CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

C/EH/50091/2020 with Custom Appeal No. 50017 of 2019

(Arising out of order-in-original No. 30/2018/RNS/COMMR./ IMP/ICD/TKD dated 23.10.2018 passed by the Commissioner of Customs (Import), Inland Container Depot, Tughlakabad, New Delhi).

M/s Indo Rubber and Plastic Works **Appellant**
C-13, Sports Goods Complex
Delhi Road, Meerut, U.P.

VERSUS

Commissioner of Customs **Respondent**
Inland Container Depot
Tughlakabad, New Delhi.

APPEARANCE:

Shri Abhishek A. Rastogi, Shri Pratyush P. Saha and Ms. Rashmi Deshpande, Advocates for the appellant
Shri Sunil Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C. J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. 50240/2020

DATE OF HEARING: 10.02.2020
DATE OF DECISION: 13.02.2020

ANIL CHOUDHARY:

The appellant is a proprietary concern engaged in the manufacture of sports goods under its own brand name 'Vicky'. They are also engaged in importing and distribution of sports goods of 'Li Ning' brand of sports goods like Badminton Racquets, shuttles, shoes, clothes, bags, water bottles etc. from M/s Sunlight Sports Pte. Ltd., Singapore.

2. The appellant entered into a distribution agreement dated 01.01.2010 with Sunlight sports for the purpose of import and sale of 'Li Ning' branded sports goods within India (except Tamil Nadu, Andhra Pradesh & Kerala). Article 7 of the agreement pertains to marketing, advertising and promotion of the 'Li Ning' products within India. Relevant extracts from the distribution agreement are reproduced below:

> *"Article 4 –*
> *The Distributor will use its best endeavours to promote and extend sales of Goods within the Territory.*
>
> *Article 7 –*
> *The Distributor will bear all costs of Marketing, Advertising and promotions for the Territory.*

"The Distributor - (appellant) hereby expressly agrees to implement such programmes and incur such advertising and promotional expenditure as may be agreed during such discussions. In the event that the Company (Sunlight sports) agrees to be responsible for any expenditure in connection therewith, and that the Distributor shall incur expenses on its behalf, the Distributor hereby expressly agrees that it shall not, at any time, spend more than the amount that the Company shall have agreed in writing shall be so spent. Any claims by the Distributor on the company in respect of such expenditure, shall be supported by vouchers evidencing the sums claimed".

3. Further, Sunlight Sports (represented by appellant) has entered into an agreement with Karnataka Badminton Association (KBA) dated 12.09.2012 for promotion of the 'Li Ning' products. Under this agreement, Sunlight Sports have to provide various sports equipment to KBA. In turn, Sunlight Sports and the 'Li Ning' brand becomes the title sponsor for State Championships and the sponsor for various other badminton events conducted by KBA. Further, KBA teams

representing the State at State or National level tournaments are obliged to use 'Li Ning' branded equipment, clothes, shoes etc. The territory assigned to the appellant for distribution is whole of India except the States of Tamilnadu, Andhra Pradesh and Kerala.

4. Another agreement dated 01.02.2014 has been entered into by Sunlight Sports, with Ms. P.V. Sindhu, a prominent badminton player, through M/s Sporty Media Solutionz Pvt. Ltd., the management company representing Ms. Sindhu. Under this agreement, Sunlight Sports undertakes to provide various 'Li Ning' branded products to Ms. Sindhu free of cost along with a sponsorship amount in cash, including tournament bonuses payable on reaching a particular stage of the tournament. In turn, Ms. Sindhu agrees to promote the 'Li Ning' branded products.

5. Similar other agreements have been entered into by Sunlight Sports for promotion of the 'Li Ning' brand within India. Such agreements have been signed by the Manager of the appellant, on behalf of Sunlight Sports/appellant firm.

6. Revenue investigated into the valuation aspect of import of 'Li Ning' brand goods from Singapore for the period February, 2012 to March, 2015. Pursuant to investigation, show cause notice dated 03.02.2017 was issued for the aforementioned period disputing the valuation of the imported goods invoking the extended period of limitation, alleging that marketing, advertising, sponsorship and promotional expenses/ payments made by the appellant to promote the 'Li Ning' brand was a condition of sale and consequently such amount was liable to be included in the value of the imported goods

in terms of Rule 10(1)(e) of the Customs (Determination of Value of Imported Goods) Rules, 2007 (hereinafter referred as CV Rules).

7. The allegations made in the show cause notice are summarised as follows:

> "a. *In compliance with Article 7 of the distribution agreement, the appellant has undertaken promotion of 'Li Ning' branded products.*
>
> *b. Scrutiny of the sponsorship agreements entered into by Sunlight sports shows that they are represented in India through the appellant. Sunlight Sports are promoters for providing cash sponsorship/ equipment to third parties such as KBA, Ms. Sindhu, etc.*
>
> *c. Some sponsorship agreements are signed by Mr. Ram Malhotra, the Manager of the appellant on behalf of 'Sunlight Sports'.*
>
> *d. The statement of Mr. Ram Malhotra was recorded in terms of Section 108 of the Customs Act, which confirmed the above facts.*
>
> *e. The appellant claimed that the entire amount of marketing expenses shown in the financial statements does not pertain solely to the 'Li Ning' brand. However, no bifurcation of this amount was provided and hence, it appears that the entire amount pertains to the 'Li Ning' brand.*
>
> *f. From the above, it can be inferred that price is not the sole consideration for import of goods.*
>
> *g. Since price is not the sole consideration, the proviso to Section 14 of the Customs Act applies. Any amount paid for costs and services is includible in the value of imported goods in terms of rule 10(1)(e) of the Customs Valuation Rules.*

Consequently, the amount of marketing expenses incurred by the appellant which is a condition of sale is liable to be included in the import value. These expenses are paid by the appellant on behalf of Sunlight Sports.

h. The appellant has mis-declared the value to the extent of non-inclusion of marketing expenses.

i. The appellant has not disclosed the sponsorship/ promotional agreements and hence, the extended period of limitation may be invoked."

8. The appellant contested the show cause notice mainly on the grounds that they are not paying any amount on behalf of M/s Sunlight Sports. Further, contended that on harmonious reading of the agreement makes it evident, that the responsibility of sales, promotion within India is entirely with the appellant. The appellant has incurred marketing cost in pursuant of this responsibility. Further, expenses incurred by appellant for sales promotion/ advertisement, is not a condition of sale of the goods under import. Further, import is on arms length price. The parties are not related to each other. The appellant had also incurred marketing and sales promotion cost for its own brand 'Vicky', bifurcation of the cost for promotion of 'Vicky' and 'Li Ning' brand was given. Further contended that the transactions are properly recorded in the books of accounts, the agreement with M/s Sunlight Sports, Singapore was disclosed to the Department and thus there is no element of any concealment or contumacious conduct on the part of the appellant. Hence, extended period of limitation is not available to the Revenue.

9. The show cause notice was adjudicated on contest confirming the differential demand of duty holding that the marketing cost/ expenses incurred by the appellant were a condition of sale of the imported goods. Had the appellant not agreed to bear such cost as provided in Article 7 of the Agreement, M/s Sunlight Sports would not have appointed them they as a sole distributor and no imports would have taken place. Further, observing that some of the agreements between 'M/s Sunlight Sports' and 'Sports Association' in India for its sponsor is signed by the Manager of the appellant. Hence, it was concluded that appellant have made payments or incurred expenses on behalf of M/s Sunlight Sports. The contention of the appellant that advertisement and promotion was a post import activity and hence cost was not includible in the value of the imported goods and thus Rule 10(1)(e) of the CV Rules is not attracted, was rejected. Further, the bifurcation of the advertisement and sale promotion cost as regards 'Li Ning' and 'Vicky' brand filed, was rejected as the same being was not signed by the appellant or authenticated by their Chartered Accountant. Further, held that the non disclosure of distribution agreement tantamounts to suppression of facts and wilful misstatement with intent to evade payment of customs duty. Accordingly, the differential duty of Rs.1,60,45,493/- was confirmed and further the goods imported during the disputed period were held liable for confiscation, but in absence of availability of goods, redemption fine was not imposed. Further, equal penalty was imposed under Section 114A of the Customs Act, 1962.

10. Being aggrieved, the appellant – assessee is before this Tribunal.

11. Learned Counsel appearing for the appellant urges that the impugned order is vitiated as the same is passed on incorrect understanding of the facts. Further, the impugned order is passed in a mechanical way without proper application of mind. He further urges that in para 16 of the impugned order, the learned Commissioner has observed that the appellant is the Authorised sole and exclusive agent and distributor of 'Li Ning' products in India. It is submitted that appellant is not the sole and exclusive agent appointed for distribution of 'Li Ning' brand in India. There are other agents who have been appointed for distribution of the said products in India, who have also been importing identical goods.

12. Further, in para 24.4 of the impugned order, it is observed that the appellant had not disclosed the agreement and the same tantamounts to mis-statement. It is submitted that the appellant is not related to M/s Sunlight Sports, Singapore. Further, on being requisitioned during investigation, the appellant did provide the copy of agreement. It is further urged that appellant have neither incurred nor is paying any amount towards sales promotion/ advertisement on behalf of M/s Sunlight Sports. On conjoint reading of Article 4 and 7 (supra), it is evident that appellant importer is not bound to incur any fixed amount or percentage of the import value of the goods or the invoice value of the goods, towards advertisement and sales promotion. The agreement explicitly provides that the post import cost (for publicity at discretion of appellant) whatsoever, shall be

borne by the appellant. Such costs are at the discretion of the appellant importer with further stipulation that the expenditure made is in consultation with M/s Sunlight Sports. Further, Article 7 of the agreement provides that for any advertisement or sales promotion campaign at the instance of M/s Sunlight Sports, such costs shall be borne by M/s Sunlight Sports as per the pre-sanction budget. The appellant is only obliged to maintain proper vouchers for expenses, if any, made on behalf of M/s Sunlight Sports.

13. It is further urged that agreement with Sports Association, prominent players etc. have been entered into by M/s Sunlight Sports. M/s Sunlight Sports is a global brand with contacts in the sports management industry. M/s Sunlight Sports being a global brand is better placed to negotiate with prominent players for sales promotion. Under the arrangement the appellant have paid the sponsorship amount to the sports association/ players by virtue of Article 4 and 7 of the Agreement. The Agreement with players or association has to be interpreted in conjunction with the 'Distribution Agreement'. A combined reading of the Distribution Agreement with the players/ association reveals that it is the appellant, who is liable to pay the amount/ provide goods to the player / association. Accordingly, the Manager of the appellant have signed on the agreement. Thus, the payment made to sports association and sportsman are by the appellant and not on behalf of M/s Sunlight Sports. Further, stipulation mentioned in the agreement with the players, that they shall always use 'Li Ning' brand sports goods and wear, wherever they play in any part of the world, is to safeguard the

business interest of the appellant as well as conflict with other brand owners. Further, the transaction between appellant and M/s Sunlight Sports does not attract Rule 10(1)(e) of CV Rules, as there is no pre-condition imposed on the appellant to incur any particular percentage or amount towards sales promotion/ advertisement. Thus, in the absence of the condition precedent – payment actually made or to be made as a condition of sale of the imported goods, being absent, no loading or enhancement of the assessable value is called for. Further, in the facts and circumstances, there is no payment from the buyer-appellant to seller or to third party to satisfy any obligation of the seller - M/s Sunlight Sports. Thus, in the facts and circumstances, the payment or expenditure not being contingent to import transaction, does not call for addition to the value of the goods. Further, reliance is placed on the ruling of the Hon'ble Supreme Court in **Toyota Kirloskar Motor Pvt. Limited -2007 (213) ELT 4 (SC)** where it was held that fee paid for technical assistance having direct nexus with post importation activities and not to the import itself, are not to be included in the transaction value since such fee are not paid as condition of sale. Appellant also relied on the ruling of this Tribunal in **Richemont India Pvt. Ltd., vs. Commissioner of Customs, New Delhi-2016 (343) ELT 209 (Tri. Del.)** where the facts that Richemont was importing watches for distribution from foreign exporter located in Dubai. The agreement included obligation to incur marketing expenses in the territory of India. It was Revenues case that such marketing activities was a condition of sale and hence such cost should be added to the value of the imported goods. This Tribunal held in favour of the assessee recording the

finding that the distribution agreement does not specify any amount, which was required to be so spent. Further, approval is 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. Further, observed that such expenditure was mutually beneficial to both the seller and importer. It is further urged that ignoring the expenditure incurred for promotion of 'Vicky' brand has also vitiated the impugned order. Further, under the facts and circumstances, invocation of extended period of limitation is not available, as no case of suppression of facts, etc. is made out.

14. It is further urged that under the facts and circumstances, penalty is not attracted under the provisions of Section 114A, hence penalty imposed be set aside. Accordingly, learned Counsel prays for allowing their appeal with consequential benefits.

15. Opposing the appeal, learned Authorised Representative for Revenue urges that any sponsorship /promotion/ endorsement charges incurred by appellant –importer on behalf of the supplier, is includible in the assessable value of the imported goods, as provided in 1st proviso to Section 14(1) of Customs Act. The said proviso prescribes that any amount paid or payable for cost and services, on behalf of the seller, is addable to the transaction value, to the extent in the manner specified in the Rules made in this behalf. The only requirement for addition in the import value, under Rule 10(1)(e) is that obligation to incur expense by the buyer or any amount paid by the buyer to a third party to satisfy obligation of the seller should be a

condition of sale between the seller and buyer. All such ingredients are available in the instant case. It is further contented that the argument of the appellant that their transaction value is higher than that of other importers in respect of import of same/ like goods and hence their transaction value is at arm's length and does not attract the charge of undervaluation is not tenable. Further, the contention of the parties, being not related, both the contentions are misplaced because in the impugned order, addition of sponsorship / promotional expenses have been ordered to be added to the transaction value under Rule 10(1)(e) of the CV Rules, and there is no rejection/ acceptance of transaction value. Further, the contention of appellant that such expenses are in the nature of post importation activity does not hold good in view of Article 7 of the Distribution Agreement. Further, promotion contract dated 12.09.2012 and national players sponsorship agreement dated 01.02.2014, have been entered into between the supplier of goods and the sports association / player, and hence serve interest of the supplier. Further, the said agreement are signed by the representative of the appellant and also the expenses have been borne by the appellant. Further, in the promoters contract M/s Sunlight and 'Li Ning' are referred as promoters in Agreement with Karnataka Badminton Association. Further, in the said agreement the appellant is obliged to supply free products to KBA, but such expenses for goods are admittedly incurred by the appellant. Similarly, in the 'national players sponsorship agreement' is a tri-par-tite agreement between the supplier and Ms. P. V. Sindhu and Sporty Media. Not only this agreement is signed by the appellant's Manager, but the products, cash, equipment

sponsorship, tournament bonus, is borne by the appellant. This is contrary to para 4 of the agreement wherein M/s Sunlight Sports is supposed to provide and make available the sponsorship benefits and make payments. Thus, it is established that pre-condition for addition of the promotion expenses in dispute, to the assessable value under Rule 10(1)(e) of CV Rules, are available in the instant case. It is further urged that mutuality of interest is not a criteria for non clubbing of such expenditure. Further, reliance is placed on the ruling of this Tribunal in **Reebok India Company vs. Commissioner of Customs, Patparganj-2018-TIOL-561-CESTAT-DEL** wherein coordinate Bench of this Tribunal under the fact that Reebok India was importing from 'Reebok brand goods' from RIL, England under Agreement for sale. The agreement provided that Reebok India was required to incur the expenditure on promotion, equal to 6 per cent of total invoice value and further under the facts that the parties were related to each other. This Tribunal held that such sale transactions attract provision under Rule 10(1)(e), as under the distribution Agreement - Reebok India was to necessarily spend 6 per cent of the invoice value on advertisement and promotion, and further the seller was controlling every aspect of such promotion and further Reebok India was obliged to provide the details of such expenditure incurred periodically to RIL, England.

16. Having considered the rival contentions, we find that in the facts and circumstances of the present case there is nothing in the agreement that a fixed amount or fixed percentage of the invoice value of the imported goods, is obliged to be spent by the appellant

as a condition of sale/ import. As per the stipulation in the agreement, the appellant is obliged to or responsible for sales and distribution in its territory of distribution and further to make such expenditure in consultation with the seller, does not attract the provisions of Rule 10(1)(e) of CV Rules. The said Rule 10(1)(e) provides for addition of 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 and obligation of the seller, to the extent that such payments are not included in the price actually paid (transaction value). We find that there is total absence of the prescribed condition precedent as the appellant is not obliged to incur any particular amount or percentage of invoice value towards sales promotion/ advertisement. Further, we find that the activity of advertisement and sales promotion is a post import activity incurred by the appellant on its own account and not for discharge for any obligation of the seller under the terms of sale. The ruling of this Tribunal in the case of **Reebok India Company** (supra) is not applicable, as the facts in the present case are totally different and unlike Reebok India Company, nowhere provides for any fixed expenditure towards sales and promotion as a pre-condition of sale. Further, in the instant case, the parties are not related to each other. Further, the appellant importer is not obliged to give any account of expenditure incurred by it to M/s Sunlight Sports, incurred by them, unless such expenditure is incurred at the instance of M/s Sunlight Sports under stipulation of reimbursement. Further, we find that the interpretative note to Rule 3(b) provides, that activity undertaken by the buyer on its own account, even though by agreement, are not

considered as direct payment, even though they might be regarded as benefit to the seller also. Further, in the facts of the present case, appellant has not paid any amount on behalf of M/s Sunlight Sports – seller. Further, the impugned order is also vitiated due to mistake of fact, as noticed herein above.

17. Accordingly, we allow this appeal and set aside the impugned order. The appellant shall be entitled to consequential benefits, including refund of amount deposited during investigation. We further make it clear that such amount deposited during investigation have taken the character of pre-deposit *ipso facto* under Section 129E of the Customs Act. The appellant shall be entitled to interest as per Rules on the refund amount, as found payable to them. Misc. Application for E. Hearing, is also disposed.

(Pronounced on 13.02.2020).

(**Anil Choudhary**)
Member (Judicial)

(**C. J. Mathew**)
Member (Technical)

Pant