

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

PRESENT

Mr. Justice P.K.Balasubramanyan (Chairperson)
Mr. J.K.Batra (Member)
Mr. J. Khosla (Member)

The 8th April, 2011

Ruling No. AAR/Cus/04//2011
In
Application No. AAR/Cus/44/06/2010

Applicant : M/s Xerox India Limited
Block One, 5th & 6th Floor
Vatika Business Park,
Sector-49, Sohna Road
Gurgaon-122018

Commissioner
Concerned : The Commissioner of Customs
(Import & General)
New Custom House,
Near IGI Airport
New Delhi-110 037

Present for the
applicant : Sh. Thirumalai, Advocate

Present for the Commissioner
concerned : Sh. B.K..Singh, Jt. CDR
Sh. Sumit Kumar, SDR

Ruling
(By J.K.Batra)

M/s Xerox India Limited, the applicant is a joint venture company in India and is engaged in the trading of information technology and office automation hardware and related services. As a part of its ongoing business activities, the applicant is already importing certain types of office machines and equipments for sales and services within India. The applicant states that at the time of importation of these products, the applicant in certain cases was unable to identify

exactly as to whether a particular product would be used for the purpose of retail sale or for captive consumption or by way of supply as part of a service contract or for any use other than retail sale. The actual usage of the products became known to the applicant in some cases at the time of clearance for home consumption, and in some cases, the same was known only at a point of time subsequent to the clearance for home consumption.

2. In the application for advance ruling and further written submissions filed by the applicant, it is stated that the applicant proposes to import, sell and supply specific high performance and latest technology office automation, information technology and electronic products classifiable under Chapter headings 8517, 8528, 8443 and 8472 of the First Schedule to the Customs Tariff Act, 1975. However, under the proposed activity, the applicant wants to import the equipments based on the orders received from the clients for provision of services or under service agreements, as the case may be, as well as negotiations in the form of proposals, correspondence etc. with the prospective clients. It would be definitely known to the applicant at the time of clearance for home consumption that the products proposed to be imported by the applicant, would either be supplied to the clients under the service agreement or sold out to "large customers". As per the proposed activity, it is stated that it would also be known to the applicant at the time of such clearance that the products proposed to be imported would be used for display, as free samples or for replacement of defective machines.

3. It is submitted by the applicant that where the imported products are not intended for retail sale, additional duty of customs leviable under sub-section (1) of Section 3 of the Customs Tariff Act, 1975 should not be based on the Maximum Retail Price (MRP) of the products, irrespective of whether it is printed on the package before clearance. The applicant submits that in law, the MRP need not be printed on such products even under the Standards of Weights and Measures Act, 1976 (hereinafter referred to as the SWM Act) or the rules made thereunder, namely the Standards of Weights and Measures (Packaged Commodities) Rules, 1977(hereinafter referred to as the Packaged Commodities Rules), if the products are not meant for retail sale and are declared as such at the time of clearance. According to the applicant therefore, the additional customs duty under Section 3 of the Customs Tariff Act in respect of the proposed activities is payable on the basis of the transaction value and not based on the MRP.

4. The application for advance ruling was admitted by the Authority vide its Order dated 6th August, 2010 after duly taking note of the objections of the concerned Commissioner and after

hearing the applicant and the Commissioner. The following questions were raised by the applicant for consideration by the Authority namely:-

“1. In those cases where the Applicant makes a categorical declaration on the outer packing of the said products — “Not Meant for Retail Sales”, — can the Applicant pay additional customs duty on a value determined under Section 4 of the Central Excise Act, 1944 i.e. on the basis of the ‘transaction value’ of the goods, and ignoring the MRP on the packing of the product (which may be done to comply with internal business guidelines)?

2. Would the Applicant be exempt from paying Special Additional Duty under Section 3(5) of the Customs Tariff Act, 1976 for transactions covered under Question No.1 above?”

5. From the information made available by the applicant in the application as well as in its written submissions dated 12th July, 2010 and 4th Feb., 2011, it is observed that the proposed import activity is mainly in respect of multifunctional devices and printers classifiable under headings 8443 31 90 and 8443 32 90 respectively of the First Schedule to the Customs Tariff Act, 1975. The multifunctional devices are claimed to perform two or more of the functions of printing, copying or facsimile transmission and are capable of connecting to an automatic data processing machine or network. The proposed business activities have been classified by the applicant into various categories as follows:-

A. Providing certain specialized end to end services: After importation, the aforesaid products would be installed at the premises of clients who have entered into agreement with the applicant for providing end to end services. These clients could be either large corporates from service industry, financial institutions, consultancy firms, large printers & jobbers which will use the applicant’s services and goods either for providing services to their customers or for generating print out material such as brochure, leaflets etc.. The equipments would bear the declaration “Products not meant for Retail Sale” on the outer package thereof. The imported equipments could be installed either at the client’s premises or at the applicant’s own premises. The products would be capitalized in the books of accounts of the applicant. The applicant will be responsible for upkeep and maintenance of the equipment, supply of parts and consumables required therein and generally provide support in the operations thereof.

The applicant undertakes to furnish at the time of import the requisite contract / correspondence evidencing the arrangement for provision of services as aforesaid.

B. Sale of products to large customers: Such customers would include Government Departments, institutional, commercial, industrial users and service providers such as DGS&D, EIH, LANCO etc.. These customers will buy the products for their end use and not for any resale and trading thereof. The products will carry a declaration on the outer packing "Products not meant for Retail Sale". The applicant undertakes to furnish at the time of import the requisite contract / correspondence evidencing the aforesaid arrangement.

C. Internal and captive use of the products in the applicant's premises: The products in this category will be used internally within the business premises of the applicant for its own business and office use. The cost of equipments would be capitalized in the books of accounts of the applicant. The applicant undertakes to furnish an appropriate declaration at the time of import that the equipment would not be sold for retail sale, since the same would be used for applicant's own purposes or for providing services to customers.

D. Display / demonstration and free samples: The imported products will be used for display or demonstration at exhibitions. The equipment may also be supplied on a free of cost basis to prospective customers. The cost of equipment would be capitalized in the books of accounts of the applicant except where there is replacement free of cost. The outer package of the equipment would bear a declaration "Products not meant for Retail Sale".

E. Free replacement: The imported equipment namely multifunctional devices and printers classifiable under heading 8443 31 00 and 8443 32 90 may also be used as a free replacement under warranty arrangement. The outer package of the product would bear a declaration "Products not meant for Retail Sale". A declaration would also be made at the time of import that the equipment would not be sold in retail since the same would be used for free replacement under warranty arrangements.

Apart from aforesaid categories, the applicant would continue to be engaged in the business of retail sales of such products.

6. Additional duty of Customs on imported articles is leviable under sub-section (1) of Section 3 of the Customs Tariff Act, 1975 [CTA, 1975] and is equal to excise duty for the time being leviable on a like article if produced or manufactured in India. If such excise duty on a like article is leviable at any percentage of its value the additional duty of customs shall be calculated at that percentage of the value of the imported article. Sub-section (2) of the said Section 3 of CTA, 1975 prescribes the manner of calculating the value of imported article for levy of additional duty. It lays down that the value of imported article shall be the aggregate of

(i) the value of the article determined under Section 14 of the Customs Act, 1962 and

(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 or any other law (with some exceptions).

It is, however, the proviso to the said sub-section (2) which is relevant for the matter before us. Proviso to sub-section (2) of Section 3 of CTA, 1975 reads as follows:-

“Provided that in case of an article imported into India, -

(a) in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 (60 of 1976) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such article; and

(b) where the like article produced or manufactured in India, or in case where such like article is not so produced or manufactured, then, the class or description of articles to which the imported article belongs, is the

*(i) goods specified by notification in the Official Gazette under sub-section (1) of section 4A of the Central Excise Act, 1944(1 of 1944), **the value of the imported article shall be deemed to be the retail sale price declared on the imported article less such amount of abatement, if any, from such retail sale price as the Central government may, by notification in the Official Gazette, allow in respect of such article under sub-section (2) of section 4A of that act or***

(ii) the goods.....” [emphasis supplied]

Sub-section (2) of Section 3 of CTA, 1975 therefore lays down two methods for determination of value of imported articles in so far as their assessment to additional duty of customs is concerned. In case it is required under the provisions of the SWM Act, 1976 or rules made thereunder or under any other law, to declare on the package thereof the retail price of such article and such articles have been specified by a notification issued under Section 4 A (1) of the Central Excise Act, 1944, then the value of the goods would be based on the retail sale price printed on the article [Maximum Retail Price (MRP) based assessment]. In all other cases the value shall be the aggregate of value determined under Section 14 of the Customs Act and the customs duty chargeable on the said article (Transaction value based assessment).

The issue that calls for a determination, therefore, is whether the goods imported under the five different categories of business activities as proposed to be undertaken by the applicant would require to be assessed to additional duty of customs on the basis of the transaction value as prescribed under the main sub-section (2) of the said Section 3 of CTA, 1975 or on the basis of the retail sale price in terms of the proviso to the said sub-section (2). This would in turn require a determination whether the applicant is required to declare the retail sale price on the goods sought to be imported for its various categories under the provisions of SWM Act, 1976 and rules made thereunder. The other stipulation for the applicability of the MRP based assessment is fulfilled since the applicant has declared in the application that all the equipments proposed to be imported by it have been notified under sub-section (1) of Section 4A of the Central Excise Act, 1944.

7. Since the levy of the additional duty of customs under the CTA, 1975 is dependent on the requirement or otherwise of a declaration of the retail sale price on the package, it is necessary to examine the provisions of the SWM Act and the rules made thereunder.

Chapter II of the Packaged Commodities Rules framed under SWM Act contains various provisions relating to packages intended for retail sale. Rule 6 (1) (f) of the Packaged Commodities Rules under the said Chapter II requires every package intended for retail sale to bear thereon in the prescribed manner the “retail sale price” of the package.

As per clause (r) of rule 2 of the Packaged Commodities Rules “retail sale price” has been defined as follows:

(r)“Retail sale price” means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer.....”

As per Rule 2 A of the Packaged Commodities Rules, the said Chapter II does not apply to institutional and industrial consumers. In the explanation to the said rule 2A these terms have been defined as follows:-

“(a) **Institutional consumer**:- Means those consumers who buy packaged commodities directly from the manufactures / packers for service industry like transportation [including airways, railways], hotel or any other similar service industry.

(b) **Industrial consumer**. - Means those consumers who buy packaged commodities directly from the manufacturers / packers for using the product in their industry for production, etc.”

Rule 3 of the Packaged Commodities Rules further provides that the provisions of said Chapter II “shall apply to packages intended for retail sale.....”

The expression “retail sale” has been defined as per clause (q) of Rule 2 of the Packaged Commodities Rules as follows:-

(q)“retail sale” , in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer;

8. It is the contention of the applicant that in order to impose the obligation of declaring the retail sale price on the packages, it is necessary that there has to be a “sale”. It has been claimed that the activities proposed to be undertaken by the applicant do not envisage any sale transaction nor are the goods intended for any sale in retail as defined in clause (q) of rule 2 of the Packaged Commodities Rules. The applicant has further submitted that his declaration at the time of import should be accepted to determine whether or not the packaged commodity is intended for retail sale. The applicant has cited the observations of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in the case of Central Arecanut and Cocoa Marketing & Processing Co-op Ltd v CCE Mangalore (2008) 226 ELT 369 (Tri- Chennai) to support the acceptance of this declaration.

It has been pointed out by the applicant that institutional and industrial consumers have been specifically excluded from the scope of term “retail package” by virtue of the definition of

retail package given in clause (p) of Rule 2 of the Packaged Commodities Rules. The said clause reads as follows,:

“(p) “retail package” means the packages which are intended for retail sale to the ultimate consumer for the purpose of consumption of the commodity contained therein and includes the imported packages:

Provided that for the purposes of this clause, the expression “ultimate consumer” shall not include industrial or institutional consumers.”

It has been contended therefore that in respect of bulk supplies to Government and other institutions for the purpose of Rule 2(p) a broader meaning has to be assigned. Further, the explanation under Rule 2 A defining institutional and industrial consumers will come into play only if Chapter II becomes applicable. According to the applicant this is not so in the present case and if the supplies are not to the ultimate consumers then there will be no marking of retail sale that would be required.

The applicant has also emphasized that no declaration of retail price *per se* is required merely because a package is an imported package. The applicant has pointed out that prior to its amendment on 13.1.2007 Rule 33 specifically applied to packaged commodities imported into India and there was a requirement to declare on all pre packaged items imported into India the retail sale price as per clause (r) of Rule 2. However, the requirement of declaration to be made on every package was specifically excluded in terms of Rule 33 (4) as it then stood. The said Rule 33 has been omitted with effect from 13.1.2007 “confirming the position that in respect of imported packages that are not intended for retail sale there is no obligation to mark the retail sale price and hence the provisions of Section 4 A of the Central Excise Act cannot be attracted”.

9. The Departmental Representative (DR) appearing on behalf of the Commissioner has contested the arguments made on behalf of the applicant. It has been submitted that the application for advance ruling itself is not maintainable because the proposed import of goods identical to the goods previously imported cannot be considered as an “activity which is proposed to be undertaken” by the applicant; it is an ongoing activity. It has been further pointed out that the questions framed for ruling fall outside the jurisdiction of the Authority since the applicant has requested for a ruling on an issue under the provisions of the SWM Act and

the rules made thereunder. Moreover, under clause (c) of sub-section (2) of Section 28H of the Customs Act, the question on which an advance ruling can be given is confined to *“the principles to be adopted for the purposes of determination of value of goods under the provision of **this Act**”*, that is the Customs Act, 1962. The Authority has thus no jurisdiction to entertain an application for valuation under the CTA, 1975.

10. On the main issue it was stated by the DR that the SWM Act, 1976 or the Rules made thereunder do not make any distinction in respect of commodity/packages meant for (a) captive use/self use (b) servicing or (c) sale to Government Departments, large customers etc..The aforesaid statutory provisions are applicable to commodities in general and are not confined to the category of packages. Exception to this rule has been made in the law itself whereby “institutional consumers” and “industrial consumers” have been kept out of the applicability of Chapter II of the Packaged Commodities Rules. The applicant cannot therefore claim a separate treatment for the goods for the purposes of levy of additional duty intended for captive use, servicing, sales to Government departments etc.

11. Referring to the definition of the expression “retail package” as per clause (p) of Rule 2 of the Packaged Commodities Rules, it has been contended by the DR that any imported packages in whatever form shall always get classified as a retail packages and provisions of the Packaged Commodities Rules would get applied. It was also submitted that even though Rule 3 declares that provision of Chapter II shall apply only to packages intended for retail sale, the imported packages would be covered within the ambit of the said Chapter II because they have already been sold before their importation. It was implied that imported packages have landed in India only after the sale has been affected and thus are subject to provision of Chapter II in view of the definition of “retail package” in clause (p) of Rule 2.

The expression “retail sale” has been defined in Clause (q) of Rule 2 in relation to commodity and not in relation to a package. Hence according to the DR the status of individual packages cannot determine whether or not the provisions of SWM Act are attracted or not.

Industrial consumer has been defined in Chapter II to mean a consumer who buys packed commodities directly from the manufacturers / packers for using the product in their industry for production etc. The DR submitted that the applicant is neither a manufacturer nor a packer which can be said to be supplying the goods to industrial consumers within the definition in Chapter II. Hence these deliveries to the so called industrial consumers are not exempt from

the provision of the SWM Act or Rules made thereunder. Further the goods supplied by the applicant are not going to be used as raw materials consumables or inputs so as to enable the receivers of these goods to be classified as industrial consumers.

12. Before coming to the merits of the issue requiring a determination, it is felt necessary to deal with some of the preliminary objections raised by the Departmental Representative. It has been claimed that the application for advance ruling is not maintainable because many of the items are already being imported by the applicant. The Authority has already dealt with this question in its order of admission dated 6th August, 2010. It was noted in the order that though in a broad sense the imports proposed to be undertaken are not something new, the complexion of import transaction takes a different colour. The goods have been imported hitherto 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 these are meant for resale or for providing services etc. If so, the structure of the transaction has changed with the resultant impact on the duty payable and therefore the proposed activity is something different from the activity already undertaken in respect of the same goods.

13. It has been further contended on behalf of the Commissioner that the questions that are required to be examined for a ruling fall outside the jurisdiction of the Authority. Firstly the Authority is being called upon to give a ruling in relation to the provisions of the SWM Act and the Rules made thereunder; secondly under clause (c) of sub-section (2) of Section 28H of the Customs Act, the Authority is enabled to give an advance ruling for the purposes of determination of value of goods under the Customs Act, 1962 and not under the Customs Tariff Act, 1975.

It is no doubt true that under Section 28H, sub-section (2), clause (c), the Authority can entertain questions pertaining to the principles to be adopted for the purposes of determination of value of the goods under the provisions of the Customs Act, 1962. The ruling has however been sought in respect of additional duty of customs which is leviable under sub-section (1) of Section 3 of CTA 1975. The additional duty of customs is equal to excise duty for the time being leviable on a like article produced or manufactured in India. Sub-section (2) of said Section 3 lays down the manner of computation of value of the imported goods chargeable to additional duty on ad valorem basis. Such a value has been specified to be the aggregate of value of the imported article determined under sub-section (1) of Section 14 of the Customs Act and the duties of customs chargeable under the Customs Act or under any law for the time

being in force. Sub-section (8) of Section 3 of the CTA, 1975 further provides that the provisions of the Customs Act, 1962 including those relating to drawbacks, refunds & exemption from duties shall apply to the duty chargeable under Section 3 of CTA, 1975 as they apply in relation to duties leviable under the Customs Act. As can be observed the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 are so inextricably linked that it is not proper to interpret Section 28H of the Customs Act, 1962 in a narrow sense as has been sought to be done by the Departmental Representative. Value of imported goods for levy of additional duty of custom is again dependent on the value of goods under Section 14 of the Customs Act, 1962. Moreover, it cannot be denied that had the same questions been posed by an applicant in relation to the same goods manufactured and cleared from a factory within the country, these would squarely be within the jurisdiction of the Authority in terms of sub-section (2) of Section 23C of the Central Excise Act, 1944. The provisions of Section 4A of the Excise Act are similar to the provisions of the proviso to sub-section (2) of Section 3 of the CTA, 1975. We do not therefore think it proper to deny a ruling to the applicant on the questions raised.

Proviso to sub-section (2) of Section 3 of the CTA, 1975 requires the adoption of MRP based assessment for determination of additional duty of customs of the goods that are required to bear a declaration of retail sale price under the SWM Act and the rules thereunder. In order to examine the issue raised therefore, the provisions of SWM Act and the rules thereunder have necessarily to be analyzed and interpreted. Such an interpretation is squarely within the jurisdiction of this Authority. In the past also this Authority has given rulings in areas within its statutory jurisdiction but where it became necessary to interpret any of the "allied" Acts such as the Drugs Prices Control Order, the Aircraft Act, 1934 etc. The objections by the DR are therefore not maintainable.

14. On the merits of the question, what is needed to be determined is whether the applicant is required to declare the retail sale price on the packaged commodities sought to be imported under various categories in terms of the provisions of SWM Act, 1976 and the rules thereunder. The obligation to put a declaration on the packages intended for retail sale has been imposed under Rule 6 of the Packaged Commodities Rules. Specifically the "retail sale price" of the package is required to be indicated in pursuance of clause (f) of sub rule (1) of the said rule 6. As per clause (r) of rule 2, the "retail sale price" means the maximum price at which the packaged commodities may be sold to the ultimate consumers. By virtue of the provisions of rule 3, Chapter II [of which rule 6 is a part] applies only to packages intended for retail sale. The

conclusion that is obvious from the aforesaid provisions of the Packaged Commodities Rules is that a declaration regarding retail sale price in terms of rule 6 needs to be made only in respect of packages intended for retail sale. There is no requirement for such a declaration in respect of packages which are not intended for retail sale. It is to be noted that retail sale has been defined in clause (q) of rule 2 in relation to a commodity to mean the sale, distribution or delivery of said commodity. The declaration under rule 6 is required to be made in respect of package not only for sale but also for distribution or delivery; however, the declaration relating to the retail sale price would be required to be made under clause (f) of sub-rule(1) of the said rule 6 only in respect of packages intended for retail sale. The Hon'ble Supreme Court in its judgment in the case of M/s Jayanti Food Processing (P) Ltd vs Commissioner of Central Excise, Rajasthan [2007(215)ELT 327 (SC)] has observed as follows:-

“The requirement of rule 6(1) (f) is specific. It requires the retail sale price of the package be printed or displayed on the package. If there is no sale involved of the package, there would be no question of rule 6 (1) (f) being attracted.”

In view of this interpretation it is difficult to accept the contention of the DR that all packaged commodities whether meant for captive consumption or for servicing are required to bear the declaration pertaining to maximum retail price. We are also unable to accept the proposition that “institutional consumers” and “industrial consumers” which have been kept out of the applicability of Chapter II of the Packaged Commodities Rules are the only two excluded categories. The obligation to indicate the retail sale price arises only in respect of packages intended for retail sale. Once the obligation has been established, the law has exempted sales made to “institutional consumers” and the “industrial consumers”, as defined in the Packaged Commodities Rules, from the requirement of declaration under rule 6. If there is no obligation under the law to make a declaration under rule 6, there is no need for an exemption from making such a declaration. Absence of a specific exemption cannot impose an obligation to declare as has been contended by the DR.

15. The Departmental Representative has also contended that import packages in all cases shall get classified as retail packages in terms of definition of “retail package” in clause (p) of rule 2 of the Packaged Commodities Rules. In the said clause retail package has been defined as follows:-

*“retail package” means the packages which are intended for retail sale to the ultimate consumer for the purpose of consumption of the commodity contained therein **and includes the imported packages:***

Provided that for the purposes of this clause, the expression “ultimate consumer” shall not include industrial or institutional consumers

(emphasis supplied)

The DR has attempted to justify his contention by referring to the highlighted phrase in the definition of “retail package”. According to the DR, therefore, all imported packages satisfy the definition of “retail package” and hence they need to bear a declaration. We are, however, unable to accept the interpretation given by the DR; this definition merely implies that imported packages which are intended for retail sale to the ultimate consumers for the purpose of consumption of the commodity contained therein would also be deemed as retail packages. Imported packages have also to satisfy the criteria of “intended for retail sale” to be categorized as retail package. In any case the term “retail package” has not been used in rule 6 (1) (f) requiring declaration to be made on a package. It has also not been used to define “retail sale price” or even the “retail sale”. The requirement to make a declaration is not affected directly by the fact whether or not goods are covered by definition of retail package. We may hasten to add that apart from the provision of the Packaged Commodities Rules, the requirement of indicating declaration on the imported packages also flows from the provisions of the Foreign Trade (Development and Regulation) Act, 1992 and the instruments made thereunder. As per Notification No. 44(RE-2000)/1997- 2002 dated 24.11.2000, all packaged products which are subject to the provisions of the Standards of Weight and Measures (Packaged Commodities) Rules, 1977 when produced / packed / sold in domestic market shall be subject to compliance of all the provisions of said rules, when imported into India. Therefore whatever is the obligation for making a declaration in respect of packaged commodities produced or manufactured within India under SWM Act or Rules made thereunder has to be discharged in respect of packaged commodities imported into India.

16. The Departmental Representative has also claimed that since the goods have landed in India as a result of a sales transaction between the buyers in India and the seller abroad, these goods satisfy the requirement of rule 3 regarding Chapter II being applicable to packages intended for retail sale. This argument is without any basis because as per sub rule (3) of Rule

1 of the Packaged Commodities Rules the said rules apply to commodities in the packaged form which are intended to be sold in the course of inter-State trade and commerce. The transaction between the foreign supplier and the Indian buyer is a transaction in the course of International Trade and not inter-State trade. The said import transaction by the applicant by itself cannot impose an obligation on the importer under the Packaged Commodities Rules. It is only if the goods after import are intended for intra-State trade and commerce that the obligations under the Packaged Commodities Rules take effect. The provisions of the SWM Act and the Packaged Commodities Rules made thereunder have to be complied with in respect of an imported article only just before its clearance for home consumption. In the facts before us the goods proposed to be imported by the applicant for providing services etc. cannot be said to be intended for retail sale to be covered within the ambit of Chapter II.

17. On behalf of the Commissioner it has also been pointed out that the applicant is taking a contradictory stand in relation to declaration of retail price on the packages. On the one hand the applicant claims that he is not required under law to declare the retail price on the packages; the applicant nevertheless would indicate the maximum retail price on the packages "to comply with internal business guidelines". There is some merit in what the DR has mentioned about declaration of the price on the packages even when the law does not require the applicant to do so. However, this does not change the legal position i.e. the assessment based on retail sale price can be resorted to only if there is requirement under the SWM Act or the rules made thereunder to declare the retail price on the packages. The fact that legally it is not required in certain cases to declare the price and yet it proceeds to do so would not make the applicant ineligible for the transaction based assessment. Even the Supreme Court in the case of Jayanti Food Processing (P) Ltd has observed that if there is no requirement under SWM Act or the rules made thereunder for declaration of MRP on the packages, then there would be no question of applicability of Section 4 A of the Central Excise Act, 1944. Even if the assessee voluntarily displays on the pack the MRP, that would be of no use if otherwise there is no requirement under SWM Act and the rules made thereunder to declare such a price.

18. In view of the aforesaid analysis the question whether or not the goods would require to be assessed to additional duty of customs on the basis of transaction value as prescribed under the main sub-section (2) of Section 3 of the CTA, 1975 or on the basis of the maximum retail price in terms of the proviso to the said sub-section (2) is determined in respect of each of the categories of business activities of the applicant as follows:

A. Providing certain specialized end to end services: As per the information furnished by the applicant and summarized in clause A of paragraph 5 of this ruling, the goods in this category are not intended for sale; these would be used for providing services. In the circumstances there is no requirement under Rule 6 (1) (f) of the Packaged Commodities Rules to declare the retail sale price on the package. Consequently the proviso to sub-section (2) of Section 3 of CTA, 1975 is not applicable in respect of this category of goods. The additional duty of customs would therefore be leviable by applying the provisions of the main sub-section (2) of the said Section 3 i.e the aggregate of the value of the imported goods determined under sub-section (1) of Section 14 of the Customs Act, 1962 and duty of customs leviable under Section 12 of the said Customs Act or under any other law for the time being in force (transaction value method).

B. Sale of equipment to large customers: In this category the applicant proposes to supply the goods to large customers such as Government departments, institutional, commercial and industrial users. The goods are definitely intended for sale notwithstanding the declaration on the outer packing to the contrary i.e. “products not meant for retail sale”. Rule 6(1) (f) of the Packaged Commodities Rules requires every package intended for retail sale to bear the prescribed declaration. The “retail sale” in relation to a commodity means the sale, distribution or the delivery of such commodity from retail sales agency or other instrumentality for consumption by an individual or group of individuals and any other consumers [rule 2(q)]. There is no doubt that multifunctional devices and printers imported by the applicant and supplied to Government departments or other large customers are intended for consumption by individuals and other consumers. The volume of sales in a particular transaction or the nature of the buyers has not been specified as a criterion for determination whether a declaration of retail price is required to be made on the package or not under the Packaged Commodities Rules. The only exception that has been made under Packaged Commodities Rules in this behalf is in respect of ‘industrial consumers’ or ‘institutional consumers’.

The “institutional consumers” have been defined in rule 2 A to be those consumers who buy packaged commodities directly from the manufacturers / packers for service industry like transportation (including airways, railways), hotel or any other

similar service industry. The applicant has informed vide its letter dated 4th Feb., 2011 that it “understands” that the customers in this category would purchase the equipment for their own use and not for resale or trading. There is no declaration from the applicant as regards the proposed use to which these equipments would be put to by the buyers. Since these equipments are not meant for service industries like transportation, hotel or any other similar service industry in the hands of Government departments or other large customers, these buyers cannot be categorized as “institutional consumers” for the purposes of the packaged commodities.

Likewise the term “industrial consumers” under rule 2 A refers to those consumers who buy packaged commodities directly from the manufacturers/ packers for using the product in their industry for production, etc. The Government departments and other large customers cannot be categorized as industrial consumers also because they are not going to put these products for use in any industry for production etc. In view thereof, the benefit of exclusion clause under rule 2 A is not available to the applicant in respect of sale of products to large customers which may include Government departments, commercial users and service providers etc.

For the products covered by this category of imports, the provision of rule 6(1)(f) are squarely applicable and as such the applicant would be required to declare the retail sale price on the packages intended for sale to Government departments and other large customers. In that event the value of the imported goods for the levy of additional duty of customs would need to be determined on the basis of retail sale price by applying the proviso to sub-section (2) of Section 3 of CTA, 1975, that is, the MRP based assessment.

C. Captive use of the products in the applicant’s premises: In this category of the proposed business activity also the products are not intended for retail sale but would be used by the applicant within its own business premises for office use. There being no intention to sell the goods, the obligation imposed by rule 6 (1) (f) of the Packaged Commodities Rules is not applicable. Hence the goods will be assessed to additional duty of customs under the provisions of main sub-section (2) of Section 3 of CTA, 1975 on the basis of the value representing the aggregate of value of the imported goods under sub-section (1) of Section 14 of CA, 1962 and the duty of customs leviable under

Section 12 of the said CA, 1962 or any other law for the time being in force, that is, the transaction value method.

D. Display / demonstration and free samples: In so far as the goods intended for display / demonstration at exhibition are concerned, the applicant claims that the cost of goods would be capitalized in the books of accounts of the applicant. The applicant has however, not indicated what will happen to the imported products after the exhibition / demonstration is over. Normally such goods are disposed of after the exhibition is over. Therefore, the goods though at the time of import may be immediately required for display / demonstration but would need to be eventually disposed of by sale. Such goods should therefore be treated as goods intended for retail sale and would therefore be required to bear the declaration as stipulated under Rule 6 (1) (f) of the Packaged Commodities Rules. Consequently the goods would need to be assessed to additional custom duty on the basis of retail sale price indicated thereon as stipulated in the proviso to sub-section (2) of Section 3 of CTA, 1975, that is MRP based assessment.

In the case of goods that are intended to be distributed as free samples, since no sales are involved, there would be no need for declaration of retail sale price in terms of Rule 6 (1) (f) of the Packaged Commodities Rules and consequently such free samples also would be assessed to additional duty of customs on the basis of transaction value method.

E. Free Replacement: The imported equipment is proposed to be used as free replacement under warranty arrangements. In the case of such goods since no sale is intended, the goods will not be required to bear the declaration under Rule 6(1) (f) of the Packaged Commodities Rules. Consequently the assessment to additional duty on such goods would be on the basis of the aggregate of value of imported goods determined under sub-section (1) of Section 14 of Customs Act and duty of customs chargeable thereon under sub-section (1) of Section 12 of the said Act or under any other law for the time being in force, that is, the transaction value method.

19. As may be observed from the aforesaid analysis, the same goods in some cases may require to bear the declaration as stipulated under Rule 6 (1) (f) of the Packaged Commodities Rules, some other goods of the same class but not intended for retail sale may be exempted

from the obligation for a declaration of retail sale price. Consequently the mode of assessment and the incidence of duty would be different in respect of goods identical in shape, size, functions, & packing but declared for a different use. It is likely that at different points of time and having regard to the market conditions, duty levability may be more if goods are intended for retail sale or vice versa. This places an additional responsibility on the applicant for making a true and correct declaration at the time of import and to ensure that the goods are used for the purpose for which the declaration is made and that there is no diversion from one intended use to another. The applicant would no doubt be maintaining necessary records to satisfy the proper officer of Customs if the need arises that the goods have been deployed for the declared activity and have not been diverted for retail sale or vice versa.

20. Before we conclude, we would like to observe that the Departmental Representative has brought to our notice during arguments that the Standards of Weight and Measures Act, 1976 was being repealed and substituted by the Legal Metrology Act, 2009 with effect from 1st March, 2011. It was learnt thereafter that the commencement of the Legal Metrology Act has been deferred by a month. We have given our ruling in the context of SWM Act and the Packaged Commodities Rules. The applicant is at liberty to make another application to seek advance ruling, if so required, in the context of the provisions of Legal Metrology Act, 2009 and the rules made thereunder as and when these provisions take effect.

21. The other issue on which a determination is required pertains to levy of the Special Additional Duty (SAD) of customs on imported articles. SAD is leviable under sub-section (5) of Section 3 of the Customs Tariff Act, 1975 on imported articles to counter-balance the sales tax, value added tax, local tax etc., for the time being leviable on like articles on their sale, purchase or transport in India. The Central Government has by notification no. 19/2006-Cus dated 1/3/2006, directed that all goods specified in the First Schedule to the CTA, 1975 be liable to the said additional duty at the rate of 4% ad valorem. However, by a notification no. 29/2010-Cus dated 27.2.2010; the following goods have been exempted from the levy of this duty, namely:

“All pre-packaged goods intended for retail sale in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 (60 of 1976) or the rules made thereunder or under any other law for the time being in force, to declare on package therefore the retail sale price of such article”.

In view of the aforesaid exemption goods imported by the applicant which are required to bear a declaration under the provisions of SWM Act and the Packaged Commodities Rules would be exempt from the levy of SAD; all other imported articles would be leviable to SAD.

22. Accordingly in conclusion the multi-functional devices and printers classifiable under heading 8443 31 90 and 8443 32 90 respectively of the First Schedule to the Customs Tariff Act, 1975 and used for the following business activities details of which have been specified in para 5 will be assessed to additional duty of customs on the basis of a value which shall be the aggregate of the value determined under sub-section (1) of Section 14 of the Customs Act, 1962 and Customs duty leviable under sub-section (1) of Section 12 of the Customs Act, 1962 or under any other law for the time being in force, under the main sub-section (2) of Section 3 of CTA, 1975.

- (i) Products intended for providing certain specialized end to end service.
- (ii) Products for internal and captive use of the applicant.
- (iii) Free samples
- (iv) Free replacement under warranty arrangements

The aforesaid goods would be leviable to Special Additional Duty under sub-section (5) of Section 3 of CTA, 1975; no exemption is available to such goods under Notification No. 29/2010 dated 27.2.2010.

In respect of the following activities however, imported products will be assessed to additional duty of customs on the basis of the retail sale price in terms of the proviso to sub-section (2) of Section 3 of CTA, 1975.

- (i) Products intended for sale to Government Departments, large customers etc..
- (ii) Products intended for display and demonstration.

Such goods would be exempt from the levy of Special Additional Duty in terms of Serial No.1 of the Table in the Notification No. 29/2010-Cus dated 27.2.2010

23. Accordingly Ruling is given and pronounced on this day, the 8th of April, 2011.

Sd/-
(J.K.Batra)
Member

Sd/-
(P.K.Balasubramanyan)
Chairman

Sd/-
(J.Khosla)
Member