

BRIEF FACTS OF THE CASE

M/s. Indian Farmers Fertilizer Cooperative Ltd., IFFCO Sadan, C-1, Distt Centre, Saket Place, New Delhi-110017 having IEC Code Number – 0588034096 (*hereinafter referred to as the 'IFFCO'*) is a Multistate Co-operative Society primarily engaged in production and distribution of fertilisers. On the basis of Intelligence gathered by DRI, Ahmedabad the imports of Urea by M/s. IFFCO was taken up for analysis and it was revealed that while the prevailing import price of Urea is around US\$ 410 per MT, M/s. IFFCO is importing Urea from M/s. Oman India Fertiliser Company, Oman (OMIFCO) at about US\$ 160 per MT. The study of the imports from OMIFCO revealed that the said company is a joint venture between the Oman Oil Company (50%), M/s. IFFCO (25%) and M/s. KRIBHCO (25%). Further, the import of Urea from the said company is on the basis of a long term Urea off-take Agreement (UOTA) between the Govt. of India and OMIFCO. The Urea is being purchased by the Department of Fertiliser from OMIFCO and the imports are being made by M/s. IFFCO and M/s. KRIBHCO on the basis of an agreement for Handling and Marketing of Urea signed between the Department of Fertiliser and IFFCO and KRIBHCO.

2. Based on the above intelligence, inquiry was initiated against M/s. IFFCO and the said importer was issued summons calling upon them for recording their statement and to produce the import documents.

3. A statement of Shri Birinder Singh, Senior General Manager (Project Services) of M/s. Indian Farmers Fertilizer Cooperative Ltd., IFFCO Sadan, C-1, Distt Centre, Saket Place, New Delhi-110017 was recorded on 05.07.2013 under Section 108 of the Customs Act, 1962, wherein, he inter-alia, stated that

- he was working as Senior General Manager (Project Services) in M/s. Indian Farmers Fertilizer Cooperative Ltd., IFFCO Sadan, C-1, Distt Centre, Saket Place, New Delhi-110017 since 2012; in the capacity of Senior General Manager (Project Services) he was handling the work related to the new projects set up by M/s. IFFCO in India as well as abroad.
- Their company M/s. Indian Farmers Fertilizer Cooperative Ltd. was engaged in manufacturing of Fertilizers, Marketing and Handling of Fertilizers and other non-profitable activities for farmers, etc.;
- that M/s. IFFCO are having 05 manufacturing units and various branch/marketing offices all over India.; that apart from these manufacturing units in India they are also having 02 Joint Venture manufacturing companies with other Multi-National companies in Oman and Senegal which are in operation and 01 is in the process of being set up in Jordan.
- On being specifically asked about the Joint Venture company in Oman i.e. M/s. Oman India Fertilizer Company, Oman, he stated that the initial Memorandum of Understanding was signed between Govt. of India and the Sultanate of Oman

represented by the then Ministry of Petroleum and Minerals, Muscat, Oman and acknowledged by M/s, Krishak Bharti Cooperative Limited (KRIBHCO) (a multi state Cooperative Society), M/s. Rashtriya Chemicals & fertilizers Ltd. (RCF) and M/s. Oman Oil Company Limited;

- that KRIBHCO, RCF and Oman Oil Company Limited contemplated co-operation between Govt. of India and Sultanate of Oman. KRIBHCO and RCF and Oman Oil Company Limited were designated by the Govt. of India and Sultanate of Oman respectively to endeavor to complete the study and assessment of the broad technical parameters and determine the financial viability of establishing a joint venture fertilizer project in Oman. Further, by a Memorandum of Understanding (MOU) in 1994 the GOI, KRIBHCO, RCF, Sultanate and Oman Oil Company Limited agreed to collaborate in the implementation of a project to design, finance and construct a fertilizer manufacturing plant in Oman. Pursuant to the MOU and the execution by KRIBHCO, RCF and Oman Oil Company Limited, a joint Venture company was incorporated for the purpose of implementing the project.
- Pursuant to the decision taken by RCF not to proceed with the Project, RCF had assigned all of its interest under the Original Joint Venture Agreement to IFFCO and transferred all of its shares in the company to IFFCO in 2000 and accordingly restated the Joint Venture Agreement amongst Oman Oil, KRIBHCO and IFFCO in Oct. 2000 incorporating certain changes to the Original Joint Venture Agreement.
- accordingly IFFCO invested in the Joint Venture Company Oman India Fertilizer Company (OMIFCO) and has equity stake of 25% in the said JV Company.
- that as a return on their investment, they are getting Dividend on their equity.
- Thereafter GOI and OMIFCO entered into a agreement (UREA OFF-TAKE AGREEMENT) to agree and set out the terms and conditions for the off-take of Urea.
- that as per clause 2.1 (Supply and Sale by the Company):- The company shall offer to supply and sell to the GOI, in bulk, FOB the Loading Terminal, one Hundred percent (100%) of Actual Production of Urea from and after the Date of commencement of Production for the term and on the terms and conditions of the Agreement.
- Further as per clause 5.1 price of Urea Produced after the Date of Commercial Production the company and GOI agreed for the Long Term Price of Urea for Rated capacity (initially specified manufacturing capacity) Quantity and for Excess Quantity.
- As per clause 5.1 (a) Urea produced upto Rated Capacity:- the rates were initially finalized for the initial 15 Years.
- That as per clause 5.1 (c) Excess Urea:- The Price FOB the Loading Terminal payable by the GOI to the Company for purchase of Excess Urea shall be an

amount equal to ninety five (95) percent of the market Price prevailing on the date of the applicable bill of lading.

- On being asked the reason for the low price of the Urea sold by OMIFCO to GOI, he stated that this was a decision taken by the Board of Directors of OMIFCO and accordingly a UOTA was signed between OMIFCO and GOI;
- that being a 25% equity stake holder they have their Directors on the Board of OMIFCO and they would have been a party to the decision of the Board of Directors of OMIFCO for selling Urea at a lower price to the GOI on a long term off take basis;
- that in the recent past the average price of Urea was about 400 US\$ per MT and the Urea sold by OMIFCO to GOI under the UOTA was at a price of about 160 US\$ per MT CFR
- Further, on being asked whether it is true that the return on their equity investment i.e. Dividend is lowered on account of the low rate at which the Urea is sold by OMIFCO to GOI, he stated that it is true; that the agreement between OMIFCO and GOI is only for Urea and in respect of Ammonia the agreement is between OMIFCO and IFFCO.
- As per above said Urea Off-Take Agreement between GOI and M/s. Oman India Fertilizer Company (a Joint Venture Company) GOI is purchasing the said Urea and they are only handling and Marketing the said imported urea as assigned by the GOI in terms of the Handling and Marketing Agreement signed between the GOI and IFFCO from time to time; that in terms of the said agreement they are filing bills of entry for the Urea purchased by GOI from OMIFCO and on the basis of the price informed to them by the Ministry of Chemicals & Fertilisers, Department of Fertilisers; that for the Urea imported by them they are not making any payments to OMIFCO as the buyer was the GOI and GOI are making payments directly to OMIFCO.
- On being asked regarding the import of Urea by IFFCO from other overseas suppliers, he stated that Urea was permitted to be imported only by the State Trading Entities; that in the case of IFFCO and KRIBHCO the GOI has issued licences in relation to OMIFCO Urea; that they participate in the Tenders of the GOI for Handling and Marketing of Urea other than from OMIFCO and which are through the STEs; that on they being successful in the Tenders, they handle and Marketing of Urea which are purchased by the STEs and they file the bills of entry for import; that the imported Urea in these cases are also sold in the domestic market on the guidelines of the GOI; that the Urea import related work at IFFCO Head office was being mainly looked after by Shri Kallingal of Marketing Department.

4. A statement of Shri T. Kallingal, Deputy General Manager (Marketing) of M/s. Indian Farmers Fertilizer Cooperative Ltd., IFFCO Sadan, C-1, Distt Centre, Saket

Place, New Delhi-110017 was recorded on 22.07.2013 under Section 108 of the Customs Act, 1962, wherein, he inter-alia, stated that :-

- at present he was working as Deputy General Manager (Marketing) of M/s. Indian Farmers Fertilizer Cooperative Ltd and in the capacity of Deputy General Manager (Marketing) he was handling the work related to handling and transportation of Fertilizers pertaining to imported fertilizers.
- He has been shown the statement of Shri Birinder Singh, Senior General Manager (Project Services) of M/s. Indian Farmers Fertilizer Cooperative Ltd., and he fully agreed with the content narrated in the statement by Shri Birinder Singh.
- On being specifically asked about the of reason for low price of the Urea imported and some time at higher price, he stated that as per long term Urea Off-Take Agreement (UOTA) for the off-take of Urea between GOI and OMIFCO, OMIFCO agreed to supply and sell the Urea in bulk to the GOI, on FOB the Loading Terminal, one Hundred percent (100%) of Actual Production of Urea from and after the Date of commencement of Production for the term and on the terms and conditions of the Agreement.
- Further as per clause 5.1 price of Urea Produced after the Date of Commercial Production the company and GOI agreed for the Long Term Price of Urea for Rated capacity (initially specified manufacturing capacity) Quantity and for Excess Quantity. As per clause 5.1 (a) Urea produced upto Rated Capacity: - the rates were initially finalized for the initial 15 Years.
- As per clause 5.1 (c) Excess Urea:- The Price FOB the Loading Terminal payable by the GOI to the Company for purchase of Excess Urea shall be an amount equal to ninety five (95) percent of the market Price prevailing on the date of the applicable bill of lading; that as clause 5.3 of the said UOTA provides for determining the market price of Urea. In terms of the said clause the market price of Urea would be equal to the simple average of the average of the low and high end FOB Middle East prices of Granular Urea in bulk as published in each of the issues of the following journals in the last two weeks before the date of bill of lading :- 1) Fertiliser Market Bulletin, U.K, 2) Fertiliser Week by British Sulphur, U.K and 3) Fertecon Weekly Nitrogen Fax, U.K.
- that they had imported about 04 consignments of Urea, on behalf of GOI, from OMIFCO which was the Urea produced in excess of the rated capacity;
- that accordingly the price in these cases was 95% of the Market Price, determined in terms of clause 5.3 of the UOTA; that these four consignments were of excess Urea beyond the rated capacity and hence priced as per clause 5.3 of the UOTA. The import details of these 04 consignments are as under:-

Sr. No	Bill of Entry No. & Date	Rate per MT (in US\$)	Quantity (in MT)	Port of Import
1	7036728 dtd.07/06/2012	469.06	41787.859	PIPAVAV
2	7418688 dtd.18/07/2012	396.23	47901.22	PIPAVAV
3	235 dtd.03/07/2012	414.04	38807.00	KAKINADA
4	463 dtd. 11/07/2012	397.81	41798.527	VISHAKAPATNAM

- On being asked the reason for the low price of the Urea sold by OMIFCO to GOI, he stated that this was a decision taken by the OMIFCO and GOI under UOTA.
- On being asked that being a 25% equity stake holder they have their Directors on the Board of OMIFCO and they would have been aware about the decision of low price of the Urea, in this regard he stated that the price fixation of OMIFCO Urea being a policy decision, he was not aware about the mechanism for pricing.
- As per above said Urea Off-Take Agreement between GOI and M/s. Oman India Fertilizer Company (a Joint Venture Company) GOI was purchasing the said Urea and they are only handling and Marketing the said imported urea as assigned by the GOI in terms of the Handling and Marketing Agreement signed between the GOI and IFFCO from time to time;
- that in terms of the said agreement they are filing Bills of Entry for the Urea purchased by GOI from OMIFCO and on the basis of the price informed to them by the Ministry of Chemicals & Fertilisers, Department of Fertilisers;
- that for the OMIFCO Urea handled and marketed by them GOI is making payments to OMIFCO directly as the buyer was the GOI.
- On being further asked regarding the import of Urea by IFFCO from other overseas suppliers, he stated that Urea was permitted to be imported only by the State Trading Enterprise; that they participate in the Tenders of the GOI for Handling and Marketing of Urea other than from OMIFCO and which are purchased by the STEs for Department of Fertilizer; that on they are being successful in the Tenders, they handle and Market Urea which are purchased by the STEs and imported by them on behalf of GOI by filing the bills of entry for import.
- M/s. IFFCO and M/s. KRIBHCO have signed a 'Handling and Marketing Agreement' with Govt. of India effective from 1st May, 2012 whereby GOI has agreed to appoint M/s. IFFCO and M/s. KRIBHCO as their Fertilizer Marketing Entities for Urea off take from M/s. OMIFCO;
- that vide the said agreement they have been assigned the work related to discharging all the obligations of GOI arising out of the lifting and shipping

activities. They are bound to discharge the function of unloading, handling, bagging, transportation, distribution, marketing and other allied functions connected with handling of Urea from loadport to the distribution network.;

- that as per agreement they have the ownership of the material for handling purpose and accordingly they have insurable interest in the cargo and empowered to arrange for marine insurance of cargo during voyage and claim for damage and loss of cargo;
- that as per agreement their liability starts from loadport, they get insurance in their name for the cargo when Bill of Lading was issued; that as per the said agreement the Department of Fertilizer in consultation with them arranges for shipping of OMIFCO urea at loadport; that the ownership of the material was transferred to them while the vessel was on high seas on behalf of Department of Fertilizers.
- After that they file the Bills of Entry in their name to get clearance of cargo from Customs; that they make duty payments and then make all arrangements for unloading, bagging and movement of cargo from the port; that besides performing the responsibility of handling operation they are also responsible for Quantity and Quality of cargo and efficiency of operation like speedy discharge of cargo from vessel, expeditious evacuation of cargo from port, security, etc.; that they have to intimate the DOF for every event on day to day basis.
- As per Para 4 Designated Agent:- they are paid a fee of Rs. 10 per MT of urea for performing the work as designated agent apart from handling and distribution expenses; that GOI has fixed rates for handling and marketing as per Para 5 of Agreement.
- On behalf of GOI they sell the urea to the farmers through their marketing channels like cooperative societies etc. on controlled rate fixed by GOI and collect the price; that they have to pay to GOI, the Pool issue Price (fixed by GOI) minus applicable charges incurred by them during handling and marketing of Urea like Customs duty, marine insurance, lump sump charges, port dues, ICC, Take or pay liability, designated agent fee and Rs.850/- on account of ad-hoc inland freight within 45 days from the date of completion of discharge from the vessel.
- On being asked about the 'POOL ISSUE PRICE', he stated that 'POOL ISSUE PRICE' means (presently) Rs. 5110 per MT, (MRP- Distribution and Retailer Margin) or the price announced by the Govt. from time to time.
- The agreement between OMIFCO and GOI was only for Urea and in respect of Ammonia the agreement was between OMIFCO and IFFCO; that he was handling work related to handling and transportation of Fertilizers of imported fertilizers and not other material imported by IFFCO, whereas Ammonia was their raw material used in manufacture of fertilizers in their Indian Plants; that he was unaware about the aspect relating to the import of Ammonia which are handled by their Plant at Kandla where the same was utilized as a raw material. Further

he submitted a copy of the Ammonia off-Take agreement between OMIFCO and IFFCO and some annexures related to Ammonia off-Take agreement.

5.1. M/s. IFFCO vide their letter dated 12.07.2013 submitted the photo copies of MOU between the GOI and the Government of the Sultanate of Oman dated 13.03.1993, MOU amongst the GOI, KRIBHCO & RCF and the Government of the Sultanate of Oman and Oman Oil Company dated 30.07.1994 and copy of amended and restated JV Agreement amongst Oman Oil Company and KRIBHCO & RCF.

5.2. Further, M/s. IFFCO vide their letter dated 29.07.2013 submitted the photo copy of Long Term Ammonia Off-Take Agreement (AOTA) signed on 29.05.2002 between IFFCO and OMIFCO and also clarified certain facts regarding AOTA vide the said letter.

5.3. Further, M/s. IFFCO vide their letter dated 08.08.2013 submitted the photo copies of import documents in respect of import of Ammonia like copies of Commercial Invoices, Bills of Lading, Bills of Entry, Certificate of Analysis and Certificate of Origin for the period from 2012-13 and also submitted the photo copies of the documents in respect of import of Urea from M/s. OMIFCO, Oman for the period from 20.05.2013 to 07.07.2013.

6 Relevant Legal Provisions:

A. Foreign Trade (Regulation) Rules, 1993

RULE 11: Declaration as to value and quality of imported goods: - On the importation into, or exportation out of, any customs ports of any goods, whether liable to duty or not, the owner of such goods, **shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act, 1962 (52 of 1962), state the value, quality and description** of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of such Bill of Entry or Shipping Bill or any other documents.

B. Customs Act, 1962

Section 14(1):- For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf :

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:

Provided further that the rules made in this behalf may provide for,-

- (i) the circumstances in which the buyer and the seller shall be deemed to be related;
- (ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;
- (iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section :

(ii) **Section 28 – Notice for payment of duties, interest etc.** – (1) when any duty has not been levied or has been short levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may within six months from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words “one year” and “six months”, the words “five years” were substituted.

(iii) **Section 28AA :- (1)** :- Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made there under, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(iv) **Section 46: Entry of goods on importation.** - (1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form

(4) The importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

(v) **Section 111 – Confiscation of improperly imported goods, etc.**- The following goods brought from a place outside India shall be liable to confiscation-

(m) :- any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of Section 54.

(vi) **Section 112- Penalty for improper importation of goods, etc.** – Any person –

(a) - who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harboring, keeping, concealing, selling or purchasing or in any other manner dealing with the goods which he knows or has reason to believe are liable to confiscation under Section 111 shall be liable to penalty

C - Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

2. Definitions. — (1) In these rules, unless the context otherwise requires, -

- (a) “computed value” means the value of imported goods determined in accordance with rule 8.
- (b) “deductive value” means the value determined in accordance with rule 7.
- (c) “goods of the same class or kind”, means imported goods that are within a group or range of imported goods produced by a particular industry or industrial sector and includes identical goods or similar goods;
- (d) “identical goods” means imported goods -
 - (i) which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods,
 - (ii) produced in the country in which the goods being valued were produced, and
 - (iii) produced by the same person who produced the goods, or where no such goods are available, goods produced by a different person,
 - but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods;
- (e) “produced” includes grown, manufactured and mined;
- (f) “similar goods” means imported goods -
 - (i) which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;
 - (ii) produced in the country in which the goods being valued were produced; and
 - (iii) produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person,
 - but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods;
- (g) “transaction value” means the value referred to in sub-section (1) of section 14 of the Customs Act, 1962;

(2) For the purpose of these rules, persons shall be deemed to be “related” only if -

- (i) they are officers or directors of one another’s businesses;
- (ii) they are legally recognised partners in business;
- (iii) they are employer and employee;
- (iv) any person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;
- (v) one of them directly or indirectly controls the other;
- (vi) both of them are directly or indirectly controlled by a third person;
- (vii) together they directly or indirectly control a third person; or
- (viii) they are members of the same family.

Explanation I. - The term “person” also includes legal persons.

Explanation II. - Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.

3. Determination of the method of valuation. — (1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10;

(2) Value of imported goods under sub-rule (1) shall be accepted :

Provided that -

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -

- (i) are imposed or required by law or by the public authorities in India; or
- (ii) limit the geographical area in which the goods may be resold; or
- (iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.

(3) Where the buyer and seller are related, the transaction value shall be

(a) accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.

(b) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time.

(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;

(ii) the deductive value for identical goods or similar goods;

(iii) the computed value for identical goods or similar goods :

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of rule 10 and cost incurred by the seller in sales in which he and the buyer are not related;

(c) substitute values shall not be established under the provisions of clause (b) of this sub-rule.

(4) If the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through rule 4 to 9.

4. Transaction value of identical goods. —

(1)(a) Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued :

Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

(b) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods.

(c) Where no sale referred to in clause (b) of sub-rule (1), is found, the transaction value of identical goods sold at a different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustment leads to an increase or decrease in the value.

(2) Where the costs and charges referred to in sub-rule (2) of rule 10 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if

there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.

(3) In applying this rule, if more than one transaction value of identical goods is found, the lowest such value shall be used to determine the value of imported goods.

5. Transaction value of similar goods. — (1) Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of similar goods sold for export to India and imported at or about the same time as the goods being valued :

Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

(2) The provisions of clauses (b) and (c) of sub-rule (1), sub-rule (2) and sub-rule (3), of rule 4 shall, mutatis mutandis, also apply in respect of similar goods.

11. Declaration by the importer. — (1) The importer or his agent shall furnish -

(a) a declaration disclosing full and accurate details relating to the value of imported goods; and

(b) any other statement, information or document including an invoice of the manufacturer or producer of the imported goods where the goods are imported from or through a person other than the manufacturer or producer, as considered necessary by the proper officer for determination of the value of imported goods under these rules.

(2) Nothing contained in these rules shall be construed as restricting or calling into question the right of the proper officer of customs to satisfy himself as to the truth or accuracy of any statement, information, document or declaration presented for valuation purposes.

(3) The provisions of the Customs Act, 1962 (52 of 1962) relating to confiscation, penalty and prosecution shall apply to cases where wrong declaration, information, statement or documents are furnished under these rules.

12. Rejection of declared value. — (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation. - (1) For the removal of doubts, it is hereby declared that :-

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) *The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -*

(a) *the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;*

(b) *the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;*

(c) *the sale involves special discounts limited to exclusive agents;*

(d) *the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;*

(e) *the non declaration of parameters such as brand, grade, specifications that have relevance to value;*

(f) *the fraudulent or manipulated documents.*

7. From the documents and evidences on record it is forthcoming that a joint venture company was formed as per the Memorandum of Understanding (MOU) between the Government of India and the Sultanate of Oman dtd.15/06/1993 .The MOU was acknowledged by KRIBHCO, RCF and Oman Oil Company Limited. In terms of the said MOU the companies designated by the GOI for setting up of a joint venture Ammonia-Urea project were M/s. KRIBHCO and M/s. Rashtriya Chemicals and Fertilisers Limited (RCF) (subsequently replaced by IFFCO) while Oman Oil Company Limited was designated by the Sultanate of Oman. In pursuance of the said MOU a further MOU was signed on 30/07/1994 between the GOI, RCF, KRIBHCO and Sultanate of Oman and Oman Oil Company Limited. Further, as per the said MOU dtd.30/07/1994 the obligations of the GOI were to be performed through KRIBHCO and RCF while the Sultanate of Oman would perform its obligations through Oman Oil Company Limited. As per the said MOU the equity participation in the new JV company was to be as under:-

1) KRIBHCO/RCF	- 50%
2) Oman Oil Company Limited	- 50%

7.1 The other salient features of the said MOU dtd.30/07/1994 are enumerated as under:-

- i) Oman Oil Company Limited would exclusively provide natural gas to the proposed Fertiliser Plant under a long term gas supply agreement at a price determined and stated in the said MOU.
- ii) KRIBHCO and RCF shall commit to purchase on FOB Oman basis under a long term take-or-pay contract, on terms and conditions to be agreed upon, 100% of the Urea production of the Fertiliser Plant at a price equal to the defined Calculated Floor Price or the Market price of Urea FOB Oman, whichever was greater.

- iii) The Calculated Floor Price (CFP) of Urea was defined to mean a price necessary to yield a 10% Internal Rate of Return on the equity investment in the Fertiliser Project.
- iv) KRIBHCO and RCF would be entitled to a Urea Sales Fee at the rate of US\$ 3.50 per MT in consideration of the sales and take-or-pay expenses incurred by them.

7.2 In pursuance of the said MOU dtd.30/07/1994 a Joint Venture Agreement dtd. 02/04/1997 was signed between KRIBHCO, RCF and Oman Oil Company Limited. In terms of the said JV agreement a new JV company in the name and title of Oman India Fertiliser Company LLC (OMIFCO) was formed with equity participation as envisaged in the MOU i.e. KRIBHCO – 25%, RCF -25% and Oman Oil Company Limited – 50%. The said JV agreement too provided that :-

- i) Oman Oil Company Limited would exclusively provide natural gas to the proposed Fertiliser Plant under a long term gas supply agreement at a price determined and stated in the said MOU.
- ii) OMIFCO will decide on pricing policies of all of its products, subject to the provisions of this agreement, the UOTA and the Ammonia Off-take Agreement (AOTA), if any.
- iii) KRIBHCO and RCF shall commit to purchase on FOB Oman basis under a long term take-or-pay contract, on terms and conditions to be agreed upon, 100% of the Urea production of the Fertiliser Plant at a price equal to the Urea Market Price FOB Oman during the term of the Urea Off-take Agreement (UOTA).
- iv) KRIBHCO and RCF would be entitled to a Urea Sales Fee at the rate of US\$ 3.50 per MT in consideration of the sales and take-or-pay expenses incurred by them.
- v) KRIBHCO and RCF would provide OMIFCO and interest bearing loan equivalent to the amount of the difference between the Urea Market Price and the Calculated Floor Price of Urea, where the Urea Market Price was less than the Calculated Floor Price of Urea.

7.3 As per the Supplemental to the said JV agreement dtd.02/04/1997 one of the additional conditions precedent for achieving the effective date of the said JV Agreement would be (a) finalization of the Gas Supply Agreement between OMIFCO and the Sultanate of Oman, and (b) UOTA to be entered into between OMIFCO on one hand and KRIBHCO and RCF on the other hand.

7.4 As RCF decided not to proceed with the project and assigned all of its rights and obligations in the original JV agreement to IFFCO, vide and Assignment Agreement dtd.16/10/2000, an amended and restated JV agreement was signed on

20/10/2000 between Oman Oil Company Limited, KRIBHCO and IFFCO. In the amended and restated JV agreement dtd.20/10/2000 it was agreed upon that :-

- I) The GOI had agreed to enter into a long term UOTA with OMIFCO for the purpose of meeting part of the long term urea requirements of GOI.
- II) Project Agreements would collectively mean the Gas Supply Agreement, UOTA, AOTA, the Personnel Supply, Technical Services and Training Agreement and the Urea Sales Fee Agreement.
- III) For the sale of the Urea and Ammonia produced by the Fertilizer Plant the company would enter into a take or pay UOTA with the GOI which will provide for fixed long term pricing for 15 years commencing with the Date of Commercial Production and a take or pay AOTA with IFFCO for 10 years.
- IV) In consideration of the efforts of KRIBHCO and IFFCO facilitating the sale by OMIFCO of Urea to the GOI, they would be entitled to a Urea Sales Fee at the rate of US\$ 3.50 per MT in consideration of the sales and take-or-pay expenses incurred by them.

7.5. Subsequently a Urea Off-take Agreement (UOTA) was signed between the GOI and OMIFCO on 29/05/2002. As per clause 2.1(a) of the said agreement OMIFCO shall offer to sell to the GOI, 100% of the Actual Production of Urea from and after the date of commencement of production. The price at which the Urea was to be sold to the GOI was set out in clause 5 of the said agreement. Clause 5.1 (a) details the Long term price (LTP) of Urea produced up to rated capacity, for Contract year 1 to 15. The Urea in excess of the rated capacity would be sold to the GOI at a price which was equal to 95% of the Market price prevailing on the date of the applicable bill of lading.

8. In terms of the JV agreement dtd.20/10/2000 a Ammonia Off-take Agreement was signed on 29/05/2002 between IFFCO and OMIFCO. As per the said agreement IFFCO had agreed to enter in to the agreement in pursuance of the JV agreement dtd.20/10/2000, for purchase of the surplus Ammonia produced or to be produced at the Fertiliser Plant over and above that required for Urea production. In terms of the said AOTA OMIFCO shall offer to sell to IFFCO, FOB the loading terminal, all of the Ammonia produced from and after the date of commencement of production. The price at which the Ammonia was to be sold to IFFCO was stated in clause 5 of the said agreement. As per clause 5.1 (a) the price was US\$ 100 per MT FOB the loading terminal for quantities of Ammonia upto 270,000 MT in any contract year. As clause 5.1 (b) the price of Ammonia in excess of 270,000 MT in any contract year would be 95% of the Market Prices, as per clause 5.1 (d) the price of Make-up Quantity (difference between the minimum quantity and actual quantity made available) and Commissioning Ammonia (Ammonia produced prior to the date of commercial production) would be US\$ 100 per MT.

9. It was seen from the MOUs as well as the subsequent JV agreements that OMIFCO was formed as a consequence of the understanding and agreement between the Government of India and the Sultanate of Oman. For the purpose of implementation of the understanding and agreement the GOI designated KRIBHCO and IFFCO (originally RCF) while the Sultanate of Oman designated the Oman Oil Company Limited. It was in pursuance with the decision of the Government of India designating them for the said purpose, that KRIBHCO and IFFCO entered into the JV agreement and invested in the equity of the JV Company OMIFCO. As per the JV agreement dtd.20/10/2000 the Board of Directors of OMIFCO was made up of 3 directors from IFFCO/KRIBHCO and 3 directors from Oman Oil Company Limited. The Directors nominated from the Indian side consist of one director each representing IFFCO and KRIBHCO and one director representing the Government of India. In the light of these facts it has to be examined whether the supplier and buyer are related. The term related is defined in Rule 2 (2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007 (hereinafter referred to as the CVR) as :

“ For the purpose of these rules, persons shall be deemed to be “related” only if -

- (i) they are officers or directors of one another’s businesses;**
- (ii) they are legally recognised partners in business;**
- (iii) they are employer and employee;*
- (iv) any person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;*
- (v) one of them directly or indirectly controls the other;*
- (vi) both of them are directly or indirectly controlled by a third person;**
- (vii) together they directly or indirectly control a third person; or*
- (viii) they are members of the same family.*

Explanation I. - The term “person” also includes legal persons.

Explanation II. - Persons who are associated in the business of one another in that one was the sole agent or sole distributor or sole concessionaire, howsoever described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.

9.1 In the instant case it was evident that IFFCO/KRIBHCO and OMIFCO are legally recognized partners in business inasmuch as IFFCO/KRIBHCO hold 50% of the equity of OMIFCO. There are two representatives of IFFCO/KRIBHCO on the Board of Directors of OMIFCO while another Director on the Board of OMIFCO represents the Government of India. It is also pertinent that at and around the time when the JV agreements were signed between KRIBHCO/IFFCO and OMIFCO the Government of India was having a major equity stake in KRIBCHO and IFFCO. In view of these, it was evident that IFFCO/KRIBHCO as the Importer and the Government of India – through the Department of Fertiliser, fall within the ambit of related person in terms of the said Rule 2 (2) (i), (ii) and (vi) of the CVR, 2007.

9.2 The import of Urea, purchased by the Department of Fertiliser, by IFFCO in terms of the UOTA was also squarely covered by the term related person as per Explanation –II of Rule 2 (2) of the CVR, 2007. From the statement of the personnel of IFFCO as well as the documents on record i.e. the MOUs, the JVs and the UOTA it was clearly evident that 100% of the Rated Production Capacity of Urea of OMIFCO was to be sold to the GOI. Further, the Urea produced in excess of the Rated Production Capacity of Urea was to be offered for sale to the GOI and **only** upon refusal or failure of the GOI to purchase the excess quantity of Urea, OMIFCO was free to sell the same in the open market. These terms of sale of the production of Urea between OMIFCO and the GOI falls squarely within the ambit of the related person as contained in Explanation-II of Rule 2 (2) of the CVR, 2007. Therefore also KRIBCHO/IFFCO and OMIFCO on one hand and the Department of Fertiliser on the other are related persons.

10. From the terms and conditions which form part of the MOU and the JV agreements it was seen that purchase of 100% of the Urea Production of OMIFCO was an integral part of the project agreement. This was also evidenced by the Supplemental to the said JV agreement dtd.02/04/1997 as per which one of the additional conditions precedent for achieving the Effective date of the said JV Agreement would be (a) finalization of the Gas Supply Agreement between OMIFCO and the Sultanate of Oman, and (b) UOTA to be entered into between OMIFCO on one hand and KRIBHCO and RCF on the other hand.

11. Further, IFFCO were also importing Ammonia from OMIFCO at prices ranging from US\$ 100 to US\$ 118 per MT. The prevailing market price of Ammonia as evidenced from the imports of IFFCO from other overseas suppliers was in the range of US\$ 414 to US\$ 735 per MT. The imports of Ammonia by IFFCO from OMIFCO are under the AOTA dtd.29/05/2002 between IFFCO and OMIFCO signed in terms of the JV agreement dtd.20/10/2000. The AOTA provided for sale of all of the surplus Ammonia produced by OMIFCO. As stated in the preceding paragraphs IFFCO has a 25% equity participation in OMIFCO and therefore, the relationship between IFFCO and OMIFCO falls within the ambit of related person as defined in Rule 2(2) (ii) of the CVR, 2007. The terms of sale of the entire surplus production of Ammonia to IFFCO also falls within the ambit of the related person as contained in Explanation-II of Rule 2 (2) of the CVR, 2007. Therefore also IFFCO and OMIFCO are related persons.

12. In view of the above, it was evident that IFFCO had imported Urea and Ammonia from OMIFCO which was clearly and evidently a related party at prices which are clearly influenced by the relationship between these parties as was evidenced from the documents and evidences on record. The fact that the price at which the Urea was imported from OMIFCO does not represent the true and correct value of the said product was also evidenced from their imports of Urea from OMIFCO at market prices.

Therefore, the declared values of Urea and Ammonia imported by IFFCO, as detailed in **Annexure A**, are liable to be rejected in terms of Rule 12 of the CVR, 2007. Rule 3 (4) of the CVR, 2007 provides that where the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through Rule 4 to 9.

13. Rule 4 of the CVR, 2007 provides for determination of value on the basis of the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued. IFFCO are also importing Urea from OMIFCO at market prices as well as importing from other overseas suppliers. Similarly in the case of Ammonia IFFCO are also importing Ammonia from overseas suppliers other than OMIFCO at prices which represent the prevailing international market prices. Therefore, the value of the Urea and Ammonia imported by IFFCO from OMIFCO are required to be re-determined in terms of Rule 4 of the CVR, 2007 by adopting the transaction value of identical goods i.e. Urea and Ammonia imported by IFFCO at the prevailing market prices from the very same supplier and other suppliers at and around the same time. M/s.IFFCO are also importing Urea, produced in excess of the rated capacity, from OMIFCO at Market Prices. In terms of Clause 5.1 (c) and 5.3 (a) of the UOTA dtd.29/05/2002 the market price in respect of the excess Urea would be 95% of the simple average of the low and high end prices of Urea as published in the three specified publications. Though this price was 5% less than the market prices as per the specified publications, the same can be accepted as the transaction value for the purpose of Section 14 (1) of the Customs Act, 1962 considering the volumes involved. Therefore, this price was being adopted for the purpose arriving at the re-determined assessable value in terms of Rule 4 of the CVR, 2007.

14. M/s. IFFCO had imported 552213.272 MTs of Urea at a declared value of Rs. 523,55,99,896/- and 81529.034 MTs of Ammonia at a declared value of Rs.67,34,27,634/- from OMIFCO during the period from 30/08/2012 to 03/07/2013. The value of the said Urea and Ammonia re-determined in terms of Rule 4 of the CVR, 2007, by adopting the transaction value of identical goods i.e. Urea and Ammonia imported by IFFCO at the prevailing market prices from the very same supplier and other suppliers at and around the same time, comes to Rs.1258,27,07,958/- in respect of 552213.272 MTs of Urea and Rs.319,13,79,805/- in respect of 81529.034 MTs of Ammonia. The differential Customs duty at the applicable rate amounting to Rs. 58,75,09,575/-, as detailed in Annexure A, is required to be levied and collected from M/s. IFFCO on these re-determined values under the provisions of Section 28 (1) of the Customs Act, 1962 along with interest at the applicable rate under Section 28 AA of the Customs Act, 1962. The 552213.272 MTs of Urea and 81529.034 MTs of Ammonia valued (re-determined) at Rs.1258,27,07,958/- and Rs.319,13,79,805/- respectively are also liable for confiscation in terms of Section 111 (m) of the Customs Act, 1962 in as much as M/s. IFFCO at the time of filing bills of entry for import of Urea from OMIFCO

have in the Declaration form for import of goods, filed in terms of the Bill of Entry (Electronic Declaration) Regulations, 2011, affirmed to a declaration that the applicable Method of Valuation was Transaction Value as per Rule 4 which was factually wrong/incorrect as is evident from the foregoing and also the form of declaration for import of goods which required them to declare whether they were related to OMIFCO and here too they did not declare that they were related to the sellers. This also rendered M/s. IFFCO liable for penal action under Section 112 (a) of the Customs Act, 1962.

15.1 In view of the above, M/s. Indian Farmers Fertilizer Cooperative Ltd., IFFCO Sadan, C-1, Distt Centre, Saket Place, New Delhi-110017, was issued a Show Cause Notice bearing F.No.DRI/AZU/INQ-66/2013/1988 dated 29.08.2013 calling upon to show cause to Commissioner of Customs, Custom House: Kandla, as to why:-

- (i)** The value of Rs. 195,89,00,262/- (Rupees One Hundred and Ninety Five Crores Eighty Nine Lakhs Two Hundred and Sixty Two only), declared by them in respect of 208466.193 MTs “Urea’ imported by them, should not be rejected and re-determined as Rs.486,00,38,341/- (Rupees Four Hundred Eighty Six Crores Thirty Eight Thousand Three Hundred and Forty One only), as detailed in Annexure-A to the Notice, under Section 14 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- (ii)** The 208466.193 MTs goods i.e. “Urea’ imported, as detailed in Annexure ‘A’, totally valued at Rs. 486,00,38,341/- should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962.
- (iii)** The differential Customs duty amounting to Rs. 18,07,84,419/- (Rupees Eighteen Crores Seven Lakhs Eighty Four Thousand Four Hundred Nineteen only) on import of Urea, as detailed in the Annexure ‘A’ to the show cause notice, should not be demanded and recovered from them Section 28 (1) of the Customs Act, 1962.
- (iv)** The value of Rs. 67,34,27,634/- (Rupees Sixty Seven Crores Thirty Four Lakhs Twenty Seven Thousand Six Hundred and Thirty Four only), declared by them in respect of 81529.034 MTs “Ammonia’ imported by them, should not be rejected and re-determined as Rs.319,13,79,805/- (Rupees Three Hundred and Nineteen Crores Thirteen Lakhs Seventy Nine Thousand Eight Hundred and Five only), as detailed in Annexure-A to the Notice, under Section 12 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- (v)** The 81529.034 MTs goods i.e. “Ammonia’ imported, as detailed in Annexure ‘A’,

totally valued at Rs. 319,13,79,805/- should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962.

- (vi)** The differential Customs duty amounting to Rs. 12,96,74,539/- (Rupees Twelve Crores Ninety Six Lakhs Seventy Four Thousand Five Hundred Thirty Nine only) on import of Urea, as detailed in the Annexure 'A' to the show cause notice, should not be demanded and recovered from them Section 28 (1) of the Customs Act, 1962.
- (vii)** Interest should not be recovered from them on the said differential Customs duty, as at (iii) & (vi) above, under Section 28AA of the Customs Act, 1962.
- (viii)** Penalty should not be imposed on them under Section 112 (a) of the Customs Act, 1962.

15.2 In view of the above, M/s. Indian Farmers Fertilizer Cooperative Ltd., IFFCO Sadan, C-1, Distt Centre, Saket Place, New Delhi-110017, was issued a Show Cause Notice bearing F.No.DRI/AZU/INQ-66/2013/1988 dated 29.08.2013 calling upon to show cause to the Commissioner of Central Excise & Customs, Visakhapatnam-II as to why:-

- (i)** The value of Rs. 84,00,29,193/- (Rupees Eighty Four Crores Twenty Nine Thousand One Hundred and Ninety Three only), declared by them in respect of 90564.260 MTs "Urea" imported by them, should not be rejected and re-determined as Rs.212,83,84,590/- (Rupees Two Hundred and Twelve Crores Eighty Three Lakhs Eighty Four Thousand Five Hundred and Ninety only), as detailed in Annexure-A to the Notice, under Section 14 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- (ii)** The 90564.260 MTs goods i.e. "Urea" imported, as detailed in Annexure 'A', totally valued at Rs. 212,83,84,590/- should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962.
- (iii)** The differential Customs duty amounting to Rs. 8,02,83,865/- (Rupees Eight Crores Two Lakhs Eighty Three Thousand Eight Hundred and Sixty Five only) on import of Urea, as detailed in the Annexure 'A' to the show cause notice, should not be demanded and recovered from them Section 28 (1) of the Customs Act, 1962.
- (iv)** Interest should not be recovered from them on the said differential Customs duty, as at (iii) above, under Section 28AA of the Customs Act, 1962.

- (v)** Penalty should not be imposed on them under Section 112 (a) of the Customs Act, 1962.

15.3 In view of the above, M/s. Indian Farmers Fertilizer Cooperative Ltd., IFFCO Sadan, C-1, Distt Centre, Saket Place, New Delhi-110017, was issued a Show Cause Notice bearing F.No.DRI/AZU/INQ-66/2013/1988 dated 29.08.2013 calling upon to show cause to the Commissioner of Customs, Mangalore as to why:-

- (i)** The value of Rs. 91,96,32,884/- (Rupees Ninety One Crores Ninety Six Lakhs Thirty Two Thousand Eight Hundred and Eighty Four only), declared by them in respect of 97201.372 MTs "Urea" imported by them, should not be rejected and re-determined as Rs.219,10,88,164/- (Rupees Two Hundred and Nineteen Crores Ten Lakhs Eighty Eight Thousand One Hundred and Sixty Four only), as detailed in Annexure-A to the Notice, under Section 14 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- (ii)** The 97201.372 MTs goods i.e. "Urea" imported, as detailed in Annexure 'A', totally valued at Rs. 219,10,88,164/- should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962.
- (iii)** The differential Customs duty amounting to Rs. 7,92,30,735/- (Rupees Seven Crores Ninety Two Lakhs Thirty Thousand Seven Hundred Thirty Five only) on import of Urea, as detailed in the Annexure 'A' to the show cause notice, should not be demanded and recovered from them Section 28 (1) of the Customs Act, 1962.
- (iv)** Interest should not be recovered from them on the said differential Customs duty, as at (iii) above, under Section 28AA of the Customs Act, 1962.
- (v)** Penalty should not be imposed on them under Section 112 (a) of the Customs Act, 1962.

15.4 In view of the above, M/s. Indian Farmers Fertilizer Cooperative Ltd., IFFCO Sadan, C-1, Distt Centre, Saket Place, New Delhi-110017, was issued a Show Cause Notice bearing F.No.DRI/AZU/INQ-66/2013/1988 dated 29.08.2013 calling upon to show cause to Commissioner of Customs (Preventive), Jamnagar as to why:-

- (i)** The value of Rs. 80,95,49,457/- (Rupees Eighty Crores Ninety Five Lakhs Forty Nine Thousand Four Hundred and Fifty Seven only), declared by them in respect of 82984.083 MTs "Urea" imported by them, should not be rejected and re-determined as Rs.187,53,20,822/- (Rupees One Hundred and Eighty Seven

Crores Fifty Three Lakhs Twenty Thousand Eight Hundred and Twenty Two only), as detailed in Annexure-A to the Notice, under Section 14 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;

- (ii)** The 82984.083 MTs goods i.e. “Urea’ imported, as detailed in Annexure ‘A’, totally valued at Rs. 187,53,20,822/- should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962.
- (iii)** The differential Customs duty amounting to Rs. 6,64,13,542/- (Rupees Six Crores Sixty Four Lakhs Thirteen Thousand Five Hundred Forty Two only) on import of Urea, as detailed in the Annexure ‘A’ to the show cause notice, should not be demanded and recovered from them Section 28 (1) of the Customs Act, 1962.
- (iv)** Interest should not be recovered from them on the said differential Customs duty, as at (iii) above, under Section 28AA of the Customs Act, 1962.
- (v)** Penalty should not be imposed on them under Section 112 (a) of the Customs Act, 1962.

15.5 In view of the above, M/s. Indian Farmers Fertilizer Cooperative Ltd., IFFCO Sadan, C-1, Distt Centre, Saket Place, New Delhi-110017, was issued a Show Cause Notice bearing F.No.DRI/AZU/INQ-66/2013/1988 dated 29.08.2013 calling upon to show cause to the Commissioner of Customs, Visakhapatnam, as to why:-

- (i)** The value of Rs. 70,74,88,101/- (Rupees Seventy Crores Seventy Four Lakhs Eighty Eight Thousand One Hundred and One only), declared by them in respect of 72997.364 MTs “Urea’ imported by them, should not be rejected and re-determined as Rs.152,78,76,042/- (Rupees One Hundred and Fifty Two Crores Seventy Eight Lakhs Seventy Six Thousand and Forty Two only), as detailed in Annexure-A to the Notice, under Section 14 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- (ii)** The 72997.364 MTs goods i.e. “Urea’ imported, as detailed in Annexure ‘A’, totally valued at Rs.152,78,76,042/-, (re-determined value), should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962.
- (iii)** The differential Customs duty amounting to Rs. 5,11,22,475/- (Rupees Five Crores Eleven Lakhs Twenty Two Thousand Four Hundred Seventy Five only) on import of Urea, as detailed in the Annexure ‘A’ to the show cause notice,

should not be demanded and recovered from them Section 28 (1) of the Customs Act, 1962.

- (iv) Interest should not be recovered from them on the said differential Customs duty, as at (iii) above, under Section 28AA of the Customs Act, 1962.
- (v) Penalty should not be imposed on them under Section 112 (a) of the Customs Act, 1962.

16. In this regard, the Central Board of Excise & Customs vide Order F.No.437/83/2013—Cus-IV dtd. 29.10.2013 assigned the Show Cause Notice F.No.DRI/AZU/INQ-66/2013/1988 dated 29.08.2013 issued by Additional Director General, Directorate of Revenue Intelligence, Zonal Unit, Ahmedabad in the case of M/s. IFFCO to the Commissioner of Customs, Kandla for purpose of adjudication. Accordingly, I take up the case for adjudication.

DEFENCE

17. M/s. IFFCO in their reply dated 12.02.2014 to the Show Cause Notice, had denied all the allegations made in the Show Cause Notice, has, inter-alia, submitted that

17.1 ADG has wrongly assumed that IFFCO has transactional relationship with OMIFCO and, accordingly, invoked the clause defining related parties to the relationship between IFFCO and OMIFCO ; that it was GOI which was the Buyer of this urea from OMIFCO under the Urea Offtake Agreement (UOTA) with OMIFCO. IFFCO has purchased urea from GOI on high sea sales basis and imported the same into India. But IFFCO and GOI are not related parties in terms of rule 2(2) of CVR; that GOI has entered into “Imported Urea Marketing Agreement” with IFFCO on 01.05.2012; that they had submitted copy of agreement (*page-45* .); *that* in the said agreement, IFFCO has been described as Fertiliser Marketing Entity. Clauses 3(ii) & (x) and 6(i) (at *pages 48, 49 & 53*) of the agreement show that IFFCO shall handle urea on the basis of ownership of the material. Ownership was to be transferred to IFFCO while the vessel was on the high seas. IFFCO bears all the risks and rewards of Ownership; that IFFCO has paid the pool issue price less ocean freight, customs duty and handling charges within 20 days from the unloading of the goods. IFFCO was to pay the amount irrespective of realisation of pool price by it on resale. In the agreement, IFFCO was to establish letter of credit in favour GOI for the amount payable by it which can be encashed on the 45th day of completion of discharge of the vessel. Letter of credit in favour of seller was a mode of payment of consideration for goods purchased; that when the marketing agreement was entered into between IFFCO and the GOI on 01.05.2012, GOI had no shareholding in IFFCO. Therefore, IFFCO and GOI cannot be treated as related parties in terms of rule 2(2).

17.2 ADG has grossly erred in alleging that IFFCO and OMIFCO are related persons in terms of rule 2(2)(i), (ii), (vi) or Explanation II to this rule of Customs Valuation (Determination of Value Of Imported Goods) Rules, 2007; that *both parties are artificial legal entities, they cannot be officers or directors of one another's business. Therefore, clause (i) of rule 2(2) cannot be invoked against IFFCO; that only a natural person can be officer or director. In the present case, both transacting parties are not natural persons and, therefore, it was not possible that anyone can act as director or officer in another's business; that IFFCO having a director in the Board of Directors of OMIFCO cannot be considered as the importer acting as a director; that in any case, the relationship envisaged in rule 2(2)(i) was between two natural persons, who are the transacting parties and who are officers or directors in one another's business; that this was not the case here.*

17.3 *There was no evidence that OMIFCO and IFFCO are legally recognized partners. Therefore, rule 2(2)(ii) cannot be invoked against IFFCO; that ADG has misunderstood that IFFCO and OMIFCO are legally recognized partners in any business taking into account the fact that IFFCO was holding 25% of the equity of OMIFCO; that in the Partnership Act, 1932, "partnership" has been defined as a relationship between persons who have agreed to share profit of business carried on by all or any of them acting for all; that one partner was the agent of another. Partnership was formed through an agreement; that OMIFCO and IFFCO have no partnership agreement to carry out any business by them together or by any one on other's behalf; that OMIFCO was an independent legal entity incorporated overseas in the Sultanate of Oman and was conducting its own business; that it was controlled by its board of directors; that ADG has failed to appreciate that IFFCO has joint venture agreement with Oman Oil Company Ltd., not with OMIFCO and, therefore, it cannot be relied upon to allege that IFFCO and OMIFCO are partners that a company and its shareholders cannot be termed as partners in the business carried on by the company.*

17.4 *There was no evidence whatsoever on record to support the ADG's allegation that OMIFCO and IFFCO are controlled by a third person. Therefore, rule 2(2)(vi) cannot be invoked against IFFCO; that ADG has alleged that when the JV agreement was signed between IFFCO, KRIBHCO and Oman Oil Company, GOI was having a major equity stake in IFFCO/KRIBHCO; that the ADG was required to establish that someone controls both IFFCO and OMIFCO, which he has not done; that Government of India had no control over OMIFCO at any point of time; that Courts have held that a person, to have controlling interest in a company, must own more than 50% of the shares in it; that ADG has stated that GOI had majority of equity stake in IFFCO and KRIBHCO when the JV agreement was signed. But thereby, the Government of India cannot control OMIFCO. IFFCO and KRIBHCO, together, do not have more than 50% of shares in OMIFCO; that In view of court rulings, GOI cannot be said to be controlling both OMIFCO and IFFCO; that ADG's attempt to invoke rule 2(2)(vi) would fail.*

17.5 *IFFCO is not acting as sole agent or sole distributor or sole concessionaire of OMIFCO; that ADG has not been able to justify invocation of any of the clauses of rule 2(2); That he has not justified in invoking Explanation II to rule 2(2); Courts have held that a person, to have controlling interest in a company, must own more than 50% of the shares in it. In *Vodafone International Holdings BV vs. Union of India, (2012) 6 SCC 613 : (2012) 341 ITR 1*, the Supreme Court has held that controlling interest in a company is an incident of holding a majority of shares; that Courts have held that mere existence of a distributorship agreement between supplier and importer cannot lead to conclusion that they are related unless their relationship falls within any of clauses (i) to (viii) to rule 2(2) of Customs (Valuation) Rules, 1988; that Explanation-II states that the parties to the transaction should be associated in the business of one another and that one of them was a sole agent or sole distributor or sole concessionaire of the other. IFFCO and OMIFCO are in relationship of seller and buyer and a buyer cannot be considered as an agent or a distributor or concessionaire of seller; that IFFCO has not been appointed as agent or distributor or concessionaire of any one. Hence, ADG has wrongly relied upon the Explanation II to rule 2(2) to allege that IFFCO and OMIFCO are related persons; that it should be noted that Explanation-II lays emphasis on exporter and importer being associated in the business of one another; that mutuality of interest has to be established before Explanation-II could be invoked; that mere sale-purchase agreement does not create mutual interest; that only buyer having interest in seller or seller having interest in buyer was not enough; that both should have interest in each other.*

17.6 Even when the parties are related, under section 14 of the Customs Act, 1962, read with rule 3(3)(a) of CVR, transaction value shall be adopted if it was not influenced by the relationship; that ADG has not established that the price of the goods imported by IFFCO was influenced by the relationship between IFFCO and OMIFCO; that the price charged under a long term agreement between GOI and OMIFCO for bulk sale of

urea with take or pay obligations under an international contract cannot be compared with market price in the spot market in order to come to a conclusion that the transaction value has been influenced by the relationship of IFFCO with OMIFCO that the prices for urea and ammonia supplied have been fixed in the agreements for stipulated quantities. For supplies beyond that 95% of the market price was payable. The "market price" has been defined in the agreement as the average of low and high end FOB Middle East prices as quoted in the specified international journals; that GOI and IFFCO, in a competitive environment offered to purchase urea and ammonia from OMIFCO on long term basis at the then prevailing international prices and accordingly entered into the AOTA with OMIFCO by offering better terms than the other international contenders and took commercial risk of future market fluctuations with take or pay obligations; that the Long Term Price was negotiated and entered into on arms length basis and gave comfort to OMIFCO lenders in terms of assured cash flows for Debt servicing of the project finance; that under the present provisions of the law, the customs authority was required to accept the price where the importer produces evidence about truth and accuracy of the price declared for the imported goods; that Rule 3(3) prescribes the mode of valuation where the buyer and the seller are related; that Rule 3(3)(a) states that the transaction value between related persons is to be accepted if the relationship did not influence the price; that Rule 3(3)(b) provides that transaction value shall be accepted if it satisfied the condition specified therein; that in the notice, ADG has not doubted that GOI and IFFCO had paid the prices for the urea and ammonia at the rates negotiated in the long terms off take agreements dated 29.05.2002; that ADG has alleged that the price payable by IFFCO under the agreement was influenced by its relationship with OMIFCO without any evidence; that the price, which has been fixed for a long period for sale of guaranteed quantity of goods cannot be compared with the current market price of such goods; that it was ordinary business practice to sell the goods at a lower price when the purchaser has agreed to buy a specified quantity for long period.

17.7 The history of negotiations leading to the signing of urea and ammonia off-take agreements shows that each party was negotiating the long term off-take price taking into account the prevailing marketing conditions and its own interest; that there was no mutuality of interest between the parties and their relationship did not influence the price of the imported goods; that IFFCO has enclosed copy of the letter F.No.2(26)/PF.II/99 dated 4th January 2000 as *Annexure-C*; that it would be clear from that that contemporaneous international market price trends have been taken into account while negotiating the LTP with OMIFCO ; that GOI was keeping its own interest in mind while dealing with OMIFCO; that it was doing so on the basis of adversarial relationship with OMIFCO; that there was no hint of any mutuality of interest between GOI and OMIFCO; that the long term price agreed between GOI and OMIFCO was on the basis of price trends of the goods in the international market as reported by reputed third party information; that IFFCO has enclosed Urea Forecasts by M/s Chem Systems at *page-102...105 (Annexure-D)*; that from this, it was to be noted, the price FOB gulf ranged from US\$ 92 to 133 PMT from 1998 to 2002 and the price forecast was US\$ 132 PMT for next 10 years; both under the AOTA and UOTA, there was a take or pay liability; that in case OMIFCO was forced to reduce production due to default in lifting by IFFCO or GOI, it has to be compensated for the loss of margins; that the loss of margin was the difference between LTP and unit (variable) cost of production, which implies that at all time, the prices under LTP were fairly remunerative.

17.8 The goods are not liable to be confiscated under section 111(m) of the Customs Act; that the ADG has wrongly proposed to impose penalty under section 112(a) of the Act; that as per section 111(m), any goods brought from a place outside India, which do not correspond in respect of value or in any other particular with the entry made under this Act shall be liable to be confiscation; that IFFCO has correctly declared the value of urea and ammonia as discussed above. ADG has proposed to reject the transaction value and it was not the case of the Department that IFFCO had misdeclared the transaction value; that there was no mis-declaration of value of the goods imported by IFFCO; that it was not a case where it can be alleged that IFFCO has not made declaration disclosing full and accurate details relating to value of imported goods as

per the rule 11 of CVR; that ADG has also proposed to impose penalty under section 112(a) that as per this section, penalty can be imposed on a person who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111 or abets the doing or omission of such an Act; that the goods imported by IFFCO are not liable for the confiscation as discussed above, penalty under section 112(a) cannot be imposed on it, that there was no intention to evade payment of duty as alleged in the notice; that IFFCO had correctly declared the value and other information and paid customs duty accordingly; that Penalty was not leviable when IFFCO was under *bona fide* belief that the on the imports of urea and ammonia, it has paid the correct amounts of customs duty; that they requested to drop the proceedings in view of the above submissions and requested for personal hearing in the case.

PERSONAL HEARING :

18. Personal hearing in the matter was held on 04.03.2015 and Shri P. K. Sahu, Advocate attended the personal hearing on behalf of M/s. IFFCO. During the course of Personal Hearing, Shri Sahu reiterated the defence submission made by the M/s. IFFCO vide their reply dated 12.02.2014. He further submitted that IFFCO purchased Urea from Govt. on high sea sale basis of contemporaneous price prevalent and forecast during relevant period and price fixed for 15 years; that it was a long term contract price; that the deal was at arms length and not influenced by any other considerations; that he had cited many case laws and contested that they are not the related persons and hence price charged is the genuine transaction value for the import under dispute; that in view of the above requested to drop the proceedings.

DISCUSSION AND FINDINGS

19.1 I have carefully gone through the records of the case, including the Show Cause Notice dated 29.08.2013, the written submissions dated 12.02.2014, as well as the oral submissions made during the course of Personal Hearing.

19.2 I find that the following main issues are involved in the subject Show Cause Notice, which is required to be decided:-

- (i) Whether the value of Rs. 523,55,99,896/- declared by M/s. IFFCO in respect of 552213.272 MTs “Urea’ imported by them, is required to be rejected and re-determined as Rs.1258,27,07,958/- as detailed in Annexure-A to the Notice, under Section 14 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- (ii) Whether the 552213.272 MTs goods i.e. “Urea’ imported, as detailed in Annexure ‘A’, totally valued at Rs. 1258,27,07,958/- is liable for confiscation under Section 111(m) of the Customs Act, 1962.
- (iii) Whether The differential Customs duty amounting to Rs. 45,78,35,036/- on

import of Urea, as detailed in the Annexure 'A' to the show cause notice, is required to be demanded and recovered from them Section 28 (1) of the Customs Act, 1962.

- (iv) Whether the value of Rs. 67,34,27,634/- declared by them in respect of 81529.034 MTs "Ammonia" imported by them, is required to be rejected and re-determined as Rs.319,13,79,805/- as detailed in Annexure-A to the Notice, under Section 12 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- (v) Whether the 81529.034 MTs goods i.e. "Ammonia" imported, as detailed in Annexure 'A', totally valued at Rs. 319,13,79,805/- is liable for confiscation under Section 111(m) of the Customs Act, 1962.
- (vi) Whether the differential Customs duty amounting to Rs. 12,96,74,539/- on import of Urea, as detailed in the Annexure 'A' to the show cause notice, is required to be demanded and recovered from them Section 28 (1) of the Customs Act, 1962.
- (vii) Whether Interest is required to be recovered from them on the said differential Customs duty, as at (iii) & (vi) above, under Section 28AA of the Customs Act, 1962.
- (viii) Whether M/s. IFFCO is liable for penal action under Section 112 (a) of the Customs Act, 1962.

20. Firstly, it is significant to mention that, the issue before me for decision is that whether the supplier and the buyer are related. For further transparency the term "related" is defined in Rule 2 (2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter referred to as the CVR) :

"For the purpose of these rules, persons shall be deemed to be "related" only if -

- (i) **they are officers or directors of one another's businesses;**
- (ii) **they are legally recognised partners in business;**
- (iii) *they are employer and employee;*
- (iv) *any person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;*
- (v) *one of them directly or indirectly controls the other;*
- (vi) **both of them are directly or indirectly controlled by a third person;**
- (vii) *together they directly or indirectly control a third person; or*
- (viii) *they are members of the same family.*

Explanation I. - The term "person" also includes legal persons.

Explanation II. - Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever

described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.

20.1 I find from the records that a joint venture company was formed as per the Memorandum of Understanding (MOU) between the Government of India and the Sultanate of Oman dtd.15/06/1993. The MOU was entered into by KRIBHCO, RCF and Oman Oil Company Limited. In terms of the said MOU the companies designated by the GOI for setting up of a joint venture Ammonia-Urea project were M/s. KRIBHCO and M/s. Rashtriya Chemicals and Fertilisers Limited (RCF) (subsequently replaced by IFFCO) while Oman Oil Company Limited was designated by the Sultanate of Oman. In pursuance of the said MOU a further MOU was signed on 30/07/1994 between the GOI, RCF, KRIBHCO and Sultanate of Oman and Oman Oil Company Limited. Further, as per the said MOU dtd.30/07/1994 the obligations of the GOI were to be performed through KRIBHCO and RCF while the Sultanate of Oman would perform its obligations through Oman Oil Company Limited. As per the said MOU the equity participation in the new JV company was to be as under:-

- | | |
|-----------------------------|-------|
| 1) KRIBHCO/RCF | - 50% |
| 2) Oman Oil Company Limited | - 50% |

20.2 I further find from the records that the other salient features of the said MOU dtd.30/07/1994 are as under:-

- v) Oman Oil Company Limited would exclusively provide natural gas to the proposed Fertiliser Plant under a long term gas supply agreement at a price determined and stated in the said MOU.
- vi) KRIBHCO and RCF shall commit to purchase on FOB Oman basis under a long term take-or-pay contract, on terms and conditions to be agreed upon, 100% of the Urea production of the Fertiliser Plant at a price equal to the defined Calculated Floor Price or the Market price of Urea FOB Oman, whichever is greater.
- vii) The Calculated Floor Price (CFP) of Urea was defined to mean a price necessary to yield a 10% Internal Rate of Return on the equity investment in the Fertiliser Project.
- viii) KRIBHCO and RCF would be entitled to a Urea Sales Fee at the rate of US\$ 3.50 per MT in consideration of the sales and take-or-pay expenses incurred by them.

20.3 In pursuance of the said MOU dtd.30/07/1994 a Joint Venture Agreement dtd. 02/04/1997 was signed between KRIBHCO, RCF and Oman Oil Company Limited. In terms of the said JV agreement a new JV company in the name and title of Oman India Fertiliser Company LLC (OMIFCO) was formed with equity participation as

envisaged in the MOU i.e. KRIBHCO – 25%, RCF -25% and Oman Oil Company Limited – 50%. The said JV agreement too provided that :-

- vi) Oman Oil Company Limited would exclusively provide natural gas to the proposed Fertiliser Plant under a long term gas supply agreement at a price determined and stated in the said MOU.
- vii) OMIFCO will decide on pricing policies of all of its products, subject to the provisions of this agreement, the UOTA and the Ammonia Off-take Agreement (AOTA), if any.
- viii) KRIBHCO and RCF shall commit to purchase on FOB Oman basis under a long term take-or-pay contract, on terms and conditions to be agreed upon, 100% of the Urea production of the Fertiliser Plant at a price equal to the Urea Market Price FOB Oman during the term of the Urea Off-take Agreement (UOTA).
- ix) KRIBHCO and RCF would be entitled to a Urea Sales Fee at the rate of US\$ 3.50 per MT in consideration of the sales and take-or-pay expenses incurred by them.
- x) KRIBHCO and RCF would provide OMIFCO and interest bearing loan equivalent to the amount of the difference between the Urea Market Price and the Calculated Floor Price of Urea, where the Urea Market Price is less than the Calculated Floor Price of Urea.

20.4 As per the Supplemental to the said JV agreement dtd.02/04/1997 one of the additional conditions precedent for achieving the effective date of the said JV Agreement would be (a) finalization of the Gas Supply Agreement between OMIFCO and the Sultanate of Oman, and (b) UOTA to be entered into between OMIFCO on one hand and KRIBHCO and RCF on the other hand.

20.5 As RCF decided not to proceed with the project and assigned all of its rights and obligations in the original JV agreement to IFFCO, vide and Assignment Agreement dtd.16/10/2000, an amended and restated JV agreement was signed on 20/10/2000 between Oman Oil Company Limited, KRIBHCO and IFFCO. In the amended and restated JV agreement dtd.20/10/2000 it was agreed upon that :-

- V) The GOI had agreed to enter into a long term UOTA with OMIFCO for the purpose of meeting part of the long term urea requirements of GOI.
- VI) Project Agreements would collectively mean the Gas Supply Agreement, UOTA, AOTA, the Personnel Supply, Technical Services and Training Agreement and the Urea Sales Fee Agreement.
- VII) For the sale of the Urea and Ammonia produced by the Fertilizer Plant the company would enter into a take or pay UOTA with the GOI which will provide for fixed long term pricing for 15 years commencing with the Date of Commercial Production and a take or pay AOTA with IFFCO for 10 years.

VIII) In consideration of the efforts of KRIBHCO and IFFCO facilitating the sale by OMIFCO of Urea to the GOI, they would be entitled to a Urea Sales Fee at the rate of US\$ 3.50 per MT in consideration of the sales and take-or-pay expenses incurred by them.

20.6. I also find a Urea Off-take Agreement (UOTA) was signed between the GOI and OMIFCO on 29/05/2002. As per clause 2.1(a) of the said agreement OMIFCO shall offer to sell to the GOI, 100% of the Actual Production of Urea from and after the date of commencement of production. The price at which the Urea was to be sold to the GOI was set out in clause 5 of the said agreement. Clause 5.1 (a) details the Long term price (LTP) of Urea produced up to rated capacity, for Contract year 1 to 15. The Urea in excess of the rated capacity would be sold to the GOI at a price which is equal to 95% of the Market price prevailing on the date of the applicable bill of lading.

20.7. In terms of the JV agreement dtd.20/10/2000 a Ammonia Off-take Agreement was signed on 29/05/2002 between IFFCO and OMIFCO. As per the said agreement IFFCO had agreed to enter in to the agreement in pursuance of the JV agreement dtd.20/10/2000, for purchase of the surplus Ammonia produced or to be produced at the Fertiliser Plant over and above that required for Urea production. In terms of the said AOTA OMIFCO shall offer to sell to IFFCO, FOB the loading terminal, all of the Ammonia produced from and after the date of commencement of production. The price at which the Ammonia is to be sold to IFFCO is stated in clause 5 of the said agreement. As per clause 5.1 (a) the price is US\$ 100 per MT FOB the loading terminal for quantities of Ammonia upto 270,000 MT in any contract year. As clause 5.1 (b) the price of Ammonia in excess of 270,000 MT in any contract year would be 95% of the Market Prices, as per clause 5.1 (d) the price of Make-up Quantity (difference between the minimum quantity and actual quantity made available) and Commissioning Ammonia (Ammonia produced prior to the date of commercial production) would be US\$ 100 per MT.

20.8. I find from the MOUs as well as the subsequent JV agreements that OMIFCO was formed as a consequence of the understanding and agreement between the Government of India and the Sultanate of Oman. For the purpose of implementation of the understanding and agreement the GOI designated KRIBHCO and IFFCO (originally RCF) while the Sultanate of Oman designated the Oman Oil Company Limited. It was in pursuance with the decision of the Government of India designating them for the said purpose, that KRIBHCO and IFFCO entered into the JV agreement and invested in the equity of the JV Company OMIFCO. As per the JV agreement dtd.20/10/2000 the Board of Directors of OMIFCO is made up of 3 directors from IFFCO/KRIBHCO and 3 directors from Oman Oil Company Limited. The Directors nominated from the Indian side consist of one director each representing IFFCO and KRIBHCO and one director representing the Government of India.

20.9 In view of the above, I find that that IFFCO/KRIBHCO and OMIFCO are legally recognized partners in business inasmuch as IFFCO/KRIBHCO holds 50% of the equity of OMIFCO. There are two representatives of IFFCO/KRIBHCO on the Board of Directors of OMIFCO while another Director on the Board of OMIFCO represents the Government of India. It is also pertinent that at and around the time when the JV agreements were signed between KRIBHCO/IFFCO and OMIFCO the Government of India was having a major equity stake in KRIBCHO and IFFCO. Thus, it is evident that IFFCO/KRIBHCO as the Importer and the Government of India – through the Department of Fertiliser, fall within the ambit of related person in terms of the said Rule 2 (2) (i), (ii) and (vi) of the CVR, 2007.

20.10 I also find that, the importer argued that since both parties are artificial legal entities, they cannot be officers or directors of one another's business. Therefore, clause (i), (ii) and (vi) of rule 2(2) cannot be invoked against IFFCO.

20.11 I find that the contentions of the noticee is factually incorrect, as Rule 2(2)(i), (ii) and (vi) of the CVR, 2007 specifies

- (i) they are officers or directors of one another's businesses*
- ii) they are legally recognised partners in business.*
- (vi) both of them are directly or indirectly controlled by a third person;*

As already discussed supra, that IFFCO/KRIBHCO and OMIFCO are legally recognized partners in business inasmuch as IFFCO/KRIBHCO holds 50% of the equity of OMIFCO. There are two representatives of IFFCO/KRIBHCO on the Board of Directors of OMIFCO while another Director on the Board of OMIFCO represents the Government of India. It is also pertinent mention here that at and around the time when the JV agreements were signed between KRIBHCO/IFFCO and OMIFCO the Government of India was having a major equity stake in KRIBCHO and IFFCO. Thus, it is evident that IFFCO/KRIBHCO as the Importer and the Government of India – through the Department of Fertiliser, falls within the ambit of related person in terms of the said Rule 2 (2) (i), (ii) and (vi) of the CVR, 2007. Further I find from the statement of the key personnel of IFFCO as well as the documents on record i.e. the MOUs, the JVs and the UOTA it is clearly evident that 100% of the Rated Production Capacity of Urea of OMIFCO is to be sold to the GOI. Further, the Urea produced in excess of the Rated Production Capacity of Urea is to be offered for sale to the GOI and only upon refusal or failure of the GOI to purchase the excess quantity of Urea, OMIFCO is free to sell the same in the open market. These terms of sale of the production of Urea between OMIFCO and the GOI falls evenly within the ambit of the related person as contained in Explanation-II of Rule 2 (2) of the CVR, 2007. Therefore, IFFCO and OMIFCO on one hand and the Department of Fertiliser on the other are related persons.

20.12 As per the terms and conditions which form part of the MOU and the JV agreements, I find that purchase of 100% of the Urea Production of OMIFCO was an integral part of the project agreement. This was also evidenced by the Supplemental to the said JV agreement dtd.02/04/1997 as per which one of the additional conditions precedent for achieving the Effective date of the said JV Agreement would be (a) finalization of the Gas Supply Agreement between OMIFCO and the Sultanate of Oman, and (b) UOTA to be entered into between OMIFCO on one hand and IFFCO on the other hand.

20.13 I also find that IFFCO were importing Ammonia from OMIFCO at prices ranging from US\$ 100 to US\$ 118 per MT. The prevailing market price of Ammonia as evidenced from the imports of IFFCO from other overseas suppliers is in the range of US\$ 414 to US\$ 735 per MT. The imports of Ammonia by IFFCO from OMIFCO were under the AOTA dtd.29/05/2002 between IFFCO and OMIFCO signed in terms of the JV agreement dtd.20/10/2000. The AOTA provided for sale of all of the surplus Ammonia produced by OMIFCO. As stated in para supra that IFFCO had a 25% equity participation in OMIFCO and therefore, the relationship between IFFCO and OMIFCO falls within the ambit of related person as defined in Rule 2(2) (ii) of the CVR, 2007. The terms of sale of the entire surplus production of Ammonia to IFFCO also falls within the ambit of the related person as contained in Explanation-II of Rule 2 (2) of the CVR, 2007. Therefore also IFFCO and OMIFCO are related persons.

20.14. In view of this, I do not find any merit in the contention of the importer, which is required to be rejected summarily.

21. As already discussed above, that IFFCO have imported Urea and Ammonia from OMIFCO which was clearly and evidently a related party at prices which are clearly influenced by the relationship between these parties as it transpired from the documents and evidences on record. The fact that the price at which the Urea is imported from OMIFCO does not represent the true and correct value of the said product is also evidenced from their imports of Urea from OMIFCO at market prices. Consequently, the declared values of Urea and Ammonia imported by IFFCO, as detailed in **Annexure A**, are liable to be rejected in terms of Rule 12 of the CVR, 2007.

21.1 I find that Rule 3 (4) of the CVR, 2007 provides that where the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through Rule 4 to 9. Therefore, I proceed sequentially these Rules of the CVR, 2007.

Rule 4: Transaction Value of identical Goods

Rule 5: Transaction Value of similar Goods

Rule 6:	Determination of value when value cannot be determined under rules 3, 4 and 5
Rule 7:	Deductive value
Rule 8:	Computed Value
Rule 9:	Residual Method

21.2. Rule 4 of the CVR, 2007 provides for determination of value on the basis of the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued. IFFCO are also importing Urea from OMIFCO at market prices as well as importing from other overseas suppliers. Similarly in the case of Ammonia IFFCO are also importing Ammonia from overseas suppliers other than OMIFCO at prices which represent the prevailing international market prices. Therefore, the value of the Urea and Ammonia imported by IFFCO from OMIFCO are required to be re-determined in terms of Rule 4 of the CVR, 2007 by adopting the transaction value of identical goods i.e. Urea and Ammonia imported by IFFCO at the prevailing market prices from the very same supplier and other suppliers at and around the same time.

21.3 M/s. IFFCO were also importing Urea, produced in excess of the rated capacity, from OMIFCO at Market Prices. In terms of Clause 5.1 (c) and 5.3 (a) of the UOTA dtd.29/05/2002 the market price in respect of the excess Urea would be 95% of the simple average of the low and high end prices of Urea as published in the three specified publications. Though this price is 5% less than the market prices as per the specified publications, I find that the same is required to be accepted as the transaction value for the purpose of Section 14 (1) of the Customs Act, 1962 considering the volumes involved. In view of the above, I find that this price is being adopted for the purpose arriving at the re-determined assessable value in terms of Rule 4 of the CVR, 2007. Hence I find that Rule 4 will be applicable, therefore I adopt the same being the value of identical goods under Rule 4 of Custom Valuation (Determination of value of Imported Goods) Rules 2007.

22. I find that M/s. IFFCO in their written submissions as well as during the course of personal hearing has advanced many arguments to justify that the deal was at arm's length and was not influenced by any other considerations by citing various case laws and contested that they are not the related persons and hence price charged is the genuine transaction value for the import under dispute. Further they also contended that they had purchased Urea from Govt. of India on high sea sale basis of contemporaneous price prevalent and forecast during relevant period and price fixed for 15 years and it was a long term contract price.

22.1. In this regard, after careful consideration of the arguments put forth and judgements cited by them I am of the considered view that as already discussed and decided by me that IFFCO and OMIFCO are legally recognized partners in business inasmuch as IFFCO/KRIBHCO hold 50% of the equity of OMIFCO and there were three representatives of IFFCO/KRIBHCO and GOI on the Board of Directors of OMIFCO and when the JV agreement was signed between KRIBHCO/IFFCO and Oman Oil Company, GOI was having a major equity stake in KRIBHCO/IFFCO. Further, 100% of the Rated Production Capacity of Urea of OMIFCO was to be sold to the GOI. Only upon refusal or failure of the GOI to purchase the excess quantity of urea, OMIFCO was free to sell the same in the open market. These terms of sale of the production of urea between OMIFCO and the GOI clearly implies that they the related persons as contained in Explanation-II of rule 2 (2) of CVR, 2007.

22.2 It is a well settled legal position once it is held that the supplier and the importer are related and the relationship has influenced the price, valuation cannot obviously be done under the Transaction value method accepting the declared value. Therefore, the value of urea and ammonia imported by IFFCO from OMIFCO are required to be re-determined in terms of rule 4 of CVR by adopting the transaction value of identical goods i.e. urea and ammonia imported by IFFCO at the prevailing market prices from the very same supplier and other suppliers at and around the same time, as decided by me in the preceding paras. Consequently their claims are rejected in toto.

23. I find that M/s. IFFCO had imported 552213.272 MTs of Urea at a declared value of Rs. 523,55,99,896/- and 81529.034 MTs of Ammonia at a declared value of Rs.67,34,27,634/- from OMIFCO during the period from 30/08/2012 to 03/07/2013.

23.1 In view of the above discussion, I reject the above assessable value declared by M/s.IFFCO under Rule 12 of Customs Valuation Rules, 2007 and re-determine the value to Rs.1258,27,07,958/- in respect of 552213.272 MTs of Urea and Rs.319,13,79,805/- in respect of 81529.034 MTs of Ammonia, by adopting the Rule 4 of CVR, 2007, as transaction value of identical goods i.e. Urea and Ammonia imported by IFFCO at the prevailing market prices from the very same supplier and other suppliers at and around the same time, read with Section 14 of Customs Act, 1962.

23.2 Thus, M/s IFFCO has evaded customs duty of Rs. 58,75,09,575/- and I hold that **M/s. IFFCO is liable to pay the differential duty amounting to Rs. 58,75,09,575/- and said differential duty not levied or short levied is to be recovered from them under Section 28(1) of the Customs Act, 1962.**

23.3. Further, as per the wordings of Section 28AA of the Customs Act, 1962 it is clear that when M/S. IFFCO is liable to pay duty in accordance with the provisions of Section 28 ibid, in addition to such duty is liable to pay interest as well. The said Section provides for payment of interest automatically along with the duty. I have already held that differential Customs Duty of Rs. 58,75,09,575/-, is required to be recovered from them. In view of this, **I hold that M/s. IFFCO is liable to pay interest involved on the amount of Rs. 58,75,09,575/- the provisions of Section 28AA of the Customs Act, 1962.**

24 In this case, as already discussed and decided by me, in as much as M/s. IFFCO at the time of filing bills of entry for import of Urea and Ammonia from OMIFCO have in the Declaration form for import of goods, filed in terms of the Bill of Entry (Electronic Declaration) Regulations, 2011, affirmed to a declaration that the applicable Method of Valuation is Transaction Value as per Rule 4 which is factually wrong/incorrect as is evident as decided by me and also the form of declaration for import of goods which required them to declare whether they were related to OMIFCO and here too they did not declare that they were related to the sellers which in turn led to less payment of differential duty of Rs. 58,75,09,575/- on the impugned goods, they have violated the provisions of Section 46 (4) of the Customs Act, 1962. Accordingly, the said imported goods are liable for confiscation, under Section 111(m) of the Customs Act, 1962. This contravention and or violation falls within the purview of the nature of offence prescribed under Section 111(m) of the Customs Act, 1962. **Thus, the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962.**

24.1. Therefore, I hold that 552213.272 MTs of Urea at a declared value of Rs. 523,55,99,896/- and 81529.034 MTs of Ammonia at a declared value of Rs.67,34,27,634/- imported by the said noticee from OMIFCO during the period from 30/08/2012 to 03/07/2013 as detailed in Annexure-A to the Show Cause Notice, are liable for confiscation under Section 111(m) of the Customs Act, 1962. I find that the Bills of Entry covered by the Show Cause Notice mentioned in Annexure-A to the Show Cause Notice have been finally assessed at the relevant time, and the impugned goods have been cleared. **As such, since the impugned goods have been cleared and are not available for confiscation, I refrain from imposing redemption fine in lieu of confiscation in respect of the said Bills of entry in view of the legal settled legal position in the case of :**

- (i) SHIV KRIPA ISPAT PVT. LTD., V/s. COMMISSIONER OF C.EX. & CUS., NASIK, reported in 2009 (235) E.L.T. 623 (Tri. – LB)
- (ii) CHINKU EXPORTS V/s. COMMISSIONER OF CUSTOMS, CALCUTTA, reported in 1999 (112) E.L.T. 400 (Tribunal). This judgment has been maintained by the hon'ble Supreme Court as reported in 2005 (184)E.L.T. A36 (S.C.)
- (iii) COMMISSIONER OF CUSTOMS, AMRITSAR V/s. RAJA IMPEX (P) LTD., reported in 2008 (229) E.L.T. 185 (P & H)

25. As regards, imposition of penalty on M/s. IFFCO under Section 112(a) of the Customs Act, 1962, since it has been held that the impugned goods as detailed in Annexure-A to the Show Cause Notice are liable for confiscation under Section 111(m) ibid of the Customs Act, 1962, I, hold that the penalty under Section 112 (a) ibid is attracted on the importer. However, considering the fact that such imports are primarily for the use of farmers and they were acting on the instructions of the Govt. of India, I take lenient view while determining the quantum of penalty.

25.1 I find that M/s. IFFCO has cited various decisions/judgements in support of their contention on confiscation under Section 111(m) and penalty under Section 112(a) of the Customs Act, 1962, I am of the view that the conclusions arrived may be true in those cases, but the same cannot be extended to other case (s) without looking to the hard realities and specific facts of each case. Those decisions / judgments were delivered in a different context and under different facts and circumstances, which cannot be made applicable in the facts and circumstances of this case.

26. In view of the forgoing discussions and findings, I pass the following order:-

:ORDER:

- (i)** I hereby reject the declared value of Rs. 523,55,99,896/- declared by M/s.IFFCO in respect of 552213.272 MTs "*Urea*' imported by them under Rule 12 of the Customs Valuation Rules, 2007 and re-determined as Rs. 1258,27,07,958/- (Rupees One Thousand Two Hundred Fifty Eight Crores Twenty Seven Lakhs Seven Thousand Nine Hundred Fifty Eight Only) as detailed in Annexure-A to the Notice, under Section 14 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.
- (ii)** I confiscate the 552213.272 MTs valued at Rs. 1258,27,07,958/-(re-determined) of "*Urea*' imported by M/s.IFFCO, as detailed in Annexure 'A' to the Notice, under Section 111(m) of the Customs Act, 1962, However, the Bills of Entry have been assessed finally and the impugned goods are not available for confiscation, I refrain from imposing any redemption fine in lieu of confiscation.
- (iii)** I confirm and demand the differential Customs duty amounting to Rs. 45,78,35,036/- (Rupees Forty Five Crores Seventy Eight Lakhs Thirty Five Thousand Thirty Six Only) on import of Urea, as detailed in the Annexure 'A' to the show cause notice, and determine the total differential Customs duty payable by M/s. IFFCO, as Rs. 45,78,35,036/- (Rupees Forty Five Crores Seventy Eight Lakhs Thirty Five Thousand Thirty Six Only) under Section 28(8) of the Customs Act, 1962, and recovered from them Section 28 (1) of the Customs Act, 1962

- (iv)** I hereby reject the declared value of Rs.67,34,27,634/- in respect of 81529.034 MTs of “Ammonia” *imported by them* under Rule 12 of the Customs Valuation Rules, 2007 *and* re-determined as Rs.319,13,79,805/-(Rupees Three Hundred Nineteen Crores Thirteen Lakhs Seventy Nine Thousand Eight Hundred Five Only) as detailed in Annexure-A to the Notice, under Section 14 of the Customs Act, 1962 read with the Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.
- (v)** I confiscate the 81529.034 MTs of “Ammonia” valued at Rs. 319,13,79,805/- (re-determined) imported by M/s.IFFCO, as detailed in Annexure ‘A’ to the Notice, under Section 111(m) of the Customs Act, 1962 However, the Bills of Entry have been assessed finally and the impugned goods are not available for confiscation, I refrain from imposing any redemption fine in lieu of confiscation.
- (vi)** I confirm and demand the differential Customs duty amounting to Rs. 12,96,74,539/- (Rupees Twelve Crores Ninety Six Lakhs Seventy Four Thousand Five Hundred Thirty Nine Only) on import of AMMONIA as detailed in the Annexure ‘A’ to the show cause notice, and determine the total differential Customs duty payable by M/s. IFFCO, as Rs. 12,96,74,539/- (Rupees Twelve Crores Ninety Six Lakhs Seventy Four Thousand Five Hundred Thirty Nine Only) under Section 28(8) of the Customs Act, 1962, and recovered from them Section 28 (1) of the Customs Act, 1962.
- (vii)** I order for recovery of interest involved on the differential duty as at **(iii) and (vi)** above from M/s. IFFCO under Sections 28AA of the Customs Act, 1962.
- (viii)** I impose penalty of Rs.5,00,00,000/- (Rupees Five Crores Only) on M/s. IFFCO under Section 112 (a) of the Customs Act, 1962.

(P V R REDDY)
COMMISSIONER

F. No. S/10-77/ADJN/2013-14

Date: 06.04.2015

To;

1. M/s. Indian Farmers Fertilizer Cooperative Ltd.,
IFFCO Sadan, C-1, Distt Centre,
Saket Place, New Delhi-110017

Copy to:

- 1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad, with copy of Show Cause Notice
- 2) The Additional Director General, DRI, AZU, Ahmedabad for information pl.
- 3) The Deputy/Assistant Commissioner(GR-I), Customs House, Kandla,
- 4) The Assistant Commissioner (Recovery Section), Custom House Kandla,
- 5) Guard File.