

# Advertising, marketing and promotional (AMP) expenses in customs valuation

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## Abstract

Customs duties are an important aspect of international trade and compliance is mandatory for all companies and organisations engaged in overseas business. These customs duties generate revenue to the importing state and no link is needed between the two parties of different countries for the importing state to levy duty. Primarily, General Agreement on Tariffs and Trade (GATT) Article VII and Customs Valuation Rules, 2007, govern customs valuation in India and lay down the standards regarding transaction value, related party transactions and 'price paid or actually payable'. Each of these authorities will be explained in this paper, along with recent rulings of Customs Excise and Service Tax Appellate Tribunal (CESTAT) and a comparative analysis of India with customs valuation in other jurisdictions, such as USA, Canada and the European Union. The objective of this paper is to establish whether advertising, marketing and promotional expenses should be included in the 'price actually paid or payable' of the goods or services imported. The considerations affecting this analysis are twofold: the extent of the term, 'post-importation expenses' and the nature of 'buyer's own account'. Further, the researcher will study the observations of the Technical Committee on Customs Valuation. Even though various technical terminologies are involved in the study of this issue, the finer nuances will be delineated carefully throughout the paper.

## 1. Introduction

Since the advent of international trade, customs valuation has been a pivotal subject matter for both developed and developing countries and has been used to calculate import duties on an *ad valorem* basis. An *ad valorem* duty rate is expressed as a percentage of the value of imported goods (Rosenow & Shea, 2010). Additionally, authorities use the Custom Valuation Rules (CVR) to calculate taxes such as value added tax (VAT), excise and sales tax on the imported goods (Rosenow & Shea, 2010, p. 3). It may also be used to determine rules of origin<sup>1</sup> and trade statistics.

Customs valuation underwent a transformation after the 1979 GATT Valuation Code, which was further substantiated in the 1994 Agreement on Article VII. Hence, before 1979, there was much uncertainty about the calculation of duty on imported products worldwide. Primarily, two main concepts were followed: the notional concept and the positive concept. The notional concept was based on the Brussels Definition of Value (BDV). Here, the 'normal price' was:

the price which [the imported goods] would fetch at the time when the duty becomes payable on a sale in the open market between buyer and seller independent of each other. (World Trade Organization, 2019).

The positive concept focused more on the ‘actual value’—the actual price paid for the goods during the transaction and disregarded the ‘notional’ price, which may be paid under ideal competitive conditions (WTO, 2019). To understand the cases explained in the latter half of the paper, the following Agreement, Rules and terms need to be understood.

## **2. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, 1994**

The general introductory Commentary to Article VII of GATT, which forms a part of the Agreement on Implementation of GATT (WTO, 1994, p. 1) (the ‘Agreement’) states that:

The primary basis for customs value under this Agreement is ‘transaction value’ as defined in Article 1. Article 1 is to be read together with Article 8 which provides, *inter alia*, for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods.

This above statement is further substantiated by the preamble, which recognises that the basis for valuation of goods for customs should, to the greatest extent possible, be the transaction value of the goods being valued. Article 1(1) of the Agreement equates ‘transaction value’ with the ‘price actually paid or payable’ when the goods are sold by the exporting country to the country of importation. It lists four conditions that, if not satisfied, will lead to the rejection of the transaction value and can invite further loading onto the original transaction value. The Notes to Articles defines ‘price actually paid or payable’ as the total price to be paid by the buyer to the seller, either directly or indirectly.

Note to Article 1(1) of the Agreement states that indirect payment, such as the settlement of the seller’s debt by the buyer, will also be considered in the transaction value. Further, the Note to Article 1 clarifies that activities undertaken by the buyer on their own account, even though it may benefit the seller, will not be considered an indirect payment and will not be added to the transaction value. Moreover, conditions in the agreement between the parties relating to marketing of the imported goods will not result in the rejection of the transaction value. It has been made clear, by virtue of Note to Article 1(1) (b), that if the buyer undertakes marketing expenses on their own account, even though pursuant to an agreement with the seller, it will not be included in the customs value.

Another pivotal aspect of Article 1 is its interpretation of ‘related parties’ and their impact on the transaction value. One of the provisos mentioned in Article 1(1) states that the buyer and seller must not be ‘related parties’ and if they are, as per Article 1(1)(d), the transaction value will be acceptable under the provisions of Article 1(2). Article 1(2)(a) makes it clear that, even though the parties (buyer and seller) are related, this fact in itself would not be the grounds for rejecting the transaction value. In such a situation, the sale shall be examined, and the transaction value will be accepted if the relationship did not influence the price. In other words, the transaction was carried out at an ‘arm’s length’. This Article makes a reference to Article 15(4) of the Agreement, which defines related parties. For the purposes of this paper, related parties will be interpreted in the light of Article 15(4)(e) as ‘one of them directly or indirectly controls the other’.

### 3. Customs Valuation Rules, 2007 (India)

To say that the Indian Customs Valuation (Determination of Value of Imported Goods) Rules (CVR) draws considerably from the GATT Agreement would be an understatement. CVR, 2007 is almost verbatim of the Agreement with only a few variations, one of which is crucial to our analysis and will be discussed later. Rule 2(1)(g) of CVR redirects the definition of transaction value to Section 14(1) of the Customs Act, 1962 (India) which defines it as ‘the value at which like or identical goods are sold in the course of international trade through a transaction between unrelated buyer and seller’. This is subject to Rule 3 of CVR, which deals with determination of methods of valuation. This paper is concerned with the following provisions:

1. **Rule 10(1)(e):** Rule 10 lays down the adjustments by virtue of any direct/indirect payments made by the buyer to the seller but those not included in the ‘price actually paid or payable’. 10(1)(e) provides:

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 included in the price actually paid or payable.

Rule 10 is based on Article 8 of the GATT Valuation Code. However, the text of Rule 10(1)(e) of CVR, 2007 is conspicuously absent from the GATT Code. It is only mentioned in Annex III of the Agreement to further clarify the meaning of ‘price actually paid or payable’, but this general statement is subject to the particular rules. The concept of ‘condition of sale’ in this context (i.e. expressly for determination of value) does not form a part of the international agreement but is rather a product of national policy.

2. **Rule 3(2)(b):** This rule corresponds to Article 1.1(b) of the GATT Valuation Code. These provisions are similar and state that in absence of any condition of sale, the transaction value will be accepted. Further, the interpretative note to Rule 3(2)(b) makes it clear that if the buyer takes up on their own account activities relating to marketing of goods, those activities will not be a part of the value of the imported goods. This Note, as explained above, is the same as the interpretative note to Article 1(1)(b) of the Agreement.

Apart from this, similar to the GATT Agreement, Rule 2(2)(v) defines ‘related parties’. The Customs Valuation Rules are used extensively for international trade and they monitor transactions so as to avoid misuse and arrive at the right transaction value.

### 4. Advertising, marketing and promotional expenses

Advertising, marketing and promotional (AMP) expenses are a novel phenomenon in this era of international trade between multinational companies. As a trend, related enterprises, such as the national subsidiary of a global brand and the global brand itself, have a distribution agreement that lays down the terms of marketing deliverables and promotional costs that obligate the buyer (subsidiary) to comply with the same. The common example for this will be: Company A is a worldwide manufacturer and seller of high-end clothes and suits. Company ‘A India Ltd’ is a subsidiary of Company A, which sells A’s product in India. Company A and Company ‘A India Ltd’ may often enter into a distribution agreement by which the Indian subsidiary imports goods of the worldwide brand into the country. They are related parties and the agreement between them may also specify a sum that ought to be incurred by the subsidiary for the marketing of the product in India. Marketing expenses thus can be of two broad types:

1. The global parent company obligates the national subsidiary, through an agreement to spend a particular percentage of the total import value on AMP.
2. The global parent company requires the national subsidiary to contribute to a certain amount of the worldwide promotional expenses undertaken by the parent. This kind of agreement between the two parties is not related to importation of goods and is independent of importation and trade between the parties.

Moreover, the buyer may decide to spend on advertising on its own accord or, as seen above, be prompted by the seller. The buyer may pay the seller or a third party provider for those expenses (Neville Jr., 2016). As this paper centres around the ambit of this particular term, it will be explained in detail through various case laws.

## 5. Analysis of authorities

The introduction summarises the researcher's attempt to consolidate the various rules and regulations affecting customs valuation and linking the same to advertising expenses. The law regarding the current position is vague and often misrepresented. The main issue is:

*Whether marketing and advertising expenses can be included in the 'transaction value' for the purposes of customs valuation.*

This is sought to be studied through the following legislative pronouncements:

### 5.1 India

The controversy regarding the above issue centred around the decision of the Delhi Bench of Customs, Excise and Service Tax Appellate Tribunal in the case of *Reebok India Ltd. v CC, Patparganj (2018 VII 49 CESTAT DEL CU)*, which was delivered on 12 January 2018 by Dr Satish Chandra and V Padmanabhan. The tribunal was tasked with interpreting a distribution agreement between Reebok International Limited (RIL, England) and Reebok India Limited (subsidiary of RIL, England). The facts of the case are set out below.

The appellant in the case was Reebok India Ltd., a subsidiary of RIL, England. Both parties had entered into a distribution agreement in 1995. As the parties were 'related' within the meaning of Rule 2(2)(v) of CVR, 2007, they made an application to the Special Valuation Branch to accept the 'transaction value' of their imports. On basis of this application, the Directorate of Revenue Intelligence (DRI) investigated the allegation that the transaction value did not include certain costs pertaining to advertising, marketing and promotion of the goods (para 2). The terms of the distribution agreement between the parties, brought into question by DRI were:

Distributor agrees to spend on advertising and promotions, a sum not less than six percent (6%) of its total net invoiced sales of products. As a guideline, at least half of the expenditure shall be in the form of media (print, radio and/or television) advertising. Details of such expenditure shall be reported quarterly to Reebok and are subject to annual verification by independent audit. (para 7)

It was argued by the DRI that this clause of the distribution agreement was a condition of sale for imports by the appellant. The appellant thus had an obligation to spend the requisite amount on AMP (para 5). Hence, the DRI invoked Rule 10(1)(e) of CVR, 2007. It stated that the 6 per cent was a condition of sale and it conferred an obligation on the buyer, hence making it a part of the 'price actually paid or payable'. On the other hand, the appellant relied on the Interpretative Note to Rule 3(2)(b), which explained that activities undertaken on the buyers own account will not be included in the price paid or

payable. The Note had also made an explicit reference to how marketing costs should not be included in the transaction value (para 4.ii). The appellant also claimed that AMP expenses are, by their very nature, post-importation expenses and so should not be loaded onto the import amount (para 4.v). The tribunal concluded that RIL, England is the owner of the brand name Reebok and was controlling every aspect of the advertising to be undertaken by its subsidiary (appellant). The tribunal stated:

Therefore, from these agreements it is evident that such appellant is carrying on such brand promotion on behalf of RIL, England and such expenses were made on their behalf. Hence, we conclude that advertising and promotional expenses have been incurred as a condition of sale and on behalf of the seller and may be considered as satisfying the obligation of the seller. (para 8)

It is interesting to note that the same judges of the Delhi Bench of CESTAT delivered a contradictory judgment on 2 April 2018 in the case of *Giorgio Armani India Pvt. Ltd. v. New Delhi 2018 VII 248 CESTAT DEL CU*. As in the previous case, the appellant is an Indian subsidiary of a global parent brand engaged in high-end fashion retail. Hence, they too are 'related parties' and, because of this, the appellant made an application to the Special Valuation Branch for appraisal and acceptance of the transaction value of imports. The original authority decided, vide his order to load additional amounts onto the transaction value, including an annual franchise fee of five per cent of value of net purchases, two per cent for institutional advertising and promotional campaign and three per cent on account of advertising expenses required to be undertaken by the appellant as per the terms of the distribution agreement (para 1). For the purposes of analysing the AMP, the last two additions will be considered:

First, the appellant had submitted in the tribunal that the two per cent required to be undertaken was merely a part of worldwide advertising and not related to the actual importation of goods (para 3.b). It is a common presumption that there must be some nexus between the import of goods and the amount spent on advertising. If there is no connection between the two, it cannot be said that the transaction value should be loaded with an unrelated amount. Ironically, the earlier *Reebok India Ltd.* decision made a reference to such kind of agreements where the appellant (subsidiary of parent) is required to contribute a certain amount to worldwide advertising. It referred to the judgment of *Samsonite South Asia Pvt. Ltd. v. Commr. Of Customs 2015 (327) ELT- 528 Tribunal-Mumbai* and agreed that, when the expenses charged to the account of the subsidiary (in this case, the appellant) are merely a share of the global expenditure, it will cease to have a connection with the import and thus will not be loaded onto the transaction value (*Reebok India Ltd.*, para 10). The judgment of the *Samsonite* case reads:

There is no nexus between the imports made by the appellants and the expenditure shared by the appellants for the global advertising campaign. We also find that the sharing of cost towards advertising expenses is not a condition of sale for the import of goods. (para 6.1)

The facts of this case were similar to *Reebok India Ltd.* and *Giorgio Armani India Pvt. Ltd.* The appellant (*Samsonite India*) was a subsidiary of the global parent company and, through an agreement, was engaged in contributing to a global advertising campaign for 2008 (para 2). Hence, the tribunal was quick to separate the actual importation from an unrelated amount.

Second, the tribunal in *Giorgio Armani India* went against its judgment delivered in *Reebok India* with regards to the three per cent AMP expenses of the total import cost to be undertaken by the buyer in pursuance of an agreement. In this case, the tribunal held that the stipulated three per cent amount for advertising was not a condition of sale. It was of the view that the appellant is not fulfilling any obligation by the seller by incurring three per cent of the import value on AMP expenses (para 10). This judgment delivered by the same technical member of the Delhi Bench of CESTAT, Mr V Padmanabhan is in stark contrast to his decision in the *Reebok India* case.

It is helpful to look at a complementary case that helps provide a comprehensive view on the matter. The appellant subsidiary, *Richemont India Pvt Ltd (Customs – Case No. 50868/2015)* had imported watches from Richemont Dubai (the parent company) through a distribution agreement between the two related parties. The commissioner, however, stated that the goods were priced at a lesser amount than other identical goods exported by Richemont Dubai to unrelated buyers. Therefore, the Commissioner only relied on Rule 4 of CVR, 2007<sup>2</sup> and made no reference to Rule 10. But, during the hearing of the appeal, DRI relied on Rule 10 to bring in the costs of AMP expenses and royalty payments onto the transaction value. The appellant contended that AMP expenses were post-importation expenses and hence cannot be added to the price actually paid or payable. In its decision, the tribunal held that there was no need to go into the question of whether AMP expenses should be included in the assessable value of the goods imported. Hence, the question of law remained unanswered.

### 5.2 United States of America

The question being investigated has baffled numerous other jurisdictions, including the Customs Authority of the United States of America. US Customs and Border Protection is the ruling authority on matters relating to transaction value of imports (US Customs and Border Protection, 2016). A few of the relevant cases are described below.

CROSS Ruling HQ 544638 (Seagrams Case, 1991): In this case, a seller was a manufacturer of Polish vodka who had entered into an agreement with Seagrams (the importer) in 1988. The agreement, in paragraph 12(b) required Seagram to develop and execute a marketing plan for the imported vodka (p. 2, para 3). The agreement required that the Seagrams and the exporter each make minimum payments for brand marketing purposes each calendar year. Brand marketing included advertising, merchandising, promotion, market research, public relations, testing and similar brand-building activities. The amount to be spent on AMP expenses depended on the volume of product imported into the US (p. 2, para 4). The question that arose was whether these expenses should be included in the price actually paid or payable (p. 3). The counsel for the importer argued that the payments for advertising indirectly benefited the buyer and hence they could not be loaded onto the assessable value. Moreover, it was contended that the brand marketing expenditure had no relation to the production and export of vodka and hence could not be said to be made exclusively for the imported merchandise. The court to resolve the issue relied on Title XIX of the United States legislation (p. 4), particularly Section 153.103(a)(2). The text is:

Activities such as advertising, undertaken by the buyer on his own account, other than those for which an adjustment is provided in § 152.103(b), will not be considered an indirect payment to the seller though they may benefit the seller. The costs of those activities will not be added to the price actually paid or payable in determining the customs value of the imported merchandise.

It concluded that the advertising expenses will not be considered an indirect payment to the seller even though it may benefit the seller and thus will not be added to the transaction value of imported vodka (p. 5). However, this case can be distinguished on the simple fact that the parties in the transaction were unrelated.

CROSS Ruling HQ H038381 (November 2014): In this case, the buyer and seller are related parties: the seller and the importer sell merchandise under the same trademarked name. Both these parties contracted a service agreement that governs their relationship independent of import–exports. They also have a distribution agreement that sets out the terms of import. Article 8 of the distribution agreement relates to marketing and advertising and Article 8.1 states that the importer will ‘actively and continuously promote’ the products in its territory. Moreover, Article 8.2 specifies that the importer has an ‘obligation to use any publicity tools provided by the Seller and such tools must be used according to the seller’s instructions’. While deciding this matter, HQ said:



Based on the language of the agreements between the parties, the Importer does not have an option regarding advertising and marketing. The Importer must “use any publicity tools that may be provided to it by the Company” as the Seller directs. Therefore, the portion of the service fee related to advertising and marketing, prorated to account for only the imported merchandise, would be considered part of the price actually paid or payable.

This judgment can be criticised on two grounds. First, though HQ made a reference to Title 19 152.103(a) (2), they failed to take into consideration its essence. It states explicitly that even though advertising may benefit the seller, it will not be considered an ‘indirect payment’. Perhaps what differentiates this clause is that there is no reference made to ‘agreement of advertising’ between the parties. However, it should be clarified that the presence of marketing agreements between related parties will not lead to rejection of the transaction value according to Note to Article 1(1)(b), paragraph 2 of GATT Agreement on Article VII.

Second, it can be argued that the service agreement as a whole, and the distribution agreement concerning AMP expenses, between the parties could have existed independently of the importation of goods. Hence, even though the court only loaded AMP charges on the amount of goods imported, the intention behind sharing advertising costs had no nexus with importation and was rather a separate agreement governing the relationship between a parent and a subsidiary. Thus, even the stance in USA regarding this issue is ambiguous.

### 5.3 Canada

The government of Canada, as a common practice, issues ‘D Memos’ which reflect the stance of the country on a particular matter. With regard to the matter at hand, the Canadian Border Services Agency (CBSA) published Memorandum D13-4-13 on 31 March 2015 on Post-Importation Payment or Fees (Subsequent Proceeds). Appendix B relates to ‘Marketing and Promotional Fees’ which may not be added to the price actually paid or payable. As a reiteration of the general rule, it states that the costs of marketing activities shall not be added to the price paid or payable. However, when already included in the price paid or payable, such costs cannot be deducted. The memo states that the purchaser/importer has to substantiate the receipt of justified services relevant to the payments. Simply put, Canada agrees that when the expenses accrue to a buyer by virtue of a contract between the parties or otherwise and it relates specifically back to the goods imported, AMP expenses will not be included in the dutiable value. To better understand the importance of this clause:

If the marketing fee charged cannot be related to the specific product(s), which are imported and sold in Canada, then the fees cannot be identified as legitimate services the Canadian subsidiary received. Accordingly, this type of marketing or promotional fees would be found to be an addition to the price paid or payable.

However, this is where Canada errs. If the marketing expenses are not related to the imported goods, then the question of customs valuation should not arise in the first place. The very definition of ‘price actually paid or payable’ presumes that payments made to the seller cannot be ‘free-floating’ or unrelated to the imported goods. The payments must be tied back in some way to those imported products. In the case of Canada, they will make the payments dutiable even there is no ties to the import, thus contradicting the nature of price actually paid or payable (Neville Jr, 2016).

## 5.4 European Union

It can be argued that the European Union perhaps takes the best interpretation of marketing expenses and their addition to the price actually paid or payable. Commission Regulation (EEC) No. 2454/93 in Article 149 states:

- (1) For the purposes of Article 29 (3) (b) of the Code, the term ‘marketing activities’ means all activities relating to advertising and promoting the sale of the goods in question and all activities relating to warranties or guarantees in respect of them.
- (2) Such activities undertaken by the buyer shall be regarded as having been undertaken on his own account even if they are performed in pursuance of an obligation on the buyer following an agreement with the seller.

This Code was amended by Commission Implementing Regulation 2015/2447 and the Implementing Act of UCC, in its Article 129, states that marketing activities ‘undertaken by the buyer or an undertaking relating to the buyer’ shall not be an indirect payment. Thus, the 1993 regulation clearly provides for the contingency where AMP expenses are to be incurred by the buyer based on an agreement with the seller. It clearly states that a ‘buyer’s own account’ will also include costs spent in pursuance of an ‘obligation’. Consequently, such costs will not load onto the transaction value of the goods imported. The 2015 Implementing Act merely compiled the two subsections into one term, ‘undertaking relating to the buyer’, which clearly establishes that irrespective of an agreement between the parties or obligation on the buyer, the AMP expenses are outside the purview of customs valuation.

## 6. Interpretation and appraisal

Considering the stance of various jurisdictions on this matter, it is evident that further clarification, discussion and discourse is required. The researcher will now evaluate the information gathered to suit the Indian approach. It is argued that AMP expenses must not be included in the ‘price actually paid or payable’, as it is against the generally accepted position of law. It is necessary to rely on the points set out below.

### 6.1 Post-importation expenses

Post-importation expenses are known as ‘subsequent proceeds’. To define this simply, it means those expenses incurred by the buyer after the importation of goods or services. Hence, a simple interpretation concludes that such expenses must not be added to the price actually paid or payable since it has no relation to the importation of goods because the costs occur in the future. However, there are many more considerations to study. The Supreme Court, in the case of *CC, Ahmedabad v. M/S Essar Steel Ltd 2015 (319) ELT 202 (SC)* held that a cursory reading of Section 14 of the Customs Act, 1962<sup>3</sup> makes it evident that post-importation expenses find no place in the transaction value and should not be loaded. It reads:

A cursory reading of the Section makes it clear that customs duty is chargeable on goods by reference to their value at a price at which such goods or like goods are ordinarily sold or offered for sale at the time and place of importation in the course of international trade. This would mean that any amount that is referable to the imported goods post-importation has necessarily to be excluded. (para 7)



It is clear that in cases where the AMP expenses to be incurred are tied to the importation, these are to be borne after the importation of goods. Any percentage specified for advertising and marketing by the agreement between the buyer and seller should not be loaded onto the transaction value. There are numerous other cases that settle the issue on post-importation expenses. The Supreme Court in *Commissioner of Customs (Port), Kolkata vs. J K Corporation Ltd (2007) 9 SCC 401* noted that any amount paid for post-importation service or activity would not be loaded onto the assessable value of the imported goods so as to allow the DRI to levy customs duty (para 5). The position is so clear in the Indian legislation that it would be against the interests of justice to levy customs on post-importation charges.

## 6.2 Buyer's own account

If this term is interpreted in plain English, a buyer's own account either means for the buyer's own interest or by the buyer's own efforts (Neville Jr, 2016). It is contended by the researcher that the 'buyer's own account' and 'condition of sale' must not be treated as mutually exclusive terms. In many of the cases discussed above, the tribunals or authorities make this fallacy in their judgment. It is assumed that when the buyer undertakes AMP expenses in pursuance of an agreement, it ceases to be on the 'buyer's own account'. However, it can be both. Even though the obligation emanates from an agreement, the buyer uses their own efforts to further advertising. Where the tools for advertising are provided by the seller, the benefit of such marketing accrues to both seller and buyer as the demand for their products/services increases. The 1985 Case Study 3.1 of Technical Committee on Customs Valuation (TCCV) notes that is a common commercial practice for buyers to advertise their products (even through an agreement with seller) to augment their business. Many have erred in interpreting 'buyer's own account' to mean by the buyer's own initiative and requiring a voluntary payment of their own accord by the buyer/importer. However, that is a misinterpretation of language. If one reads the French and Spanish<sup>4</sup> text of the agreement, the true sense of the term becomes more evident as there, 'buyer's own account' is connoted in a wider sense.

Further, as explained through examples, especially the GATT Agreement, the explanatory Note to Article 1(1)(a) in the Agreement disregards the aspect of advertising benefitting the seller. It states that, irrespective of the benefit to the seller, AMP expenses will be interpreted as on the buyer's own account and outside the scope of price actually paid or payable. The 1990 Commentary 16.1 of the TCCV, which talks about 'Activities undertaken by the buyer on his own account after purchase of goods but before importation', further strengthens this point. It clarifies the position relating to AMP expenses undertaken by the buyer after purchase but before importation. Even when the advertising has been done before actual importation but after the goods have been sold to buyer through agreement, they still will not be counted for the purposes of customs valuation. This clearly indicates the intention of the international agreement to keep AMP expenses away from transaction value calculations.

## 7. Conclusion

It can be concluded that the GATT Agreement, Rules framed and legislations passed by countries in pursuance of the Agreement and opinions of the TCCV all point in one direction: AMP expenses are not to be regarded as a part of the price actually paid or payable and the transaction value is to be accepted without consideration of the costs incurred by the buyer on marketing. However, there is no doubt that the tribunal pronouncements in India and elsewhere have yielded a different view. A look at the contradictory judgments of *Reebok India* and *Giorgio Armani* given by the Delhi CESTAT is a fine example of the confusing nature of AMP expenses. Hence, the following points must be reinforced:

- The interpretive Note to Article 1(1)(b) of the GATT Agreement, 1994, as explained above, makes it clear that marketing expenses should not be included in the assessable value even when they emanate from an agreement with the seller. This express provision thus removes doubts regarding whether advertising undertaken by the buyer through agreement is a condition of sale or merely on the 'buyer's own account'.
- The 1993 Union Customs Code enforced in the jurisdiction of European Union provides a true and accurate interpretation of 'buyer's own account'. It is clearly stated in Article 149 that promotional activities undertaken by the buyer even because of an obligation in an agreement will still be considered to be on the buyer's own account.
- When it comes to worldwide promotional expenses and the buyer having to contribute a certain percentage for the same, it is emphasised that where there is no nexus between the actual importation of goods and advertisement of a brand, customs duties cannot be levied. In the absence of a connection, customs valuation in itself does not apply. Many times, related parties (parent and subsidiaries) have separate agreements: one that governs importation and the other which lays down the terms of their relationship. Hence, they cannot be read together and an unnecessary link cannot be drawn. The American view is also consistent with this. In paragraph 652 of *VWP of America v. United States*, 163 F. Supp. 2d 645, it was stated that 'whether a certain payment invokes liability for customs duties depends upon its relevance to the actual importation'. In CROSS Ruling HQ 545663, the US CBP has further remarked on this issue that there is a presumption that all payments made by the buyer will be included in the price actually paid or payable, but this presumption can be rebutted if the payments are *unrelated*. For this the Headquarters relied on the cases of *Chrysler Corporation v. United States*, Slip Op. 93-186 (Ct. Int'l Trade, 22 September 1993) and *Generra Sportswear*, 8 CAFC 132, 905 F. 2d 377 (1990) to declare that independent and unrelated costs of buyer should be kept away from assessable value.

Hence, with regards to the above submissions, it is clear that advertising costs are not to be included in the transaction value. Further, it is recommended that clarifications be provided by the Central Board of Indirect Taxes and Customs (CBIC) in this regard. CBIC is urged to carefully appraise this situation as it has considerable impact on revenue collection and international trade.

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## Notes

- 1 Rules of origin denote an agreement between two or more countries where they allow imports free of duty if 50% or more of the customs value of import is carried out through operations indigenous to the particular country. For example, the foreign trade agreement (FTA) between India and Malaysia has provisions relating to rules of origin.
- 2 Rule 4 of the Customs Valuation Rules, 2007 provide for 'Transaction value of identical goods'.
- 3 The CVR, 2007 is derived from Section 14 of the Customs Act, 1962.
- 4 The French Text of the Agreement on Article VII of GATT reads as 'Accord sur la mise en œuvre de l'article VII de l'Accord général sur les tarifs douaniers et le commerce de 1994' and the Spanish text reads as 'Acuerdo relativo a la Aplicación del artículo vii del Acuerdo general sobre aranceles aduaneros y comercio de 1994'.

### Mrudula Dixit



Mrudula Dixit is a Fourth Year Law Student at Symbiosis Law School, Pune. She has interned at reputed law firms including Lakshmikumaran and Sridharan Attorneys as well as Khaitan & Company. She is interested in International Trade Law and Customs Litigation and plans to pursue it further.