, HP India had not provided cross reference to the original download of software in the factory.
- (viii) Since the QR CDs contained the original OS, the value of the software is represented by the licence fee which was not included in the assessable value. The licence agreement is unambiguous but HP India had not produced the licence agreement at the time of import.
- (ix) Therefore, the submission of HP India that the value of the licence for the software cannot be included in the value of the CD is not correct.
- (x) The software contained in the CDs is not just a backup but is the original software.
- (xi) The submission of HP India that the payment of licence fee was not a condition of sale of the imported QR CDs is not relevant because that is not the case of the department.
- (xii) Once any software is put on a media, it becomes goods as held by the Supreme Court in **Tata Consultancy Services** and in **Commissioner of Income Tax-V versus Oracle Software**¹⁴. Therefore, the CDs containing the software cannot be treated as or valued equal to blank CDs.
- (xiii) HP India had, with the malafide intention of evading customs duties, deliberately not declared the value of the OS embedded in the QR CDs. It also did not disclose the agreement which it had with the Microsoft.

Therefore, extended period of limitation was correctly invoked and penalty under section 114A of the Act was correctly imposed.

- (xiv) For the aforesaid reasons the confiscation of the seized goods under section 111 (m) of the Act and imposition of penalty under section 112 of the Act also deserve to be upheld.
- (xv) The impugned order may be upheld except to the extent it did not impose penalty under section 114AA of the Act on HP India and under section 112 of the Act on Shri Nakkina.
- (xvi) Revenue's appeal may be allowed and the appeals of HP India, Shri Sridharan and Shri Ravishankar may be dismissed.

Findings

16. We have considered the submissions advanced by Shri Lakshmi Kumaran, learned counsel for HP India, Shri Sridharan and Shri Ravishankar and by Shri Mihir Ranjan, learned Special Counsel for the Revenue and perused the records.

17. The facts of the case are not in dispute. HP India imported QR CDs from Mentor of Singapore and these CDs contained the Microsoft OS and also other drivers. It declared a value of less than US\$ 1 per CD being the cost which it had paid to Mentor towards the cost of the blank CD and the cost of copying the software.

18. Learned counsel for HP India produced before us during hearing printouts showing the cost of the Microsoft OS (Windows Vista) during the relevant time. They cost about US\$ 175 per CD which was more than a hundred times the transaction value declared by HP India. The issues to be decided by us are:

- a) Should the value of the imported CDs be as per the declared transaction value or should it be determined

under Rule 8 of the 1988 Rules or Rule 9 of the 2007 Rules as was done in the impugned order? It needs to be noted that the 1988 Rules applied until the 2007 Rules were notified and thereafter, the 2007 Rules would apply but they are more or less similar.

- b) Consequently, can the differential duty be demanded?
- c) Has the extended period of limitation under the proviso to section 28(1) been correctly invoked in this case?
- d) Is the confiscation of the seized goods under section 111(m) correct and consequently, if the redemption fine imposed under section 125 fair and proper?
- e) Were the penalties correctly imposed on HP India under section 114A?
- f) Did the Commissioner err in not imposing penalty on HP India under section 114AA as asserted by the Revenue?
- g) Were the penalties correctly imposed on Shri Sridharan and Shri Ravishankar under section 112?
- h) Did the Commissioner err in not imposing penalty on Shri Nakkina under section 112 as asserted by the Revenue?

Value of the imported QR CDs

19. According to HP India, it declared its transaction value honestly and it had not paid any extra amount to Mentor for the CDs. Mentor and HP India are also not related parties. HP India has no written agreement with Mentor; only purchase orders were placed which also matched with the invoices in terms of values. HP India also did not pay any other party any amount as a condition of sale of the CDs by Mentor. Therefore, according to HP India, the CDs must be assessed as per the transaction value.

20. Before we examine section 14 of the Act and the 1988 Rules and the 2007 Rules, it is important to examine the nature of the Customs duties itself. As explained by Justice GP Singh in *Principles of Statutory Interpretation*¹⁵, "the nature of tax imposed by a statute has to be determined by examining the pith

15. Justice G P Singh, Principles of Statutory Interpretation, 15th edition

and substance of the statute and by paying more attention to the charging section than to the basis or machinery adopted for assessment and collection of tax¹⁶ for, the nature of tax is different from the measure of tax¹⁷. There are three components of a statute *viz.*, subject of tax, person liable to pay the tax and the rate at which the tax is levied¹⁸."

21. The nature of customs duties can be understood from the taxable event which makes them payable. Section 12 of the Act is the charging section for basic duties of customs and it reads as follows:

Section 12. Dutiable goods. –

(1) Except as otherwise provided in this Act, or any other law for the time being in force, **duties of customs shall be levied** at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **on goods imported into, or exported from, India.**

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

22. The charging section for additional duties of customs is section 3(1) of the Customs Tariff Act¹⁹ the relevant portion of which reads as follows:

3. Levy of additional duty equal to excise duty, sales tax, local taxes and other charges.—(1)Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the

16. *Ibid*, page 614 citing *Rallaram v Province of East Punjab*, AIR 1949 FC 81, pp 86,87

17. *Ibid*, page 614 citing *State of West Bengal v Kesoram Industries Ltd*, AIR 2005 SC 1646: (2004) 10 SCC 201, p 323

18. *Ibid*, page 614 citing *State of Kerala v Alex George*, AIR 2005 SC 1224: (2005) 1 SCC 299, p306

19. Tariff Act

additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article:

23. What is evident from the above charging sections is that the taxable event for charging the basic customs duty is either import of goods into India or export of goods out of India and for the additional duty of customs it is the import of goods into India. Thus, if goods are not imported into India, no customs duty is chargeable even if there was a sale of goods. For example, if one imports the goods and before they cross the Customs frontiers, re-exports them, no duty of customs is chargeable.

24. Conversely, if there is an import of goods even if there is no sale, duty of customs is chargeable because the pith and substance of duty of customs is import or export and not sale.

25. The measure of tax can be anything prescribed in the Act. In case of Customs duties, the measure is different for different types of goods- it may be the quantity of the goods imported (if specific rate of duty is prescribed under the tariff), the value of the goods imported (if *ad valorem* rate of duty is prescribed under the tariff) or tariff value (if *ad valorem* rate of duty is prescribed under the tariff and the Central Board of Indirect Taxes and Customs notifies a tariff value for the goods).

26. The valuation under section 14 of the Act and the 1988 Rules or 2007 Rules are relevant to determine the value if the goods are chargeable to import duty on *ad valorem* basis. This value shall generally be the transaction value but there are exceptions.

27. There could be many situations where goods are imported but there is no transaction value or the transaction value may not fully reflect the value of the imported goods but the charge of import duty subsists even in such cases. For example, if one imports one's own goods (such as baggage during transfer of residence), there is undoubtedly import of goods but there is no transaction, no buyer and no seller. Gifts, free samples, free prototypes of goods are examples which may be sent by an exporter to an importer in India but there is no transaction value. Goods may also be imported and there may be a transaction value but it may not reflect its true value- for instance, transfer among group companies located in India and their overseas counterparts or where the overseas seller sells them for a very small price instead of gifting them.

28. Section 14 of the Act and the 1988 Rules and the 2007 Rules provide for determination of value of the goods in each and every case where the duty is chargeable on *ad valorem* basis. The types of cases illustrated in the previous paragraph and any other situation is covered by the Rules.

29. The value of the disputed goods in this case is, according to HP India, the transaction value, i.e., the value of the blank CD plus the charges for copying the software. The software copied in the CDs includes various drives and also the Window Vista OS. HP India did not pay anything extra either to Mentor or to anyone else as a condition for sale of the CDs.

30. According to the Revenue, the value of CDs with all the software cannot be the same as the value of blank CDs and the real worth of the CDs is in the software and therefore, the value must be re-determined.

31. A question which may arise is why did Mentor sell to HP India the CDs with all the software including the Windows Vista for the price of a blank CD and a little towards the cost of copying the software when Mentor and HP India are not related persons and nothing is paid to either to Mentor or to anyone else as a condition for sale? To put it in perspective, what HP India declared was less than US\$1 per CD while (as per the documents produced by the learned counsel for HP India during hearing) the cost of Windows Vista on CD during the relevant period was about US\$175.

32. The reason is simple. The software, including the Window Vista OS which was copied on the CDs by Mentor belonged to HP India either being its own software or it having been obtained a licence from Microsoft. The blank CD and the effort in copying the software was the only contribution of Mentor. HP India

imported CDs with the software but the transaction value reflected only the value of the blank CDs (and cost of copying) and not the value of the software. Therefore, the transaction value of the CDs in this case is less than 1% of the value of CDs with Windows Vista software in the market. A couple of illustrations will make this situation very clear. The value of any printed book is far greater than the cost of the paper and the ink - the overwhelming portion of the value being the value of its content. If a person who has a copyright to a book gets copies of the book printed, say, in Singapore, and imports them, the printer in Singapore will only invoice him towards the cost of the paper and ink and effort involved in printing. He will not charge for the content of the book which is the overwhelming part of the value. While books will be imported, invoice value will only cover the cost of paper, ink, etc. Similarly, if a person owns a work of art worth a million dollars and it is located somewhere outside India and he engages a specialized agency to pack and transport it to India, the agency will only charge for the specialized packing material, the service of packing and transport. The agency will not invoice him for the work of art itself because it anyway belonged to the importer. What will be imported into India will be artwork worth a million dollars along with the packing materials but the invoice will be only for the packing material and it may be a few thousand dollars.

33. In all such cases, what will be imported is partly the importer's own goods or property and partly the overseas

supplier's goods or property and the overseas seller does not invoice the importer for that portion of the goods or that portion of the value which is the importer's own property. Such imports fall somewhere between the import of one's own goods and import of goods purchased from the overseas supplier.

34. The question is how the value of such goods should be determined. Since the taxable event for charging the duty of customs is the act of importation of the goods and not the sale or purchase, whatever goods are imported should be valued in whichever condition they are imported. Ownership of the goods is not relevant.

35. We now proceed to examine the legal provisions relevant to valuation. The value of the goods should be determined as per section 14 of the Act and the 1988 Rules and the 2007 Rules. The 1988 Rules are similar to the 2007 Rules which have been notified by Notification No. 94/2007-Cus (NT) effective from 10.10.2007. The 1988 Rules apply only to the period from 5.2.2007 to 9.10.2007 and the 2007 Rules apply to the rest of the period of dispute. We, therefore, proceed to examine the 2007 Rules including the relevant portions of 1988 Rules as required.

36. Section 14 of the Act reads as follows:

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)

37. The non-obstante clause in sub-section (2) of section 14 gives the Board the power to fix tariff values for any class of goods and if fixed, the tariff value will be the value to determine the duty. This sub-section is not relevant to this case. In all other

cases, the value to be reckoned for calculating the Customs duty shall be the transaction value subject to five conditions:

- a) Buyer and seller are not related.
- b) Price is for delivery at the time and place of importation, i.e., all costs up to the point of import are to be included. For instance, if the sale is on Free on Board basis, the costs of transportation to the place of import, transit insurance, etc. will have to be added.
- c) Price is the sole consideration for sale.
- d) Some amounts indicated in the first proviso to sub-section (1) of section 14 must be included.
- e) Valuation will be as per any other conditions as may be specified in the Rules.

38. The first proviso to sub-section (1) of section 14 provides for some additions to the transaction value. The second proviso to this sub-section provides for Rules to be made in this behalf to provide for:

- a) the circumstances in which **the buyer and the seller shall be deemed to be related;**
- b) the manner of determination of value in respect of goods **when there is no sale,**
- c) the manner of determination of value in respect of goods if **the buyer and the seller are related,**
- d) the manner of determination of value in respect of goods where **price is not the sole consideration for the sale;**

- e) the manner of determination of value in respect of goods in **any other case**; and
- f) 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.

39. The 1988 Rules and the 2007 Rules were framed as per the second proviso to sub-section (1) of section 14. The 2007 Rules comprise 13 Rules in all. Rules 1 and 2 are Preliminary rules. Rule 3 states that subject to Rule 12, the value shall be the transaction value adjusted according to Rule 10. Rule 10 provides for certain costs to be included in the transaction value. Rule 12 provides for the proper officer to reject the transaction value if he has reason to doubt its truth and accuracy. **Thus, unless the proper officer rejects the transaction value under Rule 12, the valuation has to be based on transaction value as per Rule 3 with some additions, if necessary, as per Rule 10.**

40. Rule 3 of the 2007 Rules further provides that if the valuation cannot be done under that Rule, i.e., as per the transaction value with additions as per Rule 10, then **it must be done sequentially under Rules 4 to 9. Rule 4** provides for the valuation to be done on the basis of **identical goods. Rule 5** provides for the valuation to be done on the basis of the value

of **similar goods**. Rule 6 states if Rules 4 and 5 cannot determine the value then they must be done as per Rule 7 and thereafter Rule 8 but this sequence can be reversed at the option of the importer. In other words, if the importer so chooses, Rule 8 can be applied directly instead of Rule 7. **Rule 7** provides for a **deductive method of valuation** on the basis of prices of similar or identical goods sold in India and after making some deductions from such prices. **Rule 8 provides for a computed value**, i.e., based on the cost of raw material, cost of manufacture, reasonable profit, etc. In view of Rule 6, the importer may choose the computed value without examining the feasibility of determining value through deductive methods. **Rule 9 is the residual method** which provides for determining the value where it cannot be determined under Rules 3 to 8. **Rule 10**, as already discussed, provides for addition of some costs to the transaction value if the valuation is done as per Rule 3. Rule 11 requires the importer to make a declaration. Rule 12 lays down the provision for rejection of transaction value. Rule 13 provides for interpretative notes for the Rules.

41. **To sum up, valuation has to be done as per Section 14 of the Act and the 2007 Rules sequentially** as follows:

- a) If a **tariff value** is fixed by the Board, it is the value (sub-section (2) of Section 14);
- b) If no tariff value is fixed by the Board, valuation is as per the **transaction value, if necessary, with some**

additions (as per the first proviso to sub-section (1) of section 14 and as per Rule 10);

- c) If the transaction value is rejected as per Rule 12 by the proper officer, valuation has to be done as per the **value of identical goods** (Rule 4);
- d) If transaction value is rejected and there is no value of identical goods, then it must be as per the **value of similar goods** (Rule 5);
- e) If transaction value is rejected and there is no value of identical goods or similar goods, value must be determined through **Deductive method** (Rule 7)
- f) If transaction value is rejected and there is no value of identical goods or similar goods and it is not possible to determine value following deductive method, then value must be determined through **computation** (Rule 8)
- g) If the importer so chooses, computational method may be adopted without examining the deductive method first (Rule 6).
- h) If the transaction value is rejected and there is no value of identical goods or similar goods and if it is also not possible to determine the value through deductive method or computational method, then value may be determined through the **residual method** by the officer following the above principles (Rule 9).

42. The next question which arises is when and how the proper officer can reject the transaction value. Rule 12 reads as follows:

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 mis-declaration 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.

43. Thus, if the officer has **reason to doubt** the truth and accuracy of the transaction value, he can call for information including documents and evidence. If the information and evidence is presented and after examining it or if no information or evidence as called for is presented, if the proper officer has **reasonable doubt**, then it shall be deemed that the value cannot be determined as per Rule 3 (i.e., based on transaction value with additions, if necessary). While the officer can, in the first place, call for information and evidence if he has reason to doubt, at the second stage, he should have not just some reason to doubt but a **reasonable doubt**. If he has such reasonable doubt, then the transaction value can be rejected. The grounds on which the proper officer may raise doubts about the truth and accuracy of the transaction value have been illustrated in Explanation 1 (iii) to Rule 12. The list is inclusive and not exhaustive.

44. If the importer so requests, the proper officer has to give his reasons for rejection of the transaction value in writing after giving him an opportunity of being heard. Rule 10A of the 1988 Rules which provides for rejection of the transaction value is also similarly worded.

45. In this case, the neither the SCN issued by the DRI nor the impugned order issued by the Commissioner record any reasons to doubt the truth and accuracy of the transaction value. Neither the SCN nor the impugned order has also recorded that any

additional information or clarification was sought from HP India because of the doubt and that either no information has been provided by HP India or after considering the information provided by HP India, the proper officer still had a reasonable doubt about the truth and accuracy of the transaction value.

46. Rejection of the transaction value under Rule 12 of the 2007 Rules (or Rule 10A of the 1988 Rules) is the pre-requisite for determining the value under any of the other valuation Rules. If this process was undertaken, HP India would have been aware that its transaction value may be rejected and it would have had an opportunity of seeking an opportunity of being heard and an order in writing of the reasons for rejection of the transaction value under Rule 12(2) of the 2007 Rules (or Rule 10A (2) of the 1988 Rules). Unless the transaction value is rejected, the value has to be determined under Rule 3 after making adjustments as per Rule 10 of the 2007 Rules (or under Rule 4 after making adjustments as per Rule 9 of the 1988 Rules). We reproduce below Rules 3, 10 and 12 of the 2007 Rules and the corresponding Rules 4, 9 and 10A of the 1988 Rules.

2007 Rules

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.**

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) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-
 - (i) **commissions and brokerage**, except buying commissions;
 - (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
 - (iii) **the cost of packing** whether for labour or materials;
- (b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:-
 - (i) materials, components, parts and similar items incorporated in the imported goods;
 - (ii) tools, dies, moulds and similar items used in the production of the Imported goods;
 - (iii) materials consumed in the production of the imported goods;
 - (iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;
- (c) **royalties and licence fees** related to the imported goods that the **buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued**, to the extent that such royalties and fees are not included in the price actually paid or payable;
- (d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(e) all **other payments actually made or to be made as a condition of sale of the imported goods**, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

Explanation.- Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

(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, for delivery at the time and place of importation and shall include -

(a) the **cost of transport of the imported goods to the place of importation**;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the **cost of insurance**:

Provided that -

(i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c);

(iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free onboard value of the goods;

Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii).

Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport referred to in clause (a).

Explanation.- The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on chartered vessels, lighterage or barge charges.

(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this 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 incomparable 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 mis-declaration 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.

1988 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 required 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 value;

(g) 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 9 of these rules;

(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 of similar goods in sales to unrelated buyers in India; (ii) the deductive value for identical goods or similar goods; (iii) the computed value for identical goods or similar goods.

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

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

9. Costs and services.

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

(a) the following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely :

(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for customs purpose with the goods in question;

(iii) the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely :

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller,

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller, to the extent that such payments are not included in the price actually paid or payable.

(2) For the purpose of sub-section (1) and sub-section (1-A) 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, for delivery at the time and place of importation and shall include -

(a) the cost of transport of the imported goods to the place of importation;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the cost of insurance:

Provided that -

- (i) where the cost of transport referred to in Clause (a) is not ascertainable, such cost shall be twenty percent of the free on board value of the goods;
- (ii) the charges referred to in Clause (b) shall be one per cent, of the f.o.b. value of the goods plus the cost of transport referred to in Clause (a) plus the cost of insurance referred to in Clause (c);
- (iii) where the cost referred to in Clause (c) is not ascertainable, such cost shall be 1.125% of f.o.b. value of the goods:

Provided further that in the case of goods imported by air, where the cost referred to in Clause (a) is ascertainable, such cost shall not exceed twenty per cent of the f.o.b. value of the goods:

Provided also that where the f.o.b. value of the goods is not ascertainable, the cost referred to in Clause (a) shall be twenty per cent. of the f.o.b. value of the goods plus cost of insurance for Clause N above and the cost referred to in Clause (c) shall be 1.125% of the f.o.b. value of the goods plus cost of transport for Clause (iii) above.

(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.

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).

47. Without rejecting the transaction value, the impugned order re-determined the value under the residual provision of Rule 9 of the 2007 Rules (and Rule 8 of the 1988 Rules). The re-determination of the value, therefore, cannot be sustained on merits.

48. Learned counsel for the appellant also submitted that the demand cannot also be sustained because it is based on adding the amount of licence fee which HP paid to Microsoft invoking Rule 9 of the 2007 Rules. Such addition, according to the learned

counsel, is not correct because of two reasons. Firstly, no amount was paid at all to Microsoft for the copy of Windows OS which was copied on the imported CDs and the amount was paid only for the downloaded copy of Windows. Secondly, the payment to Microsoft was not a pre-condition for sale and therefore, it was not includible in the value as per Rule 10(1)(c) read with Rule 3 of the 2007 Rules. According to the learned counsel, if the licence fee cannot be included under Rule 10(1)(c), it cannot also be included as per Rule 9 of the 2007 Rules. According to the learned special counsel for the Revenue, no demand was made at all invoking Rule 3 read with Rule 10(1)(c) of the 2007 Rules and the demand was made under Rule 9 of the 2007 Rules. This Rule was invoked because value could not be determined under Rule 3 read with Rule 10(1)(c) or under Rule 4,5,7 or 8 of the 2007 Rules.

49. We do not find it necessary to examine these submissions because the transaction value was not rejected in the first place under Rule 12 of the 2007 Rules (or Rule 10A of the 1988 Rules) in the impugned order as well as in the SCN. Therefore, the determination of value under any Valuation Rule other than Rule 3 of the 2007 Rules (or Rule 4 of the 1988 Rules) cannot be sustained.

Limitation

50. Although we have decided the question of valuation in favour of the appellant, we also proceed to decide the question of

limitation. Demand of duty not paid or short paid or not levied or short levied can be raised under section 28 of the Act within the normal period of the limitation. Undisputedly, the entire demand in this case was raised beyond the normal period of limitation. The proviso to section 28(1) of the Act provides for raising a demand invoking extended period of limitation if the duty was not paid or short paid by reason of collusion, wilful misstatement or suppression of facts. The entire period of demand is under the extended period of limitation. This proviso was invoked in issuing the SCN and in confirming the demand on the ground that the appellant had not disclosed the agreement which it had with Microsoft.

51. We have seen copies of the CDs and also their pictures in the file. They clearly indicate that they are meant for restoration and also indicate all the software which they contain including the Windows Vista. The appellant did not suppress any information or even fail to produce any information which it had any obligation to produce. After seeing that the CDs had Windows Vista, if the officer wanted any additional information and wanted to know the details of the licence which the appellant had with Microsoft for the CDs, he could have asked for them. Otherwise, the appellant had no reason to submit a copy of its licence agreement with Microsoft. The allegation in the SCN and the finding in the impugned order that the appellant had suppressed any facts cannot be sustained. We, therefore, also find in favour of the appellant on the question of limitation.

Confiscation of the goods under section 111(m)

52. The seized CDs were confiscated under section 111(m) on the ground that they did not correspond in value to the declaration in the Bill of Entry. This allegation is based on the re-determination of the value which we have already found cannot be sustained. Section 111(m) reads as follows:

Section 111. Confiscation of improperly imported goods, etc. -

The following goods brought from a place outside India shall be liable to confiscation: -

(m) any goods which do not correspond in respect of value or in any other particular **with the entry made under this Act** or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment referred to in the proviso to sub-section (1) of section 54;

53. The entries made under the Act are the Bills of Entry filed under section 46 of the Act in this case. The case of the Revenue is that the values declared in the Bills of Entry do not correspond to the values re-determined in the impugned order. Such an interpretation of section 111(m) cannot be countenanced. The importer is required by law to make an entry by filing a Bill of Entry under section 46 of the Act and is also required to self-assess duty under section 17 of the Act. There is no separate mechanism to self-assess duty. When filing the Bill of Entry, the importer has to truthfully fill in all the details in respect of the imported goods such as the nature of the goods, quantity, value, and country of export and is also required to classify the goods as per the Customs Tariff and exemption notifications. Based on this data, the system calculates the duty which completes the

self-assessment by the importer. The proper officer can re-assess the Bill of Entry. Thus, the remedy against self-assessment is the re-assessment by the proper officer (before clearance of the goods) or an appeal to the Commissioner (Appeals).

54. Evidently, the Bill of Entry includes many facts such as the nature of the goods and quantity and also includes elements which are matters of opinion of the importer such as the classification of the goods and the exemption notifications which would apply. Matters of opinion cannot be said as true or false. The importer may hold some opinion and self-assess the duty and the proper officer may hold a different opinion and re-assess the duty. On appeal, any decision can further be modified at any stage of appeal. Goods will not become liable to confiscation under section 111(m) simply because of entries in the Bills of Entry which are matters of opinion such as the classification and exemption notification do not correspond to the views taken by the proper officer during re-assessment or by an adjudicating authority or an appellate authority in the proceedings before him.

55. As far as the value is concerned, it has to be truthfully declared. The importer cannot import goods for say, US\$ 2,000/- and declare the value as US\$ 1,000/-. The importer has to truthfully declare the transaction value and any other details which are called for. The importer has no authority or responsibility to reject the transaction value and re-determine

the value using some other method. Rule 12 of the 2007 Rules and Rule 10A of the 1988 Rules empower only the 'proper officer' to do so. It is impossible for the importer filing a Bill of Entry to anticipate if the proper officer would reject the transaction value and if so, how he will re-determine the value and what would be that value and file a Bill of Entry indicating that value which the proper officer may finally determine. It is even more impossible for any importer to anticipate if after the goods are cleared, DRI will one-day start an investigation into its imports and then propose to re-determine the value as something other than the transaction value and file the Bill of Entry accordingly indicating the anticipated future value which DRI may find correct if it investigates the matter. The responsibility of the importer is confined to truthfully declaring the transaction value in the Bill of Entry. If the transaction value is not indicated correctly, the goods will be liable for confiscation under section 111(m) and NOT if the value declared in the Bill of Entry do not match with some value determined later by the proper officer during re-assessment or in any investigation or adjudication proceedings.

56. Therefore, *de hors* the re-determination of value, the confiscation of the goods under section 111(m) cannot be sustained and needs to be set aside.

Penalties

57. Penalties have been imposed under section 114A of the Act on HP India and under section 112 of the Act on Shri Sridharan

and Shri Ravishankar. According to the Revenue penalties should also have been imposed under section 114AA on HP India and under section 112 on Shri Nakkina. These sections read as follows:

“SECTION 112. Penalty for improper importation of goods, etc.-
Any person, -
(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or
(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable, -
(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;
(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:
.....”

.....
“Section 114A. Penalty for short-levy or non-levy of duty in certain cases. -
Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:.....”

“Section 114AA. Penalty for use of false and incorrect material.
- If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.”

58. The penalties under section 112 of the Act are contingent upon the goods being liable to confiscation under section 111 of the Act. Since we have held that the goods were not liable for confiscation under section 111 of the Act for multiple reasons, the penalties under section 112 of the Act cannot be sustained. Penalty under section 114A of the Act is imposable if duty is not

paid or short paid by reason of collusion, wilful misstatement or suppression of facts. Since we have found the demand of duty itself is not sustainable either on merits or on limitation, the penalty under section 114A of the Act also cannot be sustained. Penalty under section 114AA of the Act is imposable for wilfully making wrong declaration. HP India made no wrong declaration. It is the case of the Revenue that the value should be re-determined which we have found against the Revenue. Therefore, no penalty was imposable under section 114AA of the Act. **In short, all penalties need to be set aside.**

59. To sum up:

- (a) The re-determination of the value of the CDs imported by HP India cannot be sustained because the transaction value was not rejected under Rule 12 of the 2007 Rules and Rule 10A of the 1988 Rules. Consequently, the entire demand deserves to be set aside on merits.
- (b) The demand also cannot be sustained because the elements necessary to invoke extended period of limitation were not present in this case and the entire period of demand is beyond the normal period of limitation.
- (c) In the Bill of Entry, the importer only has only an obligation to declare the value which it knows and has no obligation to anticipate if the proper officer or any adjudicating authority would reject the transaction value and if so, what value such officer would find correct and file the Bills of Entry accordingly. Section 111(m) of the Act does not require the importer to do the impossible. Therefore, confiscation of the goods under section 111(m) of the Act cannot be sustained in this case even if the re-determination of value was correct.
- (d) Consequently, penalties under section 112 of the Act which are imposable if the goods are liable to confiscation can also not be sustained.
- (e) Penalty under section 114A of the Act is imposable if duty is not paid or short paid by reason of collusion, wilful mis-statement or suppression of facts. Since we have set aside the demand of duty

- both on merits and limitation, penalty under section 114A of the Act cannot be sustained.
- (f) Penalty under section 114AA of the Act is imposable for making false declarations. There is no evidence of any false declaration in this case and hence the penalty cannot be sustained.

60. In view of the above, the impugned order is set aside.

Customs Appeal 50203/2021 filed by HP India is allowed and the demand of duty and penalties imposed on it are set aside.

Customs Appeal 50204/2021 filed by Shri V. Sridharan is allowed and the penalty of Rs. 50,00,000/- imposed on him under section 112(a) of the Act is set aside. **Customs Appeal 50205/2021** filed by Shri B S Ravishankar is allowed and the penalty of Rs. 50,00,000/- imposed on him under section 112(a) of the Act is set aside. **Customs Appeal 51175/2020** filed by the Revenue is rejected. HP India, Shri Sridharan and Shri Ravishankar will be entitled to consequential reliefs, if any.

(Order pronounced in open court on 06/06/2025.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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