

THE FIAT FIASCO – I

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"Whoever comes out of the Church may not be a true Christian and whatever comes out of an oven need not be a good cake"

- **Anonymous**

Supreme Court judgements are the law of the land. Their ink has the might to rewrite any fate. Many times, in the past, the judgements of the Apex Court had refined and redefined the law and the understanding of it and here is the latest blockbuster.

THE CASE

CCE, Mumbai vs Fiat India Pvt. Ltd & Anr {2012(283)ELT167(SC)}

THE FACTS

The Respondents are manufacturer of motor cars, i.e. Fiat Uno model cars. As the wholesale price declared by them was much less than the cost of production, the department disputed that the price declared by them could not be treated as "normal price" for the purpose of determination of assessable value under Section 4(1)(a) of the Central Excise Act (CEA) for levy of excise duty.

The adjudicating authority confirmed the demand by concluding that the assessee's main consideration was to penetrate the market and hence the price at which they were selling the Cars in the market could not be considered to be a normal price as per Section 4 of CEA. He further observed that, as the cost of production of the Fiat UNO Cars was much higher than the price at which the assessee was selling them to the general public, the price was artificial and had been arrived at, without any basis, but just to capture the market and drive out the opponents from business and when the normal price cannot be ascertained as per Section 4(1) (a) of CEA, the alternate procedure under the Valuation

Rules, i.e. the best judgement (cost of production and profit) had to be applied. He had further observed that, all costs incurred to make goods saleable/marketable should be taken into account for determining the assessable value and that the loss incurred by the assessees to penetrate the market should be borne by them and in the process Government should not lose revenue.

The assessees, after losing in first appeal preferred an appeal before the Tribunal, where in they succeeded on the ground that there was no allegation that the wholesale price charged by the assessee was for any extra commercial consideration and that dealing of the assessees and their buyers was not at arms length or that there is a flow back of money from the buyers to the assessees and, therefore, the price declared by the assessees was the ascertainable normal price in view of the decision of the Supreme Court in **Commissioner of Central Excise, New Delhi v. Guru Nanak Refrigeration Corporation {2003 (153) ELT 249 (S.C.)}**.

THE ISSUE

1. Whether the Price declared by assessees for their cars which is admittedly below the Cost of manufacture can be regarded as "normal price" for the purpose of excise duty in terms of Section 4(1) (a) of CEA.
2. Whether the sale of cars by the assessees at a price, lower than the cost of manufacture in order to compete and penetrate the market, can be regarded as the "extra commercial consideration" for the sale to their buyers which could be considered as one of the vitiating factors to doubt the normal price of the wholesale trade of the assessees.

THE CONTENTION

The Revenue contended that:

1. The assessee had not fulfilled the conditions enumerated in Section 4(1)(a) of CEA and therefore the valuation has to be done in accordance with Section 4(1)(b) of CEA read with the 1975 Valuation Rules.
2. The price fixed by the assessee did not reflect the true value of the goods as the manufacturing cost and the profit was much higher than the sale price and that sole reason for lowering the price by the assessee below the manufacturing cost was just to penetrate the market and compete with other manufacturers and, therefore, such price cannot be treated as "normal price" in terms of Section 4(1)(a) of the Act.
3. A normal price, as per Section 4(1)(a), is the price at which the goods are ordinarily sold and a "loss making price" cannot be the price at which goods are ordinarily sold and the loss making price thus cannot be the "normal price" and hence the department is entitled to take into account the manufacturing cost plus manufacturing profit.

THE DECISION

"Normal Price" Regime:

Till the advent of the new "transaction value" wef 1/7/2000, the Section 4 of the CEA, read as under:

"4. Valuation of excisable goods for purposes of charging of duty of excise:

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale

trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

So the 'value' under Section 4 is deemed to be the 'normal price' at which the goods are 'ordinarily' sold to the buyer in the course of 'wholesale trade' where the buyer is not 'related person' and the 'price' is the 'sole consideration' for the sale and accordingly the Apex Court had considered the meaning of the words 'normal price', 'ordinarily sold' and 'sole consideration', as used in Section 4(1) (a) of the Act in the said case, and had concluded as under:

- A. The price declared by the assessee is not the normal price, which is established from the following three admitted circumstances, namely,
 - 1. That the price of the cars was not based on the manufacturing cost and manufacturing profit, but had been fixed at a lower price to penetrate the market;
 - 2. Though the normal price for their cars is higher, they were selling the cars at a lower price to compete with the other manufacturers of similar cars, thus depressing the sale price to an artificial level; and,
 - 3. Lastly, the full commercial cost of manufacturing and selling the cars was not reflected in the lower price.
- B. The word 'ordinarily' does not mean majority of the sales but shall mean that the price should not be exceptional. The word 'ordinarily', by no stretch of imagination, can include extra-ordinary or unusual and in the instant case, the assessees sold their cars in the market continuously for a period of five years at a loss price and claimed to have done only to compete with the other manufacturers of cars and also to penetrate the market. If such sales are taken as sales

made in the ordinary course, it would be anathema for the expression 'ordinarily sold'.

- C. In the instant case, the main reason for the assesseees to sell their cars at a lower price than the manufacturing cost and profit was to penetrate the market and this would constitute extra commercial consideration and not the sole consideration of price.

In view of the above, the Hon'ble Supreme Court had concluded that, in the instant case:

- the "loss making price" adopted by the assesseees is not the "normal price" as contemplated under Section 4 of CEA,
- the goods are NOT ORDINARILY SOLD in the course of the wholesale trade,
- the price is not the sole consideration for the sale and therefore,
- the assessing authority was justified in invoking clause(b) of Section 4(1) to arrive at the value of the excisable goods for the purpose of levy of duty of excise and accordingly the valuation requires to be done on the basis of the 1975 Valuation Rules.

Coming to the corresponding Valuation Rules 1975, the Apex court observed as under;

Rule 7 is in the nature of residuary clause. It provides that if the value of excisable goods cannot be determined under Rule 4, 5 and 6 of the Rules, the adjudging authority shall determine the value of such goods according to the best of his judgment and while doing so, he may have regard to any one or more methods provided under the aforesaid Rules. A bare reading of these rules does not give any indication that the adjudging authority while computing the assessable value of the excisable goods,

has to follow the rules sequentially. The rules only provides for arriving at the assessable value under different contingencies.

Thus the Apex Court approved the adoption of the best judgment method under Rule & of the valuation rules 1975, with the assistance of the report of the 'Cost Accountant', in determining the assessable value for the period prior to 30/6/2000.

"Transaction Value" Regime:

After amendment wef 1/7/2000, Section 4 of CEA lays down that the valuation of excisable goods chargeable to duty of excises on ad-valorem would be based upon the concept of transaction value for levy of duty and each removal is a different transaction and duty is charged on the value of each transaction. The new Section 4, therefore, accepts different transaction values which may be charged by the assessee to different customers for assessment purposes where one of the three requirements, namely; (a) where the goods are sold for delivery at the time and place of delivery; (b) the assessee and buyers are not related; and (c) price is the sole consideration for sale, is not satisfied, then the transaction value shall not be the assessable value and value in such case has to be arrived at, under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000, which is also made effective from 1st July, 2000.

The Apex Court finally concluded that, in the instant case, as it had been found that the price is not the sole consideration, the assessing authority was justified in invoking provisions of the Valuation Rules 2000, for the period even after 1st July, 2000.

Thus, this path breaking judgement on excise valuation, has left one and all, series of serious questions, which would have a disturbing impact on the entire industry, of which, I had attempted to frame a few:

1. What is actual impact of this ratio in the "transaction value" regime?

- 2. Is the ratio of this judgement would be restricted only to the automobile sector or shall be applicable across the industry?**
- 3. As it is a prevalent practice in trade, wherein supplies are made to OEM (original equipment manufacturer) on a price which would be much lesser than the cost plus profit, with a view of the handsome price margin in the spare market or international price fluctuations, what would be the impact on such OEM supplies?**
- 4. Whether this ratio would affect the various discounts given by the manufacturers, which is again to penetrate the market?**
- 5. Whether this ratio would affect the extra ordinary sales like distress sale, clearance sale etc, where the manufacturer clears the excisable goods on such contingencies, at a price less than the cost plus margin?**

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