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The "Cost" ing "Fiat" ality

Ever since, the concept of *ad valorem* duty was introduced under the Excise law, "valuation" assumed importance and has been a constant source of dispute between the assessee and the Department. Till recently, there were over a dozen decisions by the highest Court of the Land, whereby a reasonable extent of stability and certainty could have been assured. By the serpentine judgment in the case of *Fiat India Private Limited 2012 (283) ELT 161 (SC)*, that bespoke the nightmare of the manufacturing sector in India, the Hon'ble Supreme Court of India, decided against the assessee, and thereby, set the stage for future litigation on such valuation issues.

As popular novelist, Charles Dickens in his famous work "Bleak House" wrote "*Jarndyce vs. Jarndyce* drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises."

In similar fashion, in the present case, FIAT sold its cars at prices below the cost of production to enable market penetration in a competitive market. While FIAT cleared its cars on payment of excise duty at its sale price, the department demanded excise duty at the

cost of production plus notional profit margin. After losing the case at the adjudication and First Appeal stage, FIAT succeeded before the Appellate Tribunal. However, as the saying goes, won the battle lost the war.

On appeal by the Revenue, per contra, the Hon'ble Supreme Court held as under:

- Selling cars at loss for continuous period of 5 years to penetrate the market amounts to "extra commercial consideration" and thus, price is not the sole consideration in the present case and hence, normal wholesale price under Section 4(1)(a) has to be rejected. It was, further, held that under new section 4 (i.e., post 1-7-2000); such sale of goods below the cost of production to benchmark with the price of the competitors will violate the condition of "price being the sole consideration for sale";
- The Hon'ble Supreme Court observed, in such cases, the department can resort to best judgment assessment;
- It was held that in cases where goods are sold below the actual cost i.e. at a loss in wholesale trade, the value would be manufacturing cost and notional profit thereon in terms of Rule 7 of Central

Excise (Valuation) Rules, 1975 i.e. best judgment assessment.

The Supreme Court, finally closed its doors, by rejecting the review petition *vide* order dated 27-11-2012 2012-TIOL-110-SC-CX

Let us, before analysing the impact of the above decision, have a look at the statutory provisions. Section 4 of the Central Excise Act, 1944 provides that where duty any excisable goods is chargeable with reference to the value, then such value of the goods would be the transaction value of the goods or the value as determined in accordance with the Valuation Rules, 2000. Section 4(1) (a) deems that transaction value shall be the assessable value if the following conditions are cumulatively satisfied: (a) There is a sale of excisable goods; (b) The sale is for delivery at the time and place of the removal; (c) The assessee and buyer are not related and (d) Price is the sole consideration for the sale.

If any one of the conditions specified in section 4(1)(a) as enumerated above is not satisfied, then the value of excisable goods shall be determined under section 4(1)(b). For this purpose, Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 have been notified by the Central Government. As per the said Rules, post 1-7-2000, excise duty is to be on the "transaction value", which is the price actually paid or payable for the goods (excluding and including certain specified elements). The new provisions, seemingly, accept that there can be different transaction values and that each removal is a different transaction and duty is to be charged on the value of each transaction.

Before proceeding further, it becomes essential to understand the term "consideration" as used in section 4(1)(a). Consideration used in relation to any commercial transaction shall be in reference to monetary consideration and not otherwise. The term "consideration" appears at two places in the Central Excise

Act, 1944, i.e. Section 4(1)(a) and in Section 2(h) which defines "sale" as any transfer of possession of property for cash, deferred payment or any other valuable consideration. The Constitution Bench of the Hon'ble Supreme Court in the case of *Devi Dass Gopal Krishnan vs. State of Punjab & Ors.* (1967) 3 SCR 557, while interpreting the clause: 'Cash, deferred payment or any other valuable consideration' appearing in the definition of 'Purchase and Sale' under the Punjab General Sales Tax has categorically held that the term 'valuable consideration' means nothing else but 'monetary consideration'.

Additionally and more importantly, Rule 6 of the Valuation Rules provides that "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." In other words, in cases where all conditions of section 4(1)(a), as enumerated above are met, except, the condition that the price being the sole consideration, the value 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. This being so, in light of the facts of the FIAT case, in the arguendo, considering that market penetration is the additional consideration, the same is not monetary consideration and also the same does not flow from the buyer to the assessee. Thus, therein laying the subtlety of situation. However, in saying so, one has to keep an eye out for the decision of the Supreme Court in the case of *Grasim Industries Limited* (2009) 241 ELT 321 (SC). The issue, whether the concept of transaction value signals a radical departure from the concept of deemed normal price that prevailed prior to

1-7-2000, is pending decision by the Full Bench in the said case.

Apart from this, in FIAT case, the Supreme Court has taken a view different (though not saying so) from its earlier decisions in the Guru Nanak case (2003) 153 ELT 249 (SC) and the Bisleri case (2005) 186 ELT 257 (SC) and holding that, to decide on which side of the line the case falls, broad resemblance to another case is not decisive and that each case depends on its own facts as a single significant detail may alter the entire conspectus of the ruling.

The FIAT case ran an alarming bell in the already ailing manufacturing sector. There are different scenarios wherein the automobile industry; or the manufacturing sector in general, may be forced to sell their products below cost price. The factors considered by a seller could be of two types: commercial considerations and extra-commercial considerations. “Commercial Considerations” are those factors which are considered with an object of benefiting the business or achieving profit. “Commercial Considerations” would typically include factors such as introduction of a new product in a new market, technological superiority of a product, time of the year, market share, quantity, long-term relationship with the buyer, status and bargaining powers of the buyer, future business potential, matching competitive prices, economic scenario, stock lot, availability of alternatives, customer perception, etc.

On the other hand, “Extra-Commercial Considerations” would refer to all cases where the seller is getting some quantifiable advantage from the buyer like interest free advance, free supply of components, dies, moulds, capital goods, etc. While the Commercial and Extra-Commercial

Considerations play a vital role in fixing the price for a transaction or a series of transactions of sale, the same cannot be equated to the ‘Consideration for Sale’ unless the same is defined in monetary terms as explained earlier. While commercial considerations cannot, in any way, influence the value under section 4(1)(a), extra-commercial considerations can have an effect on the value of the goods sold in case of a monetary value attributable to the same as it is a contractual concept having aspects of contractual privity and monetary value in-built in them. This is where, the crux of the issue lies.

The FIAT decision has raised considerable doubts regarding how the Department shall deal with such commercial and extra-commercial considerations and would affect the extraordinary sales like distress sale, clearance sale, etc., where the manufacturer clears the excisable goods on such contingencies, at a price less than the cost plus margin. Open a Pandora’s Box, hope not, rather pray not.

However, a year thereon and multiple show cause notices to various players, there is still no clarity regarding implementation of the said decision. It appears that the Industry has taken up the issue with the Finance Minister in its post-budget interaction and also presented the case to the tax authorities. The Central Board of Excise & Customs, for its part, announced the setting up of a panel to look into the implications of the judgment. However, there has been no specific direction from the government on the same yet. With the entire manufacturing sector in India facing the heat of the decision, clarity on how the department will implement the decision is the need of the hour. To sum up, in essence, by the said “landmark” ruling has blurred the lines between the “reality” and “notion”.

