THE AUTHORITY FOR ADVANCE RULINGS
(CENTRAL EXCISE, CUSTOMS AND SERVICE TAX)
NEW DELHI

The 13th May, 2011

Order Nos. AAR/Cus/06-07/2011
In
Application Nos. AAR/44/Cus-1/07/2010 and AAR/44/Cus-1/08/2010

Applicant	:		M/s Oracle India Private Limited, 3rd Floor, A wing, IFCI Towers 61, Nehru Place, New Delhi-110019
Commissioner Concerned	:	1.	The Commissioner of Customs (I&G) New Customs House New IGI Airport New Delhi-110037
		2.	The Commissioner of Customer of Valuation, Directorate General of Valuation New Custom House. Annexe (7th Floor) Ballard Estate, Mumbai-400001
Present for the Applicant	:	1. 2.	Sh. V.Lakshmi Kumaran, Advocate Sh. L. Badri Narayanan, Advocate
Present for the Commissioner	:	1. 2.	Sh. B.K.Singh, Jt. CDR Sh.Sumit Kumar, SDR

ORDER

The applicant is M/s Oracle India Private Limited. These applications are filed by the applicant invoking section 28H of the Customs Act, 1962 seeking a ruling on two separate but interrelated questions arising out of a new line of

business it proposes to undertake. The maintainability of the applications being contested by the Customs Department, these applications were heard on the maintainability of these applications at the threshold in the context of Sec 28-I(2) of the Act. The present Order is on that question.

2. According to the applicant, it is a Private Limited Company registered in India under the Companies Act, 1956. It is a wholly owned subsidiary of Oracle Systems Corporation, USA. The applicant is already in business in India. Its current business falls in two categories, software and services. In the software business it provides distribution/sub-licensing of software along with related services. It has entered into a Software Duplication and Distribution License Agreement dated 1.6.2003 with Oracle Systems Corporation formed in USA. In terms of that agreement, the applicant has been granted a non-exclusive non-assignable right and authority to Duplicate on appropriate carrier media Software products as per standard Oracle product list updated from time to time and to sub-license the same in India. In the service business, the applicant provides captive support services to Oracle Group of Companies. These services include captive software development services to Oracle Group Companies, software consultancy services and back office IT support to Oracle Group Companies. It also provides consultancy and educational services.

3 Oracle Systems Corporation has now started a hardware business. The same can be broadly classified as Oracle hardware systems product and Oracle hardware systems support. Oracle has a wide range of Oracle Hardware products. As a routine distributor the applicant is also proposing to sell Oracle Hardware Products to customers in India. The applicant also proposes to enter into a new business activity of providing support services to customers of Oracle Hardware products in India including the providing of spare parts and assuming replacement obligations for the products to customers in India. Under the Support Services, the applicant expects to provide customers in India who purchase hardware systems products, services such as product repairs, maintenance services and Technical

support services as well as updates to hardware related software which will be under end-user licenses for use with such Hardware System Products.

4. Thus the applicant now has an opportunity to distribute Oracle Hardware Products and Oracle Hardware Support to customers in India. These products would be imported from overseas Oracle entities by the applicant as an authorized distributor. The applicant is proposing to purchase Oracle Hardware Products for sale to customers in India and for internal use. The applicant and the overseas Oracle entities are related parties. In order to carry out its new business activity, the applicant will import the Oracle Hardware Products from a related party. After import, the Oracle Hardware Products will be resold to independent third party customers in India. In this re-sale activity, the applicant proposes to operate as a distributor in India. The manner of business in that regard is set out by the applicant in one of the applications. As part of the Support Services business, the applicant will assume warranty and replacement obligations for Oracle Hardware Products in India. The manner of carrying out the business is set out in the other application.

5. Since the proposed new business involves import, the applicant has also described the course it proposes to adopt in the case of re-sale in Hardware and in the case of Support Services. The applicant seeks a ruling from this Authority on whether the deductive methodology in case of proposed re-sale transactions is in consonance with the provisions of section 14 of the Customs Act and Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 particularly when the assessment value of the new imports of identical goods is likely to vary because of the variation in the sale prices to the customers in India and whether the constructed cost method proposed by the applicant for the imports of spare parts for fulfilling warranty and annual maintenance contract obligations is in consonance with the provisions of section 14 of the Act and Rule 8 of the Rules particularly taking into account the method of calculating the constructed cost as detailed in the application.

6. In support of its claim of eligibility for seeking Advance Ruling, the applicant submits that the applicant is a wholly owned subsidiary company of which the holding company is a foreign company and that it proposes to undertake a new business activity in India, and it is making an application for Advance Ruling under section 28H(1) of the Act. The Ruling is sought on questions, essentially on the principle to be adopted for the purposes of determination of value of the goods under the provisions of the Act. The applicant also asserts that it satisfies the requirement of being a wholly owned subsidiary Indian company of which the holding company is a foreign company. The applicant proposes to undertake a new business activity in India of selling, distributing and servicing Hardware Products and Oracle Hardware support and that the application for Advance Ruling is regarding the principles to be adopted for the purposes of determination and value of goods under the provision of the Customs Act, 1962.

7. On being called upon to offer its views on the applications filed by the applicant regarding their admissibility to ruling, the Commissioner of Customs interalia raises the objection that the applicant is not a valid applicant within the meaning of section 28E (c)(i)(c) of the Act and that the activity in respect of which Advance Ruling is sought is an on going activity and not a proposed activity and that the applications are not maintainable. It is in that context that these applications were posted for hearing at the stage of admission and both sides were heard in detail.

8. Before dealing with the questions raised, we may notice some of the relevant provisions of the Act. Section 28E of the Act defines 'activity' as meaning "import or export". It defines an Advance Ruling as a determination by the Authority of a question of law or fact specified in the application regarding the liability to pay duty in relation to an activity which is proposed to be undertaken by the applicant. An 'Applicant' means interalia a wholly owned subsidiary Indian company of which the holding company is a foreign company who or which, as the

case may be, proposes to undertake any business activity in India. Of course, the definition section starts by saying “in this chapter unless the context otherwise requires”. Section 28H provides for the application for Advance Ruling. Sub-section (2) specifies the questions on which an Advance Ruling can be sought. An Advance Ruling can be sought in respect of classification of goods under the Customs Tariff Act, 1975, applicability of a notification issued under sub-section(1) of section 25, having a bearing on the rate of duty, the principles to be adopted for the purposes of determination of value of the goods under the provisions of ‘this Act’ prima facie meaning the Customs Act, applicability of notifications issued in respect of duties under the Act, the Customs Tariff Act, 1975 and the duty chargeable under any other law for the time being in force in the same manner as duty of Customs leviable under the Act and in respect of determination of origin of the goods in terms of the rules notified under the Customs Tariff Act 1975 and matters relating thereto. On receipt of the application, the Authority, after examination of the application and the records called for, may either reject the application or admit the application (the statute uses the expression “allow the application”) and thereafter in cases where the application is admitted, after examination of further materials that may be placed before it, pronounce its Advance Ruling on the question or questions specified in the application. At this stage, what we are, therefore, called upon to decide is whether the applicant is eligible to seek an Advance Ruling and whether the questions posed for our ruling come within the purview of section 28H of the Act.

9. Learned Counsel for the applicant submits that clause (c) of section 28E defines an applicant and the applicant company, a wholly owned subsidiary Indian company of which the holding company is a foreign company, proposes to undertake a new business activity in India, namely, sales and service of Hardware Products. The applicant is eligible to maintain this application in terms of sub-clause (c) of section 28E(c)(i) of the Act. Learned Counsel further submits that the questions on which Advance Ruling is sought, are in respect of the principles to be adopted for the purposes of determination of value of goods under the provisions of the

Act within the meaning of clause (c) of sub-section (2) of section 28H of the Act. On the other hand, the representative for the department submits that it is only an applicant who proposes to undertake a business activity in India, namely, either of import or export that can approach this Authority for an Advance Ruling. On its own showing, the applicant is already in the business of import and export, though according to it, it is in respect of software and hardware only for its own consumption. Still, it is not a case of an entity proposing to undertake an activity in India. The representative points out that 'activity' has been defined as meaning import or export and an entity which is already in the business of import or export, is not eligible to seek a ruling merely because it is going in for a new line of business in import or going to undertake an additional activity of import. He also submits that under Clause (c) of section 28H(2) of the Act the question should be in respect of the principles to be adopted for the purposes of determination of value of the goods under the provisions of the Customs Act and questions relating to the Customs Tariff Act, 1975, do not come within the purview of clause (c) invoked by the applicant. He pointed out the distinction between clause (c) on the one hand and clauses (d) and (e) on the other. It was pointed out that in contrast to those sub-clauses, there is no reference to the Customs Tariff Act in clause (c) of section 28 H(2) of the Act. In reply, learned Counsel for the applicant submits that section 28E itself starts by asserting that the defined meaning of an expression is not conclusive, and if the context, otherwise required, an expression can be understood in a general sense and so viewed, clause (c) which speaks of an entity which proposes to undertake any business activity in India includes an entity like the applicant who intends to start a new line of business like the one involved in this case. Counsel further submits that the interpretation sought to be placed on section 28 H(2) (c) of the Act by the representative for the Department is too narrow and self defeating and that such a narrow construction of the provision was not warrented. Counsel submits that the very object of creating the machinery for advance ruling was to shorten litigation and the narrow construction convassed for by the department would tend to defeat that object. He submits that there is no

warrant for accepting the interpretation canvassed for by the representative for the department.

10. We shall first consider the question of the eligibility of the applicant to invoke Chapter VB of the Act dealing with advance rulings. It is true that the applicant is a wholly owned subsidiary Indian company of which the holding company is a foreign company. On that score, therefore, the applicant is entitled to approach this Authority for an Advance Ruling. The additional qualification needed by such an applicant is that it should "propose to undertake, any business activity in India". Admittedly, the applicant is already engaged in the business of import into India. The claim of the applicant is that hardware business is something which has been newly undertaken by its holding company and that a new business is sought to be started by the applicant in India by undertaking a new business activity. The sale of hardware and the service thereof is a new business activity that is contemplated or that is proposed to be undertaken. This brings the applicant within Clause (c) of section 28E(c)(i) of the Act. It is argued that the term 'activity' in Clause (c) should not be confined to the definition contained in section 28E(a) of the Act and the context requires that it should be understood in general terms as to include not merely export or import business, but any business activity.

11. In Chapter VB of the Act, activity 'means import or export'. The expression activity is a term of wide import. The use of the expression 'means' at once indicates that it is not an expansive definition. It confines the expression 'activity' to import or export. The definition is a restrictive definition. It restricts the meaning of the term. It is an exclusionary definition. It is intended to exclude a meaning that otherwise would or might be taken to be included in the term. In other words , an exclusionary definition deprives the term of a meaning it would or otherwise might have. So, viewed, activity can only be import or export for the purpose of Chapter VB of the Act. Of course, the term import or export can be given a wide meaning or a liberal meaning. But still, an activity for the purposes of the Act has to be import or export. The expressions business activity and economic activity used in clause (c) of Sec. 28E can only be understood as confined to import or

export. The expression ‘activity’ is controlled by the defined meaning. Hence business activity will have to be understood to be business activity of import or export. In other words, a wholly owned subsidiary Indian company of which the holding company is a foreign company can approach this Authority, only when it proposes to undertake any business activity in India.

12. Then, we have to reckon with the expression ‘proposed’ that qualifies business activity. Proposed means planned or intended. When an entity is already in the business of import or export, can it be said that it plans or intends a business of import merely because it seeks to import something different from what it has been importing already? To propose to have a business of import is different from an import of a new article as part of the existing business. ‘Proposes to undertake’ obviously indicates that it is not a business activity that is going on, but is an activity that is to be taken up. Thus in the interpretation of applicant, there seems to be no logical reason to jettison the defined meaning.

13. Let us now read Sec. 28 E (c) (i) (c) invoked by the applicant. It speaks of a wholly owned subsidiary Indian Company of which the holding Company is a foreign company which “proposes to undertake any business activity in India” Substituting the defined meaning of ‘activity’ the provision would be ‘proposes to undertake any business of import or export in India. Proposes means plans or intends Undertake means make one responsible for and begin (an activity) or begin, commence, embark on, taken on, take up. The business must be in India. So it must be an entity that intends to commence or take up the business of import or export in India. Does this understanding result in an ambiguity? It cannot be said to create any ambiguity. If so, what would be the justification for not adopting the defined meaning for the expression ‘activity’? We think, there is none. So, on the terms of the provision only an entity that proposes to commence a business of import or export in India that can seek an advance ruling. An entity that has already commenced or set up the business of import or export in India, cannot seek a ruling merely because it intends to expand its business or to diversify.

14. According to learned Counsel, if the expression 'Activity' is substituted by the word import, it will read "Proposed to undertake business import in India" and that will carry no real sense and it is in that context that one has to ignore the definition of 'Activity' contained in the section while construing clause (c). This argument would have carried weight if the expression 'business activity' had not been preceded by the expression 'proposes to undertake'. Again we find that there is another important indication available in the section itself. When we look at the definition of 'Advance Ruling', we find that it means the determination of a question specified in the application relating to the liability to pay duty in relation to 'an activity which is proposed to be undertaken' by the applicant. Is there any justification in reading the expression 'activity' differently from the definition contained in clause (a) while understanding the scope of clause (b), defining an Advance Ruling? It is true that in the Explanation to Sec 28E(c), the expression 'economic activity' is used while explaining what a joint venture means. But surely, that economic activity must be one of import or export considering the object of the Act. The object of the Customs Act is to prevent illegal exports and ensure imposition and collection of duty on dutiable goods imported into the country. So, the business activity or economic activity can only be import or export activity. That is exactly what the definition of activity postulates. A combined reading of the definition of 'activity', 'Advance Ruling' and of 'applicant' with particular reference to sub-clause (c) clearly indicates that it is only an entity which proposes to undertake the business of import or export in India that can approach this Authority for a ruling. The provisions do not seem to contemplate an approach by an existing importing or exporting Indian subsidiary of a foreign holding company for a Ruling, whenever it starts or proposes to start a new line of business in India.

15. It is true that a definition in a statute is not always conclusive. Generally, in statutes, the definition section starts with the words 'unless the context otherwise requires'. The same is the case in the legislation on hand. But then, one must be satisfied that the context requires the expression which is defined by the Act, to be understood in a manner different from the defined sense. As observed by

the Privy Council almost a century ago, in Indian Immigration Trust Board of Natal v Govindaswamy (AIR 1920 PC 114) and by the Supreme Court in Vanguard Fire and General Insurance Company Limited, Madras v Fraser & Ross [1960(3) SCR857], when a word has been defined in the interpretation clause, prima facie that definition governs whenever that word is used in the body of the statute. As observed by Lord Lowry in Wyre Forest District Council v Secretary for State for the Environment [(1990) 2 AC 357(HL)]. "If parliament in a statutory enactment defines its terms (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorized or done under or by reference to that enactment ".

16. But, of course, where the context makes the definition given in the interpretation clause inapplicable, a defined word, when used in the body of the statute, may have to be given a meaning different from that contained in the interpretation clause. The question, therefore, is whether there is anything in the context of chapter VB of the Act compelling us to give the expression 'activity' occurring in clause (c) of section 28E (c) (i) a meaning other than the defined meaning. We see nothing in sections 28E to 28M comprised in chapter VB warrenting our giving the go by to the defined meaning of the expression 'activity'. We must notice that 'business activity' in clause (c) forms part of the very provision that defines 'activity'. It cannot be easily assumed that even while defining the term, the legislature intended a different meaning to be given to the expression earlier defined by the very same provision. Whatever doubts we may have are removed according to us, by two separate aspects. One is the use of the expression 'proposes to undertake' occurring in clause (c) indicating thereby that it is not an existing activity, of import or export that is indicated. In other words, the activity of import or export should not be one which has already been undertaken by the applicant, though the import or export might relate to some other articles or goods. The second is, the definition of 'Advance Ruling' which clearly indicates that the Ruling is to be in relation to an activity which is proposed to be undertaken.

17. It is true that an interpretation along these lines might preclude undertakings that are already in the business of import or export but which propose to start a new line of import or export business from approaching this Authority for an Advance Ruling. It is argued that such an interpretation would restrict the scope of approach to this Authority. But then, we must remember that this is a jurisdiction where a ruling is not rendered where something has already been done or something has already happened, but based on something that is proposed to be done, more or less as pleaded or set-up by the applicant. The intention behind the creation of such a forum is said to be to attract foreign investment. That object is achieved when a non-resident entity sets up the business of import or export for the first time. Once set up, the entity is in business in this country and merely because it proposes to increase its business or to diversify does not alter the situation. It is, therefore, not possible to agree with the argument that such an interpretation would discourage foreign investment. Moreover, India is now a prominent business destination and leaving entities already here, to go through the regular route for assessment of duty, would not lead to any particular hardship. It will only mean that those who are already in the business of import or export here, will have a level playing field with the resident entities. There would be nothing unjust in that position. Moreover, an existing entity otherwise qualified and which is not in the business of export or import and which proposes to start the business of import or export, would not be precluded from approaching this Authority for an Advance Ruling, inspite of this interpretation.

18. When a tribunal is constituted and powers are conferred on it to determine certain matters specified by the statute, clearly the jurisdiction of the tribunal is confined to the matters specified. As regards that jurisdiction, a liberal construction may be adopted to achieve the object sought to be achieved. But, the construction may not be so elastic as to warrant the bringing into that jurisdiction matters not clearly within its purview. As observed in Craies on Statute Law, Seventh Edition:

> "As a general rule, statutes which enable persons to take legal proceedings under certain specified circumstances, must be accurately obeyed notwithstanding the fact that their provisions may be expressed in merely affirmative language."

In the context of the Customs Act and the analogous enactments it is clear that what the statute intended was to confer on this body, the authority for giving an Advance Ruling, when an eligible entity proposes to start in India an activity of import or export for the first time. In a case where an applicant is already in the business of import or export, simply because it intends to start a new line of import or export, it is not given the right to approach this Authority for a Ruling on its liability to duty regarding the proposed new business.

19. Assuming that we give the expression 'activity' its natural or wide meaning, what would be the consequence? Business activity is obviously a term of wide import. In its natural meaning it will bring in every activity connected with a business, under the jurisdiction of the Authority for Advance Rulings even unconnected with import or export, provided the applicant is a non-resident or an Indian entity proposing to have a joint venture or a wholly owned subsidiary of a foreign company. Clearly, that is not contemplated by the statutes. The statute is intended to deal with import and export activities. In other words the business should be one of import or export. That means we have to assign the expression 'activity' its defined meaning, lest it leads to absurd results. Then we have to consider the expression 'proposes to undertake any business activity in India." Can we read it to understand to include every fresh line of import or export? If we do so, an exporting company or importing company or fully owned subsidiary Indian Company would be able to approach the Authority for a ruling every time a new article is sought to be marketed by it, imported or even otherwise. Clearly, the Advance Rulings Authority is not a substitute for the regular hierarchy of authorities under the Act. An existing importer or exporter has to take up his plea relating to the new article to be imported to the regular authorities under the Act and get it adjudicated upon.

20. An interpretation not widening the jurisdiction of this Tribunal derives support from the legislative history as well. One may contrast the definition of 'Advance Ruling' in the Act with the one in section 245N of the Income-tax Act. That provision can be said to be a forerunner of section 28E of the Act. The definition in section 245N of the Income-tax Act reads:

> *"advance ruling means-*
>
> *(i) a determination by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant; or*
>
> *(ii) a determination by the Authority in relation to [the tax liability of a non-resident arising out of] a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with [such] non-resident.*
>
> (iii) *A determination or decision by the Authority in respect of an issue relating to computation of total income which is pending before any income-tax authority or the Appellate Tribunal and such determination or decision shall include the determination or decision of any question of law or of fact relating to such computation of total income specified in the application.*
>
> (emphasis supplied)

The words "a transaction which has been undertaken or" that precede the words "proposed to be undertaken" found therein are omitted in section 28E of the Act. Hence, the Ruling is confined to 'an activity which is proposed to be undertaken'. The provision introduced in the Central Excise Act in the year 1999 and in the Finance Act 1994 providing for Advance Ruling by the amendment of the year 2009, also confine the ruling to a 'proposed activity'. The scheme subsequently adopted while providing for Advance Ruling is thus confined to a proposed activity and not to an activity which has been undertaken. This according to us clearly evinces a legislative intention to confine a Ruling by this Authority only to the undertaking of a proposed activity. Thus viewed, it cannot be

said that when an existing 'activity' is sought to be varied, added to or expanded, that would also entitle the existing entity to seek an Advance Ruling under the Customs Act.

21. We are on the whole satisfied that there is no warrant for jettisoning the definition of the expression 'activity' while understanding section 28E (c)(i)(c) of the Act. There is no compelling reason to read the expression activity de hors its definition. The fact that the entry to this Authority will become restricted is no reason to depart from the defined meaning. In any event, that is a matter for the legislature. We, therefore, hold that the applicant is not eligible to seek an Advance Ruling on the new line of business it proposes to start in the course of its existing import trade.

22. The applicant has sought to sustain its application by invoking section 28H 2(c) of the Act and submitting that what it seeks is a ruling only on the methodology of valuation under Rule 7 of the Customs Valuation (determination of value of imported goods) Rules 2007.

Section 28H 2(c) reads:

"principles to be adopted for the purposes of determination of value of the goods under the provisions of this Act".

It is submitted on behalf of the applicant that the applications are sustainable under the above provision and the applicant is entitled to have a ruling on the questions raised by it.

23. On behalf of the Department it is submitted that clause (c) speaks of the principles to be adopted for the determination of the value of goods under the provisions of the Customs Act, whereas the applicant is seeking a ruling on valuation under the Customs Tariff Act, 1975, which does not come within the scope of clause (c). It is pointed out that the expression "of this Act" can refer only to the Customs Act and not to the Customs Tariff Act. Clause (c) is compared to clause (d) of section 28H(2) to point out that whereas under clause (d) both the Customs Act and the Customs Tariff Act are mentioned, in clause (c) there is only a mention of the Customs Act. Clauses (a) and (e) of section 28H (2) are also referred to, to point out that whenever the Act wanted this body to decide a

question relating to the Customs Tariff Act, 1975 it has specifically authorized it to do so.

24. We are not inclined to sustain this objection on behalf of the Customs. A reference to section 12 of the Customs Act dealing with dutiable goods shows that duties of Customs have to be levied at the rates specified under the Customs Tariff Act, 1975 or any other law for the time being in force in India. Section 14 dealing with valuation of goods says that valuation is for the purposes of the Customs Tariff Act, 1975 or any other law for the time being in force. Section 2 of the Customs Tariff Act, 1975 also says that the rates at which duties of Customs shall be levied under the Customs Act, 1962 are specified in the first and second schedules to that Act. Sub-section (2) of the section 3 of the Customs Tariff Act also contemplates valuation to be determined under the Customs Act for imposition of duty under that Act. We thus find that the two enactments are related enactments and the operation of the Customs Act as regards the levy of duty is inextricably inter-linked with the Customs Tariff Act, 1975. Considering that what has to be ruled on under section 28H(c)of the Act are the principles to be adopted for the purposes of determination of value of the goods under the provisions of the Customs Act, we are of the view that the same can be satisfactorily done only on reading the Customs Act along with the Customs Tariff Act and the Rules thereunder. We, therefore, have no hesitation in overruling the submission of the Department that the applicant is not entitled to seek a Ruling under clause (c) of section 28H(2) on the principles to be adopted for the purposes of determination of value under the Customs Tariff Act when the application of that Act is attracted. We, therefore, find on this aspect that the application, subject to the eligibility of the applicant, is maintainable with reference to section 28H2(c) of the Act.

25. In view of finding that the applicant is not eligible to seek a ruling on its proposed business activity, the applications are not maintainable. These applications are, therefore, not admitted but are rejected. Obviously it will be open to the applicant to raise all its contentions on merits sought to be raised before us,

before the appropriate Authority at the appropriate stage and nothing said herein can prejudice the applicant at that stage.

Sd/-	Sd/-
(P.K. Balasubramanyan)	**(J. Khosla)**
Chairman	**Member**

I generally agree with the conclusions arrived at in the aforesaid order except on the issue whether the activity of the applicant can be considered as the one "proposed to be undertaken".

2. It has been concluded in the said order that the statute intended "to confer on this body, the authority for giving an Advance Ruling, when an eligible entity proposes to start in India an activity of import or export **for the first time**. In a case where an applicant is already in the business of import or export, simply because it intends to start a new line of import or export, it is not given right to approach this Authority for a Ruling on its liability to duty regarding the proposed new business" (para 18).

(Emphasis provided)

3. Section 28-I of the Customs Act, 1962 lays down the procedure to be followed on receipt of an application for advance ruling. Sub-section (2) of the said Section 28-I requires the application to be rejected where the question raised in the application is, -

(a) Already pending in the applicant's case before any officer of customs, the Appellate Tribunal or any Court;

(b) The same as in a matter already decided by the Appellate Tribunal or any Court:

There is no other substantive provision requiring the application to be rejected. However, the definitions of the terms “advance ruling” and “applicant” in Section 28E do prescribe the parameters within which the Authority is required to consider applications filed with it. Relevant extracts of the said section are reproduced below:

> *28 E Definitions.-In this Chapter,* ***unless the context otherwise requires****,-*
>
> *(a)* ***“activity****” means import or export;*
>
> *(b) “advance ruling” means the determination, by the Authority, of a question of law or fact specified in the application regarding the liability to pay duty in relation to an* ***activity*** *which is proposed to be undertaken, by the applicant.*
>
> *(c) “applicant” means-*
>
> *(i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or*
>
> *(b) a resident setting up a joint venture in India in collaboration with a non-resident; or*
>
> *(c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company,*
>
> *who or which, as the case may be, proposes to undertake any* ***business activity*** *in India:*
>
> *(ii) a joint venture in India; or*
>
> *(iii) a resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf,*
>
> *and which or who, as the case may be, makes application for advance ruling under sub-section (1) of section 28H;*
>
> *Explanation.- for the purposes of this clause, “joint venture in India” means a contractual arrangement whereby two or more persons undertake an* ***economic activity*** *which is subject to joint control and one or more of the participants or partners or equity holders is a non-resident having substantial interest in such arrangement*;
>
> (Emphasis provided)

4. From the definition of the expression “advance ruling” as given in clause (b) of Section 28 E read with definition of “activity” in clause (a), it is amply clear that a ruling can be given only in respect of an import or export which is proposed to be undertaken; the decision must precede the activity in respect of which the decision is pronounced. If the event has already occurred the ruling would cease to be an

advance ruling. The critical issue to be determined is what would constitute an "activity" for the aforesaid clause (b) in a situation where an importer imports different articles at different points of time. If he imports an article 'X', no doubt he is ineligible to approach the Authority subsequent to completion of importation of the said article for a ruling pertaining to article 'X'. However, if an eligible applicant has commenced the import activity and approaches the Authority to seek a ruling in respect of import of a new item where the applicant entertains a doubt regarding one of the questions on which ruling can be sought under sub-section (2) of Section 28H, to decline his request for a ruling would be taking too narrow a view of the term "activity".

5. An entrepreneur setting up a business activity may need to import scores or even hundreds of items at various stages of setting up of the business operations. It is possible that for most of items proposed to be imported he may not entertain any doubt about the duty liability or that such imports are covered by previous judicial decisions and hence he may choose not to seek a ruling from the Authority before commencing their import. However, he may have genuine doubts about the duty liability in respect of some of the items whether it is on matter of rates of duty or principles of valuation. He may need a definitive ruling before he intends to import those items. As per interpretation in the aforesaid order of the Hon'ble Chairperson and the Member (L) if the importer had imported a single item on which he had absolutely no doubts about the duty liability, he would be disentitled thereafter from seeking a ruling from this Authority in respect of the duty liability on imports of any item proposed to be undertaken in the future. Some of the projects may take two to three years to be set up and many of the import requirements may not even be envisaged at the time of the commencement of the project or simply that entrepreneurs may have planned to procure those items indigenously but may be forced to import subsequently due to non-availability for any reason such as disruption in local supplies, poor quality of local products etc. The aforesaid interpretation would severely limit the scope for seeking an advance ruling under the Customs Act.

6. The interpretation of the Hon'ble Chairperson and Member (L) goes against the decisions of the Authority in previous orders. An application filed by M/s Agilent Technologies India Private Limited, New Delhi seeking a ruling regarding classification of a particular model of spectrum analyser was admitted by the Authority vide its Order dated 3rd July, 2008 even though the applicant had imported different models of such an analyser in the past. During the hearing of the case on merits, it was argued on behalf of the Department that since the applicant has already imported a spectrum analyser in the past, the proposed imports constitute an "ongoing activity" and do not fall in the realm of "proposed activity" as envisaged in the definition of "advance ruling". The Authority in its order recorded that this objection was considered before admitting the application and it would not be appropriate to entertain this objection again at the stage of hearing on merits. The Department chose not to contest the decision on the eligibility of the applicant to seek a ruling in this case any further.

7. Similarly in the case of M/s Xerox India Limited, Gurgaon the Authority vide its miscellaneous order dated 6.08.2010 has admitted an application and subsequently pronounced a ruling regarding valuation of goods which were being imported by the applicant even previously but he had approached the authority for a ruling because of a change in the marketing pattern resulting in a change in the duty liability. (Misc. Order No.AAR/01/(CUS)/2010 dated 6th August, 2010) Relevant extracts of para 10 of the said order are reproduced as follows:

> "Adopting this approach, we are inclined to take the view that the applicant shall not be denied the remedy of seeking advance ruling on the ground that the import activity has already started and any further imports of the same products cannot be regarded as one "proposed to be undertaken". Though in a broad sense the future imports are not something new, the complexion of the import transaction takes a different color. Hitherto goods have been imported on the premise that all of them are for retail sale. Now, before clearing the goods, the applicant is in a position to identify whether or not they are meant for re-sale or for providing services

> etc. and the applicant will be giving a declaration to the effect that the particular goods are not meant for re-sale. If so, the duty liability will be different. At this juncture, we may again point out that we are proceeding on the basis that the applicant's version and contention is correct. Therefore, we are of the view that the proposed import activity is not identical to the earlier activity of import. This differential fact situation obtaining as on the date of clearance itself will have an impact on duty. It is therefore not just and proper to reject the application in *limine* on the ground that one of the ingredients of advance ruling is not satisfied. Hence, we are of the view that there is no legal impediment to hear questions I and 2".

In this case also the Department has not contested the matter any further so far.

8. I have also reservations on the interpretation of the expression "business activity" occurring in the definition of the term 'applicant' in clause (c) (i) (c) of Section 28E as adopted by the Hon'ble Chairperson and Member (L) in their aforesaid order. "Activity" has been defined in clause (a) of the said Section 28E to mean "import or export". The word "activity" has occurred at three places in clauses (b) &(c) of Section 28 E. In my view the word activity in the expressions "business activity" and "economic activity" in the definition of the "applicant" has to be given its natural meaning and not as pertaining to "import or export" as defined in clause (a). The term "business activity" has been defined in various business publications as "activity undertaken as a part of commercial enterprise". In businessdictionary.com it has been defined as "the aggregate economic activities (buying, selling, renting, investing) of an organization or of the commercial and manufacturing sectors of the economy". The term business activity cannot be interpreted to mean only "business of import or export" by substituting the definition of "activity" in clause (a). Similarly the expression "economic activity" cannot be given a restricted meaning of "economic activity of import or export". The context in which the term "activity" has been used in these two expressions viz "business activity" and "economic activity" requires that the exclusion clause in the beginning

of Section 28E i.e. “unless the context otherwise requires” be invoked and the definition of the term activity as given in clause (a) of Section 28E should not be adopted to interpret these two phrases.

9. It is further noticed that the definition of “applicant” as adopted in Section 28E of the Customs Act, 1962 is more or less identical to the definition of the “applicant” in the chapters pertaining to advance ruling in the Central Excise Act, 1944 (Section 23A) and in the Finance Act, 1994(Section 96A) relating to levy and collection of service tax. The term “activity” has been defined only in the Customs Act and Central Excise Act; no definition of “activity” has been provided in the Finance Act. In view of the identical definition of “applicant” in the provisions relating to Advance Rulings in the three statutes it would be incongruous to imply that the term “business activity” implies business of import or export for the purposes of the Customs Act, 1962, the business of production or manufacture for the purpose of Central Excise Act, 1944 but the term “business activity” would assume its natural meaning of when it comes to interpreting the Finance Act, 1944 for service tax. A similar incongruity is noticed if the defined meaning of “activity” is applied for interpreting the expression “economic activity” for the three acts. These expressions ought to have the same interpretation for the chapters relating to advance rulings in all the three Acts.

10. In the facts of the case before us it is true that the applicant is already in the business of import of software and provides services to its clients in India. The applicant has also imported some kind of computer hardware for its own use; it has not been marketing any computer hardware in the country. Computer hardware refers to different kinds of computers and their parts and components which are classified under different entries of the Customs Tariff Schedule. The applicant proposes to import and sell computer hardware and also provide support services. It is no doubt true that an activity of import has taken place but as discussed in the previous paragraphs, the term activity should not be interpreted in a narrow sense. If the product is different and it has not been imported earlier the activity of import can be considered as the one proposed to be undertaken and the applicant is eligible to seek an advance ruling.

11. In the circumstances it is felt that the applications need to be allowed and matter deserves to be heard on merits.

Sd/-
(J.K.Batra)
Member

In view of the opinion of the majority of the Members of the Authority on the maintainability of the applications, it is ordered that the applicant is not eligible to seek a ruling on its proposed business activity. The applications are therefore not maintainable and are rejected.

Sd/-	Sd/-	Sd/-
(J.K. Batra) Member	(P.K. Balasubramanyan Chairman	(J. Khosla) Member