आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009

फ़ोन नंबर./ PHONE No.: 079-2754 4599 फैक्स/ FAX : 079-2754 4463 E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. STC/15-42/OA/2020 DIN 20210364WT000071287A

आदेश की तारीख़ / Date of Order : 22.03.2021

जारी करने की तारीख़ / Date of Issue : 22.03.2021

द्वारा पारित/Passed by -

अमरजीत सिंह / AMARJEET SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–34/2020-21

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

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

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad, Gujarat 380004.

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

An appeal against this order shall lie before the Tribunal 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)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा

हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम एक प्रमाणित प्रति होगी।

(The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide Show Cause Notice no. LTU/MUM/CX/GLT-4/TML-Pimpri/125/2014 dated 24.8.2017 issued to M/s. TATA Motors Ltd. situated at Survey No. 1, Vill Northkotpura, GIDC Sanand, Sanand, Ahmedabad - 382170.

Brief facts of the case :

M/s. TATA Motors Ltd. situated at Survey No. 1, Vill Northkotpura, GIDC Sanand, Sanand, Ahmedabad - 382170 is a registered unit holding Central Excise Registration No. AAACT2727QXM023 and manufacturing Motor Vehicles and Parts thereof falling under Chapter 87, 84. 82 etc. of the First Schedule to the Central Excise Tariff Act, 1985.

2. During the course of EA-2000 audit conducted on the records of M/s. TATA Motors Ltd. Unit at Sanand, Ahmedabad by the officers of Ahmedabad-II Commissionerate and as communicated vide Audit Report issued vide No. 54/2013-14 dated 20.01.2014, an observation was made by the auditors on the basis of total income and expenditure figures shown in Trial Balances for Financial Years 2010-11 & 2011-12 pertaining to the said unit that the unit was running in loss and the applicability of the judgment passed by Hon'ble Supreme Court in Civil Appeal No. 1648-49/2004 in the case of Commissioner of Central Excise, Mumbai Vs. M/s. Fiat India Pvt. Ltd. & Anr. [2012(283) E.LT.161 (S.C.)] had to be verified.

3. The facts in the above said case of M/s. Fiat India Ltd are that cars were sold at a price substantially lower than the cost of manufacture for a period of five years with an intention to penetrate to market and Hon'ble Supreme Court held that in such circumstances revenue could reject the transaction value declared under Section 4 and invoke the provisions of the Central Excise Valuation (Determination of Price of Excisable goods) Rules, 2000 to assess excise duty.

4. In pursuance of Notification No. 20/2006 CE(NT) dated 30.09.2006, M/s. TATA Motors Ltd. having centralized office at Pimpri, Pune-411 018, had opted to function as a Large Taxpayer Unit and obtained Membership No. LTU/MUM/3307 dated 28.05.2013, under the jurisdiction of the L TU Commissionerate, Mumbai.

5. Accordingly, the investigation on the issue pointed in above said audit report was initiated by the Officers of L TU, Mumbai. In order to verify the issue, L TU, Mumbai had called for the detailed information from M/s. TATA Motors Ltd and the details in respect of vehicles sold below cost of production based on CAS 4 certificates and the transaction value of such vehicles cleared during 29.08.2012 to 30.09.2013 were submitted by M/s. TATA Motors Ltd. vide their letters AC/CEX/23/444 dated 07.03.2014, AC/CEX/23/65 dated 05.06.2014 and AC/CEX/23/69 dated 11.06.2014. Details of the same for the period from 01.10.2013 onwards were further called for by LTU Mumbai from M/s. TATA Motors Ltd. vide letters F.No.LTU/MUM/CX/GLT-4/TATA/Misc/2013 dated 30.07.2014, 04.12.2014, 06.07.2015 and 09.11.2015 and M/s Tata Motors Ltd. made further submissions vide their letters AC/CEX/23/188 dated 20.10.2014, AC/CEX/23/134 dated 20.07.2015 and AC/CEX/23/275 dated 18.11.2015.

6. From the detailed information submitted by M/s. TATA Motors Ltd. vide their above said letters covering period w.e.f. 29.08.2012 (i.e. the date of Hon'ble Supreme Court's Order in the matter of M/s. Fiat India Ltd. & Anr.) up to 10.07.2014 (i.e. till amendment to Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules. 2000 by inserting proviso vide Notification No. 20/2014- C.E.(NT.) dated 11.07.2014) it is observed by the officers of LTU, Mumbai that the transaction value of Motor Vehicles, as detailed therein, prima facie, appears to be lower than the cost of production and therefore, the said transaction value/ price so declared by M/s. TATA Motors Ltd. cannot be termed as normal transaction value / price for the purpose of quantification of the assessable value under Section 4(1)(a) of the Central Excise Act, 1944. Details of such clearances of Motor Vehicles were submitted by M/s. TATA Motors Ltd. vide letter 18.11.2015. The clearances effected from Sanand Nano is furnished in table below:

Summary of Vehicals having Assessable Value less than Cost of Production in r/o M/s Tata Motors Ltd., Sanand									
Sr.	Period	Despatch Quantity (No.)	Rate of Excise Duty(%)	Assessable Value (AV) in cr.	Excise duty paid on AV (in cr.)	Cost of Production (COP) (in cr.)	Excise Duty calculated on COP (in Cr.)	Difference between AV and COP (in Cr.)	Difference between Excise Duty paid on AV and calculate on COP (in Cr.)
1	29.08.2012 to 31.03.2013	25172	13.52	319.82	43.24	467.73	63.24	147.91	20.00
2	01.04.2013 to	17002	13.52	271.36	36.69	376.02	50.84	104.66	14.15
3	31.03.2014	4129	9.4	71.92	6.76	97.01	9.12	25.09	2.36
4	01.04.2014 to 01.07.2014	3376	9.4	58.46	5.50	81.09	7.62	22.63	2.13
								Total	38.63

7. It appears that the cost of production of their 'NANO' model of Motor Vehicles manufactured by M/s. TATA Motors Ltd. at their Sanand plant is much higher than the price at which the goods were being sold by them through their distributors / dealers to the ultimate consumer and the price appears artificially computed contrary to the basic tenets enshrined under the governing statute. When normal price cannot be ascertained as per Section 4(1)(a) of the said Act, the alternate procedure is under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred to as Valuation Rules) i.e. cost of production and profit has to be applied. Scrutiny of the facts on record suggests that M/s. TATA Motors Ltd. has not adhered to the basic principles prescribed under the Valuation Rules and has not fulfilled the conditions enumerated in Section 4(1)(a) of the Central Excise Act, 1944 and therefore, valuation has to be done in accordance with Section 4(1)(b) of the said Act read with the said Valuation Rules.

8. Since the assessable value of the subject goods declared by M/s. TATA Motors Ltd. does not reflect the true value of the goods, the reason for lowering the price by M/s. TA TA Motors Ltd. below the manufacturing cost appears to be driven by the motive to compete with other manufacturers and to capture market for their vehicles. Therefore, such price cannot be treated as 'normal price'. Thus, it appears that the declared price of the goods does not represent the real 'Transaction Value' under the provisions of Section 4(1)(a) of the Act ibid.

9. Section 3 of the Central Excise Act, 1944, being a charging section, clearly stipulates that the taxable event for attracting excise duty is the manufacture of excisable goods. Since the duty of excise is on the manufacture of goods irrespective of the fact whether they are sold or used within the factory of manufacture for captive consumption, sale is not a necessary condition for charging Excise Duty. Section 3 of the Act provides for levy of duty of excise and Section 3(i) thereof states that there shall be levied and collected in the prescribed manner, a duty of excise on excisable goods manufactured in India at the rates set forth in the First Schedule to the Central Excise Tariff Act, 1985. The provisions of Section 4 of the Act lay down the measure by reference to which the duty of excise is to be assessed. Section 4 of the Act read with the Valuation Rules provide for the core provision containing statutory formula for assessment and collection of duty at ad-valorem basis of duty under the Central Excise law.

10. Whereas it appears that a deliberately lowered loss making price cannot be accepted as the 'normal price' of the goods especially when it is spread over a substantial period of time and it could be inferred that such consideration could only be to compete with other manufacturers who are also engaged in the manufacture of the goods falling under the same Chapter Heading of Central Excise Tariff Act, 1985. Whereas it is well settled that under sub-section (1)(a) of Section 4 of the Central Excise Act, 1944, the 'normal transaction value / price would be the price which would be the price which must only be the sole consideration for the sale of goods.

11. The Hon'ble Supreme Court has held in the case of Union of India Vs. Hindalco Industries [2003(153)E.L.T.481] that *'if there is anything to suggest to doubt the normal price of the wholesale trade, then recourse to clause (b) of sub-section (1) of Section 4 of the Act could be made'.*

12. Whereas Section 3 of the Central Excise Act, 1944 is the charging section and the Central Excise duty is payable on the basis of transaction value. Section 4 of the Act lays down the valuation of excisable goods chargeable to duty of excise. Therefore, it is important to understand the true construction of the relevant provisions of Section 3 and Section 4 of the Central Excise Act, 1944, which are as under:

"SECTION 3. Duties specified in the (First Schedule and the Second Schedule) to the Central Excise Tariff Act, 198 5) to be levied. -(1) There shall be levied and collected in such manner as may be prescribed,

(a) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods (excluding goods produced or manufactured in special economic zones) specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule.

(provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, -....."

SECTION 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 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 the removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value ;

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

[Explanation.-For the removal of doubts, it is hereby declared that the price- cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration. if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum- duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purposes of this section,-

(a)

(b)

(c) .....

(d) "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 provision for, advertising or publicity, marketing and selling organization 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 paid or actually payable on such goods."

12.1. A plain reading of Section 4(1)(a) ibid reveals that the valuation of the excisable goods chargeable to duty of excise on ad-valorem would be based upon the concept of transaction value provided (i) the goods are sold for delivery at the time and place of delivery; (ii) the buyer is not a related person, and (iii) the price is the sole consideration for sale. It is a deeming provision and the said three conditions are necessarily required to be satisfied for a case to qualify under clause (a) of Section 4(1) of the Act failing which the transaction value shall not be the assessable value and value in such case has to be arrived at as per provisions of Section 4(1)(b) and the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

12.2. Relevant provisions of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, during the relevant period stipulate as under:

"Rule 3. The value of any excisable goods shall, for the purpose of clause (b) of subsection (1) of Section 4 of the Act, be determined in accordance with these rules.

Rule 4. The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable.

Rule 5. Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal up to the place of delivery of such excisable goods.

Explanation 1.- "Cost of transportation" includes

(i) the actual cost of transportation; and

(ii) in case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2. - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purposes of determining the value of the excisable goods.

Rule 6. Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

Explanation 1- For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value

has not been included in the price actually paid or payable shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely :

(i) value of materials, components, parts and similar items relatable to such goods;

(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

Rule 11. If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and subsection (1) of section 4 of the Act."

13. Whereas after taking the manufacturing cost and manufacturing profit into consideration, the re-determined value of the goods manufactured and cleared by M/s. TATA Motors Ltd. during the period **29.08.2012 to 10.07.2014** has been worked out as per the details submitted by M/s. TATA Motors Ltd vide letter AC/CEX/23/275 dated 18.11.2015.

14. It could be inferred from the details submitted by M/s TATA Motors Ltd. vide their letter dated 18.11.2015 that the price of their Motor Vehicles sold through their dealers was not based on the manufacturing cost & manufacturing profit but was fixed at a lower price to penetrate the market and to compete with other manufacturers of similar goods. The full commercial cost of manufacturing was not getting reflected in the lower price. There could be instances where a manufacturer may sell his goods at a price less than the cost of manufacturing and manufacturing profit, when the company wants to switch over its business to any other manufacturing activity. It could also be where the manufacturer has goods which could not be sold within a reasonable time. Whereas in the instant case, the price charged for the sale of the Motor Vehicles appears to be extra-ordinary or unusual price, specially low price, charged because of extra-commercial considerations and such transaction value does not fit into the meaning of the expression 'price is the sole consideration' in terms of Section 4(1)(a) of the Central Excise Act, 1944. Thus, it appears that the price was not the sole consideration and in such circumstances the value of vehicles cleared by M/s. TATA Motors Ltd. during the period 29.08.2012 to 10.07.2014 is required to be re-determined taking into consideration the manufacturing cost & manufacturing profit of the said goods in terms of Section 4(1)(b) read with Rule 11 of the Valuation Rules, 2000 for the purpose of excise duty.

15. The Central Board of Excise & Customs has issued Circular No. 955/16/2011-CX dated 15.09.2011 making it mandatory for assessees to submit prescribed Central Excise Returns electronically (i.e. e-filing of returns) w.e.f. 01.10.2011. The ER- 1 Return, filed under Rule 12(1) of the Central Excise Rules, 2002, will have to be electronically filed irrespective of the duty paid in the preceding financial year. Central Excise law envisages self-assessment of duty by the assessee and filing of the prescribed returns periodically, so that Department is kept informed about the assessment and duty payment by the assessee. Fundamental ingredient of this trust based scheme is the regular filing of correct returns by the assessee. These returns enable the Department to verify the duty payment, CENVAT Credit taken and other such parameters related to assessment. It is observed that M/s. TATA Motors Ltd. has not furnished the details of correct value of goods cleared in their ER-1 returns. It has been observed that they were not declaring the true and correct assessable value of their Motor Vehicles in the monthly returns filed with the Department. M/s. TATA Motors Ltd. has failed to pay proper Central Excise Duty by way of not determining the correct assessable value and not following the Central Excise procedures laid down under the Central Excise Rules, 2002 read with Central Excise Act, 1944. M/s TATA Motors Ltd. have thus taken recourse to suppression of facts leading to evasion of Central Excise Duty and appears to have deliberately engaged in the aforesaid omissions and commissions and contraventions of the relevant provisions of Central Excise Act, 1944 and the rules made thereunder. Hence the amount of central excise duty short paid by the assessee for the period **29.08.2012 to 10.07.2014** is liable to be demanded alongwith interest invoking the extended period under Section 11A (4)(c)(d)&(e) and they are also liable to penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.

16. As per instruction dated 21.12.2015 of Member(L&J/IT),CBEC, a pre show cause notice consultation was held with the representatives of M/s Tata Motors Ltd on 24.08.2017. The representatives Namely Shri Saurabh Chaudhuri, Head (Finance) and Shri Hardik Pandya, manager, Indirect Taxation, submitted a brief dated 19.08.2017 which is being taken on record. It was further informed that the facts were different in the Fiat case where the unit had itself admitted that they intended to penetrate the market. In this case, there is no intention to

penetrate the market as they are the sole manufacturer in this Sector (Nano), i.e Micro segment. Hence the ratio of Hon'ble Supreme Court's judgment in Fiat case is not applicable to their case. Hence they pleaded that demand should not be raised in respect of their unit.

17. It appeared that M/s. TATA Motors Ltd., Sanand Unit have short paid the Central Excise duty of **Rs. 38.63 Crores (Rupees Thirty Eight Crore Sixty Three Lakh Only)** as detailed in Table-A by reason of mis-statement and suppression of facts and have therefore appeared to have contravened the provisions of Section 4(1) of the Central Excise Act, 1944 read with Rule 4, 6, 8, 11 & 12 of the Central Excise Rules, 2002 with an intent to evade payment of duty. M/s. TATA Motors Ltd. are working under self assessment procedure throughout the period of dispute and therefore is statutorily required to follow the prescribed norms as laid down under the Act/ Rules ibid. Thus, the onus of correct assessment/ payment of appropriate duty of excise was always upon them but they appear to have deliberately adopted wrong method of valuation and thereby have short paid the duty.

18. It appeared that the short payment of Central Excise duty amounting to Rs. 38.63 Crores (Rupees Thirty Eight Crore Sixty Three Lakh Only) as detailed in Table-A is liable to be recovered alongwith applicable interest from M/s. TATA Motors Ltd. under the proviso to Section 11A of the Central Excise Act, 1944 read with Section 11AA ibid. Further, M/s. TATA Motors Ltd. appear to be liable for penal action under Section 11 AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002 for suppression of the true value of clearances.

19. CBEC vide Notification No. 12/2017-CE (NT) dated 9.6.2017, appointed officers of Central Excise Department as Central Excise Officers and vested them with the power under the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, with respect to the jurisdiction specified in the notification issued under Rule 3 of the Central Excise Rules, 2002. Further CBEC vide Notification No. 13/2017-CE (NT) dated 9.6.2017 jurisdiction of Central Excise officers has been notified .These notifications are made effective from 22.6.2017 vide Notification No. 16/2017 CE (NT) dated 19.06.2017 and 17/2017 CE (NT) dated 19.06.2017 respectively. CBEC vide Circular No. 1056/05/2017-CX dated 29.06.2017 issued from FNo. 267/40/2017-CX.8 informed that due to the abolishing of Large Taxpayer Units, show cause notices in future shall be issued for the past period under Central Excise and Service Tax Law treating each unit as individual assessee under the jurisdictional Commissionerate as notified by Notification No. 13/2017-CE (NT) dated 9.6.2017. Accordingly, w.e.f. 22/06/2017, M/s. TATA Motors Ltd., Sanand Unit is within the jurisdiction of Central GST and Central Excise, Ahmedabad-North Commissionerate.

20. Therefore, M/s. TATA Motors Ltd., Sanand Unit are hereby called upon to show cause to the Commissioner of Central GST & Central Excise, Ahmedabad North having his office at 1 Floor, Custom House, Opp Old High Court, Navrangpura, Ahmedabad - 380 009, as to why:

a. valuation of the impugned goods should not be re-determined in terms of Section 4(1)(b) of the Central Excise Act, 1944 read with Rule 11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000;
b. short payment of Central Excise duty amounting to Rs.38.63 Crores (Rupees Thirty Eight Crore Sixty Three Lakh Only) as detailed in Table-A for the period **29.08.2012 to 10.07.2014** should not be demanded and recovered from them under provisions to Section 11A (4) (c)(d)(e) of the Central Excise Act, 1944;
c. interest at appropriate rate should not be charged & recovered from them under Section 11AA of the Central Excise Act, 1944 on the amount of duty not paid / short paid by them; and
d. penalty should not be imposed upon them under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.

21. <u>DEFENCE REPLY:</u>

The assessee vide their submission dated 21.8.2018,has filed their reply to the Show Cause Notice dated 24.08.2017.Further, vide their letter dated 24.8.2020, they have filed their additional submissions. The assessee vide their submissions, has interalia stated as under:

1. The Noticee is engaged in the business of manufacturing of motor vehicles and parts thereof.The Noticee in the year 2003 introduced the project of developing a price affordable family transport car.

2. The car was first displayed in January 2008. The consumer response towards the car was very good and more than 2.03 lakhs booking were received during 2008-09. The Noticee due to some unfortunate developments had to shift its Nano Plant in Sanand from Singur (W.B). The shift costed around Rs 300 Cr.

3. However, the expected volume of the sales of Nano did not materialize due to the considerable time taken between the launch, booking and delivery of the product and shifting of the plant. Further, the safety concerns associated to Nano lead to negative impact on sale and the economy during that time also slowed down. Due to these reasons, the factory was only working at 25% of its total capacity. The global financial meltdown occurred in the year 2008-09 and rising fuel prices further added to the woes of the automobile industry.

4. The Noticee determines the prices of the products by considering the cost of making the product, consumer affordability for the cars, demand and supply of the product and overall economy of the country.

5. In the year 2012, the Hon'ble Supreme Court in the case of **CCE, Mumbai vs. Fiat India Pvt. Ltd., [2012 (283) ELT 161 (SC)]**, (hereinafter referred to as the **"FIAT judgment"**), heldthat selling goods at a price below cost for market penetration, for a period of more than 5 years indicates the existence of extra-commercial consideration, and therefore, the selling price cannot be considered as the 'normal price' for computing the assessable value in terms of Section 4 of the Act, and therefore, assessable value is to be computed at manufacturing cost .

6. Based on the said decision, the Noticee was served with the impugned SCN alleging that the goods are sold by the Noticee below the cost of production and hence, the assessable value would be cost of production . Accordingly, the impugned SCN demanding differential demand of Rs. 38.63 was served on the Noticee.

SUBMISSIONS

A. **The Hon'ble Supreme Court's judgment in the case of FIAT would not be applicable in the present case, both, on grounds of facts as well as law.**

A.1 The impugned SCN in the present case is issued solely on the basis of the judgment passed by the Hon'ble Supreme Court in the case of **CCE, Mumbai v. Fiat India Pvt. Ltd.**, reported in **2012 (283) ELT 161 (SC)**, (hereinafter referred to as the **"FIAT judgment"**). The non-applicability of the FIAT judgment in the present case has been explained in detail in **Ground-E**of our reply letter dated 21.08.2018.

A.2 The Hon'ble Supreme Court judgment in the case of **FIAT India Pvt. Ltd. [2012 (283) ELT 161 (SC)]** cannot be applied in the present case on account of various grounds:

a. The above said judgment was passed based on the peculiar facts wherein the assessee was having the cost of material in the range of Rs. 4 lacs whereas the car was sold in the market at less than 50% of the material cost and not even the total cost of production which was in the range of 5 Lac. In the present case, Nano was not planned to be sold at loss. It was anticipated that the company would make a good profit over the life cycle of the product. However, multiple reasons which *inter-alia* include relocation from Singur to Sanand, delayed delivery of the product in time, negative publicity (cheap car), and 4 incidences of vehicle catching fire, the sale could not kick-off and the Noticee could not utilize even 25% of the installed capacity. Eventually the Company had to discontinue this product in the recent years.

b. It is not a case of penetration in the market in as much as the Noticee is in existence since 1945 and holding large share in the automobile market. Whereas in the case of

FIAT, it was admitted fact that the product was priced to penetrate in the market as FIAT was not having any foothold in India.

c. Nano was not priced to either beat or match up with the competition in the market. In fact, this was the first of this sort launched in the market ever in India and even today there is no competition to this product.

d. During the period from 2012 to 2014, the entire automobile Industry could not make a profit due to volatile economic conditions.

e. Even the Supreme Court in para 50 of the judgment, held that there can be genuine situations where a manufacturer has to incur losses, and in all such situations, the transaction value cannot be rejected. Also, in para 66, it has been held that principles laid down in the case of FIAT do not have the general application. The facts of each case has to be evaluated independently to reach to any conclusion. Clearly in the present case the said judgment cannot be applied as basic ingredients to apply this judgment are missing in the present case.

A.3 In order to bring clarity regarding the applicability of FIAT Judgment, CBEC issued a detailed Circular No. **979/03/2014-CX dated 15.01.2014** on the implementation of FIAT judgment (hereinafter referred to as **'Circular'**). The Circular expresses the view of the Governmentand spells out the modality of implementation of the FIAT Judgment. It has been specifically mentioned in the Circular that the FIAT Judgment does not have universal application and thus, cannot be applied on every loss-making scenario.

A.4 The said Circular sets out three crucial and important factors for rejecting the transaction value where the sale price is below cost, which are not present in the instant case, as explainedin the later submissions: -

a. Reasons for sale at loss making price;
b. Whether such sales are contrary to the standard and accepted business practices; and
c. Whether such sale is leading to erosion of capital of the company.

The above three factors are not being satisfied in the present case and therefore, it is submitted that factual matrix of the instant case is no-where close to the factual matrix involved in the FIAT judgment passed by the Apex Court and that the impugned SCN issued on the basis of FIAT judgement to Noticee proposing the duty demand is unsustainable

A.5 The submissions of the Noticee *vis-à-vis* non-satisfaction of the three conditions laid down in the Circular are as under: -

<u>*Reasons for sale at loss making price*</u> -

A.6 Even though Sanand Plant was set up with installed capacity of 2.50 Lakhs cars p.a., the volumes unfortunately due to did not materialize due to following three reasons:

a) There was a considerable lapse of time between launch, booking and actual delivery of product, due to shifting of manufacturing facility from Singur to Sanand.

b) Four Nanos, out of a few thousands sold, had a fire accident on public roads which were blown out of proportion in the media and raised concerns on the safety of the vehicle leading to further negative impact on sale.

c) Economic slowed down coupled with Global economic meltdown in the automobile industry and rising fuel price.

A.7 This conclusively establishes that the reason for making losses on the subject model of vehicle in dispute for the period in dispute was genuine and without any intention to penetrate the market on part of the Noticee. It is submitted that the Noticee always determinesthe price of its products based on the prudent business practices with the intention to earn profits only.

A.8 It is further submitted that the Noticee commenced its manufacturing operations long back in the year 1945 and holds a substantial share in the Indian market. Thereby, evidencing that the Noticee was already prevalent in the Indian Market for a long time. However, in the case of FIAT, the cars sold by FIAT were not established models in the Indian market and never earned profit in the Indian market, thereby, making every possible situation for FIAT to adopt practice of undervaluing its cars, which is not present in the case of the Noticee. Hence, there cannot be any intention to penetrate the market by the Noticee during the period in dispute.

A.9 Thus, it is submitted that from the above-mentioned Para 50 & 66 of the FIAT Judgment read with the Circular, it is clear that the FIAT judgment will not apply for any and every situation where the manufacturer incurs losses, especially where the loss is incurred for the factors beyond the control of the manufacturer. The ratio of the said judgment could be applied only to cases, where assessee has deliberately incurred losses to acquire market share or due to any reason mentioned in Para A.6 above, and not in genuine situations, where the manufacturer incurs losses such as when the manufacturer wants to switch over its business for any other manufacturing activity or where the manufacturer has goods which could not be sold within a reasonable time.

Whether such sales are contrary to the standard and accepted business practices

A.10 The Noticee has always followed prudent trade and business practices and has always endeavoured its best to ensure that the vehicles are sold in profit. Apart from the prudent financial motives, the pricing decisions are also guided by other elements like economic environment, product life cycle, people's taste and priority, consumer affordability for the vehicles andmarket forces of demand and supply etc.

A.11 If for the factors beyond its control, the entity cannot earn desired profit, this will not *ipso facto* make the business practices of the entity contrary to accepted ones.It is further submitted that the Noticee was not the lone organization incurring losses in the auto sector, during the period in question. The peers of the Noticee were also suffering from losses on account of several factors which had a collective impact on the whole auto industry.The business performance of the Noticee was in line with the general auto market trend in India. The detailed submissions in this regard are made in Para D.13 to D.15 of the reply dated 21.08.2018.

A.12 It is further submitted that the entities making losses have not been limited to the private sector. In fact, the Government owned public sector undertakings have also been incurring significant losses over the disputed period. Therefore, it may be incorrect to say that every business entity which incurs losses does it with an intent to penetrate the market. Profit or loss is inherent reward or risk to a business entity and every loss cannot be imputed to a market penetration strategy. There is not even an *iota* of evidence to this effect in the impugned SCN.

A.13 However, the Department while issuing the impugned SCN has not taken into account these aspects. It is submitted that the impugned SCN issued is totally devoid of understanding and appreciation of commercial and economic considerations and business prudence, which are the most relevant factors while evaluating an economic linked issue of the present nature.

Whether such sale is leading to erosion of capital of the company –

A.14 It is further submitted that there has been no erosion of Noticee's capital due to such losses on car in dispute. The Noticee is by and large a profit-making organization, except for the period in dispute.The Noticee has been making reasonable amount of profits on its manufacturing business. Therefore, it is submitted that the present case is not a case of capital erosion. The said facts are substantiated by perusal of the balance sheets of the Noticee for the period in dispute, which have been enclosed as Annexure - 6, to the reply dated 21.08.2018.

A.15 In the present case, the Noticee has always been a profit-making entity on standalone basis as well as on consolidated basis. A year-wise tabular data showing the profit position and other relevant financial information is as under:

Period	Total Assessable Value of all vehicles	Total COP of all vehicles	Profit / (Loss) percentage on COP
From 29.08.2012 to 31.03.2013	Rs.15839 crores	Rs.13262 crores	19.43%
From 01.04.2013 to 31.03.2014	Rs.20755 crores	Rs.16558 crores	25.35%
From 01.04.2014 to 10.07.2014	Rs.5858 crores	Rs.4488 crores	30.53%

The aforesaid data along with the illustrative financial statements in this regard have been enclosed as Annexure-7& 8to our reply dated 21.08.2018 (please refer Page No. 162 to 647 to the said submissions). It is further submitted that the Circulars issued by CBEC are binding on the Department and the Department cannot take a stand contrary to the same.

A.16 To conclude, it is submitted that factual matrix of the instant case is no-where close to the factual matrix involved in the FIAT judgment passed by the Apex Court. It is therefore submitted that, as the element of deliberate loss making to penetrate the market is absent in the present case, the ratio laid down by the Hon'ble Supreme Court in the FIAT judgment cannot be applied to the facts of the present case. Therefore, the impugned SCN proposing to reject the transaction value of the cars on the basis of FIAT judgment, is liable to be dropped.

B. <u>The present issue is squarely covered in favour of the Noticee, in view of the recent decision of the Hon'ble Tribunal of Delhi, in the case of M/s Honda Cars India Ltd. v. CCE, Delhi.</u>

B.1 It is submitted that the present issue is squarely covered in favour of the Noticee, in view of the recent decision passed by the Hon'ble Tribunal of Delhi on 26.02.2018, in the case of **M/s Honda Cars India Ltd. v. CCE, Delhi, 2018-TIOL-1507-CESTAT-DEL**. The Hon'ble Tribunal in the said case was dealing with an identical issue of whether the sale of cars below cost of production would amount to market penetration as held by the Apex Court in the FIAT judgment. After carefully considering the various submissions of the assessee and the Revenue, the Hon'ble Tribunal while distinguishing the case from the FIAT judgment, remanded the matter for fresh adjudication on account of various inadequacies in the order of the lower authorities.

B.2 The facts of the said case are akin to the facts of the Noticee. In the said case, the Hon'ble Tribunal made the following significant observations:

a. Fixation of price to compete with similarly placed products cannot be assumed to be for "penetration of market".There is no admission of "penetration of market" by the assessee.

b. If the lower price is due to commercial consideration of competing in the market with no evidence of flow back of extra commercial consideration, then, it cannot be held that the transaction value is not based on the principle of price being the sole consideration.

c. The assessee was centrally registered with Large Taxpayer Unit (LTU) during the relevant time. As such, the production clearance of the assessee in all their units should have been considered in a holistic manner especially while examining the applicability of ratio of the decision of Apex court in Fiat case.

d. Every loss does not result in erosion of capital. Net worth of the company is different from the capital of the company. Unless there was reduction in the share capital, losses cannot be treated to have led to erosion of capital.

B.3 Hence, based on the observation made by the Hon'ble Tribunal in the said judgement, the impugned SCN is liable to be dropped as the entire case is based on the incorrect application of the FIAT Judgment.

B.4 Further, as observed by the Tribunal in the case of Honda Cars, the Noticee were also centrally registered with large tax payer unit (LTU) during the relevant time, therefore, the production clearance of the Noticee in all their Plants should have been considered in a holistic manner especially while examining the applicability of ratio of the decision

of Apex court in Fiat case. The Noticee had always been in a profitable position on an overall basis. The total assessable value *vis-à-vis* the COP of the vehicles sold (as mentioned above) from all the Plants during the said period shows that on overall basis, the vehicles were sold above the COP only. There was no under recovery of cost, and in fact, the profit has been rising over the years, however the Department has completely ignored this aspect.

B.5 In view of the above, it is submitted that the impugned SCN should be dropped, as the same has been issued without any basis.

C. **The impugned SCN is liable to be dropped on account offavourable Order being passed in Noticee's Dharwad, Lucknow and Jamshedpur Plant.**

C.1 It is further submitted that in Noticee's own case, the Show Cause Notice proposing to demand differential excise duty in respect of vehicles sold below COP from Dharwad Plant has been entirely dropped by the Ld. Commissioner, Central GST and Central Excise, Belgaum, *vide* **Order-in-Original No. BEL-EXCUS-000-COM-BKK-013/17-18 (CX) dated 27.03.2018.**

C.2 The Ld. Commissioner while passing the above Order dated 27.03.2018 has admitted that that there is no market penetration involved on overall basis, the consolidated operations of the Noticee from all the Plants resulted into profits and there was no erosion of capital.

C.3 Further, at para 27 of the Order, the Ld. Commissioner distinguished the FIAT Judgement by stating that the sale of excisable goods in the present case is not similar to the facts and circumstances of the FIAT case and recourse to the Section 4(1)(b) of the Central Excise Act, 1944 is not warranted and the demand of differential duty in the Show Cause Notices is not maintainable.

C.4 Similarly, the Show Cause Notice proposing to demand differential excise duty in respect of vehicles sold below COP from Lucknow and Jamshedpur was also vide dropped vide **Order-in-Original No. 09/AC/JCLKO/CX/2018-19 dated 31.01.2019Order-in-Original No. 31/Commr/2018 dated 31.12.2018** respectively.

C.5 Therefore, it is submitted that, Noticee is one entity operating from many locations, therefore, an Order passed on same issue for one location will be applicable on all the locations which is on the similar issue.

D. **The proceedings have been initiated against the Noticee with a pre-conceived notion and by pre-judging the issue against the Noticee without any basis, statutory or otherwise.**

D.1 It is undisputed fact on the record that the proceeding was initiated against the Noticee based on the FIAT judgement delivered on 29th August 2012.It is submitted that the tone and tenor of the said Show Cause Notice clearly indicates the pre-judged mind and the prejudice of the Department while initiating the proceedings against the Noticee. It is settled principle of law that the proceedings cannot be initiated against an assessee with a prejudicial mind set. The Hon'ble Supreme Court in the case of **Oryx Fisheries Pvt. Ltd. Vs. Union of India, 2011 (266) ELT 422 (SC)**, has explained as to how a show cause notice should be issued, what kind of language should be used in a show cause notice and further as to how the show cause notice should not show the prejudicial mind-set of the authority issuing it.

D.2 The Department in the present case, has not fulfilled its onus to provide evidences and therefore it is clear that the allegations in the impugned SCN have been made solely on the basis of presumptions regarding facts of the Noticee being similar to that of FIAT India.

D.3 It is further submitted that the departmental authorities have initiated the present proceedings on the premise that the Noticee has not acted in a prudent manner while undertaking business activities and has deliberately incurred loss on sale of vehicles. However, the Department has failed to look into the reasons for loss-making price and

has presumed that the sale of motor vehicles increases with their lowering of price /assessable value.

D.4 Further, if the product is not performing in line with business and not showing sustainable profitability, the management as a policy also takes appropriate decisions to phase out the product/ product range and these circumstances are normal in every automobile company and therefore, the mere fact that the lowering of prices lead to increase in sale volumes cannot be the sole basis to allege that the Noticee intended to penetrate the market.

D.5 The Noticee has always acted in a prudent manner and has taken every possible step to improve the sales of the product, with an intention to maximize the shareholders' wealth and earn profits. It is therefore submitted that the loss incurred on the Nano sales arose on account of various uncontrollable reasons as explained above and was not on account of market penetration. Further, the Noticee was already well-established player in the automobile sector as there was no intention to penetrate the market. Therefore, the allegations made in the impugned SCN that the Noticee was pricing the vehicles in dispute with the intention to penetrate the market is unsustainable and without any basis.

D.6 Therefore, based on the above submissions, the impugned SCN is issued without any basis and hence shall be dropped forthwith.

E. **Extended period of limitation cannot be invoked in the present case.**

E.1 The Department in the impugned SCN dated 24.08.2017 has invoked the provisions of extended period of limitation to demand the differential excise duty for the period from 29.08.2012 to 10.07.2014.

E.2 It is submitted that the Act or any Rules framed under it, till date do not contemplate a situation wherein the non-monetary value can also amount to consideration for the purpose of assessable value. The said concept was only introduced to the Excise Law *vide* FIAT judgement in 2012. Hence, it is submitted that there could not have been any suppression in relation to the said fact.

E.3 Further, it is submitted in this regard that the FIAT judgment was pronounced in August 2012 to introduce a new concept of extra-commercial consideration in Excise law. The Noticee had submitted all the relevant information and data related to vehicles sold below cost of production from Sanand Plant as and when requested by the Department, as detailed below:

Data for the period	Noticee's letter dated	Annexure Ref. in reply to SCN	Page Nos.
FY 2010-11 & FY 2011-12	10.09.2013 11.09.2013	Annexure-13 Annexure-14	655 to 657 658 to 659
FY 2012-13	21.10.2013	Annexure - 15	660 to 665
29.08.2012 to 31.03.2013	07.03.2014	Annexure - 19	681 to 725
01.04.2013 to 30.09.2013	05.06.2014	Annexure - 20	726 to 771
01.04.2013 to 31.03.2014	20.10.2014	Annexure - 21	772 to 818
01.04.2014 to 10.07.2014	30.06.2015	Annexure - 22	819 to 864

Thus, the whole data and information was available with the Department latest by June, 2015. However, the Department has issued the impugned SCN to the Noticee only in August 2017 i.e. after lapse of the limitation of one year for issuance of SCN as per the limitation provisions contained in the Act.

E.4 It is further submitted that the Noticee has been regularly filing the monthly Excise Returns with the Department indicating the clearance of the motor vehicle and the assessable value thereof. The Noticee submits that they believe and continue to believe that they are liable to pay excise duty based on sale price of vehicles. This bona fide

belief of the Noticee is supported by the Supreme Court judgment in the case of CCE, **New Delhi v. Guru Nanak Refrigeration Corpn. [2003(153) E.L.T. 249 (S.C)]** wherein it has been held that no differential duty can be demanded on the basis of cost of production of goods on the ground that same is higher than the wholesale price of goods. Further, the Hon'ble Tribunal of Delhi in the case of **M/s Honda Cars India Ltd. v. CCE, Delhi, 2018-TIOL-1507-CESTAT-DEL** observed that the whole issue regarding possible differential duty in respect of cars cleared by the assessee arose only because of the decision of Apex court in Fiat India Ltd. In such fact and circumstances, there is no reason to invoke allegation of suppression, misrepresentation with an intention to evade payment of duty on the part of the assessee.

E.5 It is further submitted that the proviso was inserted in Rule 6 of the Central Excise (Determination of Value) Rules, 2000*vide* Notification No. 20/2014-C.E. (N.T.), dated 11-7-2014to nullify the effect of the FIAT Judgment which created industry-wide issue with respect to assessees incurring genuine losses during the course of running their business.

E.6 It is therefore submitted that when the issue in hand was not settled and various clarifications were issued time and again to clarify the intention of the Government, it cannot be held that the Noticee, discharging excise duty on sale price of vehicles, had suppressed any facts with an intention to evade payment of duty, more so when the Noticee had acted in a bonafide manner.

E.7 Moreover, there being no positive act on part of the Noticee to suppress any fact from the Department and there being no evidence for such allegation, the Noticee submits that the proposal to invoke extended period is not correct.

E.8 In view of the above, the Noticee submits that the extended period is not invokable in the facts of the present case and hence the entire demand raised in the impugned SCN is liable to be dropped.

F. **Quantification of Demand is incorrect.**

F.1 Without prejudice to the above-mentioned contentions, if it is assumed that cost of production needs to be considered as the assessable value, then as per the Explanation to Section 4(1) of the Act, price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and money value of the additional consideration, if any, from the buyer to the assesse in connection with the sale of such goods. The loss on which the Department has demanded the duty should be considered as cum-duty price. Therefore, the differential duty should be re-worked at Rs.34.18 Crores in place of duty of Rs.38.63 Crores demanded in the impugned SCN. The computation of the re-quantified demand is enclosed as Annexure-28to the reply letter dated 21.08.2018 (please refer Page No. 909 to 910 to the said submissions).

22. PERSONAL HEARING:

Personal hearing in this matter, was held on 18.3.2021, wherein Shri Shankar Rochlani,Consultant and Shri Sandeep Sachdeva, Advocate appeared before me for the virtual hearing and reiterated the written submissions made by them on 21.8.2018 and 24.8.2020.

DISCUSSION AND FINDINGS:

23. I have gone through the records of the case and the submissions filed by the assessee in their defence. From the facts, of the case, I find that the issues to be decided are as under:

(I) **Whether the sale of excisable goods in present case is similar to the facts and circumstances of the case of FIAT India (P) Ltd. ?**

(II) **Whether valuation has to be done in accordance with Section 4(1)(b) of the said Act read with Valuation Rules?**

24. In the case of M/s Fiat India Ltd reported in 2012 (283) E.L.T 161 (S.C.) the Hon'ble Supreme Court of India, held that in case the goods were sold at a price substantially lower than

the cost of the manufacture to achieve market penetration, the transaction value declared under Section 4 of the Central Excise Act, 1944, may be rejected.

25. Circular No. 979/03/2014-CX. dated the 15th Jan, 2014, issued by CBEC, New Delhi, issued clarification on the said issue, as under:

Circular No. 979/03/2014-CX. dated the 15th Jan, 2014
Subject – Implementation of decision of Hon'ble Supreme Court in case of M/s Fiat India ltd – reg .

Attention is invited to the judgment of Hon'ble Supreme Court dated 29th August , 2012 in case of Fiat India Ltd [2012-TIOL-58-SC-CX or 2012 (283) E.L.T 161 (S.C)] (hereinafter referred to as the FIAT judgment) . References have been received from trade and field formations seeking clarification on implementation of the judgment . The facts in the case of M/s Fiat India Ltd were that the cars were sold at a price substantially lower than the cost of the manufacture and such sales continued for a period of five years . The company admitted that the purpose of such pattern of sale was to achieve market penetration . The Hon'ble Supreme Court held that in such circumstances revenue could reject the transaction value declared under section 4 and invoke the provisions of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules , 2000 to assess Central Excise duty . Following clarifications are issued in this regard -

Transaction Value below manufacturing cost and profit

2. The first issue is whether the declared transaction value can be rejected in all cases where the transaction value is lower than the manufacturing cost and profit . The Hon'ble Supreme Court has not ruled that transaction value can be rejected in all cases where the declared value is lower than the manufacturing cost and profit . At paragraph 66 in the FIAT judgment , the Hon'ble Court has declined to hold its earlier judgment in case of Collector of Central Excise , New Delhi Vs Guru Nanak Refrigeration Corpn [2003(153) ELT 249 (SC)] per-in curiam , distinguishing it on the basis of the facts of the case , though the transaction value in case of M/s Guru Nanak Refrigeration Corpn was less than the manufacturing cost and profit . The Hon'ble Supreme Court has cautioned against drawing general conclusions and inferences quoting the truism stated by Lord Halsbury that " a case is only an authority for what it actually decides and not for what may seem to follow logically from it. "

2.1 Further , in paragraph 50 , the Hon'ble Supreme Court has cited two instances where a manufacturer may sell goods at a price lower than the cost of manufacture and profit and yet the declared value can be considered as normal price . These instances are when the company wants to switch over its business or where a manufacturer has goods which could not be sold within a reasonable time . The Hon'ble Court has further held that these examples are not exhaustive . Therefore , mere sale of goods below the manufacturing cost and profit cannot be taken as the sole basis for rejecting the transaction value .

Verification of payment of duty

3. The second issue is regarding the procedure to be adopted by the field officers to identify cases where the ratio of the judgment would apply. It may be noted that , under the self-assessment procedure , there is a legal obligation on the assessee to correctly assess and pay the duty in terms of the Central Excise Act , 1944 read with the Valuation Rules , 2000 . Verification of this aspect may be conducted by the Central Excise officer during the audit of units . Aspects such as the percentage of loss at which sale has taken place , the period for which such loss making price has prevailed , reasons for sale at such loss making price , whether such sales are contrary to the standard and accepted business practices , and whether such sale is leading to erosion of capital of the company , may be looked into . In addition , due care may be taken at the level of the Commissioner to see whether the case at hand is similar to the facts and circumstances of the FIAT case .

3.1 Calculations of manufacturing cost may be carried out using CAS-4 standards . Information submitted by the manufacturer , duly certified by a Chartered or Cost Accountant should normally be accepted . Only where a decision to investigate a case has been taken at the level of the Commissioner and it is considered necessary in the interest of investigation, steps such as ordering Cost Audit of the Unit or summoning of the Costing data should be undertaken .

Period of application

4. The third issue is whether the judgment can be applied for periods prior to the date of the judgment ie 29-8-2012 , invoking the extended period of limitation . Under the provisions of valuation law , in a case where price is not the sole consideration for the sale , money value of any additional consideration flowing directly or indirectly from the buyer to the assessee is added to the transaction value in terms of rule 6 of the Central Excise Valuation Rules , 2000 . However , in the FIAT judgment , sale of cars at an abnormally lower price to penetrate the market has been considered by the Hon'ble Supreme Court as constituting extra-commercial consideration , even when there was no additional consideration of money value flowing directly or indirectly from the buyer to the seller . For the period prior to the date of the judgment , in cases where a show cause notice has been issued on the grounds of the FIAT judgment alone , there may not be a case for invoking the extended period of limitation . In such cases , only the normal period of limitation will apply .

4.1 For the period after the date of the judgment , i.e from 29- 8-2012 onwards , if there is a sale in the circumstances similar to the case of M/s FIAT and yet transaction value of goods is declared as the correct assessable value , then such declaration would amount to wilful mis-statement of the assessable value .

26. The Show cause Notice in hand was issued on the basis of the judgment of the Hon'ble Supreme Court of India, in the case of M/s. Fiat India P. Ltd., which addressed the settled position of law, with respect to fundamental principles of Central Excise valuation *i.e.* the assessable value for the purposes of calculating excise duty is the 'transaction value', provided the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale.

27. In the said case where products are sold at a price lower than the cost of production for an unduly long period of time with a view to penetrate the market,such transaction value was held to be not accepted as assessable value for the purpose of levy of excise duty. The Supreme Court also observed that merely because the assessee had not sold the products to the related person and the element of flow back directly from the buyer to the seller was not the allegation in the show cause notices issued, the price at which the assessee had sold its products to the whole sale trader cannot be accepted as 'normal price' for the sale of such products.

28. It is however pertinent to note that the aforesaid judgment was based on the peculiar facts involved in the said case i.e. long duration of 5 years for which products were sold below the cost of production and the reasoning of the assessee for such business strategy *i.e.* market penetration. Therefore, the commercial rationale and reasoning of the business to sell the goods below cost price weighed in the minds of the Hon'ble Supreme Court while determining the 'normal price' even though the parties in the said case were not related.

29. The clarification issued vide Circular dated 15.1.2014, issued by CBEC, is summarized as under::

29.1. Whether transaction value which is below manufacturing cost and profit can be rejected in all the cases?

It has been clarified that, transaction value cannot be rejected merely on sale of goods below the manufacturing cost and profit. In the paragraph 50 of the aforesaid judgment Hon'ble SC held that a manufacture may sell goods at a price lower than the cost of manufacture and profit and yet declared value can be considered as transaction value:

- When the company want to switch over its business
- Where a manufacturer has goods which could not be sold within a reasonable time

The Hon'ble Court has further held that examples cited are not exhaustive.

29.2. Identification of Cases where ratio of the judgment would apply?

It has been clarified that due care may be taken at the level of the Commissioner to see whether the case at hand is similar to the facts and circumstances of the FIAT case.Only where

a decision to investigate a case has been taken at the level of the Commissioner and it is considered necessary in the interest of investigation, steps such as ordering Cost Audit of the Unit or summoning of the Costing data should be undertaken.

It has been further clarified that calculation of manufacturing cost may be carried out using CAS-4 standards duly certified by a Chartered or Cost Accountant.

30. On perusal of Circular No.979/3/2014-CX, dated 15-1-2014 issued by the CBEC, and in light of the Supreme Court's judgment in case of FIAT India, it is imperative to examine the case on the following ingredients :

i) whether the cars were sold at a price substantially lower than the cost of the manufacture and such sales continued for a period of five years?.

(ii) whether the declared transaction value can be rejected in all cases where the transaction value is lower than the manufacturing cost and profit?

(iii) there may be two instances where a manufacturer may sell goods at a price lower than the cost of manufacture and profit and yet the declared value can be considered as normal price .

31. Details of such clearances of Motor Vehicles effected by M/s. TATA Motors Ltd.,from their Sanand plant is as under:

Summary of Vehicals having Assessable Value less than Cost of Production in r/o M/s Tata Motors Ltd., Sanand									
Sr.	Period	Despatch Quantity (No.)	Rate of Excise Duty(%)	Assessable Value (AV) in cr.	Excise duty paid on AV (in cr.)	Cost of Production (COP) (in cr.)	Excise Duty calculated on COP (in Cr.)	Difference between AV and COP (in Cr.)	Difference between Excise Duty paid on AV and calculate on COP (in Cr.)
1	29.08.2012 to 31.03.2013	25172	13.52	319.82	43.24	467.73	63.24	147.91	20.00
2	01.04.2013 to 31.03.2014	17002	13.52	271.36	36.69	376.02	50.84	104.66	14.15
3		4129	9.4	71.92	6.76	97.01	9.12	25.09	2.36
4	01.04.2014 to 01.07.2014	3376	9.4	58.46	5.50	81.09	7.62	22.63	2.13
								Total	38.63

32. From the contention of the assessee,it appeared that the cost of production of their 'NANO' model of Motor Vehicles manufactured by M/s. TATA Motors Ltd. at their Sanand plant is much higher than the price at which the goods were being sold by them through their distributors / dealers to the ultimate consumer. The assessee was engaged in the business of manufacturing of motor vehicles and parts thereof.The assessee, in the year 2003 introduced the project of developing a price affordable family transport car. The consumer response towards the car was very good and more than 2.03 lakhs booking were received during 2008-09. The Nano Plant in Sanand was shifted to Singur (W.B)., which cost around Rs 300 Cr. The expected volume of the sales of Nano car did not materialize due to the considerable time taken between the launch, booking and delivery of the product and shifting of the plant. Further, the safety concerns associated to Nano lead to negative impact on sale and the economy during that time also slowed down. Due to these reasons, the factory was only working at 25% of its total capacity. The global financial meltdown occurred in the year 2008-09 and rising fuel prices further added to the woes of the automobile industry.The assessee determined the prices of the products by considering the cost of making the product, consumer affordability for the cars, demand and supply of the product and overall economy of the country.

33. The assessee has contended that the Hon'ble Supreme Court judgment in the case of **FIAT India Pvt. Ltd. [2012 (283) ELT 161 (SC)]** cannot be applied in the present case on account of following grounds:

I. The above said judgment was passed based on the peculiar facts wherein the assessee was having the cost of material in the range of Rs. 4 lacs whereas the car was sold in the market at less than 50% of the material cost and not even the total cost of production which was in the range of 5 Lac. In the present case, Nano was not planned to be sold

at loss. It was anticipated that the company would make a good profit over the life cycle of the product. However, multiple reasons which *inter-alia* include relocation from Singur to Sanand, delayed delivery of the product in time, negative publicity (cheap car), and 4 incidences of vehicle catching fire, the sale could not kick-off and the Noticee could not utilize even 25% of the installed capacity. Eventually the Company had to discontinue this product in the recent years.

II. It is not a case of penetration in the market in as much as the Noticee is in existence since 1945 and holding large share in the automobile market. Whereas in the case of FIAT, it was admitted fact that the product was priced to penetrate in the market as FIAT was not having any foothold in India.

III. Nano was not priced to either beat or match up with the competition in the market. In fact, this was the first of this sort launched in the market ever in India and even today there is no competition to this product.

IV. During the period from 2012 to 2014, the entire automobile Industry could not make a profit due to volatile economic conditions.

V. Even the Supreme Court in para 50 of the judgment, held that there can be genuine situations where a manufacturer has to incur losses, and in all such situations, the transaction value cannot be rejected. Also, in para 66, it has been held that principles laid down in the case of FIAT do not have the general application. The facts of each case has to be evaluated independently to reach to any conclusion. Clearly in the present case the said judgment cannot be applied as basic ingredients to apply this judgment are missing in the present case.

34. I find the above Circular has laid out the following checks for rejecting the transaction value where the sale price is below cost,

(1) **Reasons for sale at loss making price;**
(2) **Whether such sales are contrary to the standard and accepted business practices; and**
(3) **Whether such sale is leading to erosion of capital of the company.**

35. The assessee has denied the allegations in the Show Cause Notice, basically on the ground that their case does not satisfy the above criteria and elaborated the same as under:

A: Reasons for sale at loss making price -

35.1. Even though Sanand Plant was set up with installed capacity of 2.50 Lakhs cars p.a., the volumes unfortunately due to did not materialize due to following three reasons:

(i) There was a considerable lapse of time between launch, booking and actual delivery of product, due to shifting of manufacturing facility from Singur to Sanand.
(ii) Four Nanos, out of a few thousands sold, had a fire accident on public roads which were blown out of proportion in the media and raised concerns on the safety of the vehicle leading to further negative impact on sale.
(iii) Economic slowed down coupled with Global economic meltdown in the automobile industry and rising fuel price.

35.2. This conclusively establishes that the reason for making losses on the subject model of vehicle for the period in dispute was genuine and without any intention to penetrate the market. They further submitted that they always determined the price of its products based on the prudent business practices with the intention to earn profits only.

35.3. The assessee was already prevalent in the Indian Market for a long time. In the case of FIAT, the cars sold by FIAT were not established models in the Indian market and never earned profit in the Indian market, thereby, making every possible situation for FIAT to adopt practice of undervaluing its cars, which is not the case of the assessee. Hence, there cannot be any intention by the assessee to penetrate the market during the period in dispute.

35.4. Para 50 & 66 of the FIAT Judgment read with the Circular, it is clear that the FIAT judgment will not apply for any and every situation where the manufacturer incurs losses, especially where the loss is incurred for the factors beyond the control of the manufacturer. The ratio of the said judgment could be applied only to cases, where assessee has deliberately incurred losses to acquire market share and not in genuine situations, where the manufacturer incurs losses when the manufacturer wants to switch over its business for any other manufacturing activity or where the manufacturer has goods which could not be sold within a reasonable time.

B: Whether such sales are contrary to the standard and accepted business practices

(i) It has been contended by the assessee that they have always followed prudent trade and business practices and have always endeavoured its best to ensure that the vehicles are sold in profit. Apart from the prudent financial motives, the pricing decisions are also guided by other elements like economic environment, product life cycle, people's taste and priority, consumer affordability for the vehicles and market forces of demand and supply etc.If for the factors beyond its control, the entity cannot earn desired profit, this will not *ipso facto* make the business practices of the entity contrary to accepted ones.It is further submitted that they were not the lone organization incurring losses in the auto sector, during the period in question. The peers of the assessee were also suffering from losses on account of several factors which had a collective impact on the whole auto industry.The business performance of the assessee was in line with the general auto market trend in India. The detailed submissions in this regard are made in Para D.13 to D.15 of the reply dated 21.08.2018.

(ii) They further submitted that the entities making losses have not been limited to the private sector. In fact, the Government owned public sector undertakings have also been incurring significant losses over the disputed period. Therefore, it may be incorrect to say that every business entity which incurs losses does it with an intent to penetrate the market. Profit or loss is inherent reward or risk to a business entity and every loss cannot be imputed to a market penetration strategy. There is not even an *iota* of evidence to this effect in the impugned SCN.

(C) Whether such sale is leading to erosion of capital of the company –

(i) The assessee further submitted that there has been no erosion of their capital due to such losses on car in dispute. The assessee is by and large a profit-making organization, except for the period in dispute. The assessee had been making reasonable amount of profits on its manufacturing business. Therefore, they submitted that the present case is not a case of capital erosion. The said facts are substantiated in their balance sheets for the relevant period.

(ii) In the present case, the assessee has always been a profit-making entity on standalone basis as well as on consolidated basis. A year-wise tabular data showing the profit position and other relevant financial information is as under:

Period	Total Assessable Value of all vehicles	Total COP of all vehicles	Profit / (Loss) percentage on COP
From 29.08.2012 to 31.03.2013	Rs.15839 crores	Rs.13262 crores	19.43%
From 01.04.2013 to 31.03.2014	Rs.20755 crores	Rs.16558 crores	25.35%
From 01.04.2014 to 10.07.2014	Rs.5858 crores	Rs.4488 crores	30.53%

36. The assessee has relied on the recent decision of the Hon'ble Tribunal of Delhi, in the case of M/s Honda Cars India Ltd. v. CCE, Delhi, reported in 2015 (328) E.L.T. 273 (Tri. - Del.), wherein, it was held as under:

Stay/Dispensation of pre-deposit - Transaction value - Rejection of - Manufacturing cost of cars higher than sale price - Deliberate lowering of sale price to penetrate market - Said lower loss-making price not representing correct transaction value as per Section 4(1)(a) of Central Excise Act, 1944 since price is not the sole consideration but influenced by extra-commercial considerations - Redetermination of transaction value at 110% of cost of production invoking Rule 11 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 - HELD : Expressions 'penetrate the market' and 'compete with other manufacturers' cannot be equated as keeping in view comparable price at which similar goods sold by other manufacturers is commercial compulsion - Price is fixed keeping factors of demand and supply in mind and such price may sometimes be more and sometimes less than manufacturing cost and cannot be said to be influenced by extra-commercial considerations - No evidence of deliberate lowering of transaction value - Many cars sold by assessee at profit during 2009-2010, though situation reversed during 2011-2012 due to higher cost of components and market forces - When price of product determined purely by market forces and element of competition then, even if it is loss-making price, it has to be accepted as transaction value - Prima facie case for waiver of pre-deposit of duty demand - Section 35F of Central Excise Act 1944

36.1 I find that CESTAT has dealt with the identical issue at hand in the above case. The Tribunal has observed that the said unit was centrally registered as Large Taxpayer Unit (LTU) during the relevant time. As such, the production clearance of the assessee in all their units should have been considered in a holistic manner especially while examining the applicability of ratio of the decision of Apex court in Fiat case. Similarly, the assessee was also centrally registered as Large Taxpayer Unit (LTU) during the relevant time, therefore, the production and clearance of the assessee in all their plants should have been considered in a holistic manner especially while examining the applicability of ratio of the decision of Apex court in Fiat case. The assessee had always been in a profitable position on an overall basis. The total assessable value *vis-à-vis* the COP of the vehicles sold (as mentioned above) from all the Plants during the said period shows that on overall basis, the vehicles were sold above the COP only. There was no under recovery of cost, and in fact, the profit has been rising over the years,

37. From the above discussion, I find that the consolidated operation of party resulted into profit; and there was, apparently, no erosion of capital during the period in dispute. I find that only a marginal percentage of the cars were sold below COP for a very less period and even then the company was in profit. The assessee is a well established company and their sale pattern does not appear to be aimed at market penetration. Circulars issued by CBEC are binding on the Department and the Department cannot take a stand contrary to the same. As such the assessee does not fall within any of the situations/checks deemed under the Circular dated 15.1.2014, which laid down the conditions for implementation of the judgment of Hon'ble Supreme Court in the case of M/s. FIAT India Ltd.

38. Further, as per the Circular dated 15-1-2014 issued in light of in light of the Hon'ble Supreme Court in the case of M/s. Fiat India P. Ltd., I find that it has been ruled out that transaction value can be rejected in all cases where the declared value is lower than the manufacturing cost and profit, Further, the Hon'ble Supreme Court in the case of M/s. Guru Nanak Refrigeration Corporation, reported in 2003(153) ELT 249 (S.C.) held that no differential duty can be demanded on the basis of production cost of goods on the ground that same is higher than the wholesale price of the goods. While pronouncing decision in FIAT case, the Hon'ble Supreme Court has not ruled out its earlier decision in Guru Nanak Refrigeration Corp case, but distinguished the same on the basis of facts. Hon'ble Supreme Court's decision in Guru Nanak Refrigeration Corpn case squarely applies to present case and I place reliance on it for deciding the case in hand.

39. The Hon'ble Supreme Court of India, in its judgment in the case of M/s. Guru Nanak Refrigeration Corpn, reported in 2003 (153) E.L.T. 249 (S.C.), has held as under:

Valuation (Central Excise) - Normal price - Refrigeration machinery parts sold by assessee in wholesale trade at the price which was approved by the excise authorities - Show cause notice issued on the ground that the cost of production of the goods was more than the cost of wholesale price, so differential duty be paid on the basis of costs of production of goods - No allegation that the wholesale price to the buyers was for consideration other than the one

at which it purported to be sold or that it was not at arms length - No flowback of money from the buyer to the assessee - In absence of these factors it cannot be contended that normal price was not ascertainable - Where normal price within the meaning of Clause (a) of sub-section (1) of Section 4 of Central Excise Act, 1944 is ascertainable, the provisions of Clause (b) ibid cannot be resorted to determine the nearest ascertainable equivalent of the normal price of the goods - Tribunal's order upheld - Section 4 ibid. [paras 4, 5]

40. ***SECTION 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 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 the removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value ;*
> *(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.*
> *[Explanation.-For the removal of doubts, it is hereby declared that the price- cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration. if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum- duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]*

41. I find that the main thrust of the Show Cause Notice, issued in light of the Supreme Court judgment in the case of M/s. Fiat India Ltd, was that the cars were sold by the assessee at a price substantially lower than the cost of manufacture for a period of five years with an intention to penetrate to market; and that Hon'ble Supreme Court had held that in such circumstances the transaction value declared under Section 4(1)(a) of the Central Excise Act, 1944. could be rejected and the provisions of the Central Excise Valuation (Determination of Price of Excisable goods) Rules, 2000 to assess excise duty, can be invoked. The demand under the subject Show Cause Notice has been raised for the period from 29.08.2012 to 10.07.2014 i.e from the date of Hon'ble Supreme Court's Order in the matter of M/s. Fiat India Ltd. till amendment to Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules. 2000 vide Notification No. 20/2014- C.E.(NT.) dated 11.07.2014. The assessable value of the goods declared by M/s. TATA Motors Ltd. had not been accepted by the department as the correct value of the goods, on one and the only ground that the lowering the price by M/s. TATA Motors Ltd. below the manufacturing cost appeared to be driven by their motive to compete with other manufacturers and to capture market for their vehicles.From the submissions of the assessee, I find that their product "Nano" car was not priced to either beat or match up with the competition in the market. In fact, this was the first car of this sort launched in the market ever in India. It was a niche product and there was no competition to this product.As such the contention of the department that the car was sold at a lower price to penetrate the market does not hold good.

42. Further, on going through the Show Cause Notice, I find that the demand has been raised purely on the basis of a presumption that the assessee had resorted to lowering of the price for penetrating the market. I also find that no corroborative evidence has been brought forward by the department to prove any flow of additional consideration received by the assessee and to substantiate the allegations made against the assessee.

43. In the instant case. I find that with effect from 1.3.2003 (Notification no.11/2003-C.E.(NT), dated 1.3.2003) i.e. prior the period of the decision of FIAT India, an explanation/proviso was inserted in Section 4 of the Act, to stipulate that in case of additional consideration, only 'money value' of which is flowing from the buyer to the seller is includable in the assessable value. In light of the amendment carried out in Section 4 of the Act. the judgment passed in the case of FIAT India shall not be applicable for the period post 2003.I agree with the assessee's contention that the allegation made in the SCN is unsustainable as it was wrongly based on the plea of the department that the assessee was altering the price of the vehicles with the sole intention to penetrate the market. The claim of the department is rebutted by the facts and reasons submitted by the assessee for keeping the price below COP, as discussed in the foregoing paras; and I find the reasons to be logical and acceptable.

44. It is observed that the Apex Court has held that in every case, where a product is sold at loss, it is not open for the departmental authorities to deem such loss as an extra commercial consideration. It is for the excise authorities to establish, on the basis of specific evidence as to

whether a particular transaction is one where extra commercial consideration has been entered into by the assessee.The ratio laid down by the Hon'ble Supreme Court in the case of M/s. Fiat India is applicable only when the party has deliberately incurred losses to acquire market penetration. However, in the present case, the assessee has not incurred losses deliberately and has conducted business rationally.

45. Further, the Hon'ble Supreme Court cited certain situations wherein transaction value should be adopted even though goods are sold below the cost of manufacturing e.g. switching over business, distress sale in case of perishable goods, etc., thereby implying that even if goods are being sold at a loss owing to genuine business/commercial reasons, then transaction ale should be accepted. In fact, before concluding on the issues, the Hon'ble Supreme Court itself referred to saying of Lord Halsbury that *"a case is only an authority for what it actually decides and not for what may seem to follow logically from it"*; and observed that each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect. Hon'ble Supreme Court's observations cautioned against drawing general conclusions and inferences.

46. It is however pertinent to highlight that the aforesaid judgment was based on the peculiar facts involved in the said case *i.e.* long duration of 5 years for which products were sold below the cost of production and the reasoning of the assessee for such business strategy was market penetration.

47. In view of above, it is clear that the applicability of said decision is purely a facts based analysis and mere sale of goods below the manufacturing cost and profit, cannot be taken as the sole basis for rejecting the transaction value as the Hon'ble Supreme Court noted the instances wherein transaction value should be accepted even though goods are sold below the cost of manufacturing and also observed that these instances are not exhaustive but only illustrative.

48. Hence, I hold that the sale of excisable goods in present case is not similar to the facts and circumstances of the FIAT case and recourse to Section 4(1)(b) of Central Excise Act, 1944, is not warranted and the demand of differential duty in the Show Cause Notices is not maintainable. If duty is not demandable, the question of imposing penalty on the party does not arise at all.

49. In similar issues, in the case of M/s. Tata Motors Ltd., Dharwad, the Commissioner, CGST & Central Excise,Belgaum has dropped the proceedings vide OIO No.BEL-EXCUS-000-COM-BKK-013/I7-I8(CX) dated 19.03.18 and the same has been accepted by the competent Authority. Further, OIO No. 09/AC/JC/LKOCX/2018-19,dated 31.01.2019, issued by the Joint Commissioner, CGST & C.Ex., Lucknow, in the case of M/s. Tata Motors Ltd., Chinhat, Lucknow, has also been accepted by the department.

50. In view of the discussion and findings in the foregoing paras,I pass the following order.

ORDER

(i) I hereby drop the proceedings initiated against the assessee vide Show Cause Notice No. LTU/MUM/CX/GLT-4/TML-Pimpri/125/2014, dated 24.8.2017.

(Amarjeet Singh)
Commissioner,
CGST, Ahmedabad North

F.NO:STC/15-42/OA/2020 DATE: 22.03.2021

To
Tata Motors Ltd.,
Survey no. 1,
Village Northkotpura,
Ta. Sanand,
Ahmedabad 382170

Copy to:

1 The Chief Commissioner, C.G.S.T., Ahmedabad Zone.
2 The Assistant/Deputy Commissioner C.G.ST., Division-III, Ahmedabad North
3 The Superintendent,C.G.S.T.,AR-IV, Division-III, Ahmedabad North
4 Guard File.