आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा ,अहमदाबाद- 380009		GST ONE NATION ONE TAX...ONE MARKET OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009
फ़ोन नंबर./ PHONE No.: 079-27544557	फैक्स/ FAX : 079-27544463	E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वरा/By R.P.A.D

फा.सं./F.No. LTU/MUM/CEX/Adj-19/Tata Motors/17-18 आदेश की तारीख़/Date of Order:- 31.01.2018

जारी करने की तारीख़/Date of Issue :- 06.02.2018

द्वारा पारित/Passed by:- जी. सी. जैन *IG. C. Jain*

अपर आयुक्त / ***Joint Commissioner***

मूल आदेश संख्या / Order-In-Original No. 05/JC/2018/GCJ

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील ,इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी ,अहमदाबाद 380015-को प्रारूप संख्या इ.ए-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रू .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि क़ी विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal againrst this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।

(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू) 2.00 .दो रूपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.

(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय: -कारण बताओ सूचना/Show Cause Notice **F.No. 24/Joint Commissioner/GLT-4/TML-AMD/CED/Non-CERA/2017-18 dated 21.06.2017 issued to Tata Motors Limited, Survey No. 1, Village Northkotpura, Taluka, Sanand, Ahmedabad, Gujatat-382 170.**

BRIEF FACTS OF THE CASE:

M/s. Tata Motors Limited, Survey No. 1, Village Northkotpura, Taluka, Sanand, Ahmedabad, Gujatat-382 170 (hereinafter referred to as 'the assessee") are engaged in the manufacture of motor vehicles and parts thereof falling under Chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985.

2. During the course of EA-2000 audit conducted at the factory premise of the assessee, it was observed by the audit that the assessee was clearing their finished goods namely Tata Nano motor cars in the domestic market through their wholly owned subsidiary company, M/s. Tata motors Limited Distribution Company (hereinafter referred to as TMLDC) by paying duty on the greatest aggregate quantity of goods cleared in the previous day by TMLDC, which is a procedure prescribed for units having depot clearances in terms of Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000; whereas the assessee was required to pay duty on the value of sales made by TMLDC to unrelated buyers in terms of Rule 10 read with Rule 9 of Valuation Rules, ibid.

3. TMLDC is having their stockyard just adjacent to the factory of the assessee from where TMLDC is clearing Nano Motor cars to the authorized distributors/dealers located all over India. During audit it was found that the assessee had considered the stock yard of TMLDC as their depot and place of removal and accordingly, the assessee was discharging duty of excise as per Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

4. It was found from the 'Distribution and Logistics Agreement" dated 31/07/2008 made between the assessee and TMLDC that TMLDC was a wholly owned subsidiary of the assessee company and had been created solely for the purpose of handling the distribution, logistic support and sale of products of the assessee company; that TMLDC is authorized to buy entire productions made by the assessee; that the assessee and the buyer are related. It is therefore observed that there is a mutuality of interest between them and that the two companies are related in terms of Section 4(3)(b) of the Central Excise Act and have a mutually beneficial arrangement and therefore in terms of Rule 10 read with Rule 9 of the Valuation Rules, the value of the goods shall be normal transaction value at which these goods are sold by TMLDC to the subsequent buyers (dealers) or say unrelated persons.

5. The above said practice followed by the assessee is covered under the provisions of Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 which is applicable to the units clearing the goods through their depots. But in the instant case the clearances made by the assessee were not through depot but were through a related person namely TMLDC. The assessee had adopted the method for the determination of value of the excisable goods as in the case of clearances made to depot/warehouse as per Rule 7 of the Central Excise Valuation Rules, 2000 and the assessment of cars made by the assessee is incorrect in view of the fact that the stockyard of TMLDC is not their depot and as per the agreement made between them and the transactions that took place clearly showed that the goods were being sold by the assessee to their subsidiary company, TMLDC, and therefore the assessee should have paid the duty of excise on the price of the goods sold by TMLDC to their dealer/distributor (unrelated buyer).

6. Therefore, following show cause notices were issued to the assessee to demand and recover the differential duty on the cars cleared during the period February, 2010 to October, 2015.

Sl No	SCN No	Date of SCN	Period covered	Duty demanded (Rs)
1	V.87/15-11/OA/2014 issued by Commissioner of C.Excise,Ahmedabad-II	2.6.2014	Feb. 2010 to Dec. 2011	2,85,54,095/
2	V.87/15-124/OA/2014 issued by the Commissioner of C.Excise,Ahmedabad-II	19.11.2014	Jan. 2012 to Dec. 2013	4,63,76,650/
3	36/ADC/GLT-4/TML-AMD/CED/Non-CERA/2014-15 issued by Addl.Commr Of C.Excise,LTU, Mumbai	3.2.2015	Jan. 2014 to Nov. 2014	30,75,403/
4	44/COMMR/GLT-4/TML-AMD/CED/Non-CERA/2015-16 issued by Commissioner, C.Excise, LTU, Mumbai	4.1.2016	Dec. 2014 to Oct. 2015	72,16,403/

7. Above said show cause notices were adjudicated by the Commissioner of the erstwhile C.Excise & Service Tax, LTU, Mumbai vide a combined Order in Original No. 37-40/COMMR(RS)/LTU-M/CX/2016-17 dated 04/08/2016; underwhich duty demand made is confirmed under Section 11A(4)/11A(1) of the C.Excise Act, 1944 and ordered for the recovery of the same along with interest as per Section 11AB/11AA of the Act. Besides, duty confirmed, separate penalty was also imposed upon the assessee under the provisions of Section11AC of the C.Excise Act, 1944 and Rule 25 of the C.Excise Rules, 2002.

8. However, it is noticed from the information provided by the assessee vide their letters No. AC/SND/EXE/06/2017-18 dated 3.5.2017 & AC/SND/EXE/15/2017-18 dated 19.5.2017 that during the subsequent period of November, 2015 to March, 2017 also they paid duty on the Tata NANO cars cleared through TMLDC in the same pattern they paid duty during the earlier period. Thus, the short paid duty of excise on the part of the assessee during the period November, 2015 to March, 2017 is worked out as under-

Assessable value on which duty paid (Rs.)	TMLDC assessable value (Rs.)	Excise duty computation of differential value (Rs.)					Total differential duty (Rs.)
		Differential value	Basic excise duty	Infrastructure cess	NCCD	Auto cess/MV Cess	
2924056310	2986250419	62194109	7774263	723141	621941	77743	9197088

9. The assessee was therefore liable to pay the differential central excise duty amounting to Rs. 91,97,088/ in respect of their finished products namely, TATA Nano motor car, cleared in the domestic market through their wholly owned subsidiary company, TMLDC, during the period November, 2015 to March, 2017. The said amount of duty is required to be demanded and recovered from the assessee along with interest under the provisions of Section 11A (1) and Section 11AA of the Central Excise Act, 1944.

10. The assessee had contravened the provisions of Rule 4 of Central Excise Rules, 2002 in as much as they have failed to pay appropriate duty on removal of excisable goods. They had

also contravened the provisions of Rule 6 of Central Excise Rules, 2002 in as much as they failed to assess the duty properly before removing the dutiable goods from their goods. They had also violated the provisions of Rule 8 of the Central Excise Rules, 2002 in as much as they had made short payment of duty excise. Hence the assessee is liable for penal action under Rule 25 of the Central Excise Rules, 2002 and/or Section 11AC of the Central Excise Act, 1944.

11. It is therefore a statement of demand/show cause notice No. LTU/MUM/ST/CEX/GLT-4/TML-AMD/167/2015 dated 21/06/2017 was issued under Section 11A(7A) of Central Excise Act, 1944 by the Joint Commissioner of erstwhile Central Excise & Service Tax, Large Taxpayer Unit, Mumbai ; asking thereunder the assessee to show cause as to why-

(i) the goods cleared during the period November, 2015 to March, 2017 should not be confiscated for contravention of Section 4 of Central Excise Act, 1944 read with Rule 7 of the Central Excise Valuation (Determination of price of excisable goods) Rules, 2000 with intent to evade payment of duty and since the said goods had already been cleared by the assessee and as such are not available physically, as to why the said goods so cleared should not be held as liable for confiscation under Rule 25 of Central Excise Rules, 2002,

(ii) Central Excise duty amounting to Rs. 91,97,088/ should not be demanded and recovered from them as per the provisions of Section 11A(1) of the Central Excise Act, 1944.

11.1 However, in pursuance of Notification No. 12/2017 C.Ex (NT) to Notification No. 14/2017-C.Ex (NT) all dated 09.06.2017 issued by the CBEC, the said show cause notice is to be adjudicated by an Officer in the rank of Additional/Joint Commissioner of Central Goods and Service Tax & C.Excise of Ahmedabad-North Commissionerate and accordingly a corrigendum dated 09.11.2017 was issued to that effect.

WRITTEN SUBMISSIONS:

12 The assessee submitted their written submissions dated 05.01.2018 through their authorized representative, Shri. Anand Nainawati, Advocate, who submitted the same on 05.01.2018 when he turned up for hearing.

12.1 The assessee submitted that each and every allegation in the impugned SCN is incorrect on facts as well as law on the following grounds and therefore cannot sustain at all.

(a) The value of greatest aggregate quantity at which goods have been sold by TMLDC to unrelated person alone is relevant for determining the assessable value in the present case. Therefore, they had correctly discharged its duty liability in terms of Rule 9 of the Valuation Rules and no differential duty is payable by them.

(b) Section 4 of the Act provides for determination of assessable value of the excisable goods cleared by the manufacturer. It provides that assessable value of the excisable goods for payment of excise duty shall be the "transaction value" under Section 4(1) (a) if the excisable goods are sold by the assessee for delivery at the time and place of the removal, where the assessee and the buyer of goods are not related and where the price is the sole consideration for the sale.

(c) It further provides that, if any one of the conditions specified in Section 4(1)(a) is not satisfied, then the value of excisable goods shall be determined under Section 4(1)(b) of the Act in the manner as may be prescribed. For this purpose, Valuation Rules have been prescribed by the Central Government.

(d) Said Valuation Rules except under Rule 10(b), provides for determination of assessable value on conceptual basis depending on the transaction under consideration.

(e) Assessable value of the excisable goods shall be the actual transaction value only in circumstances where the clearances are covered under the provisions of Section 4(1) (a) of the Act or Rule 10(b) of the said Valuation Rules. In other words, the assessable value will have to be determined on the basis of the respective conceptual value provided under the valuation rules, where the clearances are not covered under the provisions of Section 4(1) (a) of the Act or Rule 10(b) of the said Valuation Rules.

(f) In the present case the transaction carried out by them is not alleged to be covered by provisions of Section 4(1) (a) of the Act or Rule 10(b) of the Valuation Rule. In fact the SCN itself concedes that the valuation needs to be ascertained under the provisions of Rule 9 of the Valuation Rules. In such a case the valuation of the goods must be determined on the basis of conceptual value as provided under said Rule- 9.

(g) As per Rule 9, the assessable value of goods sold by an assessee to related person shall be the 'normal transaction value' at which goods are sold by the related person to unrelated buyers. Therefore, in the present case as per Rule 9, goods sold by them to TMLDC have to be assessed for 'normal transaction value' at which goods are sold by TMLDC to its unrelated buyers.

(h) Therefore, in the present case even though the place of removal for the vehicles in question is the factory gate of the Noticee the 'normal transaction value' of the similar vehicles sold by TMLDC to its independent buyers must be ascertained to determine the assessable value of the vehicles under assessment. In such a situation the actual price at which the vehicles under assessment are sold by TMLDC to independent buyers cannot be taken at all to be the assessable value.

(i) The term 'normal transaction value' under Rule 9 of the Valuation Rules is defined under Rule 2(b) as the 'greatest aggregate quantity'. Said Rule 2 (b) is extracted below :
"normal transaction value" means the transaction value at which the greatest aggregate quantity of goods are sold ;"

Accordingly in the present case the assessee is required to determine the assessable value of the vehicles sold by it on the basis of the value of the greatest aggregate quantity sold by TMLDC to independent buyers.

(j) The method of determining the greatest aggregate quantity has been explained by the board vide its **Circular No. 643/34/2002-CX dated 01st July 2002** wherein it has been clarified that, the greatest aggregate quantity for the purpose of Rule 9 has to be selected out of a time period of whole day. In other words, value of the 'greatest aggregate quantity' would refer to the price at which largest quantity of identical goods are sold on a particular day. It further explains that in case where the value of the greatest aggregate quantity on a particular day is not ascertainable at the time of removal, then value of the clearances effected on the nearest day should be considered. Relevant portion of the said Circular is extracted below:

Sl. No.	Point of Doubt	Clarification
1.	What is the scope of the term "**greatest aggregate quantity**" used in Rule 2(b) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The definition does not indicate the time period over which the quantity is to be computed. Further, it is not clear whether it refers to the largest quantity sold to any particular assessee during the period or to the goods sold to the largest number of buyers.	The term "greatest aggregate quantity" has been used to define the term "normal transaction value" used in Rules 7 and 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Seen in this context **the time period should be taken as the whole day and the transaction value of the "greatest aggregate quantity" would refer to the price at which the largest quantity of identical goods are sold on a particular day**, irrespective of the number of buyers. In case the "normal transaction value" from the depot or other place is not ascertainable on the day identical goods are being removed from the factory/warehouse, the nearest day when clearances of the goods were affected from the depot or other place should be taken into consideration.

(k) In the present case at the time of removal of goods from the factory of the assesee, the greatest aggregate quantity cleared by TMLDC for that particular day is not ascertainable on the same day. Accordingly they has adopted the value which is nearest to the time of removal i.e. the value of the greatest aggregate quantity cleared on the previous day.

(l) Therefore the valuation as arrived by the assessee in the present case is completely supported by the CBEC Circular No. 643/34/2002-CX dated 01st July 2002 read with the provisions of Rule 9 of the Valuation Rules.

(m) Therefore, they has correctly determined the assessable value under the provisions of Rule 9 on the basis of the 'normal transaction value' at which TMLDC has sold the goods to its unrelated buyers. Therefore the proposal to reject the assessable value determined by the assessee on the ground that the same is required to be determined on the basis of actual sale price of the goods under assessment is bad in law and cannot sustain and the present SCN is therefore liable to be set aside on this ground alone.

12.2 Assessee further contended that the Circular issued by the department is binding on them and departmental authorities cannot take a stand contrary to the same; that present SCN being in contradiction with the Circular issued by the departmental authorities is therefore liable

to be dropped. They further stated that the departmental authorities vide its Circular No. 643/34/2002-CX dated 01st July 2002 has clarified determination of 'normal transaction value' under Rule 9 of the Valuation Rules and accordingly the same has to be determined on the basis of value of the greatest aggregate quantity as prescribed in the Circular; that accordingly they has determined its assessable value based on the value of the greatest aggregate quantity as provided under the said Circular; that however, in order to raise the duty demand in the present case the departmental authorities have rejected the said assessable value and have formed a view in its Audit as well as SCN that 'normal transaction value' under Rule 9 is to be understood as 'actual transaction value' of the goods sold by TMLDC.

12.3 Assessee continued that the departmental authorities at one instance has clarified that determination of normal transaction value vide its Circular and subsequently has rejected the assessable value determined as per the said Circular; that the view formed by the departmental authorities is therefore contrary to clarification provided under Circular dated 01st July 2002; that the Circular dated 01st July 2002 being issued by the department itself is binding on them and departmental authorities cannot take any stand contrary to the same. In this regard, they place reliance on the decision of Hon'ble Punjab & Haryana High Court in the case of Ambuja Cements Limited -2009 (236) ELT 431. The assessee therefore argued that since the allegations of the present SCN are contrary to the prevailing position of law the same is unsustainable and the present SCN is therefore liable to be dropped in toto.

12.4 The assessee further contended that allegation of the department that method followed by them is covered under the provisions of Rule 7 of the Valuation Rules is misplaced on fact and in law itself in as much as Rule 7 is not relevant at all in the present case and thus the demand raised in the present SCN is bad in law.

12.5 They also stated that present SCN has raised a differential duty demand on the premise that the assessee is liable to discharge the duty liability under the provision of Rule 10 read with Rule 9 of the Valuation Rules, however the assessee has wrongly followed the provisions of Rule 7 of the Valuation Rules; that such an allegation is made on the basis of the observation that the assessee has treated the stock yard of TMLDC as its own 'depot' instead of considering it to be related person and therefore the assessee has assessed the goods sold to TMLDC on the value of the greatest aggregate quantity of goods cleared by TMLDC on the previous day.

12.6 The assessee further submitted that the allegations of the SCN are based on the objection raised in the EA-2000 Audit and they reproduced the relevant portion of the Audit Report as under;

"As far as the method adopted by the assessee is concerned, it is covered by the provisions of Rule 7 of the Valuation Rules which is applicable to units clearing the goods through depot..." In this regard, they submitted that, Rule 7 in the present case is not at all relevant in as much as them at no point of time has considered the stock yard of TMLDC as its own 'depot' or 'place of removal'; that on the contrary they has always treated TMLDC as its related party and applied the provisions of Valuation Rules as applicable in case of related party transaction.

12.7 The assessee further stated that the nature of relationship between the assessee and TMLDC is evident from the Excise cum sales invoices raised by them on TMLDC.; that the very fact that they has raised a sales invoice and assessed the goods to sales tax evidences that the assessee has treated TMLDC as an independent buyer and not as its own depot; that, if at all the assessee had intended to treat TMLDC as its own depot, they would not have raised any sales invoice and assess the goods for sales tax.

12.8 They further stated that the departmental authorities in the present case have in fact confused between the provisions of Rule 7 vis-a-vis Rule 9 since both the Rules provide for determination of assessable value as per the 'normal transaction value' and therefore the assessee submitted that, the departmental authorities are themselves not clear about the transaction carried out by them; that the departmental authorities in the present case have blindly assumed that the assessee has considered the stockyard of TMLDC as its own depot and place of removal and further categorized the clearances of them to be covered under Rule 7 of the Valuation Rule instead of scrutinizing and verifying specific explanation provided in its letter. Further stated that the departmental authorities in the present case have not even brought on record any evidence in support of the allegation that the assessee has considered the stockyard of TMLDC as their own depot and thereby the method followed by them is covered under the provisions of Rule 7 and since the allegations of the SCN are not based on any material evidence, the assessee contended that, it is liable to be dropped on this ground alone.

12.9 The assessee further stated that understanding of the department in the present case is based on assumption and the allegations in furtherance thereof are misplaced on facts as well as law and cannot sustain at all and therefore, the assessee pleaded that, the proceedings initiated in the present SCN are liable to be dropped.

12.10 It is further submitted that the Department is not entitled to trace the goods or chase the goods to its point of sale to an unrelated buyer and insist assessment based on the actual price at which the very goods have been sold to unrelated buyers. They also stated that the SCN has been issued by tracing the goods or chasing the goods to their ultimate sale point and sale price by contending that such sale price should be the basis for determination of the assessable value; that when an assessee has opted to discharge its duty liability on the basis of the value of the greatest aggregate quantity, it is not open for the department to chase the goods to its ultimate point of sale and raise duty demand on such actual sale price.

12.11 It is further argued that the assessee in the present case has ascertained the value of the greatest aggregate quantity by following the provisions of Rule 9 which provides for determination of assessable value on the basis of normal transaction value in case of sale to a related person; that the method to determine the normal transaction value as provided under Rule 9 is identical to the method provided under Rule 7 in as much as both the Rules prescribe for 'normal transaction value' to be the assessable value and in such a case the principles applicable for determination of assessable value under Rule 7 are equally applicable to the provisions under Rule 9 in so far as they relate to determination of 'normal transaction value'. They further stated that It is submitted that, to clarify the determination of assessable value in

case of removal of goods from place of removal other than the factory gate such as depot, CBEC issued a clarification vide CBEC Circular No. 251/85/96 – CX dated 14.10.1996 wherein it was clarified that assessment need not be carried out on the basis of actual sale price of the goods but the same can be carried out based on the price prevailing at such other place of removal on the date of clearance of goods from factory gate. Relevant portion of the said circular is extracted below.

"Point of Doubt

How assessable value will be determined at the factory gate in respect of goods to be cleared from other places of removal such as depot etc.

Clarification

Assessments need not be kept provisional till the actual sale price of the excisable goods cleared from places of removal other than factory gate is known. The assessee may be asked to declare and pay duty at the price prevailing at such other place of removal on the date such goods meant for that place of removal are cleared from the factory gate. To illustrate, if the factory is at Bombay and the storage depot is at Ahmedabad, then for a consignment meant for Ahmedabad Depot, cleared from Bombay factory on, say 1st January, the price at which an earlier consignment of goods of the same destination, is sold from Ahmedabad Depot on 1st January will be the basis for arriving at the assessable value of the goods cleared from Bombay on 1st January. If this consignment cleared on 1st January is sold, say on the 1st March from Ahmedabad Depot at a lower or higher price, such a price will be the basis for valuation of clearances on 1st March and so on. This will apply mutatis mutandis to cases of provisional assessments also where at the time of clearance on 1st January the sale price from the depot on 1st January is not known"

12.12 They continued their submissions by stating that even though the above said circular was issued during the regime of Valuation Rules, 1975; the same is in complete consonance with the valuation provisions relating to clearances from depot as contained under Rule 7 of the Valuation Rules in force during the period of present dispute. They stated that , in the judgment of Steel Authority of India Limited Vs. CCE – 2006 (199) ELT 112 (T), the Hon'ble Tribunal has held that the valuation of a consignment is to be made on the basis of sale price prevailing on the date of removal at the depot; that in the judgment of CCE Vs. Carborandum Universal Ltd. – 2008 (224) ELT 290 (T), the Hon'ble Tribunal has held that once goods are cleared from factory to depot on payment of duty on basis of a price prevailing at the depot, at the time of removal from factory, there is no need to chase the goods and to see at what price same are actually sold from the depot. They also pointed out that Hon'ble Tribunal has also confirmed identical position of law in following decisions:

i) Nahar Spg & Wvg Mills Ltd Vs. CCE – 2009 (247) ELT 708 (T)

ii) Lipi Data System ltd. Vs. CCE – 2001 (130) ELT 91 (T)

iii) Brakes India Limited Vs. CCE – 2007 (212) ELT 504 (T).

12.13 The assessee further stated that since the principles applicable to Rule 7 relating to determination of 'value of greatest aggregate quantity' are equally applicable to the provisions of

Rule 9 of the Valuation Rules in as much as both the rules prescribe for 'normal transaction value' to be the assessable value, the principle enshrined under the above said circular as well as judicial precedents is also applicable to the present case; that, accordingly, where the assessee has assessed the goods under Rule 9 on the basis of value of the greatest aggregate quantity cleared by TMLDC to its unrelated buyers, department is not entitled to trace the actual sale price of the goods and insist the assessee to assess the goods thereon; that since the proposal to assess the goods on the actual sale price of the goods itself is bad in law, differential duty demanded in furtherance thereof is bad in law and liable to be set aside in toto.

12.14 They further, without prejudice, submitted that, while raising the duty demand, departmental authorities have taken into consideration only those transactions in which the duty paid by the assessee by following normal transaction value i.e., ' value of greatest aggregate quantity' cleared by TMLDC is less than the duty payable on actual sale price of the same goods; that however, in the present case there have been instances where the assessee has paid more duty by way of following 'value of greatest aggregate quantity' cleared by TMLDC than the actual sale price of the same goods. In this regard, it is submitted that while raising the duty demand for a particular period the department needs to take into account the entire period as one single block and compute the demand for all the transactions involved in the entire period. In such computation department cannot pick and choose only those transactions where the duty paid is less than the duty payable; that in such a case the entire demand of duty needs to be raised only after setting off the excesses against the shortages. In this regard they placed their reliance in the case of TAL Manufacturing Solutions Ltd. V. CCE, Pune – I (Order No.-A/579/07/C-II/EB dated 22.08.2007) wherein matter was remanded for computation of duty after adjusting excess payment; that therefore in light of the existing precedents covering the present fact scenario, excess and shortages in the same period of demand should be set off against each other and the duty can be demanded only to the extent of excess after setting off the shortages. The assessee have enclosed Annexure-H towards sample working of correct GAQ Values done by them for 10.12.2015, 23.03.2017 & 28.03.2017 respectively.

12.15 On the proposal for confiscation of the excisable goods, it is submitted by them that since they have followed correct valuation under Rule 9 of Valuation Rule, there is no justification in the proposal of the department to confiscate the goods.

12.16 It is further stated that the present SCN also proposes to impose penalty for alleged contravention of provisions of Section 4 read with Rule 7 of the Central Excise Valuation Rules; that that allegation reveals the confused approach of the Department because as per Para No 2 of the SCN valuation required to be done in terms of Rule 10 read with Rule 9 of Valuation Rules; that imposition of penalty is a quasi-criminal proceeding and penalty cannot be ordinarily imposed unless and until "mens rea" on the part of the defaulter is proved beyond all reasonable doubts; that the SCN has failed to bring out the essential "mens-rea" or guilty mind of them. They stated that in fact, there was no intention to evade payment of duty on part of the assessee. Further stated that the ingredients under Section 11AC for imposition of penalty are *pari materia* to the ingredients of Section 11A for invoking the extended period of limitation and in such a case where the extended period of limitation cannot be invoked for the reasons explained, no penalty can be imposed on them under Section 11AC of the Act. In this regard reliance is placed in the decisions of CCE V. Birla NGK Insulators (P) Ltd. 2009 (247) ELT 631

(Tri. Kolkata), Affirmed in 2010 (256) ELT A123 (Cal.) and in the case of Alpha Lab V. CCE 2009 (247) ELT 625 (Tri. Ahmd.). It is argued by them that the allegation of 'suppression of facts' and 'short payment of duty' made by the SCN being totally baseless and without any evidence; penalty under section 11AC cannot be imposed on them in the present case.

12.17 They further argued that none of the clauses of Rule 25 is applicable in their case and hence penalty not imposable; that there is no dispute about the fact that the finished goods manufactured were cleared by them under the cover of relevant excise invoices and therefore, they has not cleared goods in contravention of any provision of Excise Rules, 2002. Therefore, it is contended by them that clause (a) of Rule 25 is not applicable; that it is also not disputed that they do not account for the excisable goods produced or manufactured by them therefore; Rule 25(b) is also not invokable; that it is not in dispute that they has duly obtained the excise registration as required by the Excise regulations, therefore the Rule 25(c) is also not invokable in the present case. As far clause (d) is concerned, the assessee submitted that there is no intention to evade payment of duty; that they are regularly filing the ER-1 Returns; that there is no suppression in the ER-1 Returns filed by them; that each and every items manufactured and cleared after payment of duty are duly reflected in the ER-1 Returns. They argued further that for the reasons stated in the preceding paragraphs, it has not violated any of the clauses of Rule 25 of the Excise Rules, 2002 in order to attract penalty; that proposal to impose penalty upon them cannot survive as the issue in the present case involves an interpretation of the provisions of law; it is settled law that the proposal to impose penalty on the assessee is not sustainable when the issue is one of pure interpretation. In this regard, they placed reliance on the following case laws and argued that penalty under Rule 25 read with section 11AC is not sustainable.

(a) CCE Vs. Swaroop Chemicals (P) Ltd, reported at 2006 (204) ELT 492 (T) (b) Haldia Petrochemicals Ltd. Vs. CCE, reported at 2006 (197) ELT 97 (T) (c) CCE Vs. TELCO LTD., reported at 2006 (196) ELT 308 (T), (d) Siyaram Silk Mills Ltd. Vs. C.C.E., reported at 2006 (195) ELT 284 (T), (e) CCE Vs. Sikar Ex-Serviceman Welfare Coop. Society Ltd; reported at 2006 (4) STR 213 (T),

(f) Hindustan Steel Ltd. Vs. State of Orissa, reported at 1978 (2) ELT (J 159) (SC), (g) Fibre Foils Ltd. Vs. CCE, reported at 2005 (190) ELT 352 (T), (h) ITEL Industries Pvt. Ltd. Vs. CCE, reported at 2004 (163) ELT 219 (T), (i) Birla Corporation Ltd. Vs. CCE, reported at 2002 (148) ELT 1249 (T).

12.18 With respect to imposition of interest it is submitted by the assessee that, it is a settled principle of law that, in cases where the demand itself is not sustainable, interest cannot be imposed. In this regard reliance is placed on Coolade Beverages Ltd, {(2004) 172 E.L.T. 451 (All)}.

12.19. They concluded the submissions by stating that In light of the submissions made above it is clear that they are not liable to pay any differential duty and such a demand of differential duty raised itself is bad in law and unsustainable and, therefore, the interest intended to be imposed upon such demand is erroneous and is liable to be dropped. They then prayed for (i) dropping the SCN dated 21.06.2017in toto (ii) grant a personal hearing; and (c) pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case.

PERSONAL HEARING:

13. The case was slated for hearing on 17.11.2017 & 11.12.2017 but nobody representing the assessee had turned up on these days. Hence next hearing date was fixed on 05.01.2018 which was attended by Shri. Anand Nainawati, Advocate, authorized representative of the assessee unit along with Shri. Hardik Amitkumar Pandya, Senior Manager of Tata Motors Ltd. During the course of hearing they submitted the written submissions and reiterated its content and requested to drop the show cause notice.

DISCUSSION & FINDINGS:

14. I have carefully gone through the statement of demand/show cause notice dated 21.06.2017 issued under Section 11A(7A) of the Central Excise Act, 1944 and the grounds and legal positions as explained in the earlier issued show cause notices No. V.87/15-11/OA/2014 dated 2.6.2014 and V.87/15-124/OA/2014 dated 19.11.2014. I have also carefully perused the written submissions made by the assessee in response to the show cause notice. Also given due consideration to the submissions made by the representative of the assessee at the time of personal hearing.

15. The facts of the case is that during the course of EA 2000 Audit, it is noticed that the assessee was clearing their finished goods namely Tata NANO Motor cars in the domestic market through M/s. Tata Motors Limited Distribution Company (TMLDC), a wholly owned subsidiary company of the assessee, by paying duty on the greatest aggregate quantity of goods cleared on the previous day by TMLDC, as per the procedure prescribed for units having depot clearances in terms of Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and the observance of the Audit is that the assessee has to pay duty on the value of sales made by TMLDC to unrelated buyers in terms of Rule 10 read with Rule 9 of the Valuation Rules, ibid. In furtherance of such observation, the Audit officers have raised an objection in the Audit Report that the assessee had considered the stockyard of TMLDC as its own depot and method of determining the assessable value by following the greatest aggregate quantity cleared on previous day from stockyard of TMLDC is covered by the provisions of Rule 7 of Valuation Rules; that the assessee and TMLDC are related persons and hence under the provisions of Rule 10 read with Rule 9 of the Valuation Rules, the assessee has to pay duty on the actual transaction value at the which the same goods are sold by TMLDC to the unrelated buyers.

16 Based on the said audit objection, the assessee was served with demand notices periodically for recovery of the differential duty which have been decided by the Commissioner of erstwhile Central Excise & Service Tax, Large Taxpayer Unit, Mumbai, under whose jurisdiction the assessee unit was fallen at the material time, by confirming the demand made to recover the differential duty along with interest and imposing penalty. The present notice, issued periodically, covers a subsequent period and the grounds relied upon for the said notice are the same as are mentioned in the earlier notices which have been decided by the above said adjudicating officer. Thus, the observations and decision made by the said adjudicating authority in his order, viz. Order-in-Original No. 37-40/Commr(RS)/LTU-M/CX/2016-17 dated 04.08.2016, would be applicable to the present case also. However, it is felt that a perusal and analysis of

the relevant valuation rules and applicability/relevancy of the same in the present case is warranted for an independent decision in the case on hands.

16.1 Thus dispute in the present case relates to the valuation of excisable goods i.e. Tata NANO cars, cleared from the factory premise of M/s. Tata Motors Limited, Sanand, Ahmedabad during the period November, 2015 to March, 2017; whether the assessee correctly paid duty of excise on the basis of price at which 'greatest aggregate quantity' of goods sold or otherwise. Notice alleges that assessee determined the assessable value on the basis of 'greatest aggregate quantity' of goods cleared on the previous day, as per the procedure prescribed for units having depot clearances in terms of Rule 7 of the Central Excise Valuation (Determination of price of excisable goods) Rules, 2000 and says that the assessee was required to pay duty of excise on the value of sales made by TMLDC to unrelated buyers in terms of Rule 10 read with Rule 9 of the Valuation Rules, ibid.

17. Firstly, I would like to have a look at the sales pattern of the Tata Nano Motor Car by the assessee. Audit officers observed that the assessee was clearing their entire final product, namely 'Tata Nano car' of various models, colours and specifications to a party named M/s. Tata Motors Limited Distribution Company Limited' (TMLDC); stockyard of which was said to have been situated just adjacent to the factory of the assessee from where TMLDC was clearing Tata Nano Motor Car to the authorised distributors/dealers located all over India. This fact is not disputed by the assessee. Assessee, as per Audit, by considering the said stock yard of TMLDC as their 'depot' and 'place of removal', discharging central excise duty on the value determined as per Rule 7 of the Central Excise Valuation (Determination of Price of Excisable goods) Rules, 2000. It is also seen that the terms and conditions in the 'Distribution and Logistics Agreement' dated 31.07.2008 made between the assessee and TMLDC; which is said to have been set up solely for the purpose of handling, distribution and logistics support works of the assessee, administer the sale/clearance pattern of the said motor cars by assessee to TMLDC and from TMLDC to various dealers and independent buyers. Significant points of the said agreement, copy of which is placed on records, are as under-

> *' B. Due to expanding business of the Company (Tata Motors Ltd), the company has considered appropriate to hand over the distribution of the products (defined below) and the logistic support activities required for the same to its wholly owned subsidiary, the distributor company (TMLDC)*
>
> *C. The Distributor company, which is subsidiary of the company having understood the requirements of the company has agreed to facilitate the distribution of the passenger vehicles presently manufactured by the company at its plant located in India, except at its Pantnagar, Uttarakhand plant and as may be manufactured by the company from time to time... throughout India (territory) on the terms and conditions agreed between the parties.*
>
> *2. **SCOPE.***
>
> *2.1 The company has appointed the distributor company on a non-exclusive basis as its distributor for sale of, distribution of the products and to provide logistics support activities required for the distribution of the products within the territory....*

2.2 The distributor company will buy from the company, stock and distribute the products to dealers and individual customers, key customers and others as may be agreed between the parties from time to time on a principal to principal basis.

*6. **Sale Process***

6.1 The company will sell the products to the distributor company on a price as may be mutually agreed between the parties.

6.5 During the term of this agreement, the distributor company from time to time shall place purchase orders on the company and the company shall supply the products to the distributor company in accordance with the purchase orders and the terms and conditions of this agreement.

6.9 Title to the products shall transfer from the company on delivery of the products to the distributor company.

6.13 The distributor company will then sell the products to the dealer as provided in the dealership agreement entered into between the distributor company and the respective dealer.

*7. **Payments, pricing, invoicing and inventory:***

7.1. The distributor company shall pay to the company the prices for the products that are in effect on the date of delivery of the products by the company. Such payment shall be made preferably before delivery of the products by the company to the distributor company or on such terms and conditions as may be agreed between the parties from time to time"

17.1. It would be evident from the above narrated terms and conditions of the said agreement that-

(i) TMLDC is a wholly owned subsidiary of assessee,i.e. M/s. Tata Motors Ltd.
(ii) They are related persons as per the meaning given under Section 4(2) of the Central Excise Act, 1944
(iii) TMLDC is solely authorised to buy the entire production made by the assessee
(iv) No buyers/customers can buy any products of assessee directly from the factory of assessee; they have to buy the same from TMLDC only.
(v) TMLDC was authorised to sell the products of the assessee on its own account or through local establishments by way of local sale or inter-state sale.

17.2 Based on the above narrated sales pattern followed by the assessee, correct method of valuation as per the Central Excise Act and Valuation Rules is to be ascertained. The said agreement made between the assessee and TMLDC clearly exhibits that the TMLDC is a wholly owned subsidiary of the assessee and hence the sale transaction between the assessee and TMLDC is under the category of sale between two related persons. The correct assessable value of the said excisable goods at the hands of the assessee would thus be computed by considering the transactions made between two related persons.

17.3 The statutory provisions in this matter are reproduced for ease of reference.

Section 4 of the Central Excise Act,1944 read as follows-

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall-

(a) In a case where the goods are sold by the assessee, for delivery at the time and place of removal, the assessee and the buyer of the goods are not related and price is the sole consideration for the sale, be the transaction value.

(b) In any other case where the goods are not sold, be the value determined in such manner as may be prescribed.

(2) .....

(3) For the purpose of this section

(a) 'assessee' means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) Persons shall be deemed to be 'related' if

(i) they are inter-connected undertakings

(ii) they are relatives

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other."

17.4 In the case on hands, it is very clear that any of the conditions specified in Section 4(1)(a) of the Act is not satisfied, then the value of excisable goods shall be determined under Section 4(1)(b) of the Act in the specified manner therein. For this purpose, the Central Excise Valuation (Determination of price of excisable goods) Rules, 2000 have been notified under Section 4(1)(b) of the Act by Notification No. 45/2000-CE(NT) dated 30.06.2000. The Rules of the said Valuation Rules which are relevant to the present case are reproduced below -

Rule 7 of C.Excise Valuation Rules, 2000

'Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place of premises (hereinafer referred to as 'such other place') from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and where such goods are not sold at or about the same time, at the same time nearest to the time of removal of goods under assessment.'

Rule 9 (substituted with effect from 01.12.2013 by Notification No. 14/2013-CE (NT) dated 22.11.2013

'Where whole or part of the excisable goods are sold by the assessee to or through a person who is related in the manner specified in any of the sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of such goods shall be the normal transaction value at which these are sold by the related person at the time of removal, to buyers (not being related person), or where such goods are not sold to such buyers, buyers (being related persons, who sells such goods in retail:
provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in Rule 8."

Rule 10 of the C.Excise Valuation Rules, 2000 (substituted with effect from 1.12.2013 by Notification No. 14/2013-CE (NT) dated 22.11.2013.

" Where whole or part of the excisable goods are sold by the assessee to or through an iner-connected undertaking, the value of such goods shall be determined in the following manner, namely-
(a) If the undertakings are so connected that they are also related in terms of sub-clause (ii) or (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act or the buyer is a holding company or subsidiary company of the assessee, then the value shall be determined in the manner prescribed in rule 9.
Explanation:- In this clause 'holding company' and 'subsidiary company' shall have the same meanings as in the Companies Act, 1956 (1 of 1956).
(b) in any other case, the value shall be determined as if they are not related persons for the purpose of sub-section (1) of section 4"

17.5 The audit report says that during the course of audit it was informed by the assessee that the entire quantity of clearance of Nano motor cars for home consumption is made to TMLDC which is a wholly owned subsidiary of the assessee. The said audit report further says that it was conveyed by the assessee that they consider the TMLDC premises at Sanand as a depot and paying duty of excise on the basis of value determined in terms of Rule 7 of the Valuation Rules and on the basis of transaction value of greatest aggregate quantity of such vehicles sold from TMLDC, Sanand at a time nearest to the time of removal.

17.6 However, the said Audit Report is found to have stated that the assessee further informed that they are paying duty as per provisions of Section 4(1) (b) of Central Excise Act, 1944 read with Rule 9 and Rule 10 of Valuation Rules; that they are applying 'normal transaction value' as defined in Rule 2 of Valuation Rules and are ascertaining the value at which the greatest aggregate quantity of particular model of car is sold by TMLDC to the dealers on the previous day and are applying the same to next day's dispatches which is in terms of Rule 9 of the Valuation Rules and Board's Circular dated 1.7.2012.

17.7 It is an undisputed fact that the assessee had sold their excisable goods viz. Nano motor cars to their wholly owned subsidiary company, namely TMLDC, who subsequently sold the same to dealers and individual customers (unrelated buyers) situated throughout India. Of course, these transactions are squarely covered under Section 4(1) (b) of Central Excise Act,

1944 read with Rule 10 and Rule 9 of Valuation Rules. Hence, the excisable goods cleared by the assessee to their wholly owned subsidiary company, viz. TMLDC, should be assessed at the normal transaction value at which the goods i.e. Nano motor cars, sold by TMLDC to their unrelated buyers.

17.8 Sub-clause (b) of Rule 2 of the Valuation Rules, 2000 defines the term "Normal transaction value" to mean the transaction value at which the greatest aggregate quantity of goods are sold. The term "value" is defined in Rule 2(c) to mean the value referred to in Section 4 of the Central Excise Act, 1944. Board's circular No. 643/34/2002-CX dated 1.7.2002 clarifies as under-

Sl. No.	Point of Doubt	Clarification
1.	What is the scope of the term "**greatest aggregate quantity**" used in Rule 2(b) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The definition does not indicate the time period over which the quantity is to be computed. Further, it is not clear whether it refers to the largest quantity sold to any particular assessee during the period or to the goods sold to the largest number of buyers.	The term "greatest aggregate quantity" has been used to define the term "normal transaction value" used in Rules 7 and 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Seen in this context **the time period should be taken as the whole day and the transaction value of the "greatest aggregate quantity" would refer to the price at which the largest quantity of identical goods are sold on a particular day**, irrespective of the number of buyers. In case the "normal transaction value" from the depot or other place is not ascertainable on the day identical goods are being removed from the factory/warehouse, the nearest day when clearances of the goods were affected from the depot or other place should be taken into consideration.

It would be evident from above that the assessee has to ascertain the rate at which greatest aggregate quantity of identical goods had been cleared from TMLDC to unrelated buyers on the day of clearance or the nearest day when clearances of the goods were effected from TMLDC to unrelated buyers.

17.9 Although the assessee is found to have stated that at the time of removal of goods from the factory of the assessee, the greatest aggregate quantity cleared by TMLDC for that particular day is not ascertainable on the same day and accordingly they had adopted the value which is nearest to the time of removal i.e. the value of the greatest aggregate quantity cleared on the previous day, it is seen that the manner of computing the 'greatest adequate quantity' is not proper. No documents/data is furnished by the assessee to suggest that the assessee the value adopted by them truly reflects the transaction value at which the greatest aggregate quantity of identical goods is being sold from TMLDC to unrelated buyers.

17.10 As per Section 4(3)(d) of Central Excise Act, 1944, 'transaction value' means the price actually paid or payable for the goods, when sold and includes in addition to the amount

charged as price, any amount that the buyer is liable to pay to, or on behalf of the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including but not limited to, any amount charged for, or to make provisions for, advertising or publicity, marketing and selling organisation expenses, storage, outward handling, servicing, warranty, commission or any other matter but does not include the amount of duty of excise, sales tax and other taxes, if any, actually payable on such goods. It can be seen from the definition if 'transaction value' that any amount which is paid or payable by the buyer to or on behalf of the assessee, on account of the sale of goods, then such amount cannot be claimed to be not part of the transaction value.

17.11 The assessee has submitted that at the time of removal of goods from their factory, the greatest aggregate quantity of identical goods cleared from TMLDC for that particular day is not ascertainable on the same day and accordingly they have adopted the value which is nearest to the time of removal i.e. the value of the aggregate quantity cleared on the previous day. Correctness of such assessable value determined by way of above practice followed by the assessee during the earlier period was already examined by the Commissioner of C.Excise & Service Tax of the erstwhile Larger Tax Payer unit in Mumbai, under whose jurisdiction the assessee was fallen at the material time and his findings is recorded in the Order-in-Original No. 37-40/COMMR(RS)/LTU-M/CX/2016-17, dated 4.8.2016, copy of which is placed on records. After examining the details of Nano Motor cars sold from the factory of assessee and the subsequent sale from TMLDC on a particular day in the earlier period, provided by the assessee, the adjudicating officer viz. Commissioner is found to have observed that inspite of the assessee's claim that they are adopting the value of the 'greatest aggregate quantity' of identical goods cleared from TMLDC, as per Board's Circular dated 1.7.2002, it is found that the said value does not reflect the correct transaction value at the time of clearance from the factory of the assessee, as it is impossible to know to which dealer, in which part of the country, TMLDC intends to clear the said goods to; which has a bearing on the ultimate sale price of the said excisable goods. The pattern of sale and the computation of assessable value of the said Nano Tata Motor cars is found as same as was followed during the time period which is covered in the above said adjudication of the Commissioner and hence the said observation of the Commissioner is mutatis- mutandis applicable to the present case also. Thus, I can not deviate from the above stand taken by the earlier adjudicating officer on the matter. However, to examine the issue afresh, an examination of the data in respect of sale of a particular model of motor cars from the factory of assessee to TMLC and from the premise of TMLDC to unrelated buyers on a particular day, included in the period of the present notice, provided by the assessee alongwith their written submissions has been made. Accordingly it is found that on 10.12.2015, assessee had sold 35 numbers of Tata Nano motor car of make ' Sangria Red Tata Nano Twist XTA (BS IV)' to TMLDC by adopting assessable value of Rs. 2,16,727/ each. The assessee had adopted this assessable value based on the clearances of identical goods on the nearest date, which is in the instant case is 9.12.2015, by TMLDC to unrelated buyers. As per the details submitted by the assessee, on 9.12.2015 itself, the motor car of said model is cleared by TMLDC to their unrelated customers at three different prices. A data of the different prices adopted by TMLDC for clearances of the motor car of said model to unrelated buyers, on 9.12.2015, as per the details provided by the assessee, is as under-

Date	Model	Qty sold	Basic value	Excise duty + cesses	Vat	Total value
9.12.15	Sangria Red-Tata Nano Twist XTA (BS IV)	2	217108	29570	4934	251612
9.12.15	Sangria Red-Tata Nano Twist XTA (BS IV)	2	216892	29551	4929	251372
9.12.15	Sangria Red-Tata Nano Twist XTA (BS IV)	4	216727	29529	4925	251181

Therefore, I find that the assessee had not computed the correct assessable value of the said Tata Nano motor cars at the time of clearance from their factory at Sanand.

17.12 In the case of depot clearances, at the time of clearances of the goods from the manufacturer's premises, the destination of the depot is known and hence it is possible to arrive at an accurate or a near accurate transaction value based on the clearances from the said depot on the nearest possible date, if not on the same date. Rule 7 of the Valuation Rules covers the cases where goods are 'not sold' at the time and place of removal but 'transferred' to depots or premises of consignment agents. In the current case, the excisable goods are 'sold' by the assessee at the place of removal to their related buyer namely TMLDC. At the time of 'sale' and on delivery of the goods the title to the goods stands shifted from the assessee to TMLDC. In the present case, the actual transaction value is known only at the time of clearances from TMLDC to unrelated buyers and not at the time of sale of the excisable goods by the assessee at the manufacturer's premises on which the excise duty is paid.

17.13. CBEC circular No. 643/34/2002-CX dated 1.7.2002, quoted by the assessee, is in clarificatory nature and makes provisions for eventualities where transaction value on the date of clearance from the manufacturer's premises is not ascertainable, and one of the ways suggested to get out of the problem is to adopt the 'greatest aggregate quantity' of clearances of identical goods from the depot/related buyer to the dealers/unrelated buyers. However, in the present case it is seen that the method of computation of 'greatest aggregate quantity' by the assessee does not reflect the actual transaction value and as clarified in the above paras, if this method is adopted, there would be significant risk of revenue loss. It is worthwhile to point out here that during the audit period it was observed that out of 103200 number of Nano motor cars cleared from the factory of the assessee to TMLDC, in the case of 49969 motor cars, the sale from TMLDC to the dealers had been effected at a value higher than the corresponding clearance value of the assessee. In such circumstance, in the adjudication order covered the previous period, Commissioner of C.Excise & Service Tax of erstwhile LTU in Mumbai has observed that the existence of the distribution company from which goods are cleared to different depots at different prices has clearly created a difficulty in arriving at the correct value on which the assessee is required to pay duty, to obviate this, the assessee should have resorted to provisional assessment. Considering the sale pattern and method of computation of assessable value of the said excisable goods is not changed during the period covered in the present notice, I am also of the said opinion of the Commissioner.

17.14. It is also seen that as held by the Hon'ble Supreme Court at para 42 of the judgment in the case of Union of India and others Vs. Bomaby Tyre International Ltd and Others, reported at 1983 (14) ELT. 1896 (SC) and at para 61 of the judgment in the case of Commissioner of C.Excise, Mumbai Vs. Fiat India Ltd, reported at 2012 (283) ELT. 161 (SC), it is for the revenue to determine, based on the evidence before it, as to what should be the price to be taken as the value of the excisable goods for the purpose of excise duty. In the present case, demand notice has been issued to the assessee demanding differential duty based on transaction value of the same goods sold by the related buyers to the independent buyers (not related buyers). It is the contention of the assessee that the department is not entitled to trace the goods or chase the goods to its point of sale to an unrelated buyer and insist assessment based on the actual price at which the very goods have been sold to unrelated buyers. Considering the circumstances of the present case, it is seen that assessee's contention is unacceptable in view of the facts narrated upon. In view of the fact that the transaction value arrived at by the assessee on which excise duty has been paid does not reflect a value which can be considered even close to the actual transaction value at which the goods have been sold by their subsidiary company to unrelated buyers, which has resulted in loss of government revenue. Thus I am of the opinion that the demand made to recover the differential duty vide the present notice sustains.

17.15 Another contention of the assessee that in many cases they had paid duty of excise on transaction value which is higher than the sale at the hands of TMLDC to unrelated buyers and in such a situation the entire demand of duty needs to be raised only after setting off the excesses against the shortages. I find that this plea made by the assessee has already been examined by the Commissioner of C.Excise & Service Tax of erstwhile Larger Tax payer Unit in Mumbai while deciding the demand notices issued covering for earlier period and observed in the above mentioned Orders-in-Original that such a contingency would not have arisen in the first place, had the assessee opted for provisional assessment; that in the absence of any provision in the Act or rules, the request of the assessee to offset excess duty payment in the manner suggested by the assessee cannot be acceded to; that the assessee is of course free to take recourse to any other option available to them as per law in this regard for claiming the excess duty paid. Since the facts of the present case is same as of the cases where the said decision is taken and no change in the Act or rules is made since the said order is issued, I have to follow the said decision of the Commissioner on the matter.

18 Notice also propose to impose penalty under Rule 25 of the Central Excise Rules, 2002 and/or Section 11AC of the Central Excise Act, 1944 for the violations of Section 4 of the Central Excise Act, 1944 and Central Excise Valuation Rules, discussed above. On the proposal to penalize them under Section 11AC of the Act, assessee is found to have contended that the ingredients under Section 11AC for imposition of penalty are *pari materia* to the ingredients of Section 11A for invoking the extended period of limitation; that in such a case where the extended period of limitation cannot be invoked, no penalty can be imposed on them under Section 11AC of the Act. On the matter of penalty under Rule 25, it is contended by the assessee that since they cleared finished goods under the cover of excise invoices, clause (a) of Rule 25 is not applicable; since there is no dispute that the finished goods were account for in specified records of the assessee, Rule 25(b) is also not invokable; that they had duly obtained c.excise registration as per Rules, and hence Rule 25(c) is also not applicable; that

there was no intention to evade payment of duty by them as they regularly filing ER-1 returns and no suppression of facts by them and hence clause (d) of Rule 25 is also not applicable.

18.1 The period covered in the present notice is November, 2015 to March, 2017. Thus the provisions of Section 11AC of the Act after amendments made vide Finance Act, 2015, effective from 14.5.2015 are applicable in the instant case. Section 11AC (1) (a) is being incorporated with effect from 14.5.2015 to determine the penalty in cases not involving fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Excise Act or Rules with the intent to evade payment of duty, in the following manner -

a) Ceiling of 10% of the duty determined under Section 11A(10) of the Excise Act or Rs. 5,000/-, whichever is higher;

b) No penalty leviable if duty amount and interest is paid within 30 days of issuance of SCN and proceedings in respect of such duty amount and interest shall be deemed to have been concluded;

c) Reduced penalty equal to 25% of the penalty if the duty amount, determined under Section 11A(10), interest and reduced penalty is paid within 30 days of communication of the Adjudication Order.

d) If the duty amount or penalty is increased in any Appellate proceedings, then the benefit of reduced penalty shall be admissible if duty, interest and reduced penalty on such increased amount is paid within 30 days of such Appellate Order.

It would be evident from above that in the case where demand notice issued under Section 11A within the normal period of two years also penal provisions under Section 11AC(1)(a) of the Act can be invoked. In the present case, on the basis of discussions made at above paras, conclusion is made that duty demand made under Section 11A(1) sustains and accordingly under Section 11A(10) of the Act the amount of the duty of excise due from the assessee; i.e. Rs. 91,97,088/, is being determined. Thus the above contention of the assessee that in a case where the extended period of limitation cannot be invoked, no penalty can be imposed on them under Section 11AC of the Act is not acceptable. Further the assessee have contravened the provisions of Section 4 of the Central Excise Act, 1944, Central Excise Rules, 2002, Central Excise Valuation Rules as mentioned above with intent to evade payment of duty of excise and hence satisfy all conditions of Rule 25(1)(a) and 25(1)(d) of the Central Excise Rules, 2002. Accordingly, I hold that the assessee is liable to face penal proceedings under the provisions of Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.

18.2 Now I deal with the proposal of the notice to confiscate the excisable goods cleared by the assessee during the period November, 2015 to March, 2017 under the provisions of Rule 25 of the Central Excise Rules, 2002. Considering that the goods cleared by the assessee during the said period is not available physically and the said goods were not cleared by the assessee clandestinely, I do not endorse the proposal made for the confiscation of the goods. This view is also based on the fact that for the violation of Act/Rules, penalty is already imposed on the assessee under the provisions of Section 11AC of the Act read with Rule 25 of the Rules.

19. In respect of proposal to charge interest on the duty not paid under Section 11AA of the Central Excise Act, 1944 it is seen that as per the provisions of this section the person, who is liable to pay duty, in addition to the duty, be liable to pay interest at the specified rate. Thus

interest liability accrues automatically from confirmation of demand of duty as recoverable. In the instant case, it is already concluded that the assessee have to pay duty of excise as per the demand made in the subject notice. The Apex Court in the case of CCE v. International Auto Ltd, reported at 2010 (250)ELT. 3(SC) observed that the interest is charged to compensate the department for loss of revenue. Relying upon this judgment of Hon'ble Supreme Court, Tribunal in the case of EMCO Ltd v. Commissioner of C.Excise, Mumbai, reported in 2011 (272) ELT. 136 (Tri.-Mumbai) held that the interest liability is a consequential liability whenever there is delayed payment of duty. Accordingly, the assessee is liable to pay interest under Section 11AA of the Act on the duty which is not paid. Thus I hold that the assessee is liable to pay interest on the duty of excise confirmed under the provisions of Section 11AA at the rate as applicable during the relevant period.

20. In view of above I pass the following order.

ORDER

(i) I confirm the demand of central excise duty amounting to Rs. 91,97,088/ (Rupees Ninety One Lakhs Ninety Seven Thousand and Eighty Eight only) against M/s. Tata Motors Limited, Survey No. 1, Village Northkotpura, Taluka, Sanand, Ahmedabad, Gujatat-382 170 under Section 11A(1) of the Central Excise Act, 1944 and order for the recovery of the same.

(ii) I also order for the recovery of the interest on the duty amount, mentioned at Sl.No (i) above under the provisions of Section 11AA of the C.Excise Act, 1944.

(iii) I impose a penalty of Rs. 9,19,709/ (Rupees Nine lakhs nineteen thousand seven hundred and nine only) upon M/s. Tata Motors Limited, Survey No. 1, Village Northkotpura, Taluka, Sanand, Ahmedabad, Gujatat-382 170 under read with Section 11AC (1) (a) of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.

However, if the amount of duty of excise and interest payable thereon, mentioned at Sl.No. (i) & (ii) above, is paid within thirty days from the date of communication of this order, the amount of penalty liable to be paid by the assessee shall be twenty five per cent of the penalty amount determined at Sl.No. (iii) subject to the payment of the amount of reduced penalty within the period of thirty days from the communication of this order.

(iv) I restrain from ordering for the confiscation of the excisable goods of the assessee cleared during the period November, 2015 to March, 2017 under the provisions of Rule 25 of the Central Excise Rules, 2002.

21. Proceedings under the above mentioned provisions are saved by Section 174 of the Central Goods and Service Act, 2017.

(G.C. Jain)
Joint Commissioner
Central Goods & Service Tax & C.Excise
Ahmedabad-North

FNo. LTU/MUM/CEX/Adj-19/Tata Motors/17-18 Date: 06.02.2018

By Regd Post AD

To

M/s. Tata Motors Limited,
Survey No. 1,
Village Northkotpura, Taluka, Sanand,
Ahmedabad, Gujatat-382 170

Copy to:

1. The Commissioner of CGST & C.Excise, Ahmedabad-North (RRA Section)
2. The Deputy/Assistant Commissioner of CGST & C.Ex., Division III, Ahmedabad North
3. The Superintendent of CGST & C.Excise, AR. V/Division III, Ahmedabad North
4. Guard File.