

F.No.354/35/2011-TRU
Government of India
Ministry of Finance
Department of Revenue
Tax Research Unit

New Delhi, the 10th July, 2014

To,

Chief Commissioners of Central Excise (All),
Chief Commissioners of Central Excise and Customs (All),
Director General, Directorate General of Central Excise Intelligence,
Commissioners of Central Excise (All),
Commissioners of Central Excise and Customs (All).

Madam/Sir,

Subject: Valuation of fertilizers for the purpose of levy of excise duty – inclusion of subsidy component in the assessable value – Clarification – Regarding.

In the Budget 2011-12, excise duty of 1% was imposed on chemical fertilizers falling under Chapter 31 of the Central Excise Tariff such as Urea, Di-ammonium Phosphate (DAP), Ammonium Sulphate, Single Super Phosphate (SSP), etc. and various grades of complex fertilizers.

2. Consequent upon the levy of excise duty @ 1% (without CENVAT facility) on chemical fertilizers in the Budget 2011-12, the Department of Revenue had clarified to the Department of Fertilizers that in the case of price-controlled fertilizers which are sold to distributors/wholesale dealers at MRP fixed by the Government at the time of their clearance from the factory the excise duty of 1% would be chargeable on the MRP and not on the total cost of production. In the case of fertilizers not subject to price-control, the excise duty would be chargeable on their wholesale price representing the transaction value at the factory gate.

3. Trade and Industry Associations have represented that inspite of the clarification issued by the Department of Revenue to the Department of Fertilizers, the field formations have issued show cause notices to the fertilizer companies seeking to levy excise duty on the subsidy component of price-controlled fertilizers in the light of the judgment of the Supreme Court in the case of CCE, Mumbai v/s/ M/s Fiat India Pvt. Limited [2012-TIOL-58-SC-CX].

4. The matter has been examined in the light of the facts in the case of M/s Fiat India (P) Ltd. vis-à-vis the facts in the case of fertilizers. The facts in the case of M/s Fiat India (P) Ltd were that the company had declared an assessable value for Uno model cars at a price which was substantially lower than the cost of manufacture, and the company continued to sell the cars at a loss making price for nearly five years. The company admitted that the purpose of doing so was

to penetrate the market and to compete with the other manufacturers of similar cars. It was under these circumstances that the Hon'ble Supreme Court held that such sales could not be regarded as sales in the ordinary course of sale or trade, nor could the declared value be accepted as the normal price for sale of cars. As the main reason for selling cars at a lower price than the manufacturing cost and profit was to penetrate the market, the apex court held that this would constitute extra-commercial consideration and not the sole consideration. Since the price was not the sole consideration for sale of cars, the Court held that the Department was justified in invoking the provisions of Valuation Rules for the purpose of levy of excise duty.

4.1 In the case of fertilizers, the manufacturers are mandated to sell the goods at the prices notified by the Government. In the case of urea, the cost of production varies greatly from manufacturer to manufacturer depending upon the use of feedstock, technology and overheads. The Government reimburses the differential between the cost of production and the notified price to the manufacturers in the form of subsidy. As per the current policy, MRP of urea is controlled and fixed by the Government. In P&K fertilizer, however, the MRP is deregulated and companies are free to fix the MRP. They do so after taking into account the subsidy component which is fixed on the basis of nutrient content (i.e per kg subsidy is fixed by the Government for phosphate, potash, nitrogen and sulphur). Both in the case of urea and P&K, fertilizer subsidy is given by the Government to benefit the farmers, as subsidy would reduce the MRP paid by farmers.

4.2 The fertilizer policy of the Government of India is aimed at providing fertilizers to farmers at affordable prices for sustained agricultural growth and to promote balanced nutrient application. The subsidy is not linked to the buyer and it cannot be said that the subsidy given by the Government to the manufacturer is part of the consideration flowing from the buyer to the manufacturer. Likewise, it cannot be said that fertilizer manufacturers have under-declared the value with a view to penetrating the market or competing with the other manufacturers of similar fertilizers.

4.3 In the Fiat India case, it was a conscious decision on the part of the manufacturer to sell the goods below the cost of production to penetrate the market and to compete with the other manufacturers of similar cars. While dealing with the word 'consideration', the Supreme Court has observed that 'consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee and it is for the Excise authorities to show that the price charged to the buyer is a concessional or specially low price or a price charged to show favour or gain in return extra-commercial advantage.

4.4 From the above, it is clear that the facts at hand are clearly distinguishable from the facts and circumstances of the Fiat India case. The manufacturers of fertilizers do not gain any extra commercial advantage vis-a-vis other manufacturers because of the subsidy received from the Government. The subsidy paid by the Government to the manufacturer is in larger public interest and not for benefitting any individual manufacturer-seller and it is also not paid on behalf of any individual buyer or entity. In view of the above, it can be concluded that the subsidy component is not an additional consideration and hence, the MRP at which the fertilizer is sold to buyers by the manufacturers is the sole consideration for its sale. Even though the subsidy component has

money value, it cannot be considered as an additional extra-commercial consideration flowing from the buyer to the seller.

4.5 The Hon'ble Supreme Court, in the Fiat India case referred to above, 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". After examination of the issue as to whether the declared transaction value can be rejected in all cases where the transaction value is lower than the manufacturing cost and profit, the Ministry has clarified vide Circular No. 979/03/2014-CX dated 15th January, 2014 that mere sale of goods below the manufacturing cost and profit cannot be taken as the sole basis for rejecting the transaction value. The Supreme Court, in the Fiat India case, has not ruled that the subsidy component provided by the Government would tantamount to consideration flowing from the buyer to the seller and therefore, should be included in the assessable value an excisable good in terms of the extant Valuation Rules.

5. It is, therefore, clarified that in respect of fertilizers for which subsidy is provided by the Government, the excise duty will be chargeable on the MRP and not on the subsidy component provided by the Government.

6. Trade Notice/Public Notice may be issued to the field formations and taxpayers.

7. Difficulties faced, if any, in implementation of this Circular may be brought to the notice of the Board.

(P.K. Mohanty)
Joint Secretary (TRU)