

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

CUSTOMS APPEAL NO. 53102 OF 2014

(Arising out of Order-in-Original No. 79/RKB/CC/NCH/2014 dated 20.02.2014 passed by Commissioner of Customs (Adjudication), Delhi)

M/s. HCL Technologies Ltd.

.....Appellant

B-39, Sector 1,
Noida - 201301 (U.P.)

VERSUS

Commissioner of Customs (Adjudication),

.....Respondent

New Customs House, IGI Airport,
New Delhi

WITH

CUSTOMS APPEAL NO. 53254 OF 2014

(Arising out of Order-in-Original No. 79/RKB/CC/NCH/2014 dated 20.02.2014 passed by Commissioner of Customs (Adjudication), Delhi)

M/s. SAP India Pvt. Limited

.....Appellant

**(Formerly known as SAP India System;
Applications and Products in Data Processing
Pvt. Ltd.)**

Wing A, 2nd Floor,
Tower B, Salarpuria Soft Zone,
Sarjapur Outer Ring Road,
Bellandur Post, Bangalore - 560103

VERSUS

Commissioner of Customs (Adjudication),

.....Respondent

New Customs House, IGI Airport,
New Delhi

AND

(Appeals filed by M/s. SAP India Pvt. Ltd.)

C/57164/2013	C/57165/2013	C/57167/2013	C/57168/2013
C/57169/2013	C/57170/2013	C/57171/2013	C/57172/2013
C/57665/2013	C/57675/2013	C/57676/2013	C/57677/2013
C/57685/2013	C/57686/2013	C/57687/2013	C/57688/2013
C/57689/2013	C/57690/2013	C/57691/2013	C/57812/2013
C/58033/2013	C/58034/2013	C/58698/2013	C/58811/2013
C/58812/2013	C/59008/2013	C/59009/2013	C/59041/2013
C/59177/2013	C/59273/2013	C/59274/2013	C/59275/2013
C/59276/2013	C/59277/2013	C/59278/2013	C/59539/2013
C/59540/2013	C/59679/2013	C/59680/2013	C/59681/2013
C/59682/2013	C/59683/2013	C/59684/2013	C/60006/2013
C/60431/2013	C/60508/2013	C/60800/2013	C/51660/2014
C/51775/2014	C/51854/2014	C/51914/2014	C/51915/2014
C/51919/2014	C/51937/2014	C/51989/2014	C/51990/2014
C/52004/2014	C/52226/2014	C/52357/2014	C/52896/2014
C/52934/2014	C/52935/2014	C/53595/2014	C/53615/2014

C/53616/2014	C/53617/2014	C/53842/2014	C/54011/2014
C/54012/2014	C/54013/2014	C/54014/2014	C/54015/2014
C/54110/2014	C/54130/2014	C/54472/2014	C/55635/2014
C/50080/2015	C/50139/2015	C/50281/2015	C/50332/2015
C/50976/2018			

AND

(Appeal filed by M/s. Shobha Asar)

C/51614/2014

APPEARANCE:

Shri V. Lakshmikumaran, Shri Rachi Jain, Shri Ashwani Bhatia and Ms. Srishty Bajaj, Advocates for the Appellant

Shri Nikhil Mohan Goyal and Shri Rakesh Kumar, Authorized Representative for the Department

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 10.09.2025
DATE OF DECISION: 29.09.2025

FINAL ORDER NO's. 51379-51462/2025

JUSTICE DILIP GUPTA:

Customs Appeal No. 53102 of 2014 has been filed by HCL Technologies Ltd.¹ to assail that part of the order dated 20.02.2014 passed by the Commissioner of Customs (Adjudication), New Delhi² that confirms the differential customs duty with interest by taking recourse to the proviso to section 28(1) of the Customs Act, 1962³ and also imposes penalty upon HCL under section 112(a) of the Customs Act.

2. **Customs Appeal No. 53254 of 2014** has been filed by SAP India Pvt. Ltd.⁴ to assail that part of the order dated 20.02.2014 passed by the Commissioner that imposes penalty upon SAP India under section 112(a) of the Customs Act.

-
1. HCL
 2. the Commissioner
 3. the Customs Act
 4. SAP India

3. SAP India has also filed 81 more appeals against separate orders passed by the Commissioner imposing penalty upon it under section 112(a) of the Customs Act.

4. **Customs Appeal No. 51614 of 2014** has been filed by M/s. Shobha Asar against the order dated 28.11.2013 passed by the Commissioner confirming the demand of differential duty by taking recourse to the proviso to section 28(1) of the Customs Act and imposing penalty under section 112(a) of the Customs Act.

5. Details of the eighty-two appeals filed by SAP India are as follows:

Appeals filed by SAP India

Sl. No.	Appeal No.	Date of order	Amount of penalty (in Rs.)	Appropriation of penalty from deposit of Rs. 9,61,98,021
1.	C/53254/2014	20.04.2014	15,49,506	15,49,506
2.	C/50080/2015	13.10.2013	1,87,257	-
3.	C/50139/2015	26.08.2014	2,28,554	-
4.	C/50281/2015	12.09.2014	2,24,898	-
5.	C/50332/2015	12.09.2014	2,74,396	-
6.	C/50976/2018	18.01.2018	3,32,734	3,32,734
7.	C/51660/2014	28.11.2013	1,33,518	1,33,518
8.	C/51775/2014	13.12.2013	1,09,907	1,09,907
9.	C/51854/2014	16.12.2013	4,58,074	4,58,074
10.	C/51914/2014	26.12.2013	4,25,163	4,25,163
11.	C/51915/2014	20.12.2013	77,085	77,085
12.	C/51919/2014	30.12.2013	91,518	91,518
13.	C/51937/2014	23.12.2013	79,186	79,186
14.	C/51989/2014	26.12.2013	1,50,018	1,50,018
15.	C/51990/2014	27.12.2013	2,95,830	2,95,830
16.	C/52004/2014	31.12.2013	1,58,206	1,58,206
17.	C/52226/2014	15.01.2014	2,95,400	2,95,400
18.	C/52357/2014	16.01.2014	18,74,782	18,74,782
19.	C/52896/2014	12.02.2014	3,49,640	3,49,640
20.	C/52934/2014	13.02.2014	6,14,628	6,14,628
21.	C/52935/2014	17.02.2014	9,62,704	9,62,704
22.	C/53595/2014	14.03.2014	23,20,048	-
23.	C/53615/2014	18.03.2014	15,32,345	-
24.	C/53616/2014	19.03.2014	5,70,544	-
25.	C/53617/2014	10.03.2014	2,53,86,731	2,53,86,731
26.	C/53842/2014	20.03.2014	3,91,214	-
27.	C/54011/2014	30.04.2014	1,24,989	-
28.	C/54012/2014	28.04.2014	1,19,627	-
29.	C/54013/2014	09.05.2014	2,07,985	-
30.	C/54014/2014	29.04.2014	8,23,096	-
31.	C/54015/2014	19.05.2014	4,27,392	-
32.	C/54110/2014	08.05.2014	5,72,866	-
33.	C/54130/2014	18.06.2014	1,95,947	-
34.	C/54472/2014	29.11.2014	2,90,492	2,90,492

35.	C/55635/2014	07.08.2014	5,91,327	-
36.	C/57164/2013	29.01.2013	3,08,294	3,08,294
37.	C/57165/2013	28.01.2013	5,77,306	5,77,306
38.	C/57167/2013	28.01.2013	1,49,847	1,49,847
39.	C/57168/2013	31.01.2013	4,83,172	4,83,172
40.	C/57169/2013	30.01.2013	6,57,672	6,57,672
41.	C/57170/2013	23.01.2013	1,76,125	1,76,125
42.	C/57171/2013	30.01.2013	1,11,153	1,11,153
43.	C/57172/2013	29.01.2013	11,99,811	11,99,811
44.	C/57665/2013	26.02.2013	83,065	83,065
45.	C/57675/2013	13.02.2013	5,97,483	5,97,483
46.	C/57676/2013	11.02.2013	12,02,832	12,02,832
47.	C/57677/2013	08.02.2013	1,33,180	1,33,180
48.	C/57685/2013	12.03.2013	1,33,086	1,33,086
49.	C/57686/2013	04.03.2013	1,58,335	1,58,335
50.	C/57687/2013	18.02.2013	1,14,362	1,14,362
51.	C/57688/2013	21.02.2013	7,38,389	7,38,389
52.	C/57689/2013	20.01.2013	23,32,852	23,32,852
53.	C/57690/2013	13.03.2013	8,33,337	8,33,337
54.	C/57691/2013	06.03.2013	1,58,090	1,58,090
55.	C/57812/2013	05.03.2013	2,48,794	2,48,794
56.	C/58033/2013	07.03.2013	2,43,547	2,43,547
57.	C/58034/2013	26.03.2013	9,16,348	9,16,348
58.	C/58698/2013	15.04.2013	25,000	25,000
59.	C/58811/2013	18.04.2013	15,89,850	15,89,850
60.	C/58812/2013	17.04.2013	3,91,568	3,91,568
61.	C/59008/2013	25.04.2013	83,205	83,205
62.	C/59009/2013	23.04.2013	1,45,587	1,45,587
63.	C/59041/2013	29.04.2013	91,398	91,398
64.	C/59177/2013	26.04.2013	1,66,668	1,66,668
65.	C/59273/2013	16.05.2013	3,79,170	3,79,170
66.	C/59274/2013	10.05.2013	1,08,074	1,08,074
67.	C/59275/2013	08.05.2013	2,66,515	2,66,515
68.	C/59276/2013	08.05.2013	91,543	91,543
69.	C/59277/2013	09.05.2013	7,15,006	7,15,006
70.	C/59278/2013	07.05.2013	1,41,423	1,41,423
71.	C/59539/2013	30.05.2013	5,07,826	5,07,826
72.	C/59540/2013	04.06.2013	13,04,707	13,04,707
73.	C/59679/2013	12.06.2013	22,49,793	22,49,793
74.	C/59680/2013	18.07.2013	90,52,207	90,52,207
75.	C/59681/2013	14.06.2013	54,16,628	54,16,628
76.	C/59682/2013	14.06.2013	9,58,329	9,58,329
77.	C/59683/2013	14.06.2013	13,09,2019	13,09,2019
78.	C/59684/2013	11.07.2013	8,33,340	8,33,340
79.	C/60006/2013	19.07.2013	17,43,217	17,43,217
80.	C/60431/2013	30.08.2013	5,41,761	5,41,761
81.	C/60508/2013	22.08.2013	12,92,000	12,92,000
82.	C/60800/2013	06.09.2013	14,63,000	14,63,000
Total			8,48,51,721	7,60,59,236

6. Details of the two appeals filed by HCL and Shobha Asar are as follows:

Appeal filed by HCL				
1.	C/53102/2014	20.02.2014	3,87,451	27,17,465
Appeal filed by Shobha Asar				
2.	C/51614/2014	28.11.2013	33,380	1,33,518

7. HCL is engaged in providing Software-led IT solutions and remote infrastructure management services. To enable it to provide such services, HCL entered into a End-User License Agreement⁵ on 31.05.2001 with SAP India to obtain non-exclusive and perpetual license to use SAP India propriety Software, Documentation and other information.

8. SAP India is 100% subsidiary of SAP AG, Germany⁶. SAP India and SAP Germany had earlier entered into a Software Distribution Agreement⁷ dated 01.01.1999, by which SAP India was licensed to market, sub-license and distribute the Software developed by SAP Germany, including documentation and other information, within India. A fresh Agreement was thereafter amended on 01.01.2000, 01.01.2002 and 01.01.2003.

9. The Business Model adopted to distribute SAP Software in India has been described as follows:

(a) Signing of EULA and other documents: SAP India entered into EULA with end users who require SAP Software for their business. The end users are issued licenses by SAP India for use of SAP Software. Upon signing the necessary documents and agreements, SAP India uploads the same onto the SAP Enterprise Resource Planning System⁸. Under EULA, the end users are provided with an option to first procure the SAP Software of their choice and then increase the licensee base depending on usage at a later stage. Accordingly, at the initial stage, when the end user requests for a particular SAP product, the agreement entered into between SAP India and the end users is titled Appendix 1. Thereafter, whenever the end user wishes to increase the number of licenses, SAP India

5. EULA
6. SAP Germany
7. SDA
8. SAP ERP System

enters into additional agreements with the end user. EULA generally provides electronic delivery of the Software as the primary mode of delivery. In addition, if the specific agreement provides an option of physical delivery, the end users may opt for it. Such physical delivery is provided only when the end user seeks physical mode of delivery of SAP Software in CD form;

- (b) Delivery of SAP Software to the end user:** Based on the request from the customer, the Software is delivered to the customer. As per the terms of the agreement, the delivery of the Software is to be made through electronic download through the SAP Service Marketplace website. However, physical delivery of the Software may also be given, as an option to the end users;
- (c) Payment of license fee by end user to SAP India:** SAP India raises an invoice upon the end user for the amount agreed under the EULA towards the license fee and collects the same;
- (d) Payment of 55% of the license fee by SAP India to SAP Germany:** SAP India pays 55% of the recognized revenue to SAP Germany; and
- (e) Physical delivery of CD containing Software, upon request:** For physical delivery of CD (as and when opted by the end user), upon receiving the request, SAP Germany exports CD directly to the end user through courier agency, DHL Ltd.⁹ A proforma invoice is raised by SAP Germany in the name and address, declaring nominal value of the CD and other documentation of end users. The value declared in the proforma invoice is for customs purposes only, and no amount is actually collected from the end customer

whether by SAP India or by SAP Germany. DHL files a courier Bill of Entry for clearance of CD through customs on behalf of the end users, pays customs duties and delivers the CD to HCL.

10. As noticed above, HCL entered into EULA with SAP India on 31.05.2001. Pursuant to this EULA, HCL entered into several Appendixes. During the relevant period i.e. from March 2006 to September 2006, HCL and SAP India signed Appendix 1.4 on 16.05.2006¹⁰ to procure Software and Appendix 1.5 08.06.2006¹¹ for additional licenses to the SAP Software procured earlier. These Appendixes specifically provided delivery of Software through electronic mode only.

11. During the relevant period, SAP India raised the following invoices on HCL:

Sl. No.	Invoice No. and Date	Amount (in Rs.)
1.	6071008839 dated 23.06.2006	8,57,808
2.	6071008862 dated 26.06.2006	1,59,40,000
3.	6071008957 dated 27.06.2006	18,00,000
Total		1,85,97,808

12. Around the same time, as per the terms of the maintenance contract with SAP India, HCL received some CDs containing SAP Software from SAP Germany under courier Bill of Entry No. 624877 dated 29.06.2006 filed by DHL, wherein value of CD was declared as Rs. 2558/-.

13. The Directorate of Revenue Intelligence¹², Bangalore initiated investigation against several End-Users in India, including HCL who were importing CDs containing SAP Software with nominal value declared in the Bills of Entry.

10. Appendix 1.4
11. Appendix 1.5
12. DRI

14. During investigation, SAP India deposited the following amount towards customs duty in respect of the import of CD containing SAP Software:

Sl. No.	Amount deposited (in Rs.)	TR-6 Challan date
1.	1,20,00,000	31.01.2008
2.	3,20,00,000	25.02.2008
3.	5,21,98,021	15.11.2008

15. HCL also deposited a sum of Rs. 27,17,465/- through a challan dated 04.03.2010.

16. The DRI alleged that the transaction value of Rs. 2558/- declared for the CD containing SAP Software on which Rs. 324/- was paid as customs duty was incorrect and it believed that the transaction value should be re-determined to Rs. 1,85,97,808/- on the basis of the payments made by HCL to SAP India during the relevant period. HCL contended that the license fee paid by HCL to SAP India was only for acquiring the rights of usage of SAP Software in India.

17. A show cause notice dated 07.04.2010 was issued both to HCL and SAP India proposing to reject the transaction value of CD under rule 10A of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988¹³ and for inclusion of license fee in the value of CD under rule 9(1)(c) read with rule 4 of the 1988 Valuation Rules. Differential duty under section 28 and interest under section 28AB of the Customs Act was proposed to be recovered from HCL. Penalty was also proposed to be imposed on HCL and SAP India under section 112(a) of the Customs Act.

18. This show cause notice was adjudicated by the order dated 20.02.2014. The transaction value of the CD as Rs. 2558/- was rejected and

13. the 1988 Valuation Rules

it re-determined to Rs. 1,85,97,808/-, which is the total amount covered by the three invoices. HCL was, therefore, directed to deposit the differential duty and penalty was also imposed under section 112(a) of the Customs Act. Penalty was also imposed upon SAP India under section 112(a) of the Customs Act. However, Rs. 27,17,465/- deposited by HCL and Rs. 9,61,98,21/- deposited by SAP India were appropriated.

19. The contention of HCL that payment of license fee was not related to the CD and that it was not a condition of sale of CD was examined by the Commissioner in the following manner:

"39. Coming to issue of valuation and the arguments that payment of license fee is not related to the imported goods; the payment of license fee is not a condition for sale of imported goods; right to use is distinct from condition of sale; EULA and CD containing the software are two distinct commodities, **I find the arguments lack legal as well as factual substance. This is because the Software Distribution Agreement, the EULA and the factum of actual physical import of software CD and subsequent formalities for Customs assessment and clearance of the goods are integral part of one whole transaction. Payment of license fee of Rs.1,85,97,808/- without having CD software has no meaning.** In an ordinary course of business nobody would pay such a huge amount for just obtaining the license and not being able to use the same. The license and the CD are closely interlinked and inseparable to make a meaningful and fruitful transaction. The argument that option to obtain SAP software in a physical form on CD is at the discretion of the importer, I find this argument is totally misplaced and factually wrong, in as much as the importer in their statement have clearly indicated that they did not place any purchase order for supply of CD from SAP, AG Germany. As a matter of fact, they do not have any direct linkage with SAP AG

Germany as no agreement exists between M/s HCL Technologies the importer of software and M/s. SAP AG Germany, M/s. SAP AG Germany exported the software in CD form as per the terms of agreement of SDA entered between M/s. SAP AG Germany and M/s. SAP India Systems. How did M/s. SAP AG Germany fixed a nominal value which was declared to Customs and further how did they receive the said nominal value. M/s. SAP AG Germany on their own raised the proforma invoice indicating the nominal value of Rs. 3,005/- and directed the DHL Courier to file the bill of entry on behalf of M/s. HCL Technologies declaring the nominal value. **Important question to be considered is that whether CD imported has an independent use without any reference to license to use, what is the true value of CD. Can the CD be independently imported and effectively put to use when there was no agreement (EULA) and the importer had not paid the license fee as per the EULA agreement? Admittedly not. Unless the license fee is paid, the SAP software contained in the CD could not have been accessed and used by the importer. This clearly brings out the fallacy of the argument that supply of CD and payment of license fee are two distinct transactions and payment of license fee is not a condition of sale. From the facts, it clearly emerges that all the actions are integral part of one whole transaction for a consideration of Rs.1,85,97,808/-.** I would also like to mention that a proforma invoice indicating the nominal value has been mentioned by M/s. SAP AG Germany. However, no such payment has been made directly to the M/s. SAP AG Germany by the importer M/s. HCL technologies. The question arises what is the value of that CD, why did M/s. SAP AG Germany supplied and exported the CD to the noticee importers directly when there is no such specific request or order from the importer. To my mind, it is a part of larger well designed plan to evade payment of Customs duty. **The entire**

transaction, by way of having series of agreements using Distributors, Licensees, Sub-licensees and the ultimate users, was clearly devised in such a way to hoodwink the exchequer from collecting its legitimate Customs duties."

(emphasis supplied)

21. In connection with the imposition of penalty upon SAP India, the Commissioner observed:

"43. M/s. SAP India Systems is well established wholly owned subsidiary company of M/s. SAP AG Germany who have all the technical legal expertise available. **They very well knew that if the software is directly exported to them by their principals from Germany, they become liable for proper valuation of imported software by the Special Valuation Branch. Therefore, to evade to payment of duty, they advised their principals M/s. SAP AG Germany to directly export the software to individual vendors making them importers. Knowing fully well they are not the importers and, hence, no duty can be demanded from them, yet once investigation started they quickly deposited the duty, with a view that once investigations are abandoned and the impending issuance of show cause notice is shelved, they would claim refund of the amount deposited by them as no duty could have been demanded from them.** As a matter of fact, they did so by filing the refund claim. Had the DRI taken the bait, their nefarious design would have succeeded and the exchequer would have lost huge valuable revenue. Only because the DRI did not fell for the bait and carried meticulous detailed investigations, their well thought out design to evade Customs duty came to light. It is interesting to note that they deposited Rs.3.20 Crores on 25.02.2008, claimed back the same as refund on 25.08.2008. Yet again on 15.11.2008 they

deposited Rs.5.21 Crores. The question arises what was the need to indulge in such flip flop. This, to my mind, was done to douse the heat of investigation that had reached them. Therefore, I have no doubt in my mind that there is no factual or legal substance in the above argument. No cogent and reasoned explanation whatsoever has been advanced regarding the statutory statements of Shri Rajiv Subramanian, their Chief Financial Officer and why they deposited such huge amount of duties. **From the facts brought out in the show cause notice, it clearly brings out the fact that the noticee under a carefully devised plan created web of agreements, licensees, sub-licensees which resulted into suppression of material facts having a direct bearing on the valuation of goods and thereby suppressed the true transaction value resulting into evasion of Customs duty.** I also find that their Chief Financial Officer Shri Subramanian in his own statement before the DRI has clearly admitted the suppression of facts with regard to non-disclosure of existing EULA between the noticee and the importer, the fact of payment of Rs.1,85,97,808/- as a value for procuring the SAP software, the Invoice raised in this behalf and devising the whole mechanism in such a way so that the Customs duty chargeable is evaded. This admittance of evasion has neither been questioned by the noticee company nor have they contradicted the same. To my mind, this was not some unintentional, isolated single action which resulted into such an evasion. From the sequence of events and the circumstances of case, it is clearly established that they were fully aware regarding the leviability of Customs duty on the import of software, to escape from duty, they devised a complex mechanism. **M/s.SAP India Systems procured the orders from Indian customers and received payment for the software and created an EULA to camouflage. The fact that when DRI initiated investigation and called them, M/s. SAP India Systems immediately came forward to pay the**

duty and actually paid the duty of Rs.9.61 Crores on their own. *** I have no doubt in my mind that they were well aware that the software on CD being imported in India is chargeable to Customs duty, yet they carefully crafted/devised a mechanism to evade the duty.** This fact is further substantiated that subsequent to the investigations carried out by the DRI, the noticees have changed the tracks and on their own are declaring proper transaction value and paying duty on the subsequent imports of software.

44. **Therefore, malafide actions of the noticee makes the said imported software liable for confiscation under Section 111(m) of the Customs Act, 1962 as proposed in the show cause notice.** However, I note that the goods had already been cleared from the Customs and are not physically available for confiscation. In the facts and circumstances, no confiscation can be ordered and no redemption fine can be imposed. **In my view, the noticee is liable for penalty under Section 112(a) of the Customs Act, 1962 and I reject the argument raised by the noticee in this behalf."**

(emphasis supplied)

20. Aggrieved by the said order, HCL filed this appeal. This appeal was earlier decided by the Tribunal by an order dated 12.07.2017. The matter was remanded to the adjudicating authority for deciding whether the officers of DRI had the jurisdiction to issue the show cause notice under the Customs Act. The department challenged this order before the Delhi High Court. The Delhi High Court, by order dated 27.03.2019, remanded the matter to the Tribunal. The Supreme Court, in the judgment dated 07.11.2024, passed in **Commissioner of Customs vs. Canon India¹⁴** settled the issue of

14. **R.P. (C) No. 400 of 2021 decided on 07.11.2024 in Civil Appeal No. 1827 of 2018**

jurisdiction holding that the officers of DRI had the power to issue show cause notice under section 28 of the Customs Act for the period pre and post 2011.

21. This appeal has, therefore, been heard.

22. Before advertng to the submissions made on behalf of the parties, it would be useful to reproduce the various Agreements involved in the appeal.

23. The first Agreement is the **Software Distribution Agreement dated 04.03.2003** between SAP Germany and SAP India. SAP Germany is referred to as SAP AG and SAP India is referred as ND. The relevant portions are reproduced below:

"Software Distribution Agreement

between

SAP Aktiengesellschaft
(hereinafter: SAP AG)

and

SAP India Systems
(hereinafter: ND)

RECITALS

WHEREAS, SAP AG owns rights to certain computer software listed in Exhibit 1 hereto;

WHEREAS, ND markets, licenses, sells and/or distributes software and provides support to software End Users;

WHEREAS, SAP AG desires to grant to ND, and ND desires to accept, a license to market and sublicense the Software in the Territory;

WHEREAS, SAP AG and ND entered into a Software Distribution Agreement dated as of January 1, 1996, which was superseded by a Software Distribution Agreement dated as of January 1, 1999 which was amended twice as of January 1, 2000 and January 1, 2001, and

WHEREAS, SAP AG and ND wish to amend and restate the Software Distribution Agreement effective as of January 01, 2003, as already discussed during the recent past and agreed between the parties;

Article 2: Grant Of Rights

2.1 Grant of License. Subject to the terms of this Agreement, SAP AG hereby grants to ND, and ND hereby accepts, a non-exclusive license to use, market, and sublicense the Software, Documentation, Third Party Database and Third-Party Software to End Users in the Territory and to End Users outside the Territory who either: (i) are subsidiaries or affiliates of parent companies headquartered in the Territory or (ii) are subsidiaries or affiliates that perform the data processing requirements of the parent on computer processing units located in the Territory. All other exceptions to the territorial limitations set forth in this Article 2 require the prior written consent of SAP AG.

Article 4: Obligations of SAP AG

4.1. Order Execution

4.1.1. Upon the execution of a license agreement by an End User, ND shall place an order for the required number of copies of the Software, number of authorized users and other relevant items determined and agreed upon in such license agreement to be provided to the End User under the procedures set forth in this Article 4.1.

4.1.2. All orders by ND for copies for the Software shall be entered into the internal SAP order entry system. SAP AG shall notify ND in writing promptly upon determining that it will not accept such order. **If an order so entered has not been rejected by**

SAP AG within ten business days following its entry into the order entry system, ND may consider the order to have been accepted by SAP AG. With the order, ND shall indicate the End User's type of computer(s) and operating system(s) on which the Software is to be installed, and the location(s) where the End User will use the Software. SAP AG will only accept such order if the computers and operating systems have been found previously by SAP AG to meet the minimum system requirements for properly running the Software.

4.6 Delivery

4.6.1. SAP AG will deliver the Software ordered by ND free of shipping costs, except for all ancillary costs, including but not limited to customs duties and fees, which will be borne by ND. Delivery shall be made either directly to the End Users or to ND for redelivery to the End User, as requested by ND.

4.6.2. *****

4.6.3 The Software and Documentation normally will be provided in machine readable form on CD-ROM; the R/2 Software may be provided on magnetic tape. The Documentation for either system will be provided on paper upon written request from the End User.

Article 6: Prices and Payment

6.1. Software License Fees and Payment

6.1.1. For each license agreement for the Software entered into by ND with an End User, ND shall pay to SAP AG a license fee in an amount as determined in accordance with the formula provided in Exhibit 6 hereto. Payment shall be made in the currency of ND's Territory unless otherwise agreed in writing by SAP AG and ND. Payment shall be considered to

have been made when the payment is received in the bank account designated by SAP AG for such payments.

Article 7: Proprietary Information

7.1. Ownership of Proprietary Information

7.1.1. ND acknowledges and agrees that ownership of and title in and to all intellectual property rights, including patent, copyright, trade secret, trademark, service mark, and domain name rights, in the SAP AG Proprietary information are and shall remain in SAP AG and its licensors. ND acquires only the right to use the SAP AG Proprietary Information under the terms and conditions of this Agreement and does not acquire any ownership rights or title in or to the SAP AG Proprietary Information and that of its licensors."

(emphasis supplied)

24. The second Agreement is the **R/3 Software End-User Value License Agreement dated 31.05.2001** between SAP India and HCL. The relevant portions are reproduced below:

"SAP INDIA SYSTEMS, APPLICATIONS AND PRODUCTS IN DATA PROCESSING PRIVATE LIMITED

R/3 SOFTWARE END-USER VALUE LICENSE AGREEMENT

DATED : 31st MAY, 2001

WITH

HCL TECHNOLOGIES LTD

RECITAL

WHEREAS, SAP desires to grant to Licensee and Licensee desires to accept from SAP, a license to Use (as defined herein) SAP's proprietary R/3 Software (as defined herein) upon the terms and conditions hereinafter set forth:

1.10 "Extension" means an addition to the Software which does not require a Modification.

1.11 "Information User" means those individuals authorized to access the licensed Software solely to "read only" Software transactions. Each information User must also be licensed as a Basis/Workflow User.

1.12 "Modification" means a change to the Software which changes the source code.

1.23 **"Software" means: (i) all software specified in agreed upon Appendices hereto, developed by or licensed to SAP or SAP AG and delivered to Licensee hereunder, (ii) any Release, Versions, or Correction Levels of the Software as contemplated by this Agreement, and (iii) any complete or partial copies or replacements of any of the foregoing.**

2. LICENSE GRANT

2.1 Grant of License

(a) **Subject to this Agreement, SAP grants and Licensee accepts a non-exclusive license to Use the Software, Documentation, other SAP Proprietary Information and Third-Party Database provided by SAP to Licensee at specified site(s)** within the Territory for Productive and Non-Productive Uses. This license does not permit Licensee to: (i) Use the Software and Third-Party Database for a service bureau application; or (ii) sublicense, or rent the Software or Third-Party Database.

4. PRICE AND PAYMENT

4.1 License Fees: **In consideration of the license granted hereunder, Licensee shall pay to SAP license fees for the Software as set**

forth in Appendices hereto ("License Fees"). Fees for Maintenance Service ("Maintenance Fees") shall be paid as set forth in Appendices hereto. Any fees Licensee does not pay when due shall accrue as set out in the Appendices hereto, but shall in no event exceed the maximum amount allowed by law. Licensee also agrees to pay SAP reasonable costs and expenses of collection, including attorney's fees."

(emphasis supplied)

25. The relevant portion of **Appendix 1 to SAP India R/3 Software End-User Value License Agreement with HCL effective from 31.05.2001** is reproduced below:

"Appendix 1
to
SAP INDIA
R/3 SOFTWARE END-USER VALUE LICENSE
AGREEMENT
with
HCL Technologies Ltd
effective May 31, 2001
("Agreement")

USERS, BASIS/WORKFLOW and DATABASE	<u>Number of Users Licensed:</u>
Operational Users	124 Users
Info Users	62 Users
R/C Users	62 Users
Enterprise Office/HR Users	Nil Users
D/W Users	2 Users
BC Basis/Workflow System with INFORMIX Database	Nil Users
BC Basis/Workflow System with ORACLE Database	250 Users
BC Basis/Workflow System with DB2 Common Server Database	Nil Users
BC Basis/Workflow System with OS/390 Database	Nil Users
BC Basis/Workflow System with MSSQL Server Database	Nil Users
BC Basis/Workflow System with Database Interface	Nil Users

**HUMAN RESOURCE
MANAGEMENT****Master Records
Licensed:**

PA	Personnel Administration and Payroll	<u>5000</u>
PD	Personnel Planning and Development	<u>5000</u>

OPTIONAL PACKAGES**Quantity(ies)
Licensed:**

TR-TM	Treasury Management	<u>Nil</u> Users
BC/DW	R/3 Data Model in ADW Format	<u>Nil</u> Designated Site
PP-EH&S	Environmental, Health & Safety	<u>Nil</u> Designated Unit
PP-MES	Manufacturing Execution System	<u>Nil</u> Designated Unit

26. The relevant portion of **Appendix 1.4 dated 16.05.2006 to the SAP Software End-User Value License Agreement** is reproduced below:

"Appendix 1.4
effective: May 16, 2006

to

SAP INDIA
SAP SOFTWARE END-USER VALUE LICENSE
AGREEMENT

with

HCL Technologies Ltd ("Licensee")
effective: May 31, 2001

("Agreement")

This Appendix 1.4 is hereby annexed to and made a part of the Agreement specified above.

The following Articles and Provisions of the Agreement are specifically incorporated herein by reference: 1 (Definitions), 2 (License Grant), 3 (Verification), 4 (Price and Payment), 5 (Term and Termination), 6.1 (Protection of Proprietary Information), 7.2 (Express Disclaimer), 9 (Limitation of Liability), 10 (Assignment), 11 (Arbitration) and 12 (General Provisions). All other provisions of the Agreement are specifically excluded with respect to this Appendix. In each instance in which provisions of this Appendix contradict or are inconsistent with the incorporated provisions of the Agreement, the provisions of this Appendix shall prevail and govern

in relation to Software licensed by Licensee from SAP hereunder.

1. LICENSE GRANT:

1.1 Software licensed by Licensee from SAP hereunder is as follows:

BSI SOFTWARE PRODUCT LICENSED:

U.S. Payroll Tax	<u>Master Records Licensed</u>	
Processing (TaxFactory)		3,000

1.2 *****

1.3 DATABASE: ORACLE

2. LICENSE FEE AND PAYMENT: **The total Net License Fee to Licensee for the BSI Software licensed in item 1 above is INR 857,808/- shall be invoiced on or before May 31, 2006 and is due and payable by the Licensee within 30 days of invoice date.**

In the event Licensee exceeds the License Grant specified herein, and/or Licensee desires to expand the License Grant to additional Affiliates, divisions or business units not identified herein, Licensee agrees to provide written notification to SAP. SAP reserves the right to modify the Agreement to reflect such increase in the License Grant, recalculate the Net License Fee and Maintenance Fee accordingly and invoice Licensee for such increased license and maintenance fees, based on SAP's then current pricing in effect.

Upon SAP's reasonable request, Licensee shall deliver to SAP a report, as defined by SAP, evidencing Licensee's usage of the Software licensed under this Agreement.

4. DELIVERY: Delivery of the BSI Software is available only by electronic download. Initial delivery of the above-specified BSI Software shall take place in May, 2006 for planned use on the following Platform:

Operating System	Sun Solaris, Machine type – Sun4u
Database System	Oracle Release 9.2.0.4.0
Server	Solaris 8
Client Software	Windows

Delivery of the Software and Documentation would be through electronic download that is accessible via the SAP Service Marketplace. SAP will provide the access details for the Delivery by May, 2006.

5. MAINTENANCE FEE AND PAYMENT:

5.1 **To the degree BSI makes such services generally available to SAP, Licensee may request and SAP shall provide maintenance service (“Maintenance”) with respect to the BSI Software.** Maintenance currently includes the delivery of releases and versions of the BSI Software made available to SAP, support via telephone, coordination of defect correction with BSI, and SAP’s Online Software Services. Maintenance, from SAP, for the BSI Software licensed hereunder is limited to the sites previously identified in the Agreement and related Appendices, and is limited to a single Platform. In order to receive Maintenance hereunder, Licensee must make all required remote support connections to each Designated Unit, at its expense, as requested by SAP.

5.2 Maintenance at such site(s) shall commence upon the first day of the month following initial Delivery of the BSI Software. **Maintenance Fees for the Software licensed under this Appendix, for the total number of Users specified above is 42% (or the then current factor) of INR 772,800/- per annum + 17% (or the then current factor) of INR 85,008 per annum.** Maintenance Fees are subject to change upon Thirty (30) days notice to Licensee. Maintenance fees set forth above do not include central, state or local taxes, which shall be to Licensee’s account. Maintenance Fees are invoiced on an annual basis

effective January 1 of a calendar year. Any Maintenance Fees due prior to January 1 are invoiced on a pro-rata basis for the given calendar year in effect.

5.3 In the event Licensee elects not to commence Maintenance upon the first day of the month following initial delivery of the BSI Software, or Maintenance is otherwise declined for some period of time, and is subsequently requested or reinstated, SAP will invoice Licensee the accrued Maintenance Fees associated with such time period plus a reinstatement fee."

(emphasis supplied)

27. The relevant portion of **Appendix 1.5 dated 08.06.2006 to the R/3 Software End-User Value License Agreement** is reproduced below:

"Appendix 1.5
effective: June 08, 2006

to

SAP INDIA
R/3 SOFTWARE END-USER VALUE LICENSE
AGREEMENT

with

HCL Technologies Ltd ("Licensee")
effective: May 31, 2001
("Agreement")

This Appendix 1.5 is hereby annexed to and made a part of the Agreement specified above. In each instance in which provisions of this Appendix 1.5 contradict or are inconsistent with the provisions of the Agreement, the provisions of this Appendix 1.5 shall prevail and govern, and the contradicted or inconsistent provisions of the Agreement shall be deemed amended accordingly.

2.6 DATABASE: Oracle

3. The total Net Price License Fee to Licensee for the Software specified in Sections 2, above is INR 15,940,000, provided the following Use

restrictions are observed by Licensee and its Affiliates for the licensed Software. The use restrictions are:

A. In the case of Users licensed in this Appendix ("Existing Users"), not more than the total number of Named Users, Personnel Master Records, Software Engines, third-party software, applicable country versions, Industry Solution Software or any other software licensed by Licensee from SAP as specified in Sections 2 above, are accessed, created and/or Used as specified in the Agreement; and

4. The above specified Net License Fee of INR 15,940,000 shall be invoiced in June 30, 2006 and is due and payable within 30 days from date of invoice.

The Software licensed under this Appendix is licensed subject to receipt of payment within the stipulated terms. The Licensee understands that SAP shall issue a temporary license key for the Productive system that will shut off the system within forty five (45) days of issue of installation key to the Software if the payment stipulated in respect of this Appendix has not been received. Failure to obtain the permanent keycodes will cause the Licensee to have limited Software access until obtained. The Licensee accepts that in no event shall SAP be responsible for any damages whatsoever arising out of the software system being shut off.

If the actual number of Users called off by Licensee in respect of each phase is less than the corresponding number set out above. Licensee shall not be entitled to any refund. If the actual number of Users called off by Licensee in each phase exceeds the corresponding number set out above, Licensee will be invoiced for the difference in the License Fee and such

excess will be used to reduce the number of Users which Licensee is required to call off and the corresponding license fee payment in the next phase accordingly/ Licensee shall inform SAP in writing of any additional Users called off from the next phase before the invoicing of such phase.

5. For Software to be installed at a specific Licensee and/or Affiliate Designated Site within the Territory the parties hereto agree to execute Appendices to this Agreement, in a form similar to Appendix 2 hereto, prior to SAP's delivery of such Software to such Designated Site.
6. Maintenance Service under the Maintenance Schedule for the Software at such Designated Site(s) licensed hereunder, for the above-specified number of Users, shall commence July 01, 2006 and shall be priced at 17% (or the then current factor) of INR 15,940,000. This Maintenance Fee shall be payable annually in advance by Licensee to SAP within 30 days of invoice date.

8. LICENSE KEYCODES. Each Productive Use copy and Non-Productive Use copy of the Software licensed hereunder requires a license keycode. For each installation of the Software keycodes shall be provided upon written request by Licensee-provided that only ; quantity one (1) license keycode will be provided for the Productive Use of the Software per Designated Site. The license keycodes will be issued by SAP AG within four (4) weeks from the date of installation of the Software on each Designated Unit. The required form to receive the license keycodes from SAP AG must be executed by Licensee and faxed to SAP AG within the four (4) week period following installation of the Software. The applicable form and fax number will be included in each installation kit provided

to Licensee upon delivery of the Software. Licensees that subsequently change Designated Units for Use of the licensed Software must be re-issued license keycodes for each respective copy of the licensed Software. Failure of Licensee to obtain necessary license keycodes for the licensed Software within four (4) weeks of installation of such Software, will cause the Software to have limited User access until such time as the license keycodes are issued."

28. The relevant portion of **Appendix 2 dated 31.05.2001 to R/3 Software End-User Value License Agreement** is reproduced below:

"Appendix 2
to
SAP INDIA
R/3 SOFTWARE END-USER VALUE LICENSE
AGREEMENT
with
HCL Technologies Ltd
effective May 31, 2001
("Agreement")

Designated Site(s): HCL Technologies Ltd
3, Udyog Vihar, Phase-1,
Gurgaon 122 016

1. Software licensed to Licensee pursuant to the above-referenced Agreement consists of the following Software which is to be installed on the above referenced Designated Unit(s) at the specified Designated Site.

USERS, BASIS/WORKFLOW and DATABASE	<u>Number of Users Licensed:</u>
Operational Users	<u>100</u> Users
Info Users	<u>50</u> Users
R/C Users	<u>49</u> Users
Enterprise Office/HR Users	<u>Nil</u> Users
D/W Users	<u>1</u> Users
BC Basis/Workflow System with INFORMIX Database	<u>Nil</u> Users
BC Basis/Workflow System	<u>200</u> Users

BC	with ORACLE Database Basis/Workflow System with DB2 Common Server Database	_____ Nil _____	Users
BC	Basis/Workflow System with OS/390 Database	_____ Nil _____	Users
BC	Basis/Workflow System with MSSQL Server Database	_____ Nil _____	Users
BC	Basis/Workflow System with Database Interface	_____ Nil _____	Users

**HUMAN RESOURCE
MANAGEMENT**

**Master Records
Licensed:**

PA	Personnel Administration and Payroll	_____ 5000 _____
PD	Personnel Planning and Development	_____ 5000 _____

6. Provided SAP is performing Maintenance Service at the above-specified Designated Site, delivery of one (1) set of CD-ROM Documentation, in the English language, to such Designated Site shall be initiated upon execution of this Appendix by the parties hereto. Additional Documentation for the above-specified Designated Site may be ordered by License at SAP's then current prices in effect."

29. The relevant portion of **Appendix 2.1 dated 31.05.2001 to R/3 Software End-User Value License Agreement** is reproduced below:

"Appendix 2.1
Effective May 31, 2001

to

SAP INDIA
R/3 SOFTWARE END-USER VALUE LICENSE
AGREEMENT

with

HCL Technologies Ltd
effective: May 31, 2001

("Agreement")

Designated Site(s): HCL Comnet Systems &
Services Ltd.
A-10-11, Sector-3, Noida 201
301, UP

1. Software licensed to Licensee pursuant to the above-referenced Agreement consists of the following Software which is to be installed on the above referenced Designated Unit(s) at the specified Designated Site.

USERS, BASIS/WORKFLOW and DATABASE	<u>Number of Users Licensed:</u>
Operational Users	<u>24</u> Users
Info Users	<u>13</u> Users
R/C Users	<u>12</u> Users
Enterprise Office/HR Users	<u>Nil</u> Users
D/W Users	<u>1</u> Users
BC Basis/Workflow System with INFORMIX Database	<u>Nil</u> Users
BC Basis/Workflow System with ORACLE Database	<u>50</u> Users
BC Basis/Workflow System with DB2 Common Server Database	<u>Nil</u> Users
BC Basis/Workflow System with OS/390 Database	<u>Nil</u> Users
BC Basis/Workflow System with MSSQL Server Database	<u>Nil</u> Users
BC Basis/Workflow System with Database Interface	<u>Nil</u> Users

6. Provided SAP is performing Maintenance Service at the above-specified Designated Site, delivery of one (1) set of CD-ROM Documentation, in the English language, to such Designated Site shall be initiated upon execution of this Appendix by the parties hereto. Additional Documentation for the above-specified Designated Site may be ordered by License at SAP's then current prices in effect."

30. The relevant portion of **Appendix 2.5 dated 08.06.2006 to the R/3 Software End-User Value License Agreement** is reproduced below:

"Appendix 2.5
Effective June 08, 2006

to

SAP INDIA

R/3 SOFTWARE END-USER VALUE LICENSE
AGREEMENT

with

HCL Technologies Ltd ("Licensee")
effective: May 31, 2001

("Agreement")

Designated Site(s): HCL Technologies Ltd
A-5 Sector, 24 Noida – 201
301, India

1.1 GENERAL FUNCTION BLOCKS:

DW User incl. Basis	OP User incl. Basis	IU User incl. Basis	R/C User incl. Basis	Basis User (Standalone)	HER User
Nil	125	50	50	Nil	Nil

1.2 SPECIAL FUNCTION BLOCKS

**HUMAN RESOURCE
MANAGEMENT****Master Records
Licensed:**

PA	Personnel Administration and Payroll	<u>8,000</u>
PD	Personnel Planning and Development	<u>8,000</u>

2. DELIVERY: Licensee shall not require additional copy of the above specified Software as the license granted is for additional named users. Licensee is entitled to use these additional named users as licensed under section 2 of this Appendix 1.5 on signing of this Appendix by both the parties."

31. Shri V. Lakshmikumaran, learned counsel appearing for HCL and SAP India assisted by Shri Rachi Jain, Shri Ashwani Bhatia and Ms. Srishty Bajaj made the following submissions:

- (i) The payments made by HCL to SAP India are not liable to be included in the transaction value of the CD. In this connection, learned counsel placed reliance on rule 9(1)(c)

of the 1988 of the Valuation Rules to submit that the license fee which does not satisfy the conditions set out in the said rule shall not be added to the value of imported goods. In the present case, the payments made by HCL to SAP India and subsequently by SAP India to SAP Germany, pertain to receiving intangible rights for use of Software and/or distribution, as the case may be, and do not relate to import of CD;

- (ii)** SAP India entered into EULA with HCL for the purposes of sub-licensing of SAP Software. The EULA grants HCL a non-exclusive license only to use the Software, Documentation, and Third-Party Database at specified site(s) within the Territory. The license fee paid by HCL to SAP India is for acquiring the aforementioned rights of usage of SAP Software in India and not for import of the CD containing SAP Software. Thus, the license fee is not liable to be included in the value of CD since it is not related to the import of CD;
- (iii)** The Commissioner has included Rs. 1,85,97,808/- in the value of the CD on the basis of three separate invoices raised by SAP India on HCL. None of the three invoices are related to the import of the CD, and the impugned order has not referred to, let alone rely upon any evidence in this regard;
- (iv)** The license fee is not associated with the import of CD, as the primary mode of delivery of the SAP Software is electronic. The license fee remains payable irrespective of whether the CD is obtained physically or not. Thus, the value

of the license fee paid by HCL is not includible in the value of the imported CD;

- (v)** HCL is not required to pay the license fee at the time of import of goods. SAP India provides about four weeks period during which HCL can test run the SAP Software. Up-to the expiry of four weeks, HCL will have limited access to the SAP Software and payment of the license fee arises only if the HCL decides to convert the Software into a full version, post-trial. Thus, HCL is not required to pay the license fee for the import of the impugned goods;
- (vi)** It is settled law that license fee paid in respect of post import activities is not liable to be included in the value of the imported goods;
- (vii)** The payment of license fee to SAP India by HCL does not constitute a condition of sale of the imported goods. HCL is permitted to import the impugned goods without any prerequisite to pay the license fee at the time of importation. The obligation to pay the license fee arises only subsequently i.e. for the purpose of obtaining the license key required to access the full functionality of the SAP Software. Accordingly, the payment of the license fee is a post-importation activity and is not a condition for sale for impugned goods;
- (viii)** In any view of the matter, only 55% of the license fee is dutiable in the present case;
- (ix)** The extended period of limitation could not have been invoked in the facts and circumstances of the case;
- (x)** Interest, confiscation and penalty cannot be invoked in the present case; and

- (xi) In the absence of the machinery provisions under section 3(12) of the Customs Tariff Act, 1975¹⁵, no penalty can imposed or interest can be recovered.

32. Shri Nikhil Mohan Goyal, learned authorized representative appearing for the department assisted by Shri Rakesh Kumar made the following submissions:

- (i) Article 4.6.3 of the Software Distribution Agreement between SAP Germany and SAP India provides that the Software and Documentation normally will be provided in machine readable form on CD. Further, as per EULA between SAP India and HCL, Article 3.1 provides for delivery of the licensed Software in machine readable format. The license fees paid for the right to use Software are, therefore, to be added to the value of the CD containing SAP Software. This is because the payment of the license fee is directly related to the supply of the CD and is a condition of sale of the said CD, forming an integral part of a single transaction. The physical media and the license to use the Software are inseparable components of one commercial transaction, and the value of the license fee should be included in the assessable value of the imported goods;
- (ii) To support this contention, learned authorized representative placed reliance on the decision of the Tribunal in **Shri Atul Kaushik, Shri Krishan Dhawan, M/s Oracle India Pvt. Ltd. vs. C.C. (Export), New Delhi**¹⁶; and

15. the Customs Tariff Act

16. 2015 (330) E.L.T. 417 (Tri. – Del.)

- (iii) Penalty could be imposed in view of the decision of the Tribunal in **Satish Nandlal Rathi vs. CCE, Aurangabad**¹⁷.

33. The submissions advanced by the learned counsel for HCL and SAP India and the learned authorized representative appearing for the department have been considered.

34. To appreciate the issues, it would be useful to first refer to the various Agreements. SAP India entered into a Software Distribution Agreement dated 01.01.1999 with SAP Germany. This Agreement was amended in 2001, 2002 and ultimately w.e.f 01.01.2003. SAP Germany granted to SAP India a non-exclusive license to use, market, and sub-license the Software to End-Users. Upon execution of the License Agreement by an End-User, SAP India had to place an order upon SAP Germany for the required number copies of the Software, the number of authorized users and other relevant items determined and agreed upon in the License Agreement. All orders by SAP India for copies for the Software were required to be entered into the internal SAP order entry system and if SAP Germany did not reject the order within 10 business days, SAP India could consider the order to have been accepted by SAP Germany. With the order, SAP India was required to indicate the End-User's type of computer(s) and operating system(s) on which the Software was to be installed and the location(s) where the End-Users will use the Software. SAP Germany was then required to deliver the Software ordered by SAP India and the customs duty and fees was to be borne by SAP India. The delivery was required to be made directly to the End-User or to SAP India for re-delivery to End-User as requested by SAP India. The ownership was to remain with SAP Germany and SAP India

17. 2014 (308) E.L.T. 696 (Tri. – Mumbai)

acquired only the right to use the SAP Germany proprietary information under the terms and conditions of the Agreement.

35. SAP India also entered into R/3 Software End-User Value License Agreement dated 31.05.2001 with HCL. SAP India granted a non-exclusive license to HCL to use the Software at the specified site in consideration of license granted. HCL was required to pay license fee for the Software as set forth in the Appendices. Fees for maintenance services also had to be paid as set forth in the Appendices.

36. Appendix 1 to this R/3 Software End-User Value License Agreement dated 31.05.2001 provides for the users, basis/workflow and database as also human resource management and optional packages. It gives the number of operational users, info users, R/C users and basic/workflow system with oracle database. It also gives the personal administration and payroll, and personal planning and development.

37. With effect from 16.05.2006 an amendment was made through Appendix 1.4 in the SAP Software End-User License Agreement dated 31.05.2001. The total net license fee for the BSI Software was mentioned as Rs. 8,57,808/-. With effect from 08.06.2006, Appendix 1.5 was made part of the R/3 Software End-User Value License Agreement. Eight thousand master records were licensed and the total net price license fee was Rs. 1,59,40,000/-.

38. The issue that arises for consideration is whether the payments made by HCL to SAP India for the three invoices can be included in the transaction value of the CD.

39. As noted above, HCL and SAP India signed Appendix 1.4 on 16.05.2006 and Appendix 1.5 on 08.06.2006 to the R/3 Software End-User

License Agreement to procure Software and additional licenses, respectively. These Appendices specifically provided delivery of Software through electronic mode. SAP India raised three invoices on HCL. The first invoice dated 23.06.2006 is for Rs. 8,57,808/-. The second invoice dated 26.06.2006 is for Rs. 1,59,40,000/-. The third invoice dated 27.06.2006 is for Rs. 18,00,000/-. The total amount of these three invoices is Rs. 1,85,97,808/-.

40. Around the same time, as per the terms of maintenance contract between SAP India and HCL (Appendix 2.1), HCL received a CD containing SAP Software from SAP Germany under a courier Bill of Entry dated 29.06.2006 filed by DHL showing declared value of Rs. 2558/-.

41. The Commissioner, in the impugned order, observed that payment of license fee of Rs. 1,85,97,808/- without having CD Software has no meaning and posed a question whether could CD be independently imported and effectively put to use when there was no EULA and the importer had not paid the license fee. The Commissioner answered this question by observing that unless the license fee is paid, the SAP Software contained in the CD could not have been accessed and used by the importer. The Commissioner, therefore, concluded that all the actions are integral part of one whole transaction for a consideration of Rs. 1,85,97,808/-. For this reason, the Commissioner rejected the transaction value of CD under rule 10A of the 1988 Valuation Rules and thereafter included the license fee in the value of CD under rule 9(1)(c) of the 1988 Valuation Rules.

42. It would, therefore, be necessary to examine rule 9(1)(c) of the 1988 Valuation Rules and the relevant portion is reproduced below:

"9. Cost and services. – (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods,-

(a) *****

(b) *****

(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."

43. A perusal of rule 9(1)(c) would show that the following conditions have to be satisfied to add license fee in the transaction value:

- (i)** The license fees should related to the imported goods;
- (ii)** Buyer/importer is required to pay, directly or indirectly;
- (iii)** The same is paid as condition of the sale of the goods;
and
- (iv)** Such license fee is not included in the price actually paid or payable.

44. License fee which does not satisfy the conditions set out in rule 9(1)(c) cannot be added to the value of the CDs. The aforesaid four conditions can now be considered.

FIRST CONDITION

45. The first condition is that the license fee should relate to import of CD that contains the SAP Software.

46. The payments made by HCL to SAP India and subsequently by SAP India to SAP Germany pertain to receiving intangible rights for use of Software and/or distribution, as the case may be, and do not relate to import of CD. It is seen from Article 2 to Software Distribution Agreement

dated 01.01.2003 between SAP Germany and SAP India that the license rights granted by SAP Germany to SAP India provide for a non-exclusive license to use, market, and sub-license the Software, Documentation, Third Party Database and Third Party Software to End Users in the Territory. The license fee paid by SAP India to SAP Germany pertains to the sub-licensing of the Software by SAP India to HCL. Under Article 6 of the aforesaid Agreement, SAP India has to pay SAP Germany 55% of the recognized revenue as license fee for sub-licensing rights to End-Users. It is, therefore, clear that this fee is not for the import SAP Software in India through a CD.

47. It is also seen from the Agreement entered into between SAP India and HCL and that HCL was granted a non-exclusive license only to use the Software. The license fee paid by HCL to SAP India is for acquiring the right to use SAP Software in India and not for import of CD containing the SAP Software.

48. The Commissioner has included Rs. 1,85,97,808/- in the value of the imported goods on the basis of three separate invoices raised by SAP India on HCL as can be seen from paragraph 39 of the order, which has been reproduced above. The linking of the three invoices to the import of the CD is not justified as it is not borne out from any of the Agreements. The invoice details show that none of the three invoices relate to the import of CD. The details of the three invoices are as follows:

Sl. No.	Invoice Details			Agreement
	Invoice date	Amount (in Rs.)	Description	Appendixes
1.	23.06.2006	8,57,808	"In accordance with the above order, we invoice you for SAP Standard software"	Appendix 1.4 dated 16.05.2006 Clause 2: "2. LICENSE FEE AND PAYMENT... INR 857,808/-..." Clause 4: "4. DELIVERY:

				Delivery of the BSI Software is available only by electronic download"
2.	26.06.2006	1,59,40,000	"In accordance with the above order, we invoice you for SAP Standard software"	<p>Appendix 1.5 dated 08.06.2006 read with Appendix 2.5</p> <p>Clause 3 of Appendix 1.5: "3. The total Net Price License Fee to Licensee for the Software specified in Section 2. above is INR 15,940,000..."</p> <p>Clause 5 of Appendix 1.5: "...the parties hereto agree to execute Appendices to this Agreement, in a form similar to Appendix 2 hereto, prior to SAP's delivery of such Software to such Designated Site..."</p> <p>Clause 2 of Appendix 2.5: "2. DELIVERY: Licensee shall not require additional copy of the above-specified Software... of this Appendix 1.5"</p>
3.	27.06.2006	18,00,000	<p>"Demo License Renewal for Services Partner for Period 1st January 2006 to 31st December 2006 on my SAP Business Suite;</p> <p>SAP Utilities and SAP Retail demo licenses.</p> <p>In accordance with the above order, we invoice you for SAP Standard software"</p>	The invoice pertains to renewal of demo licenses for period 01.01.2006 to 31.01.2006. This indicates that the CD, if at all imported, would have been imported prior to 01.01.2006 i.e., prior to the introduction of CVD on the import of IT Software.

49. It transpires that the license fee paid under Invoice No's 1 and 2 relates to electronic supply of software and the additional licenses. The license fee paid under Invoice No. 3 relates to renewal of Demo licenses on SAP Software for the period 01.01.2006 to 31.12.2006, which implies the supply of SAP Software took place much prior to that.

50. It needs to be noted that rule 9(1)(c) of the 1988 Valuation Rules has not been invoked against the transmission of SAP Software under Appendix 1.4 and Appendix 1.5 but against the SAP Software that was imported in CD

under the courier Bill of Entry dated 29.06.2006. In any case, customs duty is not leviable on electronic download of Software.

51. What, therefore, follows is that the license fee is not associated with the import of the goods, as the primary mode of delivery of the SAP Software is electronic, and delivery of goods is not specified in the Appendix. The license fee remains payable irrespective of the fact whether CD is obtained physically or not. Thus, the license fee is not related to the CD and, therefore, the value of the license fee paid by HCL is not includible in the value.

52. The first condition contained in rule 9(1)(c) of the 1988 Valuation Rules is, therefore, not satisfied.

SECOND CONDITION

53. The second condition of rule 9(1)(c) of the 1988 Valuation Rules is also not satisfied. HCL is not required to pay the license fee at the time of import of goods. SAP India provides about four weeks period during which HCL can test run the SAP Software. Up-to the expiry of four weeks, HCL will have limited access to the SAP Software and instance for the payment of the license fee arises only if the HCL decides to convert the Software into a full version, post-trial. Thus, HCL is not required to pay the license fee for the import of the goods.

THIRD CONDITION

54. The third condition of rule 9(1)(c) of the 1988 Valuation Rules is also not satisfied.

55. The license fee is not paid as condition of the sale of goods. The payments made by HCL to SAP India are in relation to the rights obtained for

the post-importation activities i.e., to obtain license keycodes. HCL is permitted to import goods, install SAP Software and access it during the initial four weeks period without payment of the license fee. However, only a limited access is allowed. Full access is contingent upon payment of the license fee post-import. The aforementioned payment of license fee to SAP India by HCL does not constitute a condition of sale of the imported goods. HCL is permitted to import the goods without any prerequisite to pay the license fee at the time of importation. The obligation to pay the license fee arises only subsequently for the purpose of obtaining the license key required to access the full functionality of the SAP Software. Accordingly, the payment of the license fee is a post-importation activity and is not a condition for sale for goods. This apart, right to use the Software is different from a sale of goods. In the present case, HCL is only provided a non-exclusive right to use the SAP Software. Article 6 clearly restricts the rights of HCL to only those permitted by SAP India and HCL does not acquire the title to the intellectual property in the SAP Software. Thus, the transaction between SAP India and HCL does not amount to sale of Software.

56. The Commissioner, therefore, committed an error in holding that the license fee is a condition of sale.

FOURTH CONDITION

57. The fourth condition is also not satisfied as the payments made by HCL to SAP India are not liable to be included in the transaction value of the CDs.

58. The inevitable conclusion, therefore, that follows is that license fee paid by HCL to SAP India cannot be included in the value of CDs under rule 9(1)(c) of the 1988 Valuation Rules. Penalty, therefore, could not have been imposed upon the appellant, nor interest could have been charged.

59. In this view of the matter, it may not be necessary to examine the contention raised by learned counsel for HCL that extended period of limitation contemplated under section 28(4) of the Customs Act could not have been invoked, nor is it necessary to examine whether interest could have been charged or penalty imposed in the absence of any machinery provisions under section 3(12) of the Customs Tariff Act.

SAP India

60. It would now be necessary to examine whether penalty could have been imposed upon SAP India under section 112(a) of the Customs Act.

61. As can be seen from paragraph 43 of the impugned order, penalty has been imposed upon SAP India for the reason that SAP India carefully devised a plan of having Agreements which had a direct bearing on the valuation of CDs and thereby suppressed the true transaction value resulting into an evasion of customs duty. The Commissioner has observed that SAP India was well aware that Software on CD imported into India is chargeable to customs duty, yet it devised a mechanism to avoid duty in a mala fide manner.

62. While discussing the matter of HCL, it has been found as a fact that license fee could not have been included in the value of CD under rule 9(1)(c) of the 1988 Valuation Rules. Thus, penalty under section 112(a) of the Customs Act could not have been imposed upon SAP India.

63. Even otherwise, the department has failed to place any evidence on record to show that SAP India abetted any acts and/omission to evade payment of duty. Only a bald statement has been made that SAP India advised SAP Germany to directly export the Software to End-Users making them importers, so as to evade payment of duty. SAP India deposited the

amount of differential duty and interest on behalf of HCL. The same was with bona fide intention to protect the interest of the End-Users, their relationship with customers, and also to avoid litigation. In absence of any evidence, no mala fide intent can be attributed to SAP India and thus, no penalty could have been imposed.

64. It also needs to be noted that Bills of Entry were filed prior to the self-assessment regime and so the burden was on the department to examine and assess the duty. In the present case, the customs authorities had examined the description of goods and the value declared in the Bills of Entry. The order alleges that SAP India, under a carefully devised plan created Agreements which resulted in suppression of material facts which had a direct bearing on the value of CDs and thereby resulting in evasion of customs duty. There can be no suppression on the part SAP India as the customs authorities had allowed clearance after examining CDs and after examination of the papers. Penalty is, therefore, not imposable on SAP India.

65. What follows from the aforesaid discussion is that neither could the license fee paid by HCL to SAP India be included in the value of CDs under rule 9(1)(c) of the 1988 Valuation Rules nor could penalty have been imposed upon HCL or SAP India under section 112(a) of the Customs Act.

66. In the result, all the orders impugned in the 84 appeals are set aside. Consequently, the 84 appeals deserve to be allowed and are allowed.

(Order Pronounced on **29.09.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)