IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI, COURT HALL - III

Customs Appeal No. 40085/2024

(All arising out of Order in Original No. 1784/2023-AIR dated 18.10.2023 passed by the Commissioner of Customs (Air Cargo), Chennai)

M/s. Xiaomi Technology India Pvt. Ltd. **Appellant**
Orchid (Block E), Ground Floor to Fourth Floor
Embassy Tech Village,
Marathahalli – Sarjapur Outer Ring Road
Bengaluru, Karnataka – 560 103.

Vs.

Principal Commissioner of Customs **Respondent**
Chennai VII Commissionerate
New Custom House
Meenambakkam, Chennai – 600 016.

With

(i) Customs Appeal No. 40110/2024 (Principal Commissioner of Customs, Air Port & Cargo, Chennai VII, Chennai Vs. Xiaomi Technology India Pvt. Ltd.)
(ii) Customs Appeal No. 40390/2024 (Principal Commissioner of Customs Air Port & Cargo, Chennai VII, Chennai Vs. Sameer Bhatrahalli Rao)
(iii) Customs Appeal No. 40391/2024 (Principal Commissioner of Customs, Air Port & Cargo, Chennai VII, Chennai Vs. Hipad Technology India Pvt. Ltd.)
(iv) Customs Appeal No. 40392/2024 (Principal Commissioner of Customs, Air Port & Cargo, Chennai VII, Chennai Vs. Flextronics Technologies India Pvt. Ltd.)
(v) Customs Appeal No. 40393/2024 (Principal Commissioner of Customs, Air Port & Cargo, Chennai VII, Chennai Vs. Rising Star Mobile India Pvt. Ltd.- Now Bharat FIH Limited)
(vi) Customs Appeal No. 40397/2024 (Principal Commissioner of Customs, Air Port & Cargo, Chennai VII, Chennai Vs. DBG Technology Pvt. Ltd.)

APPEARANCE :

Shri Lakshmi Kumaran V, Advocate, Shri Anurag Kapur, Shri Rohan Muralidharan & Ms. Shobhana Krishnan, Advocates for Xiaomi India, Sameer Bhatrahalli Rao, Flextronics Technologies India Pvt. Ltd., DBG Technology Pvt. Ltd. and M/s. Hi-Pad Technology India Private Limited

Shri Vikram Naik and Shri Harsh Makhija, Advocates for M/s. Rising Star Mobile India Pvt. Ltd.

Shri P.R.V. Ramanan, Special Counsel for the Respondent-Department and Shri Anoop Singh, Authorized Representative for Revenue in C/40393/2024

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

FINAL ORDER NOS. 41324-41330/2025

Date of Hearing: 19th to 21st March 2025
& 27.05.2025
Date of Decision: 14.11.2025

Per M. Ajit Kumar,

All these appeals arise out of a common Order in Original (**OIO**) and hence they were heard for common disposal.

2. Brief facts of the case are that intelligence gathered by the officers of the Delhi Zonal Unit of the Directorate of Revenue Intelligence, (**DRI**) indicated that M/s. Xiaomi Technology India Pvt. Ltd. (**Xiaomi India**) based at Bengaluru was allegedly evading customs duty by way of non-inclusion of royalty and license fee (paid by Xiaomi India under exclusive agreements with IPR holders) to the assessable value of the goods imported. Based on the investigation it appeared that Xiaomi India had paid royalty and license fee under the provisions of the agreements entered into between the parties and this fact was not disclosed by Xiaomi India to the Customs department. Royalty and license fee is includible in the transaction value as per sec. 14 of the Customs Act, 1962 (**Customs Act**) read with Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (**Valuation Rules**), and Explanation to Rule 10(1)(c) and (e). (The terms "royalty" and "licence fee" is not being differentiated from each other while examining this issue, as has also been done by all parties to the dispute). The department alleges that Xiaomi India had

admitted that they did not disclose the fact of existence of agreements between their company, Xiaomi China and Qualcomm Inc. for payment of royalties before the authorities at Special Valuation Branch (**SVB**), Bangalore while submitting application under Board Circular No.05/2016 dated 9.2.2016. It was only after initiation of investigation by the DRI that Xiaomi India informed SVB, Bangalore about these agreements in the month of October 2019. This appeared to show suppression of fact and willful misstatement on the part of Xiaomi India. Hence three Show Cause Notices dated 7.12.2021, 8.12.2021 and 9.12.2021 were issued to the Xiaomi India along with four of its 'Contract Manufacturers' (**CM**) [viz. M/s. Rising Star Mobile India Private Limited, M/s. Flextronics Technologies India Private Limited, M/s. Hi-Pad Technology India Private Limited & M/s. DBG Technology India Private Limited], and others, for the period 01.04.2017 to 30.06.2020, under Section 28(4) of the Customs Act, 1962 making them answerable to Commissioners of Customs at ACC, Chennai, Bangalore and New Delhi. The same have been adjudicated by the Principal Commissioner of Customs (Air Cargo) Chennai-VII on being appointed as the Common Adjudicating Authority by the Board. [i.e. the Adjudicating Authority, '**AA**' for short], by the impugned order after being appointed as the common Adjudicating Authority. After due process the assessable value of mobile phones were redetermined and differential customs duties demanded. The goods were found liable for confiscation and penalties were also imposed. Aggrieved by the orders Xiaomi India, along with others are before us in appeal. Similarly aggrieved by the non-imposition of penalty and dropping of certain demands, non-imposition of redemption fine etc, Revenue has also filed five appeals against the above orders.

3. We have heard Ld. Counsel Shri V. Lakshmi Kumaran for the appellant Xiaomi India and others; Ld. Counsel Shri Vikram Naik for M/s. Rising Star Mobile India Pvt. Ltd. and Ld. Special Counsel Shri P.R.V. Ramanan, for the Revenue. Multiple and very elaborate submissions have been made by the parties involving more than a thousand page with an equally large number of judgments being cited in the submission, pre and post the oral arguments. The Apex Court had an occasion to examine a similar situation. In **Chief Commissioner of Central Goods and Service Tax & Ors. Vs M/s Safari Retreats Private Ltd. & Ors.** [CIVIL APPEAL NO. 2948 OF 2023, Dated: 03/10/2024 / 2024-TIOL-101-SC-GST], The Hon'ble Court held:

> "Very detailed submissions have been made by the parties. We find that the submissions made by the learned counsel for the assessees and the intervenors are repetitive. There are a large number of decisions relied upon, whether relevant or irrelevant. Brevity is the hallmark of good advocacy. It would be ideal if parties on one side file joint written submissions. The Judges and lawyers are humans. Sometimes, bulky compilations and submissions can be counterproductive."

The submissions made shall be stated and discussed under the relevant topics of discussion.

4. Before taking up the issues raised by the rival parties, it may be relevant to look at the business backdrop leading to such disputes.

Business backdrop

5. Modern business entities view the world as a unified economic space, with Multi-National Corporations (MNCs) offering highly

differentiated, often technology-driven products or services. The value of these products typically lies in proprietary technologies or intellectual property rights which are intangible assets and are subject to tax. The appellant Xiaomi India has also reflected the said position in their written submissions dated 11.06.2024, stating as under:

> "A.1 The Respondent submits that the Third-Party Manufacturers are operating under the globally recognised concept of 'Electronic contract manufacturing (ECM) company' that design, manufacture, test, distribute, and provide return/repair services for electronic components and assemblies for original equipment manufacturers (OEMs). It is submitted that the Electronic Manufacturing Service industry (hereinafter referred to as 'EMS industry') was introduced after the late 1970s. The ECM companies offered flexibility and eased human resources issues for smaller companies doing limited runs. The business model for the EMS industry is to specialize in large economies of scale in manufacturing, raw materials procurement and pooling together resources, industrial design expertise as well as create added value services such as warranty and repairs. This frees up the OEMs who does not need to manufacture and keep huge inventories of products. Therefore, the OEMs can respond to sudden spikes in demand more quickly and efficiently."

MNCs set prices and outsourcing strategies partly to manage profits and tax liabilities, ostensibly to maximize shareholder value. Global outsourcing—including subcontracting by function, location, or expertise or to 'sister companies'—has become standard, providing benefits like cost reduction, tax advantages, and access to specialized manufacturers. However, such possibilities provide some businessmen opportunity to create an agency or instrumentality for the purpose of tax evasion etc., by layering of ownership through subsidiaries, corporations etc. located in tax havens, trusts, investment funds and/or multiple type of legal vehicles and cleverly drafted contracts to conceal the true ownership of the goods or activity that is liable to tax. A five Judge **Constitutional Bench** of the Hon'ble Supreme Court in

Cox and Kings Ltd. Vs SAP India Pvt. Ltd. & Anr. [2023 INSC 1051, Dated: O6.12.2023] held:

> "A group company involving the parent and subsidiary companies are created for myriad purposes such as limiting the liability of the parent corporation, facilitating international trade, entering into business ventures with investors, establishing domestic corporate residence, and avoiding tax liability."

Hence tax officials have often scrutinized contracts, involving sale to group companies/ persons, or transfer of patents/ Intellectual Property Rights (**IPR**) to subsidiaries, sister companies etc. in low-tax countries, which then levy royalties to its parent organization and affiliates, ['parent' paying royalty to its 'child' on the basis of a transferred licence], to detect potential tax evasion, leading to a tax dispute.

Royalty/Licence fee

6. Coming to the facts. As submitted by Xiaomi India they are engaged in the business of selling consumer electronic goods. As of now, they do not manufacture goods in India. Mobile phones, television and power banks are either imported by Xiaomi India from Xiaomi China and their affiliates [**Xiaomi China**] or got manufactured from their CM's in India.

6.1 They further state that under different Agreements, Xiaomi India is required to pay the following royalty/licence fee to Qualcomm in respect of import of **finished/complete goods** by Xiaomi India related firms for the purpose of trading in India, as shown in Table I:

TABLE: I

S. No.	Details of Item imported for trading purposes	Details of suppliers	Royalty / License fee paid to	Purpose	Rate

1.	Complete mobile phones of Xiaomi Brand using 2G Technology (covered under SULA dated 1.1.2010) upto September 2017	Xiaomi, H.K. China, Zhuhai, Xiaomi China	Qualcomm USA	Qualcomm IPR Technology	Royalty @5% of net selling price of each subscriber unit
2.	Complete mobile phones of Xiaomi Brand using 3G, 3G Technology (covered under MPLA dated 1.1.2018) from October 2017	Xiaomi, H.K. China, Zhuhai, Xiaomi China	Qualcomm USA	Qualcomm IPR Technology	Royalty @3.25% of net selling price of each branded multimode complete terminal
3.	Complete mobile phones of Xiaomi Brand using 2G, 3G, and 4G Technology (covered under SULA dated 1.1.2010, MPLA dated 1.1.2018 and MSA dated 27.11.2010)	Xiaomi, H.K. China, Zhuhai, Xiaomi China	Qualcomm USA	Qualcomm IPR Technology	As per agreement

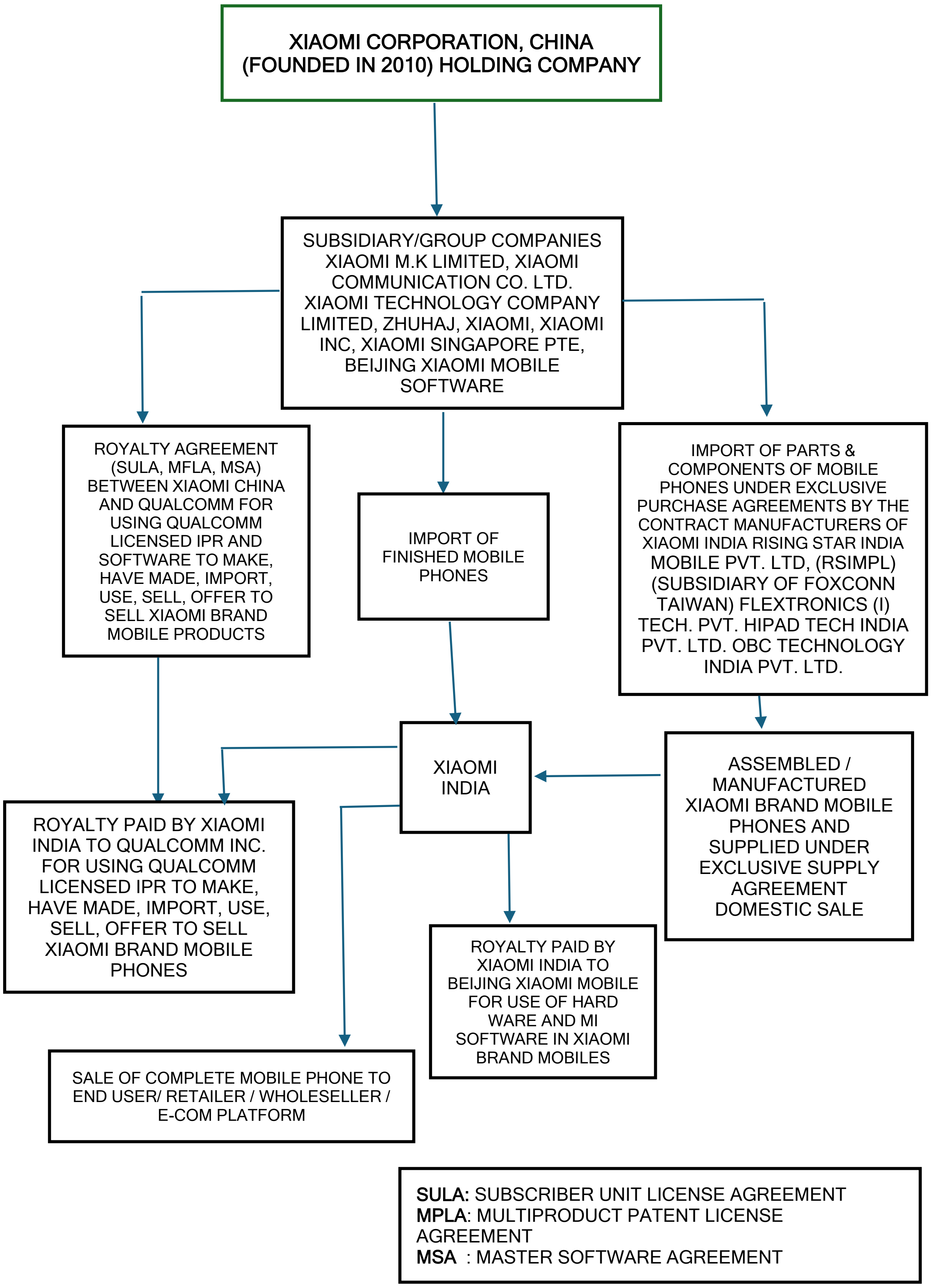
6.2 Xiaomi India is also purchasing Xiaomi brand mobile phones, manufactured by their CMs in India, by using **<u>components/ parts</u>** imported by them from different Xiaomi entities. The details of the royalty/license fee paid/payable by Xiaomi India on the components/parts used in the mobile phones manufactured by the CMs in India are given in Table II below:-

<u>TABLE: II</u>

S. No.	Pars / Components for manufacturing of Xiaomi Brand Mobile Phones	Suppliers of Xiaomi China, its affiliates and SIVs	Royalty / License fee paid to	Purpose	Rate
1.	Parts and components of mobile phone (covered under SULA dated 1.1.2010) upto September 2017	Xiaomi, H.K. China, Zhuhai, Xiaomi China	Qualcomm USA	Qualcomm IPR Technology	Royalty @5% of net selling price of each subscriber unit
2.	Parts and components of mobile phone (covered under MPLA dated 1.1.2018) from October 2017	Xiaomi, H.K. China, Zhuhai, Xiaomi China	Qualcomm USA	Qualcomm IPR Technology	Royalty @3.25% of net selling price of each branded multimode complete terminal
3.	Parts and components of mobile phones of Xiaomi Brand using 2G, 3G and 4G Technology (covered under MSA 27.11.2010)	Xiaomi, H.K. China, Zhuhai, Xiaomi China	Qualcomm USA	Qualcomm IPR Technology	As per agreement

4.	Parts and components of mobile phone (covered under LRAA dated 1.1.2017)	Xiaomi, H.K. China, Zhuhai, Xiaomi China	Beijing Xiaomi	Licensed software and hardware technology	License fee @2% of Xiaomi India' revenue generated from selling of permitted products

FLOW CHART OF THE BUSINESS MODEL OF XIAOMI INDIA



6.3 As per para 8.1 of the OIO:

-- **Xiaomi India was incorporated on October 7, 2014 under the Companies Act, 2013 as a subsidiary of Xiaomi Singapore Pte. Ltd.,** Singapore (holding company). 99.90 % of the total equity shares of Xiaomi India are held by the holding company Xiaomi Singapore Pte. Ltd. and 0.10% is held by its fellow subsidiary company Xiaomi H.K. Limited.

-- **Xiaomi Corporation, Cayman Islands is the flagship holding company and Xiaomi Singapore Pte. Ltd. is the holding company of Xiaomi India.** Beijing Xiaomi Mobile Software Co. Ltd., China; Xiaomi Communications Co. Ltd., China; Xiaomi Inc., China; Xiaomi H.K. Limited, Hongkong; Zhuhai Xiaomi Communications Co. Ltd., China and Xiaomi Communications Logisitcs India Private Limited, India are the fellow subsidiaries of Xiaomi India.

-- **Xiaomi India is engaged in the distribution and trading of the consumer electronic products** comprising of phones, IoT (Internet of things) and lifestyle products such as televisions, accessories etc and related spares.

Burden of Proof and Onus of Proof

7.1 As stated by the Hon'ble Supreme Court, in **SOUNDS N. IMAGES Vs COLLECTOR OF CUSTOMS** [2000 (117) E.L.T. 538 (S.C.)], it is always for the Customs Authorities to establish by methods known to law and in a satisfactory manner that the value of imported goods is not what the importer says it is and what that value actually is. That burden cannot be shifted to the importer/noticee. Further the presumption of innocence is a background assumption of our legal system. Having said that, discharging the burden of proof is not a one step process, it happens during the many steps involved in the continuous shifting of onus of proof between the department and the importer/noticee. There is an essential distinction between burden of proof and onus of proof, which has been discussed in the recent Apex Court's Judgment in **MAHAKALI SUJATHA Vs THE BRANCH MANAGER, FUTURE GENERALI INDIA LIFE INSURANCE COMPANY LIMITED & ANOTHER** [(2024) 8 SCC 712 / CIVIL APPEAL NO. 3821 OF 2024, Dated: 10.04.2024]

> "41. . . . Section 101 of the Evidence Act, 1872 states that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. This Section clearly states that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. Simply put, it is easier to prove an affirmative than a negative. **In other words, the burden of proving a fact always lies upon the person who asserts the same.** Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. **Further, things which are admitted need not be proved. Whether the burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case**. The party on whom the burden lies has to stand on his own and he cannot take advantage of the weakness or omissions of the opposite party. Thus, the burden of proving a claim or defence is on the party who asserts it.
>
> 42. Section 102 of the Evidence Act, 1872 provides a test regarding on whom the burden of proof would lie, namely, that the burden lies on the person who would fail if no evidence were given on either side. Whenever the law places a burden of proof upon a party, a presumption operates against it. Hence, burden of proof and presumptions have to be considered together. **There are however exceptions to the general rule as to the burden of proof as enunciated in Sections 101 and 102 of the Evidence Act, 1872**, i.e., in the context of the burden of adducing evidence: (i) when a rebuttable presumption of law exists in favour of a party, the onus is on the other side to rebut it; (ii) **when any fact is especially within the knowledge of any person, the burden of proving it is on him (Section 106).** In some cases, the burden of proof is cast by statute on particular parties (Sections 103 and 105).

> 43. **<u>There is an essential distinction between burden of proof and onus of proof; burden of proof lies upon a person who has to prove the fact and which never shifts but onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.</u>** For instance, in a suit for possession based on the title, **<u>once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence thereof, the burden of proof lying on the plaintiff shall be held to have been discharged</u>** so as to amount to proof of the plaintiff's title vide RVE Venkatachala Gounder vs. Arulmigu Viswesaraswami and VP Temple, (2003) 8 SCC 752."
>
> (emphasis added)

<u>Pre-Ponderance of Probabilities</u>

7.2 The **standard of proof** required to prove a matter is, as in a civil case, i.e. **pre-ponderance of probabilities**. Inference of pre-ponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances. A five Judge Bench of the Hon'ble Supreme Court in, **M Siddiq (D) Thr Lrs vs Mahant Suresh Das & Ors** [AIRONLINE 2019 SC 1420 / 2020 (1) SCC 1], has examined the legal issue comprehensively, as under:

> "The standard of proof.
>
> 720. **<u>The court in a civil trial applies a standard of proof governed by a preponderance of probabilities</u>**. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. Phipson on Evidence formulates the standard succinctly: If therefore, the evidence is such that the court can say "**<u>we think it more probable than not", the burden is discharged</u>**, but if the probabilities are equal, it is not. [Phipson on Evidence]. In Miller v. Minister of Pensions [Miller v. Minister of Pensions, (1947) 2 All ER 372.], Lord Denning, J. (as the Master of Rolls then was) defined the doctrine of the balance or preponderance of probabilities in the following terms : (All ER p. 373 H)
>
>> "(1) . . **<u>It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice</u>**. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice." (emphasis supplied)

721. The law recognises that within the standard of preponderance of probabilities, there could be different degrees of probability. This was succinctly summarised by Denning, LJ in Bater v. Bater [**Bater v. Bater,** [1951] P. 35 (CA).], where he formulated the principle thus: (p. 37)

> "So also, in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. **The degree depends on the subject-matter.**" (emphasis supplied)

722. The definition of the expression "proved" in Section 3 of the Evidence Act is in the following terms:

> "3. "**Proved**".- A fact is said to be proved when, after considering the matters before it, <u>the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists</u>."

723. Proof of a fact depends upon the probability of its existence. The finding of the court must be based on:

723.1 The test of a prudent person, who acts under the supposition that a fact exists.

723.2 In the context and circumstances of a particular case.

724. Analysing this, Y.V. Chandrachud, J. (as the learned Chief Justice then was) in N.G. Dastane v. S. Dastane [**N.G. Dastane v. S. Dastane**, (1975) 2 SCC 326.] held : (SCC pp. 335-36, para 24)

> "The belief regarding the existence of a fact may, thus, be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. **<u>The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second</u>.** Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. **<u>Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue</u>** [Per Dixon, J, in Wright v. Wright, (1948) 77 CLR 191 (Aust).] , CLR at p. 210"; or as said by Lord Denning, **"<u>the degree of probability depends on the subject-matter</u>".** In proportion as the offence is grave, so ought the proof to be clear [Blyth v. Blyth, [1966] A.C. 643 : [1966] 2 WLR 634 : (1966) 1 All ER 524 (HL).] , All ER at p. 536'. But whether the

issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged." (emphasis supplied)

725. The court recognised that within the standard of preponderance of probabilities, the degree of probability is based on the subject-matter involved.

726. In State of U.P. v. Krishna Gopal [**State of U.P. v. Krishna Gopal,** (1988) 4 SCC 302 : 1988 SCC (Crl.).] , this court observed : (SCC p. 314, para 26)

"26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on **a robust common sense and, ultimately, on the trained intuitions of the Judge**."
(emphasis added)

'Proved' 'Disproved' and 'Not Proved'

7.3 The Hon'ble Supreme Court of India **in RVE Venkatachala Gounder Vs Arulmigu Viswesaraswami and VP Temple** [(2003) 8 SCC 752], has examined the legal terms 'proved'. It held:

"28. Whether a civil or a criminal case, the anvil for testing of 'proved', 'disproved' and 'not proved', as defined in Section 3 of the Indian Evidence Act, 1872 is one and the same. **A fact is said to be 'proved' when, if considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists**. It is the evaluation of the result drawn by applicability of the rule, which makes the difference.

"The probative effects of evidence in civil and criminal cases are not however always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. BEST says : There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision: but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. (BEST, S. 95). **While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt.**" (See **Sarkar on Evidence**, 15th Edition, pp.58-59)

In the words of Denning LJ (Bater Vs. B, 1950, 2 All ER 458,459)

> "It is true that by our law there is a higher standard of proof in criminal cases then in civil cases, but this is subject to the qualification that **there is no absolute standard in either case.** In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. **So also in civil cases there may be degrees of probability**."

Agreeing with this statement of law, Hodson, LJ said

> "Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others." (Hornal V. Neuberger P. Ltd., 1956 3 All ER 970, 977).

29. . . . However, as held in **A. Raghavamma & Anr. Vs. Chenchamma & Anr.**, AIR 1964 SC 136, **there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.**"

(emphasis added)

In **State of W.B. Vs Mir Mohammad Omar & Ors**. [(2000) 8 SCC 382], the Hon'ble Supreme Court held that the pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused **should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning.** The Court went on to observe that the doctrine of presumption is not alien to such a rule, nor would it impair the temper of the rule. On the other hand, **if the traditional Rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.**

7.4 We can now examine the issues involved.

I. <u>Whether the CM's are the importers of the parts and components</u>

8. <u>Submissions made by Xiaomi and Ors:</u>

(i) The parts and components were not imported on behalf of Xiaomi India by the third-party CM's, the said goods were imported on their own account for manufacture of mobile phones.

(ii) The Respondent does not have any control over the imported components and thus, they should not be treated as 'beneficial owner'.

(iii) Where one person declared and accepted to be the importer between importation and clearance, another person cannot be treated as importer after clearance of goods.

(iv) As per the Hon'ble Supreme Court's judgment in the case of **Commissioner of C. Ex., Goa Vs Cosme Farma Laboratories Ltd.,** reported in 2015 (318) ELT 545 (S.C.) it was held that simply because the loan licensee had to adhere to quality control/specifications prescribed by the Principal Manufacturer, it could not mean that loan licensee was engaged in manufacture of goods on behalf of the Principal manufacturer.

v) As per the Hon'ble Patna High Court's judgment in the case of **Tata Engineering and Locomotive Company Ltd., Vs Union of India** reported at 1988 (35) ELT 617 (Pat.) and affirmed by Hon'ble SC in the case reported at 1997 (94) ELT A128 (S.C.), merely because the company has right to supervise the fabrication process so as to satisfy about quality of material used and to guarantee manufactured product according to specifications of its customers, it does not mean that the body builder manufactured the body on behalf of the buyer.

vi) **Boards Circular No. F.132/111/2007/CX.4 dated 18.07.2007** was interpreted by Xiaomi India to mean that for the expression "on behalf of" to be made applicable, there must be three parties involved. In the present case, only two parties were involved and therefore, the components cannot be said to be imported by the Third-Party Manufacturers on behalf of the Respondent.

(vii) The following clauses of the Product Purchase Agreement clearly evidences that the Third-Party Manufacturers were acting on their own account and not acting on behalf of Xiaomi:

a. **Clause 10:** The ownership and risk in responsibility for the components shall pass on to the Third Party Manufacturers once they have been delivered to the carrier appointed by the Third Party Manufacturers.
b. **Clause 27:** As per this clause, nothing in the PP Agreement is intended to or shall be deemed to establish any partnership or joint venture between the parties, constitute any party the agent of another party, or authorise any party to make or enter into any commitments for or on behalf of any other party. Both the parties confirm that they are acting on their own behalf and not for the benefit of any other person.
c. **Clause 4:** the Third-Party Manufacturers shall notify the Foreign supplier in writing of the forecast of demand for the components.
d. **Clause 3:** When the Third Party Manufacturer intends to place order for the components, it shall either send an order Form through email to supplier or orally, provided that an oral order must be confirmed by an Order Form within 3 days from the Oral order. The said Order shall be treated as offer for purchase and the supplier at its discretion accept the order. The supplier shall arrange for the delivery of the products in accordance with the Customer's instruction on the Order Form.
e. **Clause 6:** The Delivery of products shall be made by the Supplier and the risk or loss or damages of the products

passed to Customer at the Delivery point. The Third-Party Manufacturers shall conduct the inspection of products after delivery according to the specification and the Customer shall give written notice of rejection to the Supplier on account of any defects by reason of quality, delivery, etc. In case the Third-Party Manufacturer fails to give notice of rejection except for any defect which is not one that would be apparent on reasonable inspection, the product shall be conclusively presumed to comply with specifications and accordingly accepted by the Customer.

f. **Clause 7:** The Third-Party Manufacturer is responsible for obtaining at its own cost such import licenses and other consents in relation to the products as are required from time to time including IEC issued for importing relevant products.

g. **Clause 12:** The Third-Party Manufacturer acknowledged that the IPRs pertain to components are the Foreign supplier's property. Nothing in the agreement shall be construed as conferring any license or granting any rights in favour of Third Party Manufacturers in relation to IPR. The Foreign supplier asserts its full rights to control the use of its trade mark within China, India and relevant countries and the Third Party Manufacturers shall assist the Foreign supplier as required in preventing parallel imports from diluting supplier's rights.

h. **Clause 9:** The Third-Party Manufacturers shall use the products to manufacture finished goods. They are not permitted to resell the products to any Third party in any country except India. However, the resale of products in India shall be only with prior written consent of Foreign supplier. The Third-Party Manufacturer has the right to sell the scrapped product after the said products are made not usable/non-recyclable through appropriate methodology and in accordance with the applicable laws.

8.1 Submissions made by revenue:

(a) Contract manufacturers operate under contractual agreements with both Xiaomi India and Xiaomi China, which stipulate that assembled mobile phones are to be sold exclusively to Xiaomi India.

(b) Contract manufacturers are not involved in negotiation with Zhuhai Xiaomi or SIVs for purchase of components. However, all changes in the cost related to Products and its procurement shall be fully factored in the Net Selling Price, failing which Xiaomi China shall be solely responsible for such changes through Purchase Price Variance (in short PPV) claims.

(c) Contract Manufacturers have no control over the finalisation or fixation of price.

(d) Contract Manufacturers are responsible for obtaining, import licences, a valid Indian importer-Exporter Code (IEC) etc as are required for the import of goods.

(e) Ownership and risk in and responsibility for the parts and components shall pass to the Contract Manufacturer once they have been delivered to the carrier

(f) M/s. Zhuhai Xiaomi Communication Technology Company Ltd had full responsibility/liability for the clearance of products from the Indian Customs about any dispute that might arise on account of valuation of the products and would indemnify the contract manufacturers for the losses, if any, incurred by them.

(g) Zhuhai Xiaomi China had absolute control over import of components by contract manufacturers.

(h) Contract Manufacturer can only sell the products in India to Xiaomi India. CM’s can only resell the products (parts and components), in India with prior written consent of Zhuhai Xiaomi China.

(i) Contract Manufacturer has the right to sell the scrapped Products after the said Products are made non usable or recyclable through appropriate methodology and in accordance with applicable laws.

(j) All unused parts and components, finished or/and semifinished goods etc. are to be returned to Xiaomi India.

(k) The intellectual property rights are Supplier's (or its licensor's) property.

(l) If the CM's failed to pay/remit invoice value to the vendors of imported goods of Xiaomi brand mobile phones, Xiaomi India could hold their payments towards sale of finished Xiaomi hand mobile phones.

(m) The CM's cannot repack the product without the consent of supplier

(n) All transaction/indirect taxes, fines, penalties, deposits made by the CM's including legal fees paid on account of valuation of the products are to be reimbursed by Xiaomi India.

8.2 Discussion on submissions

8.2.1 **Interpretation of contracts**: Since the whole discussion is one relating to Agreements/ contracts and their interpretation, it would be relevant to note, that as per the judgments of Constitutional Courts, the nomenclature of any contract or document, is not decisive of its nature. Since this may encourage clever drafting of Agreements to camouflage the real intention of the parties. The recitals in the document read as a whole, the surrounding circumstances, the intention of the executant and acknowledgement thereof by the parties are conclusive. [See: **Puzhakkal Kuttappu Vs C. Bhargavi and Others** - (1977) 1 SCC 17 and **Namburi Basava Subrahmanyam Vs Alapati Hymavathi & Ors.** - (1996) 9 SCC 388]. Further as stated in **Wigmore on Evidence** [1981, Vol-9, para 2461], when contrive and camouflage is adopted, the Courts must aim and strive to find out the true intention by looking at the genesis of the agreement, the context and the surrounding circumstances as a whole.

8.2.2 Xiaomi India has been paying Royalty and licence fee to Qualcomm Inc from 2015-16 and to Beijing Xiaomi from the year 2017-18. It would be beneficial for the discussion to list out the important terms of some of the Agreements that are relevant for the resolution of this issue. In 'Product Purchase Agreement' (**PPA**) i.e. Contract – I below, the CM is a 'customer' with Xiaomi China being the 'seller'. In 'Goods Sales Agreement' (**GSA**) i.e. Contract II (a) & (b) the CM's are 'sellers' and Xiaomi India is the 'buyer':

8.2.3 Relevant portions of **Contract - I** between Zhuhai Xiaomi Communications Technology Co. Ltd. China (Seller) and Rising Star Mobile India Pvt. Ltd., India – Now Bharat FTH Ltd. (Customer) are reproduced below:

> 1. INTERPRETATION
>
> (d) A person includes any individual, partnership, corporation, trust, limited liability entity, unincorporated organization, association, Governmental Authority or any other entity.
>
> 2. SALE OF THE PRODUCTS
>
> a. Subject to Clause (d), during the term and subject to the provisions of this Agreement, Supplier shall sell and Customer shall buy such quantities of the Products as may be ordered by Customer from time to time
>
> ***** ***** *****
>
> 4. FORECASTS OF DEMAND
>
> a. Customer shall notify such Supplier in writing of the following estimations (without any liability to customer) and shall ensure that such estimates are accurate and complete. Such estimates shall not constitute Orders
>
> - its estimated Orders for each Month, at least one (1) calendar month before the start of that Month
> - other estimations that the Parties deem necessary, or

- any revisions to the above estimates, immediately once they are made.

b. It is agreed that trade terms and conditions with respect to price freeze (in short T&Cs) of the Products shall be negotiated between Supplier and the including affiliated companies of Customer, that is, except for the locally purchased Products in India (the price and T&Cs shall be finally approved by Supplier), **the unit prices and trade terms and conditions of all the Products used for production shall be negotiated by Supplier and SIV and Customer is not responsible for relevant material** price and T&Cs negotiation, and Supplier shall negotiate the price and Customer shall place Orders to SIV based on such price, provided **all changes in the cost related to Products and its procurement shall be fully factored in the Net Selling Price, failing which Supplier shall be solely responsible for such changes through Purchase Price Variance (in short PPV) claims.**

c. For the required Products, Customer shall purchase from Supplier/SIVs according to the Demand Forecast and Lead Time of Products delivery. **If said Products cannot be used by Customer due to the change of Demand Forecast by Supplier or other reasons not attributed to Customer, all relevant liabilities shall be borne by Supplier, and Supplier in also obliged to dispose off the Products**, as earlier as ten (10) days and within a maximum of ninety (90) days from the date of receipt of the Products arriving at Indian ports in the event Supplier fails to dispose off the Products within ninety (90) days, Customer has the right to dispose off the same in the manner as deem fit by Customer and all the losses incurred by Customer shall be borne by Supplier, provided Customer shall give a written notice of fifteen (15) days prior to the disposal

d. In the event any Products become excess in the hands of SIVs due to the reasons attributed to Supplier, **the dispute with respect to the same shall be resolved between SIVs and Supplier and no liability shall fall on Customer**

e. Products, for the production purpose, imported into India by Customer must be treated in the following manner or disposed off within ninety (90) days or the period prescribed by the laws of India as applicable, whichever is earlier

f. Transform into finished goods (FG) and invoiced to Customer:

g. If the Products are defective Products as determined by Customer, Customer shall send back to suppliers: ....

*****   *****   *****

8. PRICE AND PAYMENT

a. Customer shall pay Supplier for the Products in accordance with the provisions of this Clause 8.

b. The List Prices may be varied from time to time by Supplier on giving thirty (30) days' notice to Customer, provided Supplier would discuss with Customer before freezing the price of the Products and Supplier takes full responsibility/liability for the clearance of Products from the Indian customs which arise due to dispute raised by them on the valuation of the Products and indemnify Customer for the losses if any incurred by Customer. However, **Customer would not be involved in the negotiation between Supplier and SIV and Customer shall consent to the varied List Prices by giving to Supplier a written confirmation within ten (10) days after receiving Supplier's notice**, failing which the relevant orders yet to be accepted by Supplier shall be deemed to be withdrawn by Customer. The price applicable to each Order shall be the latest version of the List Prices for the Products.

c. Supplier shall invoice Customer from time to time for the **Net Selling Price** of any Orders accepted by Customer

d. Customer shall pay to Supplier the total amount of each invoice in US currency by wire transfer to Supplier's bank account within ninety (90) days from the date of B/L. All taxes including GST, VAT, Customs Duty, Customs Handling Charges, Transport cost from CIF, Port to Factory Site, Transit Insurance, etc., payable in India shall be borne by Customer. All amounts due to the Supplier under this Agreement shall become due immediately if this Agreement is terminated or novated despite any other provisions provided that the amount with respect to the specific invoice is due only on the effect of termination.

***** ***** *****

12. INTELLECTUAL PROPERTY RIGHTS

a. Customer acknowledges that:
- the intellectual Property Rights are Supplier's (or its licensor's) property;
- nothing in this Agreement shall be construed as conferring any licence or granting any rights in favour of Customer in relation to the Intellectual Property Rights with respect to the Products. Supplier asserts its full rights to control the use of its trade marks within China, India, and relevant countries and Customer shall assist Supplier as required in preventing parallel importers from diluting Supplier's rights; and
- any reputation in any trade marks affixed or applied to the Products shall accrue to the sole benefit of Supplier or any other owner of the trade marks from time to time.

. . . . . .

27. NO PARTNERSHIP OR AGENCY

a. Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the Parties, constitute any Party the agent of another Party, or authorize any Party to make or enter into any commitments for or on behalf of any other Party.

b. Each Party confirms it is acting on its own behalf and not for the benefit of any other person

8.2.4 Relevant portions of **Contract - II (a)** between Rising Star Mobile India Private Ltd. (Seller) who is a contract manufacturer-appellant and Xiaomi Technology India Pvt. Ltd. (Buyer) is as below:

2. PILOT PRODUCTION PHASE

The **cooperation between Buyer and Seller** in production of Goods consists of two (2) phases: (i) the pilot production phase (the "Pilot Production Phase"); and (ii) the mass production phase (the "Mass Production Phase"). Unless otherwise provided under this Agreement, the provisions other than this Section shall not apply to the Pilot Production Phase and the Goods manufactured during the Pilot Production Phase.

***** ***** *****

f. MASS PRODUCTION EVALUATION: Upon the end of Pilot Production Phase (amount of pilot Goods may range from 200 to 1000 pcs), Buyer shall evaluate and confirm whether Seller's production equipment and technical capability are suitable for entrance to the Mass Production Phase. Once confirmed, Buyer shall give a written notice to Seller, enclosed with the technical documents including but not limited to the production tools, circuit diagrams and Specifications for the mass production. Buyer shall ensure that the technical documents are complete, detailed, valid, practical and accurate and Buyer should provide technical support during the Mass Production Phase. **Once Seller receives and accepts the specification standards and other terms mentioned in such Notice from Buyer, it will be deemed that Seller has confirmed the Specification of the mass production products and Seller shall commence the mass production pursuant to the Specifications, subject to the receipt of demand forecast.**

7. TRANSFER OF TITLE AND RISK OF LOSS

Title to Goods shipped under any Purchase Order passes to Buyer upon EXW Delivery Location as per, Incoterms 2010. To Buyer, provided, if Buyer fails to pay for the Goods as per the payment cycle even after mutual discussion between the Parties, Seller has an encumbrance over the Goods, Bailed Property, etc., till such time all the payments in respect of the same is settled by Buyer as per the terms of the payment cycle.

8. PRICE AND PAYMENT

a. PRICE: Subject to Clause 8(b) below, **Buyer shall purchase the Goods from Seller at the prices based on mutual discussion between the Parties / terms of Purchase Order as accepted by Seller.**

b. PRICING MODEL AND QUOTATIONS: Notwithstanding anything to the contrary contained herein, the Parties agree that:

i. Prior to the first-time delivery of any new model of Goods, Seller shall make a quotation based on the pricing model as confirmed previously by Buyer and Seller. **The Price shall consist of the material [BOM] costs, corresponding tariff, manufacturing costs, transaction taxes, loading and unloading cost, insurance cost and all related fees and expenses, among which, the BOM costs; however, BOM costs shall be the actual landed cost of the materials incurred by Seller.**

ii. Seller shall update its quotation on the time interval agreed between Buyer and Seller so as to timely reflect the effect of change to material costs, tax, etc. on the Price of Goods.

iii. Seller's quotation shall come into effect each time only upon the mutual discussion and written confirmation, singed by both Parties.
***** ***** *****

13. REPRESENTATIONS AND WARRANTIES

b. PRODUCT WARRANTY WITH RESPECT TO WORKMANSHIP. Seller warrants to Buyer that (the "Product Warranty"):

i. the Goods will:

- conform to the specifications and standards, of the Goods as per the terms mutually agreed between the Parties,

- conform with Buyer's quality standards and the specification in writing:

- be free from defects (within the agreed limit is exempted), with respect to, workmanship which is not attributed to Buyer, however the defective products arising out of reasons attributed to Buyer shall be repaired and delivered by Buyer as explained herein in this Agreement; and

- be fit and sufficient for the particular purpose intended by Buyer and its customers, of which Seller is aware (and Seller acknowledges that it knows of Buyer's intended use of the Goods and that such Goods have been selected, designed, manufactured, or assembled by Seller based upon Buyer's stated use and will be fit and sufficient for the particular purposes intended by Buyer); and to the extent of the specification as mutually agreed between the Parties. Best efforts to comply with all applicable Laws.

All the above warranties by Seller are only to Buyer and not to any other persons/entities including the end user, dealers etc.

ii. Each of the Goods will be new and conveyed by Seller to Buyer with good title, free and clear of all Encumbrances, subject to Seller’s right over the Buyer with respect to amounts due and outstanding from Buyer.

iii. Withdrawal or Recall of Goods. If Buyer or a governmental authority determines and provides proof that any Goods sold to Buyer are defective and the defect is attributable to the bad workmanship of Seller, Seller shall undertake to rework such defective goods, more fully explained herein in this Agreement.

8.2.5 Relevant portions of the **Contract II (b)** between Flextronics Technologies (India) Private Limited (Seller) who is a contract manufacturer-appellant and Xiaomi Technology India Private Limited (Buyer), is stated below:-

1. DEFINITIONS:-

**** ***

"**Background Intellectual Property Rights**" means Buyer's Intellectual Property or Seller's Intellectual Property, as applicable, except for any Foreground Intellectual Property Rights and **<u>except for Designing and Manufacturing Methods</u>**

"**Buyer's Intellectual Property**" means all Intellectual Property Rights **<u>owned by or licensed to Buyer</u>**, including all Foreground Intellectual Property Rights and any of Buyer's Background Intellectual Property Rights **<u>used in the design. production and manufacturing of the Goods</u>** other than Designing and Manufacturing Methods.

"**Designing and Manufacturing Methods**" **<u>shall mean know how, design tools, methodologies, software, algorithms, or other means that may be used to (1) design, manufacture, assemble or test products and goods, or (ii) to design production means or the processes by which products and goods are designed. manufactured, assembled, or tested and any improvements or modifications thereto.</u>**

"**Foreground Intellectual Property Rights**" means during the Term of this Agreement, the Intellectual Property Rights for incorporation into the Goods, that is **<u>developed by Seller alone,</u>** if any, as expressly indicated in an accepted purchase order or otherwise agreed in writing by the Parties, save for any Designing and Manufacturing Methods.

"**Indirect Taxes**" shall mean all applicable customs duty, import duty, excise duty, sales tax, service tax, goods and service tax, value added tax, use tax and ad valorem tax. For the avoidance of doubt, **<u>Indirect Tax shall not include any taxes on the income of Seller arising under or in relation to this Agreement</u>**.

"**Materials**" shall mean components, parts and subassemblies that comprise the Goods and that appear on the BOM.

"**Intellectual Property Rights**" means all **<u>industrial and other intellectual property rights</u>** comprising or relating to: (a) Patents; (b) Trademarks; (c) internet domain names, whether or not Trademarks, registered by any authorized private registrar or Governmental

Authority, web addresses, web pages, website and URLs, (d) works of authorship, expressions, designs and design registrations, whether or not copyrightable, including copyrights and copyrightable works, software and firmware, application programming interfaces, architecture, files, records, schematics, data, data files, and databases and other specifications and documentation; (e) Trade Secrets, (f) mask works and the like;(g) **industrial design; and** (h) **all industrial and other intellectual property rights**, and all rights, interests and protections that are associated with, equivalent or similar to, or required for the exercise of, any of the foregoing, however arising, in each case whether registered or unregistered and including all registrations and applications for, and renewals or extensions of, such rights or forms of protection pursuant to the Laws of any jurisdiction throughout in any part of the world.

"**Patents**" means all patents (including all reissues, divisionals, provisionals, continuations and continuations-in-part, re-examinations, renewals, substitutions and extensions thereof), patent applications, and other patent rights and any other Governmental Authority-issued indicia of invention ownership (including inventor's certificates, petty patents and patent utility models).

“**Seller's Intellectual Property**” means all Intellectual Property Rights owned by or licensed to Seller, including any of Seller's Background Intellectual Property Rights used in the design, production and manufacturing of the Goods and any Designing and Manufacturing Processes.

"**Trademarks**" means all rights in and to China, India and foreign trademarks, service marks, trade dress, trade names, brand names, logos, symbols, trade dress, corporate names and domain names and other similar designations of source, sponsorship, association or origin, together with the goodwill symbolized by any of the foregoing, in each case whether registered or unregistered and including all registrations and applications for, and renewals or extensions of, such rights and all similar or equivalent rights or forms of protection in any part of the world.

"**Trade Secrets**" means all inventions, discoveries, trade secrets, business and technical information and know-how, databases, data collections, patent disclosures and other confidential and proprietary information, all to the extent constituting Confidential Information.

**** ***** *****

8. PRICE AND PAYMENT

…………

8.2 ………. Furthermore, notwithstanding anything to the contrary in this Agreement, subject to Subsections 8.2d1-3 below, Buyer agrees to **reimburse Seller for any Indirect Taxes upon Materials (including any related government-imposed deposits, bonds, or guarantees) interest and penalties imposed by the government, as well as any reasonable legal expenses and fees incurred to defend against any**

of the foregoing. (provided any such legal expenses and fees shall be first approved by Buyer in writing with such approval not to be unreasonably withheld) solely in connection with a claim that the flow, percentage or amount of Materials (including Materials subassemblies) sourced for the Goods directly from Materials (including Materials subassemblies) suppliers do not qualify for import duty exemptions and alleviations ("Reimbursement").

8.2.d.3 Buyer will not be responsible for Reimbursement resulting from Seller's non-compliance with current and future tax law, except where Seller acted in accordance with the interpretation of the applicable laws and rules generally practised by importers and/or where Seller was following the Buyer's directions or confirmation.

**** ***** *****

16. INTELLECTUAL PROPERTY

16.1 Ownership. Each of the Parties acknowledges and agrees that

(a) each Party retains exclusive ownership of its Background Intellectual Property Rights,

(b) Buyer agrees to grants to Seller a non-exclusive, **royalty-free license to use Buyer's Background Intellectual Property Rights solely for Seller's production of Goods under this Agreement** and Seller may neither use Buyer's Background Intellectual Property Rights for any other purpose other than provided herein nor disclose or transfer Buyer's Background Intellectual Property Rights to any other third parties in any manners without prior written consent of Buyer. **Buyer does not transfer or grant to Seller any of its Background Intellectual Property Rights except for the rights stated in this paragraph.**

[Clause 8 (including 8.2 and 8.2.d.3) reproduced above, will be referred to as the '**ring fencing clause**' in this order for brevity. Revenue has referred to it in their appeal as 'full responsibility/liability of Xiaomi' for the clearance of products from the Indian Customs]

9.3.4 In the **'Supply Agreement'** dated 05.07.2018, between Zuhai Xiaomi Communications Co. Ltd. and Xiaomi H.K. Ltd with Flextronics Tech (I) Pvt Ltd, some of the relevant provisions are stated as under:

8. RESALE

The Customer is not permitted to resell the Products to any third parties without prior written consent of Supplier. Notwithstanding, in case of termination or partial termination hereof for a breach by Supplier or its Affiliate thereof, without prejudice to Supplier’s trademark and related intellectual property, Customer will have right to resell the Products to third parties, to scrap or otherwise dispose of such Products for the purpose of mitigating its damages after mutual discussion with Supplier

9. TITLE AND RISK

9.1 Title and risk of loss for the Products shall pass to the Customer once they have been delivered at the Delivery Point.

9.2 <u>**The Customer shall not set up any mortgage or any other encumbrances on the Products to any third party except obtaining the written consent of the Supplier.**</u>

9.3 With the consent of the Customer, the Supplier, its agents and employees can enter any premises where the goods of the Customer are stored to ascertain whether any Materials are stored there and to inspect and count them.

12. INTELLECTUAL PROPERTY RIGHTS

12.1 The Customer acknowledges that

(a) the Intellectual Property Rights related to the Products are the Supplier's (or its licensor's) property.

(b) nothing in this Agreement shall be construed as conferring any licence or granting any rights in favour of the Customer in relation to the Intellectual Property Rights. <u>**The Supplier asserts its full rights to control the use of trade marks within China, Hong Kong and India**</u>, and

(c) any reputation in any trade marks affixed or applied to the Products shall accrue to the sole benefit of the Supplier or any other owner of the trade marks from time to time.

12.2 The <u>**Customer shall not repackage the Products**</u> without consent of Supplier or remove any copyright notices, confidential or proprietary legends or identification from the Products save for any removal which is a necessary result of a manufacturing process of which the Supplier has been previously notified in writing by the Customer.

12.3 The Customer shall not use (other than in accordance with this Agreement) or seek to register any trade mark or trade name (including any company name) that is identical to, confusingly similar to or incorporates any trade mark or trade name which the Supplier or any associated company of Supplier owns or claims rights in anywhere in the world.

12.4 If at any time it is alleged that the Products infringe the rights of any third party or if, in the Supplier's reasonable opinion, such an allegation is likely to be made, the Supplier may at its option

15. TERMINATION

15.1 Without limiting any other rights or remedies to which it may he entitled, either party may terminate this Agreement with immediate effect by giving written notice to the other party if:

(a) the other party commits a material breach of any term of this Agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of fourteen (14) days after being notified in writing to de so,

(b) the other party repeatedly breaches any of the terms of this Agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this Agreement:

(c) the other party, being the Customer, fails to pay any undisputed amount due under Clause 7.1 within fourteen (14) days after being notified in writing

(d) any step has been taken in any jurisdiction to initiate any process by or under which

(i) the ability of the creditors of the other party to take any action to enforce their debts is suspended, restricted or prevented;

(ii) some or all of the creditors of the other party accept, by Agreement or in pursuance of a court order, an amount less than the sums owing to then in satisfaction of those sums with a view to preventing the dissolution of the other party, or

(iii) a person is appointed to manage the affairs, business and assets of the other party on behalf of the other party's creditors;

(e) any process has been instituted which could lead to the other party being dissolved and its assets being distributed among the other party's creditors, shareholders or other contributors, or

(f) the other party suspends or ceases, or threatens to suspend or cease, to carry on all or a substantial part of its business;

15.2 On termination or novation of this Agreement for any reason and subject as otherwise provided in this Agreement to any rights or obligations that have accrued before termination, neither party shall have any further obligation to the other under this Agreement.

8.2.6 It is seen that the department on the basis of credible or acceptable evidence as stated in the said agreement/ contract and explained by company officials in their statements had alleged in the SCN that the restrictive conditions of the Agreements meant that although the possession of the imported goods were with the CM's, the constructive possession, ownership and control of the parts and components remains with Xiaomi through its holding company/ subsidiaries/ affiliates and mainly through Xiaomi India. The price fixation of the parts and components is not negotiated by including the contract manufacturers. All transaction taxes/ indirect taxes are to be paid and later passed on to Xiaomi India. Xiaomi India grants to the CM's a non-exclusive royalty-free license to use IPR which is either owned or licensed to them solely for the CM's production of goods and not for any other purpose. As per the Xiaomi's own submissions before us, the licenses are a part of a whole-portfolio/ whole-device license, giving access to a licensor's entire relevant portfolio of patents for activities **including to make (and have made), import** and use 'Subscriber Units' (including cell phones, telephones, personal digital assistants, laptops etc), sell (and offer to sell) such Subscriber Units and to make and have made, components, which incorporate all or any part of the licensors IPR. (The specific agreements which will be discussed later). Xiaomi India purchases the finished mobile phone from the CM's as per a pricing model that is based on cost construction and the CM's are not free to fix their own price for the sale of the finished mobile phones. Hence the exclusion of the royalty/ license fee from the price structure although it pertains to a whole-portfolio/ whole-device license, can be reasonably presumed to be at the behest of the dominant party which is Xiaomi India. The CM's have no effective control on the inputs and only get paid a manufacturing cost for assembling/ manufacturing the finished mobile phones. Any material breach of the restrictive conditions could lead to the rights and licences of the Parties under the Agreement being terminated depriving the

CM’s of further supply of goods. Hence it can be said that the CM’s did not enjoy unfettered rights of possession of the imported goods.

8.2.7 The issue of possession of goods came to be examined by the Hon’ble Supreme Court in the case of **Gunwantlal Vs The State Of Madhya Pradesh** [AIR 1972 SC 1756 / (1972) 2 SCC 194], relating to the possession of a firearm in a criminal case. The Hon’ble Court held:

> “The concept of possession is not easy to comprehend as writers of (sic) have had occasions to point out. In some cases under Section 19(1)(f) of the Arms Act, 1878 it has been held that the word "possession" means exclusive possession and the word "control" means effective control but this does, not solve the problem. As we said earlier, the first precondition for an offence under Section 25(1)(a) is the element of intention, consciousness or knowledge with which a person possessed the firearm before it can be said to constitute an offence and secondly that **possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power and control. In any disputed question of possession, specific facts admitted or proved will alone establish the existence of the de-facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question.** In this view it is difficult at this stage to postulate as to what the evidence will be and we do not therefore venture to speculate thereon. In the view we have taken, if the possession of the appellant includes the constructive possession of the firearm in question then even though he had parted with physical possession on the date when it was recovered, **he will nonetheless be deemed to be in possession of that firearm**.”
>
> (emphasis added)

In terms of the judgment while the CM’s had possession of the goods on its import into India effective control was enjoyed by Xiaomi through its India and Chinese entities.

8.2.8 Xiaomi India has drawn attention to the **Sale of Goods Act, 1930** to understand the concept of ‘buyer’ and we shall hence examine the same. Section 4 of the ‘The Sale of Goods Act, 1930’, states:

> **4. Sale and agreement to sell.**-(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to **transfer the**

> **property in goods to the buyer for a price**. There may be a contract of sale between one part-owner and another.
>
> (2) **A contract of sale may be absolute or conditional**.
>
> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, 85 but **where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.**
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. (emphasis added)

8.2.9 In the contract under dispute the transfer of the property in the goods, if any, is to take place at a future time, subject to some condition thereafter to be fulfilled, the contract is hence at best an **agreement to sell**, which shall be examined below and **not a contract for sale**. Further a contract to sell unascertained goods which are also not in existence is not a complete sale, but a promise to sell. We may now examine whether at all a sale takes place between the parties in terms of the Sale of Goods Act as per the issues raised by Xiaomi India in their submissions.

8.2.10 In **Association of Leasing and Financial Service Companies Vs Union of India**, [(2011) 2 SCC 352 = 2010 (20) S.T.R. 417 (S.C.)], the Apex Court held:

> "42. The word "sale" is a nomen juris. It is the name of a consensual contract. **The law with regard to chattels is embodied in the Sale of Goods Act.** A contract of sale is different from an agreement to sell and unlike other contracts, operates by itself and without delivery to transfer the property in the goods sold. **The word "sale" connotes both a contract and a conveyance or transfer of property.** The law relating to building contracts was well known when Gannon Dunkerley case was decided and under that law the supply of goods as part of the works contract was not a sale. **Thus, the essential ingredients of the "sale" are agreement to sell movables for a price and property passing therein pursuant to an agreement**."
>
> (emphasis added)

8.2.11 Ownership of goods caries a bundle of right like the right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc.. 'Sale' involves a transfer in the title of goods bundled with the afore mentioned rights. Sale is thus the acquisition of a right by the transferee, and loss of it by the transferor. The Hon'ble Supreme Court in **BSNL Vs Union of India** [(2006) 145 STC 91 (SC)], examined the 'use of goods' - which comes with a lesser bundle of rights than the ownership of goods - and held as under:

> "To constitute a transaction for the transfer of right **to use goods**, the transaction must have the following attributes:
>
> a. There must be goods available for delivery;
>
> b. There must be consensus ad idem as to the identity of goods;
>
> c. **The transfree should have a legal right to use the goods- consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transfree**;
>
> d. **For the period during which the transfree has such legal right, it has to be for the exclusion to the transferor** this is the necessary concomitant of the plain language of the statue – viz. a "**transfer of the right to use" and not merely a licence to use the goods**;
>
> e. Having transferred the right to use goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others." (emphasis added)

This test has been consistently followed thereafter by the Apex Court in various decisions and would also be helpful in understanding whether the apparent owner, is the real owner. [See **Great Eastern Shipping Company Limited Vs State of Karnataka & Ors**. - (2020) 3 SCC 354]; **Commissioner of Service Tax, Ahmedabad Vs Adani Gas Limited** - 2020 SCCOnline SC 682; **Commissioner of Service Tax, Delhi Vs Quick Heal Technologies Limited** - 2022 SCC Online SC 976]. Thus, for the parts and components to have been a contract for ‘use of goods’ by the CM’s, it must pass the above test laid out ‘**BSNL**’ and more. To show that it is a contract of sale, it would be necessary to also show that transfer of property took place. If the rights including those of control over the goods remains with the seller then it cannot be said to be an actual sale. It should be shown, apart from what is stated in the agreements, that the seller transfers the right of possession and effective control of the parts and components to the CM’s and the transaction is not a mere grant of permission or licence to use the goods for manufacture of goods and sale only to Xiaomi India or that the Agreement is so worded to disguise a service contract as a sale to the CM’s.

8.2.12 Xiaomi submits that the Third-Party Manufacturers are operating under the globally recognised concept of ‘Electronic contract manufacturing (**ECM**) company’ that design, manufacture, test, distribute, and provide return/repair services for electronic components and assemblies for original equipment manufacturers (OEMs). Xiaomi India has stated that based on undisputed facts and established jurisprudence on the phrase "on behalf of," it is evident that the contract manufacturers cannot be considered as manufacturing on behalf of Xiaomi India. [**COMMISSIONER OF C. EX., NEW DELHI Vs MODI ALKALIES & CHEMICALS LTD**. [2004 (171) E.L.T. 155 (S.C.)]; **PARLE BISLERI PVT. LTD. Vs COMMR. OF CUS. & C. EX., AHMEDABAD** [2011 (263) E.L.T. 15 (S.C.)]. Further the terms and conditions or degree of control emanating from contractual restrictions cannot be considered as a situation where one-party control another. [**Vishnu Agencies (Pvt.) Ltd. Etc vs**

Commercial Tax Officer & Ors. Etc - AIR 1978 SUPREME COURT 449, 1978 (1) SCC 520] Dated: 16.12.1977]. It is seen as per the Agreement that the 'supplier' has undertaken to supply goods to the 'customer' based on certain conditions, for 'transformation' of the parts and components into finished goods by the Customer using labour and services (job charges) including the customers IPR, giving it the nature of a service contract. The concept of manufacture "on behalf of", as seen from **MODI ALKALIES & CHEMICALS LTD**. (supra) and **PARLE BISLERI** (supra) etc, has developed in the context of the Central Excise Act, 1944, for the purpose of identifying inter-dependence between the actual and dummy units and the clubbing of clearances for availing SSI exemption which is not the situation in this case. Similarly, the Hon'ble Supreme Courts judgment in **Vishnu Agencies** (supra), pertain to what may be called "statutory" or "compulsory" sales. Whether they are sales at all and if so whether they are exigible to sales tax or purchase tax under the relevant statutory provisions? The judgment went on to hold that so long as mutual assent is not completely excluded in any dealing, in law it is a contract. The facts in these cases are distinguished from those in the above-mentioned judgments and hence the judgments do not come to the appellants support. The Apex Court in **Bhavnagar University Vs Palitana Sugar Mills Pvt. Ltd** [2003(2) SCC 111], observed :

> "It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision".

Moreover, it is seen that the case laws cited do not pertain to the Customs Act and the definition of 'import' under the Customs Act differs vastly from 'manufacture' as defined under the Central Excise Act. No parallels can be drawn. In **Hari Khemu Gawali Vs Deputy Commissioner of Police, Bombay and another** [AIR 1956 SC 559], a **Constitution Bench** of the Apex Court stated:

> "It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia."

8.2.13 Further in this case what is of importance is not the pedigree of the contract manufacturer, but whether in terms of the contract they as buyers of the goods enjoy the bundle of rights that comes with ownership of the parts and components subsequent to sale/ purchase. We find that the concept of 'Electronic Contract Manufacturing' (ECM) company is akin to that of a job worker. Such an arrangement does not make the CM's the owners of the goods while they manufactured phones for original equipment manufacturers (OEMs), which in this case was Xiaomi. The supplier Xiaomi China has exercised complete and dominant control, over the manner of use; disposal and sale of the parts and components; resale; construction of the sale price and constructive possession of the goods. The whole process of transformation of the goods even after the parts and components are received is put to test through a Pilot Production Phase (amount of pilot Goods may range from 200 to 1000 pcs). Its only after Xiaomi India evaluate and confirm whether CM's production equipment and technical capability are suitable for entrance to the Mass Production Phase that the remaining contract is executed. Thus, the manufacture of finished mobile phones by the CM's were subject of conditions, restriction and obligations which did not allow the CM's effective control over the imported parts and components.

8.2.14 The Supreme Court in **Gannon Dunkerely & Co. (Madras) Ltd Vs The State of Madras** [1958 (04) TMI 42 – Supreme Court of India], held thus – "It has been already stated that, both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by **passing of title in those goods**. It is of the essence of this concept that both the agreement and the sale should relate to the same subject matter." When the contract manufacturers do not obtain effective title to the parts and components, they cannot then transfer that title to Xiaomi India by sale and not the buyers of the goods. A person cannot pass on a better title to goods than he himself has. Further, all costs incurred by the CM's are reimbursed to them as per the ring-fencing clause of the Agreement between Xiaomi India and the CM's. **The presumption in law is that every businessman will arrange his affairs in his best interest and pass on costs which are not his. In fact, this is also a test of ownership in this case, as such costs come to rest with the actual owner. No business man will absorb a cost which he is not required, in the ordinarily course to do, even if Agreements put the initial burden on him. Hence on examining the conditions, restriction, obligations and reimbursements that are a part of the Agreements, any prudent man in the circumstance of this particular case would come to the conclusion that the 'buyer' of the imported goods is Xiaomi**

India and not the CM's. The Hon'ble Supreme Court in **Associated Cement Companies Ltd. Vs Commr. of Customs** [2001 AIR SCW 559 / AIR 2001 SUPREME COURT 862], held:

> "20. This Court in **The Assistant Sales Tax Officer v. B. C. Kame, Proprietor Kame Photo Studio, (1977) 1 SCC 634 : (AIR 1977 SC 1642 : 1977 Tax LR 2047)** was called upon to decide the question that when a photographer undertakes a photograph and thereafter supplies prints to his clients whether it could be said that he had entered into a contract for sale of goods. The question which this Court posed was whether the contract is a contract of work and labour or a contract for sale. **It held that a contract for sale is one whose main object is the transfer of property in, and the delivery of the possession of, a chattel as a chattel to the buyer where, however, the principle object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one of work and labour.** After referring to the earlier decisions of this Court in the case of **State of Himachal Pradesh v. Associated Hotels of India Ltd.**, (1972) 29 STC 474 : (AIR 1972 SC 1131 : 1972 Tax LR 1937) and the **State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd.**, (1958) 9 STC 353 : (AIR 1958 SC 560), in which case the Constitution Bench had held that in a building contract the property materials do not pass to the other party as in a contract for sale of movable property."
>
> (emphasis added)

8.2.15 As per Section 3 of the **Evidence Act**, 1872 [Section 2(1)(j) of the **Bharatiya Sakshya Adhiniyam 2023**], as noted earlier, a fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It is hence seen that the main object of the agreement is not for sale by the transfer of the property in the parts and components but it is one for work and labour. Xiaomi and the CM's did not provide evidence to refute the charge, so the onus of proof has not been discharged and remains with them. The department has met its obligation to show that the CM's are not the actual buyers under the Agreement. The test of a prudent man is satisfied. Although the CM's may appear as the apparent owner of the goods, they are not its real owners. Hence the Ld. AA has erred in holding that the CM's are the buyers of the goods.

II. <u>Whether Xiaomi India is the Beneficial Owner of the imported parts and components</u>

9. Xiaomi and Ors apart from the points stated above have added:

(i) The concept of 'beneficial owner' was introduced as an anti-avoidance measure against the practice of 'IEC lending' and thus, not applicable to the present scenario:

(ii) Xiaomi India has adopted the current business model which includes manufacture of goods by Third Party Manufacturers in order to mitigate manufacturing risk.

(iii) The concept of contract manufacturing is neither novel nor was it introduced by the Respondent in India. This practice of outsourcing manufacturing activity to a Third-Party Manufacturers is a well-known and well-established practice in India be it in consumer electronics or food and beverage industry.

(iv) Definition of Section 2(27) of **Companies Act** which defines control – none of those criteria satisfied here.

(v) 'Beneficial owner' as per **FATF** documents do not apply to them

(vi) When the owner of goods is available, the concept of beneficial owner is not applicable - **Pawan Munjal Vs Commissioner, Customs-New Delhi** [CESTAT, New Delhi, FINAL ORDER NO. 50283/2022, Dated: 28.03.2022]

9.1 Per contra revenue has stated that:

i) Since the imported parts and components are incorporated into finished mobile phones for subsequent sale by Xiaomi India, the latter is deemed to be the entity on whose behalf the goods are imported, thereby Xiaomi India are the "beneficial owner" according to Section 2(26) of the Customs Act. It is in this regard that Xiaomi India undertakes to reimburse the CM's for transaction taxes etc. [see: ringfencing clause]

<u>Discussion on Submissions</u>

9.2 The **Black's Law Dictionary** (2nd Pocket ed. 2001 pg. 508) defines 'Beneficial Ownership' as "a legal term where specific property rights ("use and title") in equity belong to a person even though legal title of the property belongs to another person." Under the Customs Act, the definition of importer is not tied down to the concept of owner of the goods as under the Sea Customs Act of 1878 and from 31.07.2017, includes a 'beneficial owner' for the purpose of the Act.

10.2.1 The Hon'ble Supreme Court in **Doypack Systems Pvt Ltd Vs UOI** [1988 (36) ELT 201 (SC) – para 40], stated that 'reliance may be placed on the <u>**principles of interpretation**</u> as enunciated by the Federal Court in **Auckland Jute Co. Ltd. Vs Tulsi Chandra Goswami** (1949 F.C.R. 201 at 244). **It is trite saying that the interpreter of the statute must take note of the well known historical facts**.' We shall hence examine the history of the term 'beneficial owner' before examining its relevance to the issues at hand.

<u>**History of the term 'beneficial owner'.**</u>

10. <u>International</u>

10.1 The term "beneficial owner" is stated to have originated in the United Kingdom, nearly 1,000 years ago when trusts were established for soldiers' families during religious wars. This marked the first separation of legal and beneficial ownership: trustees held legal title, while soldiers and their families were the beneficiaries.

10.2 As per **'Clarity, Opacity and Beneficial Ownership'** by Richard Collier [Published by Sweet & Maxwell, Law Publishers], the "beneficial owner" term, in modern times, seems to have been first introduced in double tax treaties in the 1966 protocol to the then existing 1945 US-UK double tax treaty where the term was introduced into revised dividend, interest and royalties Articles. The term was also used in the UK-Netherlands double tax treaty of 1967, again featuring in the dividend, interest and royalty articles. It was not until 1968 that the term was discussed at the OECD and this was initially in a Working Party considering amendments to the OECD Model of 1963. The "beneficial ownership" term was introduced in the OECD Model draft issued in 1974 and this became the revised 1977 OECD Model.

10.3 As per POLICY BRIEF NO 148, regarding **'Beneficial ownership information: Supporting fair taxation and financial integrity.'** [UN Dept of Economic and Social Affairs. January 2023], the concept of beneficial ownership, though with some variations, is used in three main areas: anti-money laundering rules, tax transparency instruments and tax treaties. It goes on to state;

> "Criminals and tax dodgers commonly rely on secrecy to disguise or hide their activity and often use opaque legal structures to this end. Money-laundering involves processing of the proceeds of crimes to disguise their illegal origin. Before the March 2022 changes to international anti-money laundering standards, in most countries, only the "legal owners" of an asset or legal vehicle (e.g. a company) were known. The legal owner may refer to another legal vehicle (such as company, partnership or trust) or to a nominee, meaning accountability cannot be ensured. **Tax evasion, harmful international tax planning and money laundering commonly create secrecy by layering of ownership through subsidiaries, corporations, trusts, investment funds and/or other legal vehicles to conceal the true ownership.** Often "shell companies", which are corporate entities that

have no independent activities, are set up only to own assets and other corporate entities. <u>Transactions are spread across multiple jurisdictions, and may involve the ownership of assets for which there is no regulation or weak recording of ownership, and the creation of complex ownership chains involving multiple types of legal vehicles.</u> The scale of illicit financial flows has been estimated to be in the hundreds of billions of dollars.

<u>Beneficial ownership transparency can reveal the true ownership and allow fair taxation and enforcement of the law.</u> For anti-money-laundering purposes, the beneficial owner is the natural person who ultimately owns, controls or benefits from legal vehicles such as companies, partner-ships and trusts." (emphasis added)

10.4 Very recently the '**Beneficial Ownership and Tax Transparency – Implementation and Remaining Challenges - OECD and Global Forum Report to G20 Finance Ministers and Central Bank Governors. July 2024, Brazil.'** held:

"1 Executive summary

The issue of transparency of beneficial ownership has gained relevance over the last years: it <u>plays a significant role in tax transparency</u>, the integrity of the financial sector and law enforcement efforts. Tax evasion, corruption, money laundering and other illicit financial flows can all flourish in the shadows of opaque ownership. <u>By using intricate chains of companies, foundations, partnerships, trusts, and similar entities across jurisdictions, the true identity of those who ultimately control the assets – the beneficial owners – remains obscured.</u> This anonymity can be further amplified through mechanisms like bearer shares, nominee shareholders and directors, and the strategic use of entities such as shell companies and inactive corporations. As a result, the ability of tax authorities and other law enforcement agencies to identify the true beneficial owners is significantly hampered.

This report builds upon the G20's commitment to combatting tax evasion and illicit financial flows. through increased transparency on beneficial ownership of legal entities, legal arrangements and bank accounts.

*****. *****. *****

The 2016 Terms of Reference adopt the FATF's definition of beneficial owner by explicitly indicating that "The FATF defines the term "beneficial owner" as the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement. <u>Reference to ultimate ownership or control and ultimate effective control refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control</u>"." (emphasis added)

10.5 Global Financial Integrity (**GFI**), a Washington DC-based research and advisory organization, launched its comprehensive study regarding estimated revenue losses from trade mis-invoicing in India during the year of 2016, a year before the insertion of the term 'beneficial owner' in the Customs Act, 1962. In its report, GFI analyzed the level of trade mis-invoicing in India and estimated potential tax revenue losses to the Indian government totaling US$13.0 billion, or the **equivalent of 5.5 percent of the value of India's total government revenue collection that year.**

Domestic

11. The concept of beneficial ownership and its disclosure in India began with the **Companies Act, 1956**, having been absent in earlier laws relating to companies, like the **Registration of the Joint Stock Companies Act, 1850**; **Joint Stock Companies Act, 1857**; **Companies Act, 1866** or the **Companies Act, 1913**. It was later addressed in the **Benami Transactions (Prohibition) Act, 1988**, and furthe**r** defined under section 2(1)(fa) of the **Prevention of Money Laundering Act, 2002** (PMLA) as well as Rule 9(3) of the **The Prevention of Money Laundering (Maintenance of Records) Rules, 2005**. The **Income Tax Act, 1961** added a definition of "beneficial owner" in section 139(1) from 2016, while the **Customs Act, 1962** incorporated the term the next year by the insertion of Section 2(3A) with effect from 31.03.2017. **The Companies (Significant Beneficial Owners) Rules, 2018** which came into effect on 13.06.2018, was introduced in the context of section 90 of

the Companies Act, 2013. It may be stated that the object and purpose of the various Acts though broadly the same however no common definition exists for the term 'Beneficial Owner'. However what stands out is that they all recogonise that the concept of beneficial ownership is not the same as legal ownership. Further the increased use of the term in the present-day legal terminology though different in different enactments is intended to bring transparency and reveal the true ownership of goods/property. This, it is felt, would allow for fair taxation and enforcement of the law at the hands of the beneficial owner who is the person who ultimately owns, controls or benefits from goods or property.

12. The plea of Xiaomi India and Ors. to minimize the effect of the concept of 'beneficial owner' by stating that it was introduced as an anti-avoidance measure against the practice of 'IEC lending' and thus, not applicable to the present scenario, hence does not appear to be correct as seen from the history of the phrase.

12.1 To show who is the beneficial owner revenue is required to show the person who "exercises effective control over the goods being imported or exported'. Hence understanding the concept of 'beneficial owner' is to understand the means and mechanisms by which they i.e beneficial owner, own and/or exert control over a legal person. Such persons may exercise control over a legal person through the legal structure and without necessarily being the actual owners on paper. Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. [**Supdt. and Remembrancer of Legal**

Affairs, West Bengal Vs. Anil Kumar Bhunja - 1980 SCR (1) 323 / 1979 CRI. L. J. 1390 / AIR 1980 SUPREME COURT 52]. The term "ownership" literally means to have or hold a thing. The **Black's Law Dictionary** defines ownership as "the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to the other".

12.2 An analysis of the meaning of 'beneficial owner' shows that it has three limbs:

(i) **<u>any person</u>**

(ii) on **<u>whose behalf</u>** the goods are being imported or exported or

(iii) **<u>who exercises effective control</u>** over the goods being imported or exported."

The word 'person' has not been defined under the Customs Act, 1962. When a word is not defined under a Central Act, its meaning can be ascertained from the definition given under clause 3 of the **General Clauses Act**, **1897**, unless there is anything repugnant in the subject or context. Section 3(42) of the said Act defines 'person', as under:

> (42) **"person"** shall <u>include</u> any company or association or body of individuals, whether incorporated or not;
>
> (emphasis added)

12.3 The understanding of parties to the Agreement is also similar. As per Contract – I above, A 'Person' includes any individual, partnership, corporation, trust, limited liability entity, unincorporated organization, association, governmental authority, or any other entity.

12.4 Xiaomi India which was incorporated on October 07, 2014 under the Companies Act, 2013, is hence covered by the definition of 'person'. The question next is on whose behalf the goods are being imported or exported.

12.5 Xiaomi India and others have referred to the case of a Co-ordinate Bench of this Tribunal sitting at New Delhi, in the case of **Pawan Munjal Vs Commissioner, Customs-New Delhi** [FINAL ORDER NO. 50283/2022, Dated: 28.03.2022]. The said order has merged into the Judgment of the Hon'ble High Court of Delhi in **Commissioner Of Customs, New Customs House, New Delhi Vs Pawan Kant Munjal** [2023 (10) TMI 324 - DELHI HIGH COURT / 2024 (390) E.L.T. 721 (Del.)]. The case involved the seizure of currency from the checked-in luggage of two air passengers one of whom was the Chairman and Managing Director of a company and was proceeding on an official engagement abroad (illegal export of currency). It does not relate to a case of import of goods on payment of duty. It is in the aforesaid background that the Tribunal has concluded that the respondent could not be held to be the beneficial owner of the seized currency. The Order found approval from by the Hon'ble High Court. The said judgments are based on the setting of their own facts. The SLP filed by revenue against the Judgment came to be dismissed by the Hon'ble Supreme Court as reported in **COMMISSIONER OF CUSTOMS, NCH, NEW DELHI Vs PAWAN KANT** [2024 (390) E.L.T. 697 (S.C.)]. **However, the Hon'ble Supreme Court has left the question of law open**. Hence the judgments are distinguished on facts, and the legal issue remains open.

13. As seen from the discussions above:

(a) As per the individual contracts [Contract – I and Contract – II (a) & (b) supra], the CM's were found to be not owners of the goods as discussed earlier.

(b) It was also seen that as per the Agreement signed by Xiaomi India and Beijing Xiaomi Mobile Software dated 01.12.2017 failure on the part of Xiaomi India to pay the license fee to Beijing Xiaomi would lead to cessation of the use of license in any form. This would lead to the stoppage of the import of parts / components of mobile phones, since the phones cannot be produced by the CM's without the benefit of the royalty-free license granted to them by Xiaomi India. Hence the prompt payment of license fee by Xiaomi India is a sine quo non for the supply of parts and components to the CM's

13.1 As stated by the Larger Bench of this Tribunal in **Steel Strips Vs Commissioner Of C. Ex., Ludhiana** [2011 (269) E.L.T. 257 (Tri-LB)], the amendment to the definition of 'importer' being designed to prevent tax evasion and tax base erosion, the term cannot be used in a restricted sense so as to defeat the avowed object of the Legislation. It was held:

> "5.4 <u>In construing provisions designed to prevent tax evasion, if the Legislature uses words of comprehensive import, the courts cannot proceed on an assumption that the words were used in a restricted sense so as to defeat the avowed object of the Legislature</u> - Ref : C.A. Abraham v. ITO, Kottayam, AIR 1961 SC 609, p. 612. <u>The principle behind this rule is that an enactment designed to prevent fraud upon the revenue "is more properly a statute against fraud rather than a taxing statute, and for this reason properly subject to liberal construction in the Government favour</u>" - Ref : CRAWFORD, Statutory Construction, p. 508. So in interpreting a provision to plug leakage and prevent tax evasion a construction which would defeat its purpose should be eschewed and a construction which preserves its workability and efficacy should be preferred - Ref : **Commissioner of Sales Tax, Delhi Vs Sri Krushna Engg. Co.,** (2005) 2 SCC 695, p. 703."
>
> **(emphasis added)**

14. We may now examine the relevant provisions of the Customs Act. Custom duty refers to the tax imposed on goods. Goods become liable to import duty or export duty when there is import into, or export from India. **Section 12** of the Customs Act 1962, which is the charging section, states:

> "12. Dutiable goods
>
> (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of Customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.
>
> (2) The provisions of sub-section (1) shall apply in respect of all goods belonging to government as they apply in respect of goods not belonging to Government."

14.1 As per **Section 47** duty is to be paid by the importer.

> 47. Clearance of goods for home consumption.
>
> - (1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the **importer has paid the import duty**, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption. (Emphasis added)

14.2 In keeping with the context, it is helpful to repeat that "Importer" has been defined under **section 2(26)** of the Customs Act as under:

> Section 2(26): "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, **beneficial owner** or any person holding himself out to be the importer." (emphasis added)

Section 2(3A) of the Customs Act defines 'beneficial owner' as follows:

> "2(3A) "beneficial owner" means any person on whose behalf the goods are being imported or exported or **who exercises effective control over the goods** being imported or exported." (emphasis added)

It is pertinent to note that the definition of importer is not related to the question of title of the goods.

14.3 Assessment of duty means correct quantification and computation of total tax due as per the provisions of the Customs Act and has been defined as per **section 2(2)** as extracted below:

> Section 2(2) "assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to -
>
> (a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;
>
> **(b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;**
>
> (c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;
>
> (d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;
>
> (e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;
>
> (f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil; (emphasis added)

14.4 When a duty of customs is chargeable on any goods by reference to their value, that 'Value' as per section 2(41) of the Customs Act, 1962 in relation to any goods means the value thereof determined in accordance with the provisions of sub-section (1) of Section 14 thereof. Relevant portion of Section 14 of the Customs Act, 1962 is reproduced below:

> **Section 14. Valuation of goods.**—(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **the value of the imported goods and export goods shall be the transaction value of such goods**, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:
>
> **Provided that such transaction value in the case of imported goods shall include**, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, **royalties and licence fees**, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf: . . . .
>
> (emphasis added)

14.5 The law, in a nutshell, hence provides that, duties of Customs shall be levied on goods imported into or exported from India. Levy in a sense involves assessment which includes self-assessment. A Co-ordinate Bench of this Tribunal in its Order in **Principal Commissioner of Customs, ACC (Import) Commissionerate, New Delhi Vs M/s M. D. Overseas Limited** [FINAL ORDER NO. 51727/2021, Dated: 13.08.2021 / 2021 (8) TMI-704 CESTAT NEW DELHI], has set out the procedure for self-assessment as under:

> **"22.** The Regulations of 2018 [**Bill of Entry (Electronic Integrated Declaration and Paperless Processing) Regulations, 2018],** have made provisions for submission of a declaration and generation of the bill of entry in an electronic form on the automated platform provided by the Central Board of Indirect Taxes and Customs. Sub-regulation (2) of Regulation 4 embodies a legal fiction. Regulation 4(2) stipulates that the bill of entry is deemed to have been filed and self-assessment completed when after the entry of the electronic integrated declaration on the customs automated system (or by data entry through a service centre) a bill of entry number is generated by the Indian Customs Electronic Data Interchange ("EDI") System. The self-assessed copy of the bill of entry may be electronically transmitted to the authorized person under the deeming fiction which is created by Regulation 4(2). **Hence, the bill of entry is deemed to be filed and the self-assessment completed when the requirements of Regulation 4(2) are fulfilled namely by the (i) entry of the declaration on the customs automated system; and (ii) generation of a bill of entry number by the EDI system.**

> **Following this, the self-assessed copy of the bill of entry is electronically transmitted to the authorized person.”**
>
> (emphasis as in original)

The normal procedure for the clearance of imported goods.

15. Ownership of goods is not an essential condition to be an importer. In the normal case the transaction value of the goods as declared by the importer, who as per section 46 presents a bill of entry declaring the transaction value, forms the basis for the valuation of the goods. In the absence of a dispute the process moves smoothly. If the royalties and licence fees paid by the beneficial owner who has not filed the Bill of Entry are to form a part of the transaction value, the question is whether the manner of computation or assessment of tax has any bearing with who pays the tax. Since section 2(26) of the Customs Act 1962, defines an “importer”, to include any owner, beneficial owner or any person holding himself out to be the importer, a question arises as to who should pay the tax, since the department has sought to collect the tax from the beneficial owner and not from the person who paid the import duty and took release of the goods for home consumption.

15.1 **Section 30** of the Customs Act, 1962, requires the person-in-charge of a vessel or any other person as may be specified, to deliver to the proper officer an arrival manifest or import manifest prior to the arrival of the vessel. The said manifest carries the name of the consignees/ importers. An Importer-Exporter Code (IEC), issued by the office of the DGFT, is a key business identification number which is a mandatory requirement for persons desirous of undertaking export from India or Import to India. Once the goods have landed at the port, the importer as defined under section 2(26) (ibid) and whose cargo figures in the arrival manifest or import manifest filed under section 30 is required to present a bill of entry as per **section 46** (ibid) and make and subscribe to a declaration as to the truth of the contents of such bill of entry and in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed. It is only when the imported goods are not claimed/ cleared from customs or abandoned by the original importer/ consignee mentioned in the manifest, that the others can step into his shoes and for which an amendment to the manifest would be required in terms of section 30(3) ibid.

15.2 **Section 28** of the Customs Act, 1962 deals with the recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. Sub section (4) to the said section provides for a varied procedure for recovery of duty. It states:

> (4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, <u>by reason of</u>,–
>
> (a) collusion; or
>
> (b) any wilful mis-statement; or
>
> (c) suppression of facts,
>
> <u>by the importer or the exporter or the agent or employee of the importer or exporter,</u> the proper officer shall, within five years from the relevant date, <u>serve notice on the person chargeable with duty or interest</u> which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.
>
> (emphasis added)

15.3 Ordinarily the goods can be imported by a consignee of the goods who is either its owner or beneficial owner or any person holding himself out to be the importer, and not by more than one person simultaneously. However as per section 28(4) (which deals with cases of aberration from the normal procedure), if duty is to be demanded for a blameworthy conduct, for reasons listed in the section, committed by the importer or the exporter or the agent or employee of the importer or exporter, notice has to be served on '**the person chargeable with duty or interest'**. Hence in the situation listed in section 28(4), the person from whom duty is to be demanded has not been restricted to the importer and would have to be examined in this special situation on a case-by-case basis considering the peculiar facts of the case as fraud vitiates all solemn acts and the veil would have to be pierced. In **Mohan Singh Vs State of M.P.,** (1999) 2 SCC 428], the Hon'ble Supreme Court held as under:

> "11. … **Efforts should be made to find the truth, this is the very object for which courts are created.** To search it out, the courts have been removing the chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long as chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limit, to find out the truth.…"
>
> (emphasis supplied)

16. As the finding of fact by the Tribunal is final, it is obligated in the scheme of the CESTAT (Procedure) Rules, 1982, to examine the issue in detail and for that purpose it can even of its own motion, call for any documents or summon any witnesses on points at issue, if it considers necessary to meet the ends of justice. [Rule 23(4)]. The Apex Court in **Karnani Properties Ltd Vs Commissioner Of Income Tax, West Bengal** [1972 SCR (1) 457 / AIR 1972 SUPREME COURT 2315], held that it is for the Tribunal to find facts and it is for the High Court and the Supreme Court to lay down the law applicable to the facts found.

Further in **Standard Radiators Pvt. Ltd. Vs Commissioner Of Central Excise** [2002 (143) ELT 24 (SC) / (2002) 10 SCC 740], the Hon'ble Supreme Court held that the Tribunal is the last fact finding authority and it is expected that it will discuss the facts in some detail and not cursorily and come to briefly stated conclusions on that basis. Hence this issue will be examined in detail.

Can the demand for duty be made from the beneficial owner in this case

17. Xiaomi India and Ors, have placed reliance on the Hon'ble Supreme Court in the case of **Vellanki Frame Works Vs Commerical Tax Officer, Visakhapatnam** reported in 2021 (375) ELT 289 (S.C.) in support of their stand as found approval by the Hon'ble Court that the definition of importer cannot be used to usurp the identity of an importer from the person who filed the bill of entry. In other words, the person in whose name the bill of entry is filed does not cease to be an importer. Support was also taken from the Judgment of the Hon'ble Madras High Court in the case of **J.B. Trading Corporation Vs Union of India** reported in 1990 (45) ELT 9 (Mad.), the Coordinate Bench of this Tribunal in **Perfect Commodity Impex Vs Commissioner of Customs, Kandla** reported in 2003 (161) ELT 316 (Tri-Mumbai); **Nalin Z. Mehta Vs Commissioner of Customs, Ahmedabad** reported in 2014 (303) ELT 0267 and to **CC (EP), Mumbai Vs Virendra Kanshiram** Gandhi reported in 2003 (155) E.L.T.128 (Tri. - Mumbai), wherein the Hon'ble Tribunal relying on the report of the select committee held that the demand under Section 28 can be raised on the importer who filed the bill of entry and it cannot be demanded

from any other person. We shall examine the crux of these judgments below.

17.1 The Apex Court in **Union of India Vs Sampat Raj Dugar And Anr** [AIR 1992 SUPREME COURT 1417, 1992 (2) SCC 66, (1992) 58 ELT 163 SC] has held that where an importer abandons the imported goods and does not pay for them he cannot be treated as the owner of the goods. It went on to hold that whether or not the importer is the owner of such goods in law, the Imports (Control) Order creates a fiction that he shall be deemed to be the owner of the such goods from the time of their import till they are cleared through Customs. **This fiction is created for the proper and effective implementation of the said order and the Imports and Exports (Control) Act. The fiction however cannot be carried beyond that.** It cannot be employed to attribute ownership of the imported goods to the importer even in a case where he abandons them, that is, in a situation where he does not pay for and receive the documents of title. Hence the Supreme Court acknowledged that the Customs Act provides for a situation where it can be determined as to who is the actual owner of the goods, if and when required. **It further explicitly states that they were speaking of a case where the import is not contrary to law.**

17.2 A three Judge Bench of the Apex Court in **MUNICIPAL CORPORATION OF GREATER MUMBAI Vs ANKITA SINHA & ORS.** [AIRONLINE 2021 SC 861], held:

> "15.3 The application of the **Heydon's Rule** could adequately aid us here as the Rule directs adoption of that construction which **"shall suppress the mischief and advance the remedy"** as was pertinently observed by Justice S.R. Das, for a **seven judge bench** in **Bengal Immunity Co. Vs State of Bihar** [1955 (2) SCR 603; AIR 1955 SC

> 661], "...the office of all judges is to make such construction as shall suppresses the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief; and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

[Also see: **British Airways PLC vs. UOI** – 2002 (139) ELT 6 (SC); **Directorate of Enforcement vs. Deepak Mahajan** – 1994 (70) ELT 12 (SC); **State of Himachal Pradesh v. Kailash Chand Mahajan,** AIR 1992 SC 1277]. Further in **R.K. Garg Vs Union of India** [(1981) 4 SCC 675], a five Judge Bench of the Apex Court, while examining an issue connected with black money which has become a serious threat to the national economy, observed that laws relating to economic activities must be viewed with greater latitude and deference when compared to laws relating to civil rights such as freedom of speech and the legislature should be allowed some play in the joints. It further went on to hold:

> "10. . . The court must always remember that 'legislation is directed to practical problems, that **the economic mechanism is highly sensitive and complex**, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; **'that exact wisdom and nice adaptation of remedy are not always possible'** and that judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. . . ." (emphasis added)

17.3 The Apex Court in its judgment noted that the menace of black money has reached such staggering proportions that it is causing havoc to the economy of the country and poses a serious challenge to the fulfilment of our objectives of distributive justice and setting up of an egalitarian society. The concept of beneficial ownership finds similarity in as much as it concerns anti-money laundering and tax transparency, which are concerns related to areas that pose a serious threat to the economy and has international ramifications. The Hon'ble Court in its judgment went on to observe:

> 12. <u>The first casualty of this evil of black money is the revenue because it loses the tax which should otherwise have come to the exchequer.</u> The generation of black money through tax evasion throws a greater burden on the honest tax payer and leads to economic inequality and concentration of wealth in the hands of the unscrupulous few in the country. In addition, since black money is in a way 'cheap' money because it has not suffered reduction by way of taxation, there is a natural tendency among those who possess it to use it for lavish expenditure and conspicuous consumption. The existence of black money is to a large extent responsible for inflationary pressures, shortages, rise in prices and economically unhealthy speculation in commodities. <u>It also leads to leakage of foreign exchange, making our balance of payments rather distorted and unreal and tends to defeat the economic policies of the Government by making their implementation ineffective</u>, particularly in the field of credit and investment. Moreover, since black money has necessarily to be suppressed in order to escape detection, it results in immobilisation of investible funds which would otherwise be available to further the economic growth of the nation and in turn, foster the welfare of the common man. <u>It is therefore no exaggeration to say that black money is a cancerous growth in the country's economy which if not checked in time is certain to lead to chaos and ruination.</u> <u>There can be no doubt that urgent measures are therefore required to be adopted for preventing further generation of black money as also for unearthing existing black money so that it can be canalised for productive purposes with a view to effective economic and social planning.</u> (emphasis added)

17.4 In the light of the above judgments we find that the Customs Act in special circumstances allows the Proper Officer to examine the actual person who is the importer and as per Section 28(4) ibid permits him to serve notice on **the person chargeable with duty or interest** which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice. The sub-section needs to be read in a manner that it can effectively stem the mischief that the insertion of the word 'beneficial owner' in the Customs Act was meant to achieve, considering the evolving history of the term in the Indian context and the rapid growth of this relatively new white collar crime worldwide. Hence once the foundational facts have been proved in this case, a purposive interpretation of the term 'beneficial owner', depending both on the text of the definition and the context in which sub-section (4) of section 28 has been freed from the requirement of demanding duty from the person who filed the Bill of Entry only, must help us in determining the legislative intent in favour of revenue. Hence in the peculiar facts of this case, including the ring fencing of the CM's from Government related demands and making it reimbursable to the CM's as discussed earlier, duty can be demanded from the beneficial owners. A three Judge Bench of the Apex Court in **Vijay Madanlal Choudhary Vs Union Of India** [2022 SCC ONLINE SC 929], held:

> "98. . . .As observed in **P.P.N. Krishna Lal & Ors. Vs Govt. of Kerala & Anr.** [1995 Supp (2) SCC 187], the Court cannot be oblivious about the purpose of the law. <u>Further, the special provisions or the special enactments as in this case is required to tackle new situations created by human proclivity to amass wealth at the altar of formal financial system of the country including its sovereignty and integrity</u>. While dealing with such provision, reading it down would also defeat the legislative intent."

17.5 We hence find that the judgments in the case of **Vellanki Frame Works** (supra) etc referred to by Xiaomi and others are relevant as per the facts of their own case. No principle has been laid out that duty can only be demanded from the person who files the Bill of Entry. Even section 28(4) does not require so. Hence the legislative intent in the case of fraud is clear that duty can be demanded from the person chargeable with duty or interest and not necessarily from the importer. Further while dealing with the fast-evolving devices employed with fraud, the provisions of law cannot be ascribed to have the same limitations as when enacted decades ago. The modern phenomena of multinational groups with new and sophisticated corporate structures for execution and delivery of complex commercial transactions, needs to be viewed with a modern approach keeping in view the mischief and its solution in law. It was in this light that a five Judge Bench of the Hon'ble Supreme Court in **Cox and Kings** (supra), propounded the '**Group of Companies Doctrine**', holding that the phenomenon of group companies is the modern reality of economic life and business organisation. Though the Companies Act, 2013 has statutorily recognized a subsidiary company as a separate legal entity and a parent company is not generally held to be liable for the actions of the subsidiary company of which it is a direct or indirect shareholder (Para 82 of the Hon'ble Courts Judgment). It was felt that the separateness of corporate personality should be ignored by courts in exceptional situations where a company is used as a means by the members and shareholders to carry out fraud or evade tax liabilities. The veil of a corporation could be lifted where fraud is intended to be prevented or trading with an enemy is sought to be defeated (para 85). The judgment went on to recogonised that in cases involving complex transactions involving multiple parties and contracts, a non-signatory may be substantially involved in the negotiation or performance of the contractual obligations without formally consenting to be bound by the ensuing burdens, including arbitration (para 91). Therefore, there is a need to adopt a modern approach to consent, in matters of arbitration, which takes into consideration the circumstances, apparent conduct, and commercial facets of business transactions (para 92). Though the facts and issue differ from the present issue the need for considering the circumstances, apparent conduct, and commercial facets of business transactions, needs to be adopted. This approach is not new. The Hon'ble Supreme Court has also in other judgments recogonised new developments leading to various different kinds of crimes and issues, unforeseen by the Legislature, come to immediate focus. Such situations have been tackled by the Apex Court by approving of the principle of 'updating construction'.

17.6 In the case of **Senior Electric Inspector Vs Laxminarayan Chopra** [(1962) 3 SCR 146] and **J.K. Cotton Spinning & Wvg Mills Ltd. Vs Union of India** [AIR 1988 SC 191], the Supreme Court observed that, in a modern progressive society **it would be unreasonable to confine the intention of a legislature to the meaning attributable to the word used at the time the law was made** and, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them.

17.7 In the case of **National Textile Workers' Union Vs P.R. Ramakrishnan** [(1983) 1 SCC 228], it was stated:

> "We cannot allow the dead hand of the past to stifle the growth of the living present. <u>Law cannot stand still; it must change with the changing social concepts and values</u>. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. <u>Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth</u>. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind." (emphasis added)

Hence, we feel that the mind should not be allowed to boggle at the logical consequence of the application of a term inserted in the law to remedy an internationally emerging mischief involving tax evasion and the judgments cited by Xiaomi and others do not come to their help.

18. We find in the Agreements between the CM's and Xiaomi India a supporting fact as extracted earlier. Clause 8.2 in the agreements of Xiaomi India and Flextronics dated 05.12.2020, (referred to as "ring fencing" clause), goes to show the understanding of the parties on subsequent government action on taxes, interest, penalties etc on the CM's which shifts the burden of reimbursement to Xiaomi India. Hence the parties too agree that the final resting place of these charges will be Xiaomi India, the beneficial owner. The original taxes etc paid by CM's are passed on as a part of the finished mobile phone pricing structure to Xiaomi India and all subsequent charges that was anticipated, by way of reimbursement from Xiaomi India. There does not appear to be any other reason for this clause, at least it was not disclosed by the parties in their submissions. Hence when the changes made in the definition of importer is made in the Customs Act, to include 'beneficial owner', the history of the term showing the significant role it plays in tax transparency, the integrity of the financial sector and law enforcement efforts, the ring fencing clause in the Agreement with CM's etc, all point to the deceptive nature of a service contract being passed of as a contract for sale. All these leads to the conclusion that the SCN satisfies the provisions of the said section and the duty sought to be demanded from Xiaomi Inia cannot be faulted.

19. The matter can be looked at from another angel. Facts (which are in the special knowledge of the appellants), if otherwise than that alleged by revenue, must be demonstrated by them (section 106 of the **Evidence Act, 1872** / section 109 of the **Bharatiya Sakshya Adhiniyam**, **2023**). Especially when the issue involves complex, layered ownership and control structures of Xiaomi, coupled with equally complex multiple agreements. It must be shown that both the legal ownership and the beneficial ownership vests with the CM's at the time of import. The appellants have relied on the agreements to state that the contract manufacturers are independent entities not under the control of Xiaomi. However, the terms of the various agreements show that, the rights of the Contract Manufacturers are very restricted and most other terms are averse to the CM's. Substantial control is with Xiaomi India who is the dominant party in the Agreement and there is no such right of effective possession and control that comes to vest with the CM's. In fact, it is this mutual understanding of control between the contract manufacturers and Xiaomi India and the reimbursement of any unseen costs, like duty, interest etc to the CM's which resulted in the Agreement and occasioned the imports.

20. The investigation made by DRI has hence succeeded in piercing the veil and demonstrating that Xiaomi India exercises effective control over the goods and is the 'beneficial owner' of the goods. The allegation in the SCN on 'beneficial owner' hence stands proved. The decision in the impugned order on this matter dropping the demand hence merits to be set aside.

III. <u>Whether the payment of royalty can be added to the transaction value of the imported goods under Rule 10(1)(C)</u>

21. <u>Submissions made by Xiaomi and Ors.</u>

i) Royalty cannot be added to the assessable value of components imported by third-party manufacturers as it has been paid by Xiaomi India and not by the CM's - buyer of the imported goods.

ii) The royalty paid by the Respondent under SULA, MPLA – I AND MPLA – II are for grant of license of standard essential patents and not related to imported goods.

iii) SEPs cover patented technology necessary for functioning of the mobile phone in a telecommunication network and for implementing the technical specifications/ standards. SEPs are therefore not related to the imported goods. They are not related to any specific model of mobile phone or any specific imported component.

iv) The import contracts between the third-party manufacturers and the foreign supplier do not require the third-party manufacturers/ importers to pay royalty towards import of components.

v) The Royalty agreements (SULA and MPLA) and the PP agreements are independent of each other. Neither requires the payment of royalty as a condition of sale of imported components.

vi) Royalty is paid for the post-import activity and is not related to the import of components or mobile phones.

vii) Payment of licence fee under the MSA was not made as a condition of sale of mobile phones and/or components of mobile phones. Payment of licence fee under the MSA was towards the post-import activity and functioning of mobile phones.

viii) Licence fee is subject to earning of profit. Licence fee was not paid during various financial years even though the components were imported by third party manufacturers during those financial years – this also shows that the licence had no nexus with imported goods.

ix) The LRAA and PP agreements are independent of each other, and no condition requires payment of royalty as a condition of sale of goods.

x) Mere fact that imported components could have not served any purpose without payment of royalty cannot be the reason for addition of royalty to the value of components:

21.1 <u>Submissions made by revenue:</u>

i) The payment of licence fee/royalties was required to operate the entire business of import and sale in strict conformity with the conditions of SULA and MPLA between Qualcomm the Xiaomi group. The parts/components imported contain or incorporate the IPRs of Qualcomm and Beijing Xiaomi. The said payment was made as a condition of sale and was related to the imported goods.

ii) Non-payment of royalties under agreements with Qualcomm / Beijing Xiaomi Mobile Software would constitute breach and terminate the agreements. In such circumstances, the contract manufacturers could not import components, nor could Xiaomi India import mobile phones. Hence, the payment of royalty was a condition of sale. Hence the payment of royalty / license is critical for the import of the impugned goods to supplier.

iii) For manufacturing mobile phones, Xiaomi India has allowed contract manufacturers, a royalty free right to use IPR, licences and rights received from Qualcomm and Beijing Xiaomi. The components of mobile phones which are imported for the sole purpose of manufacturing of Xiaomi brand mobile phones in India and use of IPRs, licences and rights are essential for manufacturing these mobile phones. Therefore, without the use of such IPRs, licences and rights, the import of parts and components will not serve any purpose either to the contract manufacturers or to Xiaomi India. Therefore, use of IPRs, licence and rights and consequent payment of royalty by Xiaomi India to Qualcomm Inc. and Beijing Xiaomi are directly related to the import of parts and components by the contract manufacturers.

iv) Explanation to Rule 10 provides that when royalties are otherwise includible, notwithstanding imported goods were subject to any process after import, such royalty is addable. The royalty license fee is includible in the transaction value as per Rule 10(1)(c) read with Rule 10(1)(e) and explanation to Rule 10(1).

v) Xiaomi India had paid royalty under the provisions of SULA, MPLA, MSA, LRAA. This fact was never disclosed by Xiaomi India to the Customs. The said royalty is includible in the transaction value as per Section 14 of the Customs Act, 1962 read with clause (c) and clause (e) of sub-rule 1 of Rule 10 of the Rules and explanation to Rule 10 (1) (c) and (e). Xiaomi India has admitted that they did not disclose the fact of existence of agreements between their company (Xiaomi China) and Qualcomm Inc. for payment of license fee/royalties before the authorities at SVB, Bangalore, while submitting application under Board Circular No. 05/2016 dated 09.02.2016, to examine whether such royalty are includible in the assessable value or not. It was only after initiation of investigation by the DRI that Xiaomi India informed SVB, Bangalore about these agreements in the month of October, 2019. This also shows suppression of fact and willful misstatement on the part of Xiaomi India.

21.2 Discussion on Submissions

21.3 The payment of royalty to Qualcomm Inc. and Beijing Xiaomi by Xiaomi India as per the various Agreements, was for the Xiaomi brand Mobile Phones **manufactured by their contract manufacturers in India** viz. Rising Star, Hi-Pad, Flextronics, DBG Technology **as well as for the complete Xiaomi brand mobile phones imported by Xiaomi India from Xiaomi China.**

21.4 Assessment of duty as defined under section 2(2) of the Customs Act 1962 and the determination of the value of imported goods as per section 14 (ibid) and the Valuation Rules has been discussed above. As per **Commissioner of Customs Vs. Ferodo India (P) Ltd.** [AIR 2008 SC (SUPP) 1345 / (2008) 3 SCALE 153], which has been relied upon by Xiaomi India and others, under rule 9(1)(c), [Rule 9 of the 1988 valuation Rules is now Rule 10 of the 2007 Valuation Rules], the cost of technical know-how and payment of royalty is includible in the price of the imported goods if the said payment constitutes a condition pre-requisite for the supply of the imported goods by the foreign supplier. **The judgment recogonised that there are two concepts which operate simultaneously, namely, price for the imported goods and the royalties/licence fees which are also paid to the foreign supplier.** If such a condition exists then the payment made towards technical know-how and royalties has to be included in the price of the imported goods. On the other hand, if such payment has no nexus with the working of the imported goods, then such payment was not includible in the price of the imported goods.

21.5 Relevant portion of the judgment is extracted below**:**

> "**Analysis of Rule 9(1)(c)**
>
> [of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988]
>
> 15. Rule 9(1)(c) extends the quantum of levy under Rule 4. Rule 9(4) mandates that there can be addition to the transaction value except as provided in Rule 9(1) and (2). Hence, addition for cost can only be made in situations coming under Rule 9(1) and (2). Rule 9(1) and (2) is based on the principle of attribution. Under Customs law. valuation is done on pricing whereas in the case of transfer pricing under Income-tax Act, 1961, valuation is profit based. The principle of attribution of certain costs (including royalty and licence fee payments) to the price of the imported goods is provided for in Rule 9 under situations mentioned in Rule 9(1) and (2). In transfer pricing, the arm's length price is inferred from various methods to avoid profit-shift from one jurisdiction to another and it is here that principle of allocation of profits comes in (i.e. in the case of transfer pricing).
>
> 16. **Under Rule 9(1)(c), the cost of technical know-how and payment of royalty is includible in the price of the imported goods if the said payment constitutes a condition pre-requisite for the supply of the imported goods by the foreign supplier. If such a condition exists then the payment made towards technical know-how and royalties has to be included in the price of the imported goods. On the other hand, if such payment has no nexus with the wording of the imported goods then such payment was not includible in the price of the imported goods.**
>
> 17. In the case of Essar Gujarat Ltd. (supra) the condition pre-requisite, referred to above, had direct nexus with the functioning of the imported plant and, therefore, it had to be loaded to the price thereof.
>
> 18. **Royalties and licence fees related to the imported goods is the cost which is incurred by the buyer in addition to the price which the buyer has to pay as consideration for the purchase of the imported goods**. In other words, in addition to the price for the imported goods the buyer incurs costs on account of royalty and licence fee which the buyer pays to the foreign supplier for using information, patent, trade mark and know-how in the manufacture of the licensed product in India. **Therefore, there are two concepts which operate simultaneously, namely, price for the imported goods and the royalties/licence fees which are also paid to the foreign supplier**. Rule 9(1)(c) stipulates that payments made towards technical know-how must be a **condition pre-requisite for the supply of imported goods** by the foreign supplier and if such condition exists then such royalties and fees have to be included in the price of the imported goods.

> Under rule 9(1)(c) the cost of technical know-how is included if the same is to be paid, directly or indirectly, as a condition of the sale of imported goods. At this stage, we would like to emphasis the word indirectly in rule 9(1)(c). As stated above, the buyer/importer makes payment of the price of the imported goods. He also incurs the cost of technical know-how. Therefore, the Department in every case is not only required to look at TAA [technical assistance and trade mark agreement], it is also required to look at the pricing arrangement/agreement between the buyer and his foreign collaborator. For example if on examination of the pricing arrangement in juxtaposition with the TAA, the Department finds that the importer/buyer has misled the Department by adjusting the price of the imported item in guise of increased royalty/licence fees then the adjudicating authority would be right in including the cost of royalty/licence fees payment in the price of the imported goods. In such cases the principle of attribution of royalty/licence fees to the price of imported goods would apply. This is because every importer/buyer is obliged to pay not only the price for the imported goods but he also incurs the cost of technical know- how which is paid to the foreign supplier. Therefore, such adjustments would certainly attract rule 9(1))(c).
>
> (emphasis added)

21.6 Relevant portions of Rule 10(1)(c) of the Customs Valuation (Determination of Price of Imported Goods) Rules, **2007**, issued in suppression of Customs Valuation (Determination of Price of Imported Goods) Rules, **1988**, and which came into force on 10.10.2007, is reproduced below for easy reference. [Rule 10 of the 2007 Rules is similarly worder to Rule 9 of the 1988 Rules].

> **10. Costs and services.**
>
> (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -
>
> . . .
>
> **(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;**
>
> . . .
>
> (e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

> **Explanation** - Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, **notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.**
>
> . . .
>
> (4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.
>
> *****. *****. *****
>
> **Notes To Rules**
>
> Rule 10 (1) (c). - The royalties and licence fees referred to in rule 10 (1)(c) **may include among other things, payments in respects to payments, trademarks and copyrights.** However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value.
>
> 2. **Payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale** for exports to the country of importation of the imported goods.
>
> (emphasis added)

21.7 Rule 10(1)(c) thus requires the following conditions to be satisfied before any addition is made to the price actually paid or payable in determining the value of the imported goods.

(i) Royalties and licence fees **related to the imported goods**

(ii) that the **buyer is required to pay**,

(iii) **directly or indirectly**

(iv) as a **condition of the sale** of the goods being valued,

(v) **to the extent that such royalties and fees are not included** in the price actually paid or payable.

Explanation to Rule 10(1) provides that where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

Notes to the said Rules further states that the royalties referred to in Rule 10(1)(c) may including

(vi) among other things

(vii) payments in respect to trademarks and copyrights and

(viii) Payments made towards the right to distribute and resell the imported goods shall **not be included if** such payments **are not a condition** of sale (in other words, these payments are also includible if they are a condition of sale).

21.8 Xiaomi India have in their submissions also stated that , Rule 10(1)(c) of the CVR provides for the addition of only such royalties and license fees to the transaction value which satisfy the following conditions:

a. The royalty shall be related to the imported goods.

b. The royalty is paid as a condition of sale of imported goods.

c. The importer/buyer is required to pay such royalty, either directly or indirectly;

Further, that the above conditions must be satisfied cumulatively and even if one of the conditions is not satisfied, the proposal to add royalty must fail. Reliance in this regard has been placed by them on the decision in **Indo Gulf Corporation Ltd. Vs CC, Mumbai**, 2005 (182) E.L.T. 77 (Tri. - Mumbai) affirmed by the Supreme Court in 2015 (320) E.L.T. 42 (S.C.).

21.9 We may examine how Constitution Courts have interpreted the erstwhile Rule 9 and present Rule 10 of the Valuation Rules. However, it is also true that each of these judgments is an authority in the setting of its own facts. We may still try to find some common principles involved.

A) **Collector Of Customs(Preventive) Vs Essar Gujarat Ltd.** [1996 (88) ELT 609 (SC)]

(1) **Without a licence from Midrex, the plant would be of no use** to EGL. **Therefore, in our view, obtaining licence from Midrex was a pre-condition of sale.**

(2) Midrex has granted licence to EGL not only for the right to produce in the Midrex Direct Reduction Process Plant and sell the products produced by the plant worldwide, but has also **given the licensee (EGL) the right to use all patents, confidential information for the operation of the plant.**

(3) The EGL in this case was purchasing a Midrex Reduction Plant in order a produce sponge iron. In order to produce sponge iron it was **essential to have technical know-how** from Midrex. It was also **essential to have an operating licence** from them. Without theses the plant would be of no value.

(4) **The plant would be of no value if it could not be made functional**. EGL wanted to buy the plant in working condition. This could only achieved by paying not only the price of the plant, but also the fees for the licence and the technical know-how for making the plant operational.

(5) **Therefore, the value of the plant will comprise of not only the price paid for the plant but also the price payable for the operation licence and the technical know-how**. Rule 9 should be construed bearing this in mind.

B) **Tata Iron and Steel Company Limited Vs Commissioner of Central Excise and Customs Bhubaneswar, Orissa** [2000 (3) S.CC.472].

(1) Clause (e) of sub-Rule (1) of Rule 9 is attracted when the following conditions are satisfied :-

(i) There is a **payment actually made** or to be made **as a condition of sale of the imported goods** by the buyer to the seller or to a third party;

(ii) Such payment, if made to a third party, has been made or has to be **made to satisfy an obligation of the seller**; and

(iii) **Such payments are not included in the price actually paid or payable**.

C) **Matsushita Television & Audio India Ltd. Vs CoC** reported in 2007 ECR 415 (SC)

(1) The technical know-how which was agreed to be furnished to the appellants was to **consist of quality control standard and specification of the components** to be used in the manufacture of T.V. sets.

(2) **Only such royalty which is relatable to the imported goods and which is a condition of sale** of such goods alone could be added to the declared price.

(3) In other words, **the royalty payment was to be computed not only on the domestic element of the net sale price of the colour T.V. but also on the cost of imported components.**

(4) A bare reading of the agreement shows that payment under the said **agreement related not only to the production of the goods in India but also to imports**.

(5) In the present case, **the cost of imported components was expressly included in the net ex-factory sale price of the colour T.V.**

(6) When payment to MEI was at the rate of 3% of the sales turn over of the final product, **including cost of imported component**, it became a condition of sale of the finished goods.

D) **COMMISSIONER OF CUS. (PORT), CHENNAI Vs TOYOTA KIRLOSKAR MOTOR P. LTD** [2007 (5) TMI 20 - Supreme Court / 2007 (213) E.L.T. 4 (S.C.)]

(1) The transactional value **must be relatable to import of goods** which a fortiori would mean that the amounts must be payable as a condition of import.

(2) **A distinction, therefore, clearly exists between an amount payable as a condition of import and an amount payable in respect of the matters governing the manufacturing activities**, which may not have anything to do with the import of the capital goods.

E) **Commissioner of Customs Vs Ferodo India (P) Ltd.** - AIR 2008 SC (SUPP) 1345 / (2008) 3 SCALE 153

(1) Under Rule 9(1)(c), the cost of technical know-how and payment of royalty is includible in the price of the

imported goods if the said payment **constitutes a condition pre-requisite** for the supply of the imported goods by the foreign supplier.

(2) On the other hand, **if such payment has no nexus** with the wording of the imported goods then **such payment was not includible** in the price of the imported goods.

(3) Royalties and licence fees **related to the imported goods** is the cost which is **incurred by the buyer in addition to the price** which the buyer has to pay as consideration for the purchase of the imported goods

(4) This is because **every importer/buyer is** **obliged to pay** not only the price for the imported goods but he also incurs the cost of technical know-how which is paid to the foreign supplier.

21.10 What emerges from a conspectus of the above judgments is that:

a) As per Rule 9(1)(c) [Rule 10(1)(c) of the 2007 Rules], there are two concepts which operate simultaneously, namely, price for the imported goods and the royalties/licence fees which are also paid to the foreign supplier.

b) Every importer/buyer is obliged to pay not only the price for the imported goods but he also incurs the cost of technical know-how which is paid to the foreign supplier.

c) It needs to be examined whether the imported goods would have any value without a licence from the seller or the imported goods would be of no use.

d) The agreement related not only to the production of the goods in India but also to imports.

e) Such royalty which is relatable to the imported goods, and which is a condition of sale is includable in the transaction value. In other words, the transactional value must be relatable to import of goods which a fortiori would mean that the amounts must be payable as a condition of import. The expression “condition”, simply put, conveys the idea that something could be done only if another thing was also done. [The test would be whether the goods could still be imported if the license fee/royalty is not to be paid]

f) The royalty payment was to be computed not only on the domestic element of the net sale price of the finished goods but also on the cost of imported components.

g) When payment to the seller was a % of the sales turnover of the final product, including cost of imported component, it became a condition of sale of the finished goods.

h) If such payment has no nexus with the wording of the imported goods, then such payment was not includible in the price of the imported goods.

22. It was earlier seen that the ‘Product Purchase Agreement’ between Xiaomi China and the CM’s, provides an elaborate clause on ‘Intellectual Property Rights’, which would not have been necessary if such right were not contained in the imported parts and components or involved in the process of manufacture of the mobile phones by the CM’s. At this stage it may be relevant to examine the various other royalty provisions built into some of the other Agreements that are relevant in this dispute. Only relevant portions of the Agreements are extracted for the sake of brevity.

22.1 First is the License and Royalty Arrangement. An Agreement between **Beijing Xiaomi Mobile Software Co., Ltd**. China ("Xiaomi Mobile") and **Xiaomi Technology India Private Limited**, India (Xiaomi India").

License and Royalty Arrangement

"Premises

WHEREAS, Xiaomi Mobile has **obtained licenses from third party intellectual property holders** with an enabling mechanism for the Affiliates of Xiaomi Mobile to use such third party intellectual properties and is **entitled to seek reimbursement of royalty/ license fees from its Affiliates for the same.**

WHEREAS, Xiaomi Mobile is the developer and owner of certain proprietary technologies associated with the MIUI operating software. Xiaomi India wishes to take a license from Xiaomi Mobile to use the said **proprietary software technologies in relation to the mobile phones** which are distributed by Xiaomi India in India, and Xiaomi Mobile is entitled to collect license fee from Xiaomi India towards the same.

WHEREAS, Xiaomi Mobile is the developer and owner of certain proprietary hardware technologies and Xiaomi India wishes to take a license from Xiaomi Mobile to use the said **proprietary hardware technologies in relation to the mobile phones** which are distributed by Xiaomi India. Xiaomi Mobile is entitled to collect hardware technology license fee from Xiaomi India towards the same

1, Definition

1.1, **"License Software Technologies"** shall mean:

MIUI operating software. including but not limited to object source code (executable documents) and related help documents, **all intellectual property rights embodied in or associated with** which are owned by Xiaomi Mobile. Customized or modified MIUI operating software based on the requirement of this Agreement, **including but not limited to** object source code (executable documents) and related help documents.

Updated MIUI operating software, which Xiaomi Mobile has developed in order to fix bugs or improve performances, **including but not limited to** object source code (executable documents) and related help documents.

*****. *****. *****

1.6. "**Licensed Hardware Technologies**" shall mean:

Proprietary technologies developed and owned by Xiaomi Mobile and/or its Affiliates (other than Xiaomi India) that are identified by Xiaomi Mobile as primarily and directly relating to, or reasonably necessary **for the manufacturing of** the Permitted Product:

Proprietary technologies developed and owned by certain third parties, licenses for which have been obtained by Xiaomi Mobile and/or its Affiliates (other than Xiaomi India) as of the Effective Date of this Agreement, including any extension. amendment, or renewal of said third party licenses during the term of the Agreement, that are identified by Xiaomi Mobile as primarily and directly relating to, or reasonably necessary **for the manufacturing of** the Permitted Product,

Certain technical information and know-how developed by, known to, or controlled by Xiaomi Mobile and/or its Affiliates (other than Xiaomi India) thot is identified by Xiaomi Mobile as primarily and directly relating to, or reasonably necessary for the manufacturing of the Permitted Product.

"**Licensed Technologies**" shall mean, **collectively, the Licensed Software Technologies and Licensed Hardware Technologies**.

2. Grant of Licenses

2.1. License Grant. Xiaomi Mobile hereby grants to Xiaomi India a nonexclusive, nontransferable, limited license, in the territory of India, for the term of this Agreement, under which:

. . . .

- Xiaomi India can use the Licensed Technologies for the purpose of **supplying, distributing, marketing and promoting the Permitted Products**.

3. Payments

3.1. Pricing: **In consideration of the grant of license** to the Licensed Technologies as contemplated herein, Xiaomi India will pay an arm's length consideration to Xiaomi Mobile in accordance with the following schedule:

*****. *****. *****

7. Termination

7.2. Termination for Breach: **Failure to pay or perform any obligation** hereunder within the time prescribed shall constitute an event of material default. Failure to cure any event of material default within thirty (30) days after receipt of written notice describing the non-performance, or fifteen (15) days with respect to non-payment of funds, shall entitle the Party giving such notice to terminate this Agreement.

7.3. **Effect of Termination**: After the termination of this Agreement. Xiaomi India shall immediately: (a) pay all outstanding all License Fee due under this Agreement: (b) **cease to further use the Licensed Technologies (in any form**, including partial copies it its possession or under its control): and (c) destroy all copies of the Licensed Technologies" (emphasis added)

22.2 Second is the SULA. An Agreement between **QUALCOMM** Incorporated, a Delaware corporation, and **Xiaomi Inc.,** China. with respect to the following facts:

SUBSCRIBER UNIT LICENSE AGREEMENT (SULA)

“RECITALS

WHEREAS, QUALCOMM has developed certain proprietary Code Division Multiple Access technology which may be useful in providing greater capacity and improved quality and reliability compared to other cellular telephone technologies, and QUA LCOMM manufactures and sells CDMA components and - equipment;..

WHEREAS, LICENSEE desires to obtain a license of QUALCOMM's Intellectual Property to manufacture and sell Subscriber Units, and QUALCOMM desires to grant such license in exchange for the license fees, royalties and other provisions hereof in accordance with the terms and conditions set forth in this Agreement;
and
WHEREAS, QUALCOMM desires to obtain a license of LICENSEE's Intellectual Property to manufacture, use/and sell Subscriber Units and Components, and LICENSEE desires to grant such license in accordance with the terms and conditions set forth in this Agreement.

I. HEADINGS AND DEFINITIONS.
. . . . .
"CDMA" means any spread spectrum telecommunications standard, specification or system that specifies or utilizes code division multiple access.

"Components" means application specific integrated circuits (ASICs), multi-chip modules, electronic - devices, integrated circuits, system in package (Sil'), system on Chip (SoC), including firmware thereon and accompanying or associated software, and/or families of such devices.

*****. *****. *****

5. QUALCOMM LICENSE,

5.1 Grant of License From OUALCOMM. Effective upon receipt by QUALCOMM of the initial installment of the Up-Front License Fee under Section 3 above, and subject to the terms and conditions of this Agreement, including but not limited to timely payment of the Up-Front License Fee and royalties set forth herein, QUALCOMM hereby grants to LICENSEE a personal, nontransferable, worldwide and nonexclusive license, without the right to sublicense except as set forth in Section 5.3 below, under QUALCOMM's intellectual Property to (a) make (and have made), import and use Subscriber Units, (b) Sell (and offer to Sell) such Subscriber Units, but only to Unlicensed Customers (i.e., this provision – does not grant LICENSEE a license or any rights to directly or indirectly sell or offer to sell such Subscriber Units to Licensed Customers), and (c) to make and have made), Components (provided such Components have been designed exclusively by LICENSEE and which design is owned and used exclusively by LICENSEE) and import, use and sell, offer to sell, lease and otherwise dispose of such Components but only if such Components are included as part of and incorporated within complete Subscriber Units Sold by LICENSEE in accordance with this Section 5.1 (or as replacement parts for such Subscriber

Units previously sold by LICENSEE).- The licenses set forth in this Section 5.1 are intended to be fully exhaustive and <u>include the right for LICENSEE and its sublicensed Affiliates to convey Pass-Through Rights</u> to their respective Unlicensed Customers of Subscriber Units to the extent of patent exhaustion under U.S. law; provided, however, that (i) exhaustion will be deemed to occur regardless of the country or jurisdiction in which such Subscriber Units are Sold, and (ii) if the law of the country or jurisdiction in which such Subscriber Units arc Sold provides broader Pass-Through Rights than patent exhaustion under U.S. law, then such broader Pass-Through Rights shall apply. No other, further or different license is hereby granted or implied.

*****. *****. *****

5.2 Royalties. In partial consideration for such license from QUALCOMM, LICENSEE shall pay to QUALCOMM, within thirty (30) days after the end of each calendar quarter, <u>an amount equal to the percentage set forth below of the Net Selling Price of each Subscriber Unit</u> that is Sold during such calendar quarter by LICENSEE or its Affiliates. The percentage of the Net Selling Price payable to QUALCOMM for each Subscriber Unit Sold shall be determined each calendar quarter using the following schedule: . . ."

(emphasis added)

22.3 Third is the MULTIPRODUCT PATENT LICENSE AGREEMENT. An Agreement between **Qualcomm Incorporated**, a Delaware corporation ("Qualcomm"), **Xiaomi Corporation**, Cayman Islands ("Xiaomi Corp."), and **Xiaomi Communications Co., Ltd**. China ("Xiaomi Communications").

<u>MULTIPRODUCT PATENT LICENSE AGREEMENT (MPLA)</u>

4. QUALCOMM LICENSES AND COVENANTS.

. . . .

4.2.1 Grant of Rights for Certain Branded Complete Terminals. Qualcomm hereby grants to Licensee and to each of Licensee's Affiliates a personal, nontransferable, nonexclusive, royalty-bearing license, without the right to sublicense, solely under Qualcomm's Licensed IPR to (a) <u>make (and have made), import, and use</u> Branded Complete CDMA Terminals and Branded Complete LTE Terminals, and (b) <u>Sell (and offer to Sell)</u> such Branded Complete Terminals, but only to Unlicensed Customers (i.e., this Agreement does not grant Licensee or any of Licensee's Affiliates any right to Sell (or offer to Sell) Branded Complete Terminals to Licensed Customers or to sell Non-Branded Complete Terminals to any Person).

*****. *****. *****

4.6 Rights to Have Made Components. Qualcomm hereby grants to Licensee and to each of Licensee's Affiliates a personal, nontransferable, nonexclusive license, without the right to sublicense, solely under Qualcomm's Licensed IPR <u>to have made</u>

Components solely for use in Covered Products made or Sold under the rights granted by Qualcomm in this Section 4 or as replacement parts for such Covered Products. Except as otherwise provided in this Section 4.6, no license, right or other authorization is granted by Qualcomm to make (or have made), import, use, Sell, offer to Sell, or otherwise dispose of any Components.

*****. *****. *****

7.5.4 Rights and Obligations upon Termination or Expiration.

7.5.4.1 Upon any termination or expiration of this Agreement (a) all licenses granted by a Party hereunder will terminate and (b) each Party shall, upon the written request of the other Party, use commercially reasonable efforts to return or destroy all Information furnished to it under this Agreement by the other Party, if any."

(emphasis added)

22.4 Fourth is the MPLA. An Agreement between **Qualcomm Incorporated**, a Delaware corporation ("Qualcomm") and **Xiaomi Communications Co., Ltd**., a company organized and existing under the laws of the People's Republic of China ("Licensee").

MULTIPRODUCT PATENT LICENSE AGREEMENT (MPLA)

"3. QUALCOMM LICENSES.

3.1 License Grant from Qualcomm for Covered Products.

3.1.1 License Grant. Subject to timely and proper performance in accordance with Section 4, including the timely and proper reporting and payment in full of each quarterly report and payment due hereunder, Qualcomm hereby grants to Licensee and its Affiliates a personal, nontransferable, nonexdusive, royalty-bearing license, without the right to sublicense, solely under Qualcomm's Licensed IPR,

(a) Branded Multimode Complete Teirninals; to make, have , made, import, use, Sell. and 'offer to Sell

(b) to make, have made, import, and use Multimode Semi Knockdown Kits and to Sell and offer to Sell such Multimode Semi Knockdown Kits in a Designated Country, but only to Unlicensed Customers (i.e., this clause (h) of this Section

3.1 does not grant to Licensee any license or right to directly or indirectly Sell or offer to Sell any Multimode Semi Knockdown Kits in any country other than a Designated Country, or to any Licensed Customers); and

(c) **to make and have made Components** solely for use in Covered Products made or Sold under the rights granted by Qualcomm in clauses (a) or (b) above or as 'replacement parts for such Covered Products.

For the avoidance of doubt, the licenses granted in this Section **to make or have made Covered Products include the right to practice methods and processes claimed in Qualcomm's Licensed IPR and the right to have Branded Multimode Complete Terminals made from Multimode Semi Knockdown Kits, and the license granted to Sell certain Covered Products includes Sales of such Covered Products by Licensee or its Affiliates through Distributors.**

The Parties recognize that. in certain instances, Licensee and its Affiliates may Sell a Non-Branded Multimode Complete Terminal under a brand exclusively licensed to Licensee or any of its Affiliates by a Brand Partner, where the pricing model applied to such Sales is comparable to that applied to Sales by License and its Affiliates under their own brands. Qualcomm agrees to consider in good faith, on a case-by-case basis, whether to treat such Multimode Complete Terminals as "Branded," and therefore included within the rights granted (and subject to payment of royalties) under this Agreement.

3.1.2 **Pass-Through Rights**. The licenses set forth in this Section 3.1 are intended to be fully exhaustive and include the right for Licensee and Licensee's Affiliates to convey Pass-Through Rights to their respective customers (but in the case of Multimode Semi Knockdown Kits, only to Unlicensed Customers) for Covered Products to the full extent of patent exhaustion under U.S. law; provided, however, that (i) exhaustion will be deemed to occur regardless of the country or jurisdiction in which such Covered Products are Sold, and (ii) if the law of the country or jurisdiction in which such Covered Products are Sold provides broader Pass-Through Rights than patent exhaustion under U.S. law, then such broader Pass-Through Rights shall apply.

*****. *****. *****

3.3 **Limitations Regarding Components**; Partial Termination. Except as provided in Sections 3.1(a) and (c), **no license, right or other authorization is granted by Qualcomm to make, have made, import, use, Sell, offer to Sell, or otherwise dispose of any Components**. The license to have made Components set forth in Section 3.1(c) will terminate as to any Components made for Licensee or any of its Affiliates by a particular manufacturer if such manufacturer or any of its Affiliates Asserts a patent claim Essential to a Covered Standard against Qualcomm or any of its Affiliates, provided that Qualcomm shall not seek injunctive relief against such Asserting manufacturer or its Affiliate to prevent such party from supplying Components to Licensee or its Affiliates solely for inclusion in Branded Multimode Complete Terminals.

*****. *****. *****

4. ROYALTIES, ROYALTY CERTIFICATES, AUDITS.

4.1 Royalties for Covered Products. In partial consideration for and subject to the rights granted by Qualcomm in Section 3. Licensee shall pay to Qualcomm, no later, than sixty (60) days after the end of each quarter, and for each Branded Multimode Complete Terminal that is Sold by licensee or any of its Affiliates during such quarter, and for each Multimode Semi Knockdown Kit Sold by Licensee or any of its Affiliates to an Unlicensed Customer during such quarter, an amount equal to: . . .

*****. *****. *****

7.5 **Termination.**

7.5.1 **Termination for Cause by Qualcomm.**

(a) **Termination for Breach**. Qualcomm may terminate this Agreement, by written notice to Licensee, if Licensee (1) **<u>fails to pay, in full or in a timely manner</u>**, any royalties or other amounts owed to Qualcomm hereunder, (2) fails to submit in a timely manner any report required under Section 4.3(b) to be submitted to Qualcomm hereunder or submits any false or inaccurate report to Qualcomm, (3) refuses to allow an audit of Licensee's Sales of Covered Products as provided in Section 4.5 or breaches Section 7.7, or (4) commits any other material breath of any representation, warranty, or obligation in or under this Agreement; provided, however, that in the case of any such breach that is capable of being cured, Qualcomm will not have a right to terminate this Agreement unless and until Licensee has failed to cure such breach within thirty (30) days after Qualcomm has given Licensee written notice thereof."

(emphasis added)

22.5 Fifth is the MASTER SOFTWARE AGREEMENT, entered into by and between **QUALCOMM** Incorporated, a Delaware corporation (QUALCOMM) and **Xiaomi Inc** a company organized under the laws of the People's Republic of China (LICENCEE).

MASTER SOFTWARE AGREEMENT

"RECITALS

WHEREAS, OUALCOMM and LICENSEE have entered into that certain Subscriber Unit Licence Agreement dated October 27, 2010. as may be amended from time to time by written agreement of the Parties (the "Licence Agreement") pursuant to which – QUALCOMM granted LICENSEE a licence under certain **<u>QUALCOMM intellectual property to develop. Manufacture and sell certain wireless subscriber equipment.</u>**

WHEREAS, in accordance with the terms and conditions of this Agreement, QUALCOMM is willing to deliver the Software (as defined below and identified from time to time in a Software

> Addendum) to LICENSEE **<u>for use solely with the corresponding QUALCOMM ASIC</u>** (as defined below and identified in the applicable Software Addendum): and
>
> WHEREAS, LICENSEE desires to receive the Software for its use in accordance with the terms and conditions of this Agreement.
>
> *****. *****. *****
>
> 2. SOFTWARE.
>
> 2.1 Delivery of Software. QUALCOMM shall make commercially reasonable efforts to deliver the **<u>Software that is designed for use with the applicable QUALCOMM ASIC</u>** identified in a Software Addendum QUALCOMM shall have the right at its sole discretion to reschedule any releases of the Software as required, change the number of phases and/or releases, and/or modify the functionality contained in each phase and/or release. . . ." (emphasis added)

23. From a conspectus of the above-mentioned Agreements we find that royalty payments, as per the Agreements, are made on account of bundled licensed software technologies and licensed hardware technologies, embedded in the imported parts and components used for making, using in the manufacture and selling of finished mobile phones.

23.1 This is not disputed by Xiaomi and others in their written submissions dated 11.06.2024. It is however their contention that the Standard Essential Patents (SEP) are not related to any specific model of mobile phone or any specific imported component. Hence although the method of computation of royalty for SEP is on the value of the mobile phone, the same cannot be understood to mean that the SEPs are in relation to the mobile phones. They have in support of their views relied upon the article titled "**An Experience-Based Look At The Licensing Practices That Drive The Cellular Communications Industry: Whole Portfolio/Whole Device Licensing**", by Marvin Blecker, Tom Sanchez and Eric Stasik. The article recogonised that the cellular communications industry is built around standards and has flourished in part because newcomers can implement standardized technologies, and make and sell competitive devices that are interoperable with existing networks as a part of the industry’s licensing practices, without significant investments in R&D. Some innovators have developed portfolios with tens of thousands of patents, many of which are essential to the standard or otherwise practiced by cellular equipment. **Whole portfolio/ whole device licensing**, which give access to a licensor's entire relevant portfolio of patents, are efficient and beneficial to all players in light of the broad patent portfolios held by many licensors in the cellular communications industry. From the start of the cellular communications industry, the device (handset) price has been the widely used royalty base in license agreements. **Regardless of the specific contract terms, the important point is that nearly all agreements are based on the price received by the manufacturer from the sale of a fully-functional end user device (e.g., handset), and not the individual components, subassemblies or combinations of components contained in it. Using the device price as the royalty base has many advantages for licensors and licensees in the cellular communications industry.** Using the device price as the royalty base is appropriate because it (i) best accounts for the diverse patents in major portfolios, (ii) best reflects the value created by the licensed patents, (iii) provides freedom of operation to licensees to develop new devices and change component suppliers, and (iv) simplifies relationships between licensors and licensees, helping to avoid disputes. Major innovators in the cellular communications industry frequently hold patents on numerous different kinds of technologies used in cellular communications. They are likely to have patents covering chipsets, handsets, network infrastructure, protocols, and entire networks. The practical and efficient way to license such a broad portfolio is to license, and determine the royalty based upon the price of, the handset which uses all those features. Indeed, major portfolios will generally have patents that read on an entire device, and for those patents, the device price is the only natural and appropriate royalty base. Because any such patents should be licensed using the device price as the royalty base, it is practical and efficient to also use the device price as the royalty base for other patents that are licensed from the same portfolio. It would not be practical to determine a separate royalty base and rate for each of those patents and the price of the handset is the only logical and appropriate royalty base. The conclusion arrived in the article are extracted below:

> "VI. Conclusion
>
> Whole-portfolio/whole-device licenses have been the standard practice through four generations of wireless communications technologies. There are excellent reasons for this. For major patent portfolios, whole-portfolio licenses are efficient, desirable and promote competition and innovation. Similarly, licensing fully-functional, whole devices, using the device price as the royalty base, best addresses the value created by the cellular communications technology being licensed, and is the most efficient and practical approach for both licensors and licensees. Whole-portfolio/whole-device licensing has been the foundation of the bargain between innovators and implementers since the beginning of the industry, and it has served the industry and consumers spectacularly well, as demonstrated by the unprecedented growth and dynamism of cellular communications. Any government agency or other organization asked to limit the flexibility to form these types of agreements should consider the background behind and reasons for current licensing practices in the cellular communications industry, and should proceed cautiously so as not to harm the industry by restricting efficient and appropriate licensing. Ill-advised policymaking at the behest of the implementer segment of the industry risks (i) elevating the cost of iicense maintenance and enforcement, (ii) generating unnecessary additional legal disputes,

> (iii) disincentivizing investment in innovation, and (iv) providing unfair advantages to market participants that have not invested in industry development.” (emphasis added)

23.2 It is Xiaomi’s claim that the international practice is followed in this case too. They have referred to the Hon’ble High Court of Delhi in the decision of **Telefonaktiebolaget LM Ericsson (PUBL) Vs Intex Technologies (India) Ltd.,** I.A. No. 6735/2014 in CS(OS) No.1045/2014 and **Federal Trade Commission Vs Qualcomm Inc.,** (N.D. Cal. 2017, Case No. 17-CV-00220-LH), in support.

24. **The power to levy tax is a sovereign power and cannot be made surrogate to mercantile practices, industry norms and commercial convenience.** The state is entitled to its tax. In cases where taxability is not disputed Courts do mould relief under the peculiar circumstances of individual cases, which cannot set a precedent. The Apex Court in **Raja Jagannath Baksh Singh Vs State of U.P. & Anr.** (AIR 1962 SC 1563) observed:

> “…. The power of taxation is, no doubt, the sovereign right of the State; as was observed by Chief Justice Marshall in M’Culloch v. Maryland [4 Law Edn.579 p.607] : <u>“The power of taxing the people and their property is essential to the very existence of Government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it.</u>” In that sense, it is not the function of the court to enquire whether the power of taxation has been reasonably exercised either in respect of the amount taxed or in respect of the property which is made the object of the tax.” (emphasis as in original)

Hence it is for Xiaomi and others to declare the facts about the number of patents involved with the imported goods at the time of import and pay duty accordingly, as the details are within their special knowledge. **They cannot seek to get the whole Electronic Manufacturing Industry exempted from levy of Customs duty on Royalty as per**

section 14 of the Customs Act, citing the practice in the industry. Since the details of payment of Royalty is in their special knowledge they should have listed each such IPR related technology showing the factor of separability, its use/dual use and royalty paid for each of them, before the Original Authority. If Xiaomi and Ors had provided an item-wise, stage-wise breakdown of the royalties paid at the time of import, it would have facilitated in determining the extent to which such royalty had to be added to the transaction value with regard to each such item. This would then have shifted the onus of proof back to the department, and may have supported their stand that these technologies are for major use in post manufacturing/sale activity etc. Otherwise once a royalty for a whole-portfolio/ whole-device license is paid as part of an Agreement on a price which includes the cost of imported parts and components, it's a rebuttable assumption that the royalty is for the imported goods and the department would be correct in proceeding to tax it accordingly.

24.1 Even in the case of technologies used only for post manufacturing/ sale activity there is a difference. The term used in Rule 10(1)(c) of Customs Valuation Rules, 2007 is "condition of sale". As per **Oxford Dictionary** condition means "Stipulation or something on fulfilment of which something else depend". Royalty paid exclusively for manufacturing IPR's/ patents whether belonging to software of hardware technologies relate to a post import activity. But if the royalties are for IPR's/ patents and processes embedded in the imported goods, without which the parts and components are of no use and which cannot be vivisected from the large number of other patents and processes required for post import activity, then the royalty payment will have to be added as a whole to the transaction value in terms of section 14 of the Customs Act and Rule 10(1)(c) of Customs Valuation Rules, 2007, as the availability of such IPR's/ patents are understood to be a part of the sale, whether it is written or unwritten, as discussed above. Without those rights the import of the parts and components cannot be used and would be of no use. For example, the Agreement between Xiaomi Mobile and Xiaomi India, states that royalty has to be paid for use of the said proprietary software and/or hardware technologies 'in relation to' the mobile phones, which has a very broad meaning. Such use i.e. 'in relation to' can be either direct or even indirect. [See: **CCE Vs Rajasthan State Chemical Works -** 1999 (55) ELT 444 (SC) and **Union of India Vs Ahmedabad Electricity Co. Ltd -** 2003 (158) ELT 3 (SC)]. The SULA between Qualcomm and Xiaomi China to grants the use of License from Qualcomm to make and have made, components and import, use and sell, offer to sell, lease and otherwise dispose of such components provided such components have been designed exclusively by Xiaomi and which design is owned and used exclusively by Xiaomi, is equally broad as per the industry norm. But such bunching cannot deprive the state of its taxes. It is not beyond modern technology to map specific goods/ processes used/ services rendered at different stages of a goods life. Moreover the explanation to Rule 10(1) provides that where the royalty, licence fee or any other payment **for a process, whether patented or otherwise**, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, **notwithstanding the fact that such goods may be subjected to the said process after importation of such goods**. The explanation cannot be read in a manner to render it otiose. While the article "**An Experience-Based Look At The Licensing Practices**" (supra), cited by Xiaomi examines practices that have helped the industry grow, it does not attempt to provide a cover or justification for evading payment of taxes.

24.2 Moreover the Customs Act and Valuation Rules provide for the addition of the royalty or licence fee whether it is paid directly or indirectly. Hence how so ever the appellants may have structured its business for purposes of accommodating mercantile practices, industry norms and commercial convenience, it cannot obliterate the fact that these royalty payments are payments for use of technologies which include the parts and components and have to be treated as a single composite payment includable in the transaction value of the imported goods. Further from the Agreements it is clear that the payments made include payment for the right to distribute or resell the imported goods.

24.3 In the case of **Mohanlal Shamji Soni Vs Union of India & Anr.,** [1991 AIR 1346, 1991 SCR (1) 712] it has been held by the Supreme Court that,

> "...it is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue."

The rule has been defined to mean that "so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it." [See: **Smt. J. Yashoda**

Vs Smt. K. Shobha Rani - AIR 2007 SUPREME COURT 1721, 2007 (5) SCC 730]. Xiaomi India have thus allowed the onus of proof to rest with them by not disclosing the higher or superior evidence within their possession and special knowledge. Once revenue has been able to create a high degree of probability so as to shift the onus on the noticee's, it was for them to rebut the allegations. Mere averments that the royalty paid for a whole-portfolio/ whole-device license, is only for post import activity, as it is paid at the point of sale of the finished phones is not proof. It remains a pleading which is not consistent with the Agreements submitted in this matter. As held recently by the Apex Court in **ANGADI CHANDRANNA Vs SHANKAR & ORS.** [2025 INSC 5321, CIVIL APPEAL NO. 5401 OF 2025, Dated: 22.04.2025], **it is well established that the contents in a document would prevail over any contrary oral evidence.**

25. Moreover, unlike the averment of Xiaomi India and as per Note 2 to Rule 10(1)(c), payments made by the buyer for the **right to distribute or resell** the imported goods shall not be added to the price actually paid or payable for the imported goods **if such payments are not a condition of the sale** for exports to the country of importation of the imported goods. Since the Agreements above include royalty to be paid on account of bundled licensed software technologies and licensed hardware technologies, used for making, importing, using in the manufacture and selling of finished mobile phones and does not exclude the right to distribute or resell or bring it under a separate clause, all such rights are included in the payments and are a condition of the sale.

26. Xiaomi India have stated that even assuming that they themselves import the components, manufacture the mobile phones and sell them in the Indian market, the demand of customs duty on account of inclusion royalty will not sustain for the reason that the said royalty payment is triggered only on sale of the finished mobile phone in India, and is not a condition of sale of the imported components. This position appears to be misleading as the point of payment of royalty is artificially created as per Agreement. The point of payment of royalty is not determinative of the payment being a post import payment. **In other words, the subject of tax is different from the measure on which / the stage at which Royalty is determined and paid by parties to an agreement.** The contract, which constitutes a private legal document between the parties, must be read as a whole to understand the intention of parties to the Agreements. Otherwise, clever drafting can mislead and help parties evade taxes.

27. As per the Apex Courts judgment in **Tata Iron and Steel Company Limited** (supra), Clause (e) of sub-Rule (1) of Rule 9 is attracted when the following conditions are satisfied :-

> (i) There is a payment actually made or to be made as a condition of sale of the imported goods by the buyer to the seller or to a third party;
>
> (ii) such payment, if made to a third party, has been made or has to be made to satisfy an obligation of the seller; and
>
> (iii) such payments are not included in the price actually paid or payable.

All the three conditions are seen satisfied in the agreement entered into with the IPR owners as above. The question then is whether the imported goods would have any value without a licence from the seller or the imported goods would be of no use. Applying the principle stated in **Essar Gujarat** (supra), without a licence the imported components, would be of no use. Manufacture using the intellectual hardware and software technologies embedded in the parts and components, as per the whole-portfolio/ whole-device licensing norm of the industry, which include licensor IPR restrictions to make (and have made), import etc, would be prohibited and if done subjected to litigation. Further the finished phone would be of no value if it could not be made functional. Hence such royalty is relatable to the imported goods and is a condition of sale directly or indirectly.

28. When M/s. Xiaomi India imports complete mobile phones, no further manufacturing occurs. Hence royalty payments are directly linked to these imports. Without paying royalty, M/s. Xiaomi India cannot sell the phones in India. Thus, royalty on finished mobile phones is a condition of sale and must be included in the invoice value as required by Rule 10(1)(C) of the CVR, 2007.

29. We can now examine the issue as per the principles emerging from the judgments of Constitutional Courts as stated above. It emerges that:

a) In line with Rule 10(1)(c), there are two concepts which operate simultaneously in this case, namely, price for the imported goods and the royalties/licence fees which are paid to the IPR holder by the beneficial owner.

b) Every importer/buyer is obliged to pay not only the price for the imported goods but he also incurs the cost of technical know-how which is paid to the IPR holder, and in this case is paid by the beneficial owner.

c) The imported goods would have no value without a licence from Xiaomi, who holds the IPR rights through a licence from the IPR holder, for the imported goods and which is implemented through complex layer of Agreements. Any default in payment for the IPR rights would affect the right of the CM's to import and use components and to make and 'sell' finished mobile phones. Similarly, Xiaomi India would not be able to import finished Xiaomi brand mobile phones.

d) The agreement with the CM's relates not only to the production of the mobile phones in India but also to imports of its parts and components. In other words the manufacturing processes for which royalty is paid are inseparably embodied in the finished mobile phones and the phones would be of no use without them.

e) Such royalty is related to the imported goods and is a condition of sale as otherwise the imports would not happen and is includable in the transaction value. In other words, the transactional value is relatable to import of goods and is a fortiori as expressed in the Termination Clause of the IPR Agreement.

f) The royalty payment is computed not only on the domestic element of the net sale price of the finished goods but also on the cost of imported components.

g) The royalty payment is a % of the sales turnover of the final product, including cost of imported component and thus also becomes a condition of sale of the finished goods.

h) The payments thus have nexus with the imported goods, and are includible in the transaction value of the imported goods.

30. Hence when the provisions of the Agreements are examined in the light of Rule 10(1)(c), it is seen that the Rule is satisfied as below.

(i) Royalties and licence fees are related to the imported goods

(ii) that the buyer (beneficial owner) is required to pay,

(iii) directly or indirectly

(iv) as a condition of the sale of the goods being valued,

(v) to the extent that such royalties and fees are not included in the price actually paid or payable.

Hence the royalty payments are addable to the transaction value as proposed in the SCN. Accordingly, the Ld. AA erred in his finding that the transaction value invoking Rule 10(1)(c) ibid in respect of the CM's is unsustainable. Hence the impugned order to that extent merits to be set aside.

Whether extended time limit is invokable in this case.

31. Submissions made by Xiaomi and Ors:

(i) They submitted the details of LRAA under which royalty was paid for the very first time on 31.03.2018, to the SVB authorities, vide letter dated 28.04.2018.

(ii) While submitting the application for SVB in 2016 and thereafter in 2018, they submitted the financial documents of the Respondent for FY 2014-15 to 2017-18, audited by an independent auditor, and the FORM 3 CEB (Sl. No. 35 of Volume IV of Documents filed by the Respondent) for FY 2014-15 to 2017-18 which clearly indicated the payment of royalty under various agreements including the SULA, MPLA, and MSA.

(iii) They relied on the case of **Gupta Steel Vs Commissioner of Customs, Jamnagar**, reported in 2015 (324) E.L.T. 29 (S.C.), wherein the Hon'ble Apex Court has held that when the department had full knowledge of the facts of the case, it cannot invoke extended period alleging misstatement and suppression.

(iv) The CMs were established prior to the introduction of the concept of beneficial ownership under the Customs Act in 2017; accordingly, it cannot be concluded that the incorporation of CMs was solely intended to designate Xiaomi India as the beneficial owner of imported components or to evade customs duties by excluding royalties from the valuation of these imports.

(v) The Supreme Court in **Commissioner Central Excise And Customs & Anr. Vs M/S. Reliance Industries Ltd.** [2023 (385) E.L.T. 481 (S.C.)] affirmed that when two interpretations are possible, the invocation of the extended period is unjustified.

(vi) Xiaomi India has stated that the sole allegation against them concerns its declaration to SVB regarding the import of mobile phones—specifically, its response to Question No. 6.3, stating that no payments were made by Xiaomi India as a condition of sale for the imported goods. This response is based on the honest belief that no such payments constituted a condition of sale.

31.1 <u>Submissions made by revenue</u>

(i) M/s. Xiaomi India was having MPLA, SULA, MSA, LRAA for payment of royalty band licence fee to M/s. Qualcomm Inc., M/s. Qualcomm Technology and to M/s. Beijing Xiaomi. M/s. Xiaomi India had started making payments under the head royalty to Qualcomm from 2015-16 onwards and licence fee to Beijing Xiaomi from 2017-18 onwards. M/s. Xiaomi India has failed to bring these facts to the notice of proper officers as well as SVB Bengaluru for determination of the correct assessable value of the goods imported by M/s. Xiaomi India and its CM's, as detailed at para 32.0 of the OIO.

(ii) Due to this, the correct value of imported goods was not declared by M/s. Xiaomi India, rendering the subject goods liable to confiscation under Section 111(m) of Customs Act, 1962. Thus, it is clearly established that M/s. Xiaomi India has indulged in deliberate suppression of facts by way of willful misstatement and mis-declaration in not declaring the royalty and licence fee paid or payable by them to to M/s Qualcomm and M/s. Beijing Xiaomi leading to the short levy of duty at the time of import.

(iii) Further by the above act they have rendered the goods liable to confiscation under section111(m) of the Customs Act, 1962 and penalty under section 112(a) EZ. 114A of the Customs Act, 1962.

31.2 <u>Discussion on Submissions</u>

31.3 Xiaomi India averments that the CMs were established prior to the introduction of the concept of beneficial ownership etc. does not hold much water. A remedy follows after the problem is identified. The Policy Brief of the UN Dept of Economic and Social Affairs cited at para 10.2 above, points to secrecy by layering of ownership through subsidiaries, corporations, trusts, investment funds and/or other legal vehicles to conceal the true ownership which throws a challenge to tax officials. From the discussions above Xiaomi Indias position is seen compatible to the issue identified in the UN Brief.

31.4 As regards the averments made by Xiaomi India and other that they have made all the required declarations at the time of import, it has to be stated that the issue is not of form alone but of substance also. It is not merely fulfilling the declaratory provisions in para 2.06 of FTP or the Customs Act. When special situations are present which have a strong bearing on assessment the same should also be declared at the time of import and not lie buried in various documents made available to the department. Even the Hon'ble Supreme Court in **M/s Safari Retreats** (supra) have held that sometimes, bulky compilations and submissions can be counterproductive. Further a five judge Bench of the Hon'ble supreme court in **Calcutta Discount Company Limited Vs Income-Tax Officer, Companies** [1961 SCR (2) 241 / AIR 1961 SUPREME COURT 372], held:

> "This means quite clearly that the mere production of evidence is not enough, and that there may be an omission or failure to make a full and true disclosure if some material fact necessary for the assessment lies embedded in that evidence which the assessee can uncover but does not. If there is such a fact, it is the duty of the assessee to disclose it. <u>The evidence which is produced by the assessee discloses only primary facts, but to interpret the evidence, certain other facts may be necessary</u>. . . . . If production of documents or other evidence from which material facts could with due diligence have been discovered does not necessarily amount to disclosure, it would be difficult to hold that a presumption about the production of a document at sometime in the past and its possible existence in the files of the Income Tax Officer relating to earlier years may be regarded as sufficient disclosure. <u>Disclosure of some facts, but not all, though the facts not disclosed may have come to the knowledge of the Income Tax Officer, if he had carefully prosecuted an enquiry on the facts and materials disclosed, will not amount to a full and true disclosure of all material facts necessary for the purpose of assessment.</u> A tax payer cannot resist reassessment on the plea that non-disclosure of the true state of affairs was due to the negligence or inadvertence on the part of the Income Tax Officer, and but for such negligence or inadvertence, a full and true disclosure of all material facts necessary, for the assessment would have been resulted." (emphasis added)

The question hence would be whether the declarations were true, complete and transparent or whether evasion of duty has been facilitated by secrecy and by layering of ownership to conceal the true beneficiary of the goods so as to benefit from lower taxes. Xiaomi's reliance on the Hon'ble Supreme Court's judgment in **Reliance Industries Ltd.** (supra), to the effect that when two interpretations are possible, the invocation of the extended period is unjustified, does not come to their help as there would not be a situation of two interpretations had all the facts been disclosed transparently at the initial point of import. Moreover we find that the Hon'ble supreme Court in **Associated Cement Companies Ltd. Vs. Commissioner Of Customs** [2001 (128) ELT 21 (S.C.)], had examined section 28 and had observed as under:

> "52.Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring in proviso to Section 11A of the Excise Act are missing in Section 28(1) of the Customs Act and the proviso in particular."

Hence as per the statute "with intent to evade payment of duty" is not an essential condition for evoking the extended time limit.

31.5 As regards Xiaomi India's averment regarding Form 3CEBs and providing copies of Agreements etc. as per revenue, the disclosure of royalty payments to SVB took place only after investigations were started by DRI. Customs officers doing normal assessment work verify documents submitted believing them to be a true declaration of the facts declared. Assessment of imported goods are done as per section 17 of the Act. Relevant portion is reproduced below:

> **"Section 17. Assessment of duty**. - (1) An importer entering any imported goods under Section 46, or an exporter entering any export goods under Section 50, shall, save as otherwise provided in Section 85, self-assess the duty, if any, leviable on such goods.
>
> (2) The proper officer may verify the entries made under Section 46 or Section 50 and the self-assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.
>
> <u>**Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria"**</u>
>
> (emphasis added)

31.6 The risk evaluation as mentioned in the proviso to section 17(2) is provided for by the Risk Management System (RMS) of the Indian Customs. Electronic Data Interchange (EDI) system is a trust-based system which electronically clears a majority of the consignments of imported goods, based on self-assessment by the importer without the proper officer being required to examine either the documents or the goods which were self-assessed.

31.7 With trust comes responsibility. Xiaomi India and the CM's have not shown that they have discharged their obligations under the Customs Act by making a full and true disclosure of primary facts. They knew that Royalty payments in the Cellular Communications Industry is based on the whole-portfolio/ whole-device license and that the device (handset) price has been the widely used royalty base in license agreements, although it does not reflect the technologies and the stage of their use and would include such payments for parts and components. This was a critical information that impacts assessment. Further even to interpret these facts, the proper officer would require to be provided with Agreements that show the sale/purchase of goods as per the Sale of Goods Act and the degree of control exercised by Xiaomi on the goods for which the Bill of Entry was filed by the CM's.

Hence their reliance on the judgment in **Gupta Steel** (supra) is not helpful to them as there is nothing to show that the department was in the know of the royalty/ licencing payments. When in doubt the importer is better off by complying and submitting information as would any prudent man in such circumstances. A stitch in time saves nine. Timely and complete submissions of information could have saved Xiaomi India and others the bother of explaining their case by submitting five volumes of documents and more at every appellate stage. It is clear that the correct information was not disclosed deliberately to escape from payment of duty. Thus, it is clearly established that M/s. Xiaomi India has indulged in deliberate suppression of facts by way of willful misstatement and mis-declaration in not declaring the royalty and licence fee paid or payable by them to M/s Qualcomm and M/s. Beijing Xiaomi leading to the short levy of duty at the time of import and hence the demand for duty under the extended period is justified.

Whether interest is payable

32. Submissions of Xiaomi and Ors:

32.1 Xiaomi India submits that in the light of their submissions on merits it is evident that the demand of Customs duty under Section 28(4) of the Customs Act is not legally tenable. Thus, when no Customs duty demand can stand against the Respondent the demand of interest on such alleged short payment of Customs duty under Section 28AA of the Customs Act also cannot stand before the law as per the Judgment of the Hon'ble Hon'ble Supreme Court in the case of **Pratibha Processors Vs Union of India** reported in 1996 (88) ELT 12 (S.C.).

32.2 Xiaomi India and others have also submitted that no interest, penalty or redemption fine can be imposed on them insofar as it relates to the demand for differential IGST. This is because, during the relevant time, the Customs Tariff Act did not contain the relevant provisions for demanding interest and imposing penalties.

Discussion on Submissions

32.3 We find that Pratibha Processors was a case in which on the date of clearance of the goods, no duty was payable. The Hon'ble Supreme Court stated a basic principle based on common sense that calculation of interest is always on the principal amount and if the principal amount is zero then the interest has also to be zero! Interest cannot be calculated on a non-existing duty. That is not the case, here interest has been demanded on duty payable. The more apt judgment is that of the Hon'ble High Court of Bombay in **B.V. Jewels Vs Union of India** [2024:BHC-OS:18485-DB, dated: 14.11.2024], wherein the Court held that the accrual of interest is automatic, and no separate notice of demand was required to be served. Relevant portion of which is cited below:

> "44.. . .
>
> (iii) **Section 28AA of the Customs Act provides that notwithstanding anything contained in any judgment, decree, order or direction of any Court, Appellate Tribunal or any authority or in any other provision of the said Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under Section 28.**
>
> 45. **Based on a reading of Section 28AA (1) and 28(10) of the Customs Act, there is no requirement of any demand being made in the original assessment order for interest under Section 28AA.** Suppose the demand raised under Section 28 is not paid within the specified time. In that case, interest starts running against the assesses on the expiry of the said date, and, therefore, the question of raising any demand of interest in the assessment order would not

> arise. The liability of the interest would arise only on default of payment of duty within the time specified under Section 28."
>
> (emphasis added)

Further as per the Hon'ble Supreme Court's judgment in **Commissioner of Central Excise, Pune Vs M/s SKF India** [2009-TIOL-82-SC-CX], in a case under the Central Excise Act, the provisions of which are similar to the Customs Act, that interest is leviable on delayed or deferred payment of duty for whatever reasons. Hence the plea of Xiaomi India and others is rejected.

32.4 As regards the claim of Xiaomi India and others that interest, penalty or redemption fine cannot be imposed on them insofar as it relates to the demand for differential IGST, we find that this very Bench had examined the issue in its Final Order No 40320/2025, Dated : 11.03.2025 [**M/s. Flextronics Technology India Pvt. Ltd. Vs Commissioner of Customs, Chennai VII Commissionerate**, 2025 (3) TMI 695 — CESTAT, Chennai]. Relevant portion is extracted below:

> "<u>No Interest or Penalty is leviable in the absence of machinery provision</u>
>
> 6. The Appellant submits that IGST is levied under Section 3(7) of CTA. However, the CTA has limited provisions, and it borrows various provisions from the Customs Act for implementation of its provisions. Section 3(12) of the CTA, which is the borrowing provision with regard to IGST, did not borrow provisions of interest from the Customs Act. Therefore, it is submitted that interest cannot be recovered for non-payment of IGST which is chargeable under Section 3 of the CTA.
>
> 6.1 Section 3(12) of the Customs Tariff Act, 1975, as it stood just prior to the Finance (No 2) Act 2024 been notified on 16th August 2024, is extracted below for ease of reference:
>
> > 3(12) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to the duties leviable under that Act.

While interest is compensatory in character, the Sub-Section above did not make any reference to interest. Although the Section 3(12) as it stood above is an inclusive one and should be given a broad meaning, Constitutional Courts have held that demand for interest can be made only if the legislature has specifically intended the collection of interest.

6.2 We find that the Hon'ble Bombay High Court in **Mahindra & Mahindra Ltd. v. Union of India**, [2022 (10) TMI 212 - BOMBAY HIGH COURT], has examined an identical issue regarding interest. It was held that there is no substantive provision in Section 3 of Customs Tariff Act, 1975 requiring payment of interest and in the absence of specific provisions for levy of interest, same cannot be levied or charged. The relevant portion of the decision is extracted below:

> "34. Section 9A(8) of the Customs Tariff Act, 1975 which borrowed provisions from Customs Act, 1962 did not borrow provisions relating to interest and penalty. The Hon'ble Courts, in judgments cited supra, held that in view of no specific borrowing, no interest and penalty can be imposed on anti-dumping duty. Later on, Finance (No.2) Act, 2004 amended sub-section (8) of Section 9A suitably to include interest and penalty. However, similar amendments have not been made to Section 3(6) of the Customs Tariff Act, 1975 relating to CVD, i.e., additional duty equal to excise duty or Section 3A(4) of Customs Tariff Act, 1975 relating to SAD, i.e., special additional duty or surcharge under Section 9(3) of the Finance Act, 2000.
>
> 35. Further, Section 12 of the Customs Act, 1962 levies duty on goods imported into India at such rates as may be specified in the Customs Tariff Act, 1975. In Customs Tariff Act, 1975, Section 2 provides the rates at which duties of customs are to be levied under the Customs Act, 1962 are as specified in the first and second schedules of the Customs Tariff Act, 1975. In Section 12 of the Customs Act, 1962 there is no reference to any specific provision of Customs Tariff Act, 1975.
> …
>
> 37. In view of the above, imposing interest and penalty on the portion of demand pertaining to surcharge or additional duty of customs or special additional duty of customs is incorrect and without jurisdiction."

The said decision has been affirmed by the Hon'ble Supreme Court in **Union of India v. Mahindra and Mahindra** [2023 (8) TMI 135 - SC ORDER].

6.3 We also notice that Section 3(12) of the Customs Tariff Act has been substituted, vide **Finance (No 2) Act 2024** which was notified on 16th August 2024, specifically including 'interest' among others measures. The new sub-section is reproduced below.

> *"(12) The provisions of the Customs Act, 1962 and all rules and regulations made thereunder,* **including but not limited to**

> **those relating to the date for determination of rate of duty, assessment, non-levy, short-levy,** *refunds, exemptions*, **interest, recovery, appeals, offences and penalties** *shall, as far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to duties leviable under that Act* **or all rules or regulations made thereunder, as the case may be.".** *(emphasis added)*
>
> The legislature having now incorporated 'interest' into the Customs Tariff Act, 1975, the same can be demanded for non-payment of IGST only after the substitution of the said sub-section as above, from 16.08.2024 and not on the impugned goods which were imported before that date. The appellants prayer hence succeeds on this issue."

We hence agree that no interest, penalty or redemption fine can be imposed on Xiaomi and others insofar as it relates purely to the demand for differential IGST.

Whether the goods are liable for confiscation under section 111(m) of the Customs Act

33. Submissions made by Xiaomi and Ors:

The Appellant submits that Section 111(m) of the Customs Act provides for the confiscation of goods which do not correspond in respect of value or in any other particular declared in the Bills of entry. The Appellant submits that they have always been under a bona fide belief that the payments made as royalty and license fees were not includable in the assessable value of the goods imported by them. Further, they were of the bona fide belief that no disclosure of aforesaid agreements was required to be made under the law. This belief of the Appellant is on the basis of the submissions made on merits earlier.

33.1 Submissions made by revenue:

a) Xiaomi India and its contract manufacturers have filed the bills of entry declaring only the price of the goods and suppressing the amounts paid to Qualcomm Inc., Qualcomm Technologies and Beijing Xiaomi on account of royalty and license fee. Xiaomi India was having

MPLA, SULA, MSA, LRAA for payment of royalty and licence fee to Qualcomm Inc., Qualcomm Technology and to Beijing Xiaomi. Xiaomi India had started making payments under the head royalty to Qualcomm from 2015-16 onwards and licence fee to Beijing Xiaomi from 2017-18 onwards. Despite being aware of the fact that the amount paid/payable as Royalty and license fee was liable to be added to the assessable value of these imports, Xiaomi India and the contract manufacturers appear to have deliberately suppressed the said amount in the bills of entry and other documents filed for clearance of goods with a willful intent to evade payment of legitimate Customs duty. The goods imported by Xiaomi India and the said contract manufacturers which have been imported with mis-declared value also appear liable to confiscation under Section 111(m) of the Customs Act, 1962.

b) Further the Adjudicating Authority failed to impose any redemption fine in lieu of confiscation, stating that the impugned goods are not physically available for confiscation. The Hon'ble SC judgement in the case of **CC (Import), Mumbai Vs. M/s. Finesse Creations** [2010(5)TMI 804-SC], cannot be considered as binding in nature as the appeal was dismissed "in limine" as "Delay condoned. The Civil Appeal dismissed". The SLP being dismissed at the stage of special leave without a speaking or reasoned order, there is no "res judicata", no merger of the lower order and the petitioner retains the statutory right if available of seeking relief in review jurisdiction of the High Court." Moreover the Hon'ble HC of Madras in the case of **M/s. Visteon Automotive Systems Vs. The Customs** (CMA No: 2857 of 2011 & MP No: 1 of 2011 dated 11.08.2017), which has held that physical availability of goods is not so much relevant for imposition of redemption fine. Hence the Ld. A.A. erred in not imposing a redemption fine even though the goods were not seized and were not available.

33.2 <u>Discussion on Submissions</u>

For ready reference, Section 111(m) of the Customs Act is reproduced below:

> "SECTION 111. Confiscation of improperly imported goods, etc.- The following goods brought from a place outside India shall be liable to confiscation: -
>
> ....
>
> (m) **<u>any goods which do not correspond in respect of value or in any other particular with the entry made under this Act</u>** or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;
>
> (emphasis added)

It has been discussed above that the value of the goods declared did not correspond in respect of value with that declared at the time of import as the royalty payments were deliberately not included. Hence the provisions of section 111(m) has been rightly invoked. It was also discussed above that Xiaomi and Ors knew that royalty payments in the Cellular Communications Industry is based on the whole-portfolio/ whole-device license through four generations of wireless communications technologies and that from the start of the cellular communications industry, the device (handset) price has been the widely used royalty base in license agreements, although it does not reflect the technologies involved and the stage of their use. Still, they failed to make a proper declaration of the value by including the royalty payment made and hence the goods are rightly liable for confiscation under section 111(m) of the Customs Act 1962.

33.3 As regards the confiscation of goods we find that the issue came up for examination before a Co-ordinate Bench of this Tribunal in **CHINKU EXPORTS Vs COMMISSIONER OF CUSTOMS, CALCUTTA** [1999 (112) E.L.T. 400 (Tribunal)], wherein it had held:

> "10. In view of the aforesaid findings and analysis, we are of the considered opinion that none of these charges upheld in the order impugned are in fact sustained by our analysis. In this connection we are also surprised to find that ***the redemption fine of Rs. 2.89 lakhs has been imposed when the goods were not available for confiscation, the same having been exported many years ago. Neither was any bond with a security in any format available with the Department to be enforced. In view of this it is clear that the redemption fine imposed was totally outside the purview of legal provisions in this regard***. Therefore, we set aside the order impugned and allow the appeal with consequential relief as per law."
>
> (emphasis supplied).

The department filed a Civil Appeal against the above order of the Tribunal before the Apex Court [(184) E.L.T. A36 (S.C.)]. The Hon'ble Court ordered as under:

> **"We see no reason to interfere with the impugned order. The appeal is dismissed."**

A Larger Bench of this Tribunal took note of the above judgments vide its order in **SHIV KRIPA ISPAT PVT. LTD. Vs COMMISSIONER OF C. EX. & CUS., NASIK** [2009 (235) E.L.T. 623 (Tri. - LB] and also that of the P & H High Court in **Commissioner Vs Raja Impex Pvt. Ltd**. — 2008 (229) E.L.T. 185 (P & H) and was of the opinion that confiscating the goods would not arise if there are no goods available for confiscation. Hence while the goods are liable for confiscation, they cannot be confiscated due to their physical unavailability or not being under a legal obligation to be produced. The Ld. AA has also considered the practical difficulties associated with confiscating goods that are not physically available, at para 33.5 of the impugned order, which is reasonable, legal and proper. The same is reproduced below:

> "33.5 In addition to the above judgments listed in para 33.4, I have also considered the practical difficulties that can arise if a redemption fine under Section 125 is imposed when the goods are not available for confiscation. Such fine, by its very nature and description, is a fine in lieu of confiscation and payment of this fine is option for the importer i.e. he does not have to pay this fine if he does not want to redeem the goods. If an order imposing redemption fine is imposed without the goods being available, the importer can simply exercise his option not to pay the fine, and request the department to confiscate the goods as he doesn't want to redeem the goods, and since the goods are not available to be confiscated, the department will have no option other than to accede to his demand and write off any fine imposed. Considering the order of the Hon'ble Apex Court cited above, and the practical difficulties that can be encountered by imposing a redemption fine with the goods are not available for confiscation, I refrain from imposing a fine in lieu of confiscation under section 125 of the Customs Act, 1962."

We hence find no reason to deviate from the above legal position.

Whether penalty can be imposed on Xiaomi India under section 112(a), 114A and section 114AA of the Customs Act

34. Submissions made by Xiaomi and Ors:

Since the imported goods correspond to the description, value, and other particulars entered in the Bills of Entry for home consumption the same should not be held liable for confiscation under Section 111(m) of the Customs Act as submitted in detail above and thus, no penalty under Section 112 of Customs Act can be imposed on the Respondent. They have further relied upon the judgment in the case of case of **Northern Plastic Ltd. v. Collector of Customs and Central Excise** [1998 (101) E.L.T. 549 (S.C.)], to state that if no dishonest intention of evading proper payment was involved penalty cannot be imposed. The imported goods are not prohibited therefore, penalty is sought to be imposed under sub-clause (ii) which is applicable to dutiable goods. It is submitted that the imported components of mobile phones are not 'dutiable goods' as no differential duty is payable in respect of the same and the proposal to add royalty paid by the Respondent to the assessable value of the imported components has also been dropped by the Ld. Adjudicating Authority in the impugned order as being without any basis. Detailed submissions are made below. Further in terms of the fifth proviso to Section 114A, it has been clearly provided that where penalty is levied under Section 114A, no penalty can be levied under Section 112 of the Customs Act. As regards section 114AA the intention is not to penalize an importer of goods, but to penalize those persons who fabricate documents to show export of goods without actually exporting any goods. The narration also concludes that the provision is to be used with due diligence and care so as to ensure that it does not result in undue harassment. Since it was not the intention of the government to impose penalty under section 114AA in such cases, and imposition of this penalty would result in undue harassment in the present case, no penalty is imposed on the Respondent under Section 114AA of the Customs Act,

34.1 <u>Submissions made by revenue</u>:

Due to not declaring the correct value of imported goods, Xiaomi India has rendered the subject goods liable to confiscation under Section 111(m) of Customs Act, 1962. For its acts and omissions, Xiaomi India appeared to have rendered itself to penalty under Section 112(a)(i) and/or 114A of Customs Act, 1962. As Xiaomi India suppressed the fact related to the payment of royalty and submitted false/incorrect information for assessment of the imported goods to duty, they also appeared liable to penalty under Section 114AA of Customs Act, 1962.

34.2 Discussion on Submissions

Xiaomi India argued that no penalties should be imposed due to the interpretative nature of the issue and a complete absence of mala fide intention on their part. However, we find that any breach of civil obligation under the Act is considered blameworthy, even without proof of mens rea. The Hon'ble High Court of Punjab, in **Harbajan Singh Vs State of Punjab** [AIR 1961 Punj 215] had examined the plea of 'good faith' and stated as under:

> "Good faith therefore implies, not only an upright mental attitude and clear conscience of a person, but also the doing of an act showing that ordinary prudence has been exercised according to the standards of a reasonable person. 'Good faith' contemplates an honest effort to ascertain the facts upon which exercise of the power must rest. It must, therefore, be summed as an honest determination from ascertained facts. **'Good faith' precludes pretence or deceit and also negligence and recklessness. A lack of diligence, which an honest man of ordinary prudence is accustomed to exercise, is, in law, a want of good faith**." (emphasis added)

The actions of Xiaomi India and related parties did not demonstrate good faith. The purpose of Xiaomi's complete control over the CM's has to be seen through the "Group of Companies' Doctrine" [See **Cox and Kings** (supra)]. For example though M/s. Xiaomi China who exported the goods to the CM's, was responsible to pay the royalty fee to M/s Qualcomm, at the inception of the transaction and collect it from the buyers of the goods. It has however on mutual agreement with the IPR holders, shifted the responsibility of payment of royalty from itself to M/s. Xiaomi India, facilitating the claim that the payment of royalty is a post manufacturing activity, while knowing full well that the payment made to the IPR holders was for a whole-portfolio/ whole-device license, which included the import of parts and components. It is evident from the discussions and the non-shifting of onus by Xiaomi and Ors, that complex ownership structures and contractual arrangements were used intentionally to avoid tax liabilities, including shifting royalty payment responsibilities and failing to disclose key agreements to authorities. Their claims of confusion due to the interpretative nature of the law are unconvincing, as willful suppression of facts was established. Therefore, the goods are subject to confiscation and those involved are liable for penalties under the relevant legal provisions.

34.3 The Hon'ble Supreme Court has in the case of **Balkrishna Chhaganlal Soni Vs State of West Bengal** [1974 AIR 120 / 1974 SCR (2) 107] while considering the cases of white collared crime observed as followed:

> "19. **The penal strategy must be formed by social circumstances, individual factors and the character of the crime.** India has been facing an economic crisis and gold smuggling has had a disastrous impact on the State's efforts to stabilize the country's economy. Smugglers, hoarders, adulterators and others of their ilk have been busy in their under-world **because the legal hardware has not been able to halt the invisible economic aggressor inside.** The ineffectiveness of prosecutions in arresting the wave of white-collar crime must disturb the judges' conscience.

35. We may now consider the various penalties imposed. The relevant provision is reproduced below:

> **Penalty for improper importation of goods, etc.**
>
> **112**. Any person,--
>
> (a) who, in relation to any goods, does or omits to do any act which act or omission **would render such goods liable to confiscation** under section 111, or abets the doing or omission of such an act, or

> (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable,--
>
> (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty 5[not exceeding the value of the goods or five thousand rupees], whichever is the greater;
>
> (ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:
>
> *****. *****. *****
>
> **Penalty for short-levy or non-levy of duty in certain cases.**
>
> **114A. Where the duty has not been levied or has been short-levied** or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined: . . . .
>
> *****. *****. *****
>
> **Penalty for use of false and incorrect material.**
>
> **114AA**. If a person knowingly or intentionally **makes**, signs or **uses**, **or causes** to be made, signed or used, any declaration, statement or document **which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act**, shall be liable to a penalty not exceeding five times the value of goods.
>
> (emphasis added)

35.1 The mainstay of Xiaomi's pleading was that no penalty under Section 112 of the Customs Act can be imposed where the imported goods are not liable for confiscation under Section 111 of the Customs Act. Since we have already found that the goods were liable for confiscation under section 111 that argument does not hold water, and we find that the goods are liable for confiscation under section 112(a). Considering that the goods are found dutiable, as per discussions above, hence they are rightly liable to a penalty under section

112(a)(ii). However, since a penalty is also being imposed under section 114A, no penalty can be imposed under section 112 as per the fifth proviso to section114A. The same hence merits to be dropped.

22.3 Xiaomi and Ors claim that the intention of section 114AA is not to penalize an **importer** of goods, but to penalize those persons who fabricate documents to show **export** of goods without actually exporting any goods. The issue was examined by his very same Bench in **M/s. Daebu Automotive Seat India Pvt. Ltd. Vs Commissioner of Customs, Chennai**, FINAL ORDER NOS. 40785-40790/2025, Dated: 01.08.2025, as under:

> "19.6 Section 114AA, does not make confiscation a condition for the said penalty. In fact it does not make a reference to goods at all or link it to payment of duty, but concerns itself with a declaration, statement or document which is false or incorrect in the <u>**transaction of any business for the purposes of this Act**</u>. In the circumstances the tampering with the description of the goods in the COO certificate satisfies the applicability of the said section in this case. The Hon'ble Supreme Court in **State Of U.P. & Others Vs Sukhpal Singh Bal** [AIR 2005 SUPREME COURT 3324 / 2005 (7) SCC 615], recognized deterrence as an object behind the imposition of a penalty and stated thus;
>
>> "Penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute. A penalty may be the subject-matter of a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction is responsible for any enactment intended to protect public revenue. <u>**Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty.**</u> Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is mens rea and is made the subject-matter of adjudication. In our view, penalty under section 10(3) of the Act [Uttar Pradesh Motor Vehicles Taxation Act, 1997] is compensatory. It is levied for breach of a statutory duty for non-payment of tax under the Act. Section 10(3) is enacted to protect public revenue. It is enacted as a deterrent for tax evasion. If the statutory dues of the State are paid, there is no question of

> imposition of heavy penalty. Everything which is incidental to the main purpose of a power is contained within the power itself. The power to impose penalty is for the purpose of vindicating the main power which is conferred by the statute in question. **Deterrence is the main theme of object behind that imposition of penalty under section 10(3).**

19.7 The appellants have stated that section 114AA is invokable only in respect of export cases and not imported related issues. A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation. The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the necessity for employing rules of interpretation disappears and the authorities are bound to give effect to the said meaning irrespective of consequences. While analysing and interpreting the aforesaid provisions of law, it would be apposite to refer to rules laid down by Hon'ble Apex Court in **Chief Commissioner of Central Goods and Service Tax & Ors. Vs. M/s Safari Retreats Private Ltd. & Ors.** [(2025) 2 SCC 523], pertaining to interpretation of taxing statutes, which is reproduced hereunder:-

> "RULES REGARDING THE INTERPRETATION OF TAXING STATUTES
>
> 25. Regarding the interpretation of taxation statutes, the parties have relied on several decisions. The law laid down on this aspect is fairly well-settled. The principles governing the interpretation of the taxation statutes can be summarised as follows:-
>
> a. **A taxing statute must be read as it is with no additions and no subtractions on the grounds of legislative intendment or otherwise**;
>
> b. **If the language of a taxing provision is plain, the consequence of giving effect to it may lead to some absurd result is not a factor to be considered when interpreting the provisions. It is for the legislature to step in and remove the absurdity**;
>
> c. **While dealing with a taxing provision, the principle of strict interpretation should be applied**;
>
> d. If two interpretations of a statutory provision are possible, the Court ordinarily would interpret the provision in favour of a taxpayer and against the revenue;
>
> e. In interpreting a taxing statute, equitable considerations are entirely out of place;

f. <u>**A taxing provision cannot be interpreted on any presumption or assumption**</u>;

g. <u>**A taxing statute has to be interpreted in the light of what is clearly expressed. The Court cannot imply anything which is not expressed. Moreover, the Court cannot import provisions in the statute to supply any deficiency**</u>;

h. There is nothing unjust in the taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly;

i. If literal interpretation is manifestly unjust, which produces a result not intended by the legislature, only in such a case can the Court modify the language;

j. Equity and taxation are strangers. But if construction results in equity rather than injustice, such construction should be preferred;

k. It is not a function of the Court in the fiscal arena to compel the Parliament to go further and do more;

l. When a word used in a taxing statute is to be construed and has not been specifically defined, it should not be interpreted in accordance with its definition in another statute that does not deal with a cognate subject. It should be understood in its commercial sense. Unless defined in the statute itself, the words and expressions in a taxing statute have to be construed in the sense in which the persons dealing with them understand, that is, as per the trade understanding, commercial and technical practice and usage. (emphasis added)

[Also see: Judgment of a nine-judge Bench of the Hon'ble Supreme Court in **Superintendent & Legal Remembrancer, State of West Bengal Vs Corporation of Calcutta -** (1967) 2 SCR 170]. Hence it is contrary to all rules of construction to read words into a statute which the legislature in its wisdom has deliberately not incorporated. The section does not refer to 'import' or 'export' of goods but only to, "transaction of any business for the purposes of this Act". <u>**To confine the section only to export related misuse, would be to legislate into the section what the legislature itself has left out, which is impermissible.**</u> Read in this light, the wording of the section is neutral to a situation of import or export and can hence apply to the facts of either of the situations.

19.8 The appellant has referred to the comments of the Ministry of Finance made before the Standing Committee on Finance as seen from its **Twenty Seventh Report on the**

Taxation Laws (Amendment) Bill, 2005 on 12.12.2005. At the risk of repetition it has to be stated that the Hon'ble Supreme Court while examining such a plea had in **Anandji Haridas & Co. Pvt. Ltd vs Engineering Mazdoor Sangh** [(1975) 3 SCC 862 / TS-5002-SC-1975-O], observed as below;

> "We are afraid what the Finance Minister said in his speech cannot be imported into this case and used for the construction of Clause (e) of Section 7. The language of that provision is manifestly clear and unequivocal. It has to be construed as it stands, according to its plain grammatical sense without addition or deletion of any words. **<u>As a general principle of interpretation, where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external evidence such as Parliamentary Debates, Reports of the Committees of the Legislature or even the statement made by the Minister on the introduction of a measure or by the framers of the Act is admissible to construe those words.</u>** It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question." (emphasis added)

19.9 The Principal Bench of this Tribunal at New Delhi in its FINAL ORDER NO. 55493 /2024, dated: 08.04.2024 in **Patparganj Vs KSS Abhishek Safety Systems Pvt Ltd** stated;

> "17. A plain reading of the above only shows the background in which section 114AA was introduced. Nothing in the section indicates that it does not apply to import. It will apply to both imports and exports and the recommendation of the Committee was that it should be applied with due diligence and care so as to avoid any undue harassment to trade. . ."

A similar view was taken by the Mumbai Bench of this Tribunal in **M/s. Swastik Creation Vs Commissioner of Customs, Air Special Cargo** [FINAL ORDER NO. A/86089-86090/2022, Dated: 18.11.2022]. It is a well-accepted norm of judicial discipline and in conformity with the principle of Comity of Courts, that a Bench of co-equal strength must follow the decision made earlier, on a question of law. Hence, we find that the impugned order merits to be upheld on the imposition of penalty under section 114AA of the customs Act 1962." (emphasis as in original)

However, we find that, while suppression is shown to be involved, this is not a case where any declaration, statement or document which is false or incorrect in any material particular, has been alleged in the SCN to be used in the transaction of any business by Xiaomi India for the purposes of this Act. Hence a penalty under section 114AA will not be applicable on Xiaomi India in the facts of this case.

35.2 Since the duty has not been paid by reason of willful suppression of facts Xiaomi India are liable for a penalty under section 114A of the Customs Act. We now take up revenue's plea that the penalty imposed under Section 114A of the Customs Act should be equal to the duty and interest in view of the clarification issued by the CBEC vide Circular No: 61/2002 dated 20.09.2002. We find that the matter has been examined by a Coordinate Bench of this Tribunal in the case of **Sundaram Finance Ltd** [2012 (279) ELT 220 (T-Chennai)], wherein the following has been held:

> "17. The above issue as to whether penalty under Section 114A should be imposed equivalent to the "duty demanded plus the corresponding interest accrued under Section 28AB of the said Act" instead of penalty equivalent to the "duty demanded" stands decided by this Bench in the case of **Bharti Airtel & Others**. The relevant findings are reproduced below :
>
> > "21.2 At this stage, the appeals by the department on the quantum of penalties imposed on the appellant-assessees can be considered. In the said appeals, the prayer is for imposition of penalties equivalent to the "duty demanded plus the corresponding interest accrued under Section 28AB of the Act" instead of restricting the penalties to "duty demanded". Section 114A reads as under :
> >
> > > "SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section

> (8) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined :
>
> ....
>
> Section 114A of the Customs Act envisages that the penalty thereunder should be "equal to the duty or interest so determined". Section 28 requires the proper officer to "determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice". It is to be noted that the demand of duty to be confirmed has to be either below or equal to the duty demanded in the show cause notices. Section 114A refers to cases where "the person who is liable to pay the duty or interest, as the case may be, as determined ...."
>
> It appears that Section 114A deals with penalty on the person who is liable to pay duty or the person who is liable to pay interest.
>
> 21.3 We find that the show cause notices specifically indicated only amounts of duty proposed to be demanded but did not (and could not) indicate the quantum of interest proposed to be demanded. Apparently, the duty demand itself was to be determined subject to the outer limit of amounts mentioned in the show cause notices. The interest payable depends not only on the duty so determined but also the actual date of payment of the duty so determined. Only then, the actual interest payable will be ascertainable. Obviously, in the present cases, the Commissioner at the time of adjudication of the case could not have determined the actual amounts of interest to be included in penalties under Section 114A. Further Section 114A envisages penalty "on the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of Section 28". The Commissioner was not in a position to determine the interest amount at the time of passing the impugned order. Therefore, his imposing penalties equal to the duty determined is in order."
>
> Hence we are not in position to uphold the order of the Commissioner imposing penalty equivalent to aggregate of duty and interest . ."

We concur with the above judgment of a Coordinate Bench that the statutory penalty under section 114A can only be equal to the duty demanded.

VIII. <u>Whether penalty can be imposed on Shri Sameer Bhatrahalli Sundar under section 112(a)(i) and 114AA of the Customs Act</u>

36. <u>Submissions by Shri Sameer Bhatrahalli Sundar:</u>

Shri Sameer Bhatrahalli Sundar is the Chief Financial Officer and Director of M/s. Xiaomi Technology India Private Limited. He was of the bona fide belief that royalty and license fees is not includible in the value of the imported goods and no disclosure of the aforesaid agreements was required to be made under the law. To attract penalty under Section 112(a)(i), the goods imported must be prohibited goods. However, in the present case, the imported goods are not prohibited goods and the same is an undisputed fact. Without prejudice, it is submitted that there cannot be any allegation of suppression/ misstatement etc. for non-furnishing of information that is not statutorily required to be disclosed. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in **Commissioner of C. Ex. & Customs v. Reliance Industries Ltd.** [2023 (385) E.L.T. 481 (S.C.)]. There is no allegation of Shri Sameer Bhatrahalli Sundar having made any personal gain. In this regard, the Respondent relies on the case of **Carpenter Classic Exim Pvt Ltd. vs. Commissioner of Customs, Bangalore**, [2006 (200) ELT 593 (Tri-Bang)], maintained by Supreme Court in 2009 (235) ELT 201 (SC). Hence penalty proceeding have rightly been dropped by the Ld. AA.

36.1 <u>Submissions made by revenue</u>

(i) Shri Sameer Bhatrahalli Sundar Rao, CFO of Xiaomi India, who was a key signatory and director, was responsible for taxation matters and submissions to Customs authorities.

(ii) He failed to disclose agreements related to royalty and licence fee payments, as well as arrangements for importing mobile phone components.

(iii) He also failed to guide/advise the persons who filed the bills of entry on behalf of Xiaomi India and the contract manufacturers to disclose the true facts regarding payment of royalty and licence fee by Xiaomi India. He was fully aware that M/s. Xiaomi India had been regularly remitting royalty to Qualcomm and Beijing Xiaomi.

(iv) This lack of disclosure led to mis-declaration of transaction values, making the goods subject to confiscation under Section 111(m) and himself liable for penalties under Section 112(a) and 114AA of the Customs Act.

<u>Discussion on Submissions</u>

36.2 We find that revenue has not been able to prove that the offence has been committed with the active consent on the part of the CFO. The allegations are of a general nature based on his supervisory status in the company. While there may have been negligence on his part it does not necessarily mean that mala fides was involved. Something more than negligence is necessary. He has not been shown to be the directing mind which lead to the duty evasion. Since the company is being separately penalised, hence we feel that the impugned order has correctly dopped penalty proceedings against Shri Sameer Bhatrahalli Sundar Rao, under section 112(a). Further in the case of section114AA this is not a case where in the SCN any declaration, statement or document which is false or incorrect in any material particular, has been specifically alleged in the transaction of any business for the purposes of this Act, hence the section will also not apply against Shri Sameer Bhatrahalli Sundar Rao. Penalty proceeding mentioned in the SCN hence were correctly dropped by the Ld. AA.

IX. Whether penalty can be imposed under Section 112(a) and Section 114AA on the Contract Manufactures

37. Submissions on behalf of the CM's:

a) There is no evidence to suggest that the CM's had any knowledge of these agreements, much less in withholding these agreements from the department.

b) As held in the impugned order, there is no liability on the contract manufacturers to discharge differential duty.

c) The intention of the Section 114AA is not to penalize an importer of goods, but to penalize those persons who fabricate documents to show export of goods without actually exporting any goods.

37.1 Submissions made by revenue:

a) The contract manufacturers, failed to discharge their responsibility to bring the true facts and circumstances of sale between their company and overseas supplier and the provisions of their respective agreements with seller (M/s. Zhuhai Xiaomi Communication Technology Company Ltd.) and buyer (M/s. Xiaomi India), to the notice of the respective assessing groups at the time of filing of Bills of Entry.

b) The CM's have abetted M/s. Xiaomi India in rendering the goods liable to confiscation under Section 111(m) of the Customs Act, 1962 and thus, rendering themselves liable to penalty under Section 112(a)/112(b) of the Customs Act, 1962.

c) Despite summonses dated 23.08.2021 and 31.08.2021, M/s Flextronics did not appear before the officers of DRI and it appears that they are not willing to cooperate with the investigation and to share the relevant information.

Discussion on Submissions

37.2 The CM’s did not effectively rebut allegations of abetting M/s. Xiaomi India evade duty. They enjoyed royalty-free use of IPRs and licenses involving hardware and software technologies, essential for import and manufacture of phones, which was not disclosed to authorities. The CM’s had no control over imported parts and limited involvement; their pricing structure consisted of manufacturing costs/ jobbing charges and included reimbursement of other actual costs along with and all related fees and expenses. Importing parts and components via CM’s, who acted merely as electronic contract manufacturers/ job workers, with severe restrictions on the use of the imported goods, **served no genuine business purpose** and appeared aimed at tax evasion — Xiaomi India the beneficial owner, could have imported these parts directly and got the phone manufactured from the same job workers. It would have helped them by reducing the legal work done in ensuring the controlled manufacture of the phones and in the possibility of lesser disputes. But this would expose their having paid royalty charges on the phones being manufactured. This is evident from the facts that for other brands, one of the CM’s i.e. Rising Star Mobile paid royalties to Qualcomm Inc. for manufacture of phones for others using Qualcomm IPR, but for imports from Xiaomi they did not. Further Xiaomi India ring fenced the CM’s from any future liability arising out of this arrangement including legal fees, a fact not properly addressed by the CM’s in their response. This is because M/s. Xiaomi China a subsidiary of Xiaomi India (see para 6.3 above), has shifted the responsibility of payment of royalty to M/s Qualcomm as per the aforesaid agreements from itself, which would have involved payment of duty on royalty at the import stage by the CM's, to M/s. Xiaomi India i.e. to the post manufacturing stage. The CM's hence willingly participated in the layering of transactions facilitating the evasion of taxes. They hence failed to disclose the true transaction details and agreements to the department, making the goods liable to confiscation and for them to be liable for penalties under Section 112(a). The Hon'ble Patna High Court in **Syed Askari Hadi Ali Augustine Vs Union Of India And Ors.** [1994 (42) BLJR 1389] at para 20 mentioned the following quote with approval;

> "20. In Howard De Walden (Lord) v. IRC [1942] 1 All ER 287 (CA) at page 289, Lord Greene observed : "For years a battle of manoeuvre has been waged between the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow-subjects. In that battle, the Legislature has often been worsted by the skill, determination and resourcefulness of its opponents, of whom the present appellant has not been the least successful. It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers."
>
> (emphasis added)

In the circumstances the imposition of penalty under Section 112(a) is justified as per law. As regards Section 114AA it is seen that the Contract Manufactures knowingly made a false declaration relating to the transaction value in the Bill of Entry's filed by them, by not adding the amount of royalty so as to arrive at the correct transaction value leading to a loss of revenue. Hence, they are liable for a penalty under section 114AA of the Customs Act.

38. Based on the discussions above we come to the following conclusions:

A) The CM's are not the 'buyers' of the impugned parts and components. Xiaomi India is the 'beneficial owner' of the parts and components imported by the CM's.

B) Royalties and License Fees paid by Xiaomi India are addable to the assessable value of the impugned goods as per Rule 10(1)(c) of the Customs Valuation Rules, 2007 and the differential duty is payable by Xiaomi India for the extended period.

C) The impugned goods are liable for confiscation under Section 111(m) of the Customs Act. However, since they are not physically available or covered by a bond no redemption fine can be imposed.

D) Penalty can be imposed on the Xiaomi India in terms of Section 112(a) however in terms of the fifth proviso to Section 114A, it has been provided that where penalty is levied under Section 114A, no penalty can be levied under Section 112 of the Customs Act. Hence the penalty under section 114A alone can be imposed. Further no penalty can be impose under section 114AA on Xiaomi India as this is not a case where any declaration, statement or document which is false or incorrect in any material particular, has been alleged in the SCN to be used by Xiaomi India, in the transaction of any business for the purposes of this Act.

E) The imposition of penalty under Section 112(a) and Section 114AA on the CM's is justified as per the facts of the case.

F) No penalty is imposable on Mr. Sameer Bhatrahalli Sundar Rao under Section 112(a)(i) and Section 114AA of the Customs Act, 1962.

G) No interest and penalty can be imposed on Xiaomi India insofar as it relates purely to the demand for differential IGST.

39. Based on the facts and circumstances discussed above we modify and remand the impugned order on the following terms:

I) We confirm the redetermined value of the impugned goods as stated at paras 19(i); 20(ii); 21(i) and 22(ii) of the impugned order.

II) We confirm the differential duty with applicable interest as stated at paras 19(ii); 20(iii); 21(ii) and 22(iii) of the impugned order.

III) Having determined the legal issues involved, we remand the matter to the Ld. Original Authority to redetermine the penalties on Xiaomi India and the Contract Manufacturers, in the light of the legal issues decided above. The said parties should also cooperate with the Ld. Original Authority in this regard. The parties are eligible for consequential relief if any as per law. The parties appeals and the Revenue's appeals are disposed of as above.

(Order pronounced in open court on 14.11.2025)

sd/-
(**M. AJIT KUMAR**)
Member (Technical)

sd/-
(**P. DINESHA**)
Member (Judicial)

Rex