::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001

Tele Fax No. 0281 – 2477952/2441142
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रजिस्टर्ड डाक ए. डी. द्वारा :

क	अपील / फाइल संख्या / Appeal / File No. [illegible]	मूल आदेश सं / O.I.O. No. 03 & 04/2017	दिनांक / Date 03.03.2017

ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-007-TO-008-2018-19

आदेश का दिनांक / Date of Order:	17.04.2018	जारी करने की तारीख / Date of issue:	20.04.2018

Passed by Shri Sunil Kumar Singh, Commissioner, CGST & Central Excise, Gandhinagar.

[illegible]

In pursuance to Board's Notification No. [illegible]/2017 [illegible] dated [illegible] read with Board's Order No. [illegible]/2017-ST dated 16.11.2017, Shri Sunil Kumar Singh, Commissioner, CGST & Central Excise, Gandhinagar, has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग [illegible]
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham / Bhavnagar.

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent :-

M/s Bharat Petroleum Corporation Ltd., Khanjibari, Kandla, Kutch-370 220

[illegible]
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) [illegible]
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) [illegible]
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para-1(a) above

(b) [illegible] केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001 के नियम 6 के [illegible] निर्धारित किए गए प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। [illegible] 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। [illegible] रूप में 500/- रुपए का निर्धारित शुल्क जमा करना होगा।

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(c) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी [illegible] 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। [illegible] 500/- रुपए का निर्धारित शुल्क जमा करना होगा।

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(ii) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी [illegible]

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(2) [illegible] केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35F के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, [illegible]

[illegible]
(i) धारा 11 डी के तहत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के तहत देय रकम

[illegible]

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:

[illegible]

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(i) [illegible]

In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ii) [illegible]

In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) [illegible]

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) [illegible]

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) [illegible]

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) [illegible]

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) [illegible]

In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) [illegible]

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) [illegible]

Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) [illegible] www.cbec.gov.in [illegible]

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

ORDER IN APPEAL

Sr. No.	Name and address of the Respondent	Departmental Appeal No.	OIO No. and date Against which appeal filed
01	M/s Bharat Petroleum Corporation Ltd., Khanmahar, Kandla	9/EA2/GDM/2017	02/2017 dated 03.03.2017
02	M/s Bharat Petroleum Corporation Ltd., Khanmahar, Kandla	6/EA2/GDM/2017	03/2017 dated 03.03.2017

The subject appeals are filed by Assistant Commissioner, Central Excise Division, Dhanbad (hereinafter referred to as 'the appellant' or 'the department') against Order in Original No. 02/2017 and Order in Original No. 03/2017 both dated 03.03.2017 (hereinafter referred to as 'the impugned orders') passed by the Assistant Commissioner, Central Excise Division, Dhanbad (hereinafter referred to as 'adjudicating authority') in the case of M/s Bharat Petroleum Corporation Ltd., Khanmahar, Kandla (hereinafter referred to as 'the respondent'). Since the facts of both appeals are common, the decision is being taken through common proceedings.

2. The facts of the case in brief are that the respondent is registered under Rule 20 of Central Excise Rules, 2002 (hereinafter CER-02) for receipt and storage of petroleum products viz. Motor Spirit (MS), High Speed Diesel (HSD) and Superior Kerosene Oil (SKO) and subsequent dispatch to other Oil Marketing Companies (OMCs) and other customers. The respondent has its own dealers through which they sell their products to end consumers. Apart from this, the respondent is selling the petroleum products to other OMCs namely IOCL and HPCL. The respondent was adopting two different values for the purpose of paying central excise duty i.e. (I) for sale to their dealers and (II) for sale to other OMCs.

3. The concept of Administered Pricing Mechanism (APM) was discontinued from 1.4.2002 and the OMCs were free to fix the selling price of products. Accordingly, OMCs entered into an agreement dated 31.03.2002 by which a company producing oil would supply the same to another company having the nearest marketing facility. It was observed that the price at which the product was sold to OMCs was based on Import Parity Price (IPP) and thus the assessable value at which duty was being discharged in case of OMCs was lesser than the assessable value for sale to dealers and other customers. It was further observed that the price agreed upon in terms of the above agreement was not at arm's length and did not conform to the

transaction value as defined under Section 4(1)(a) of Central Excise Act, 1944 (hereinafter CEA, 1944).

4. During scrutiny of ER-1 filed by respondent under Rule 12 of CER 02, it was observed that they had wrongly assessed the value and determined the central excise duty by under valuing the goods cleared to an OMC, at a lower rate than the sale to their own dealers and thereby they had not paid central excise duty on the differential value.

5. Accordingly, following show cause notices were issued to the respondent proposing recovery of differential central excise duty under Section 11A of the CEA, 1944, on clearance of Motor Spirit during the period from June-2002 to November-2002. The SCN also proposed recovery of interest under Section 11AB and penalty under Section 11AC of the CEA, 1944. The said show cause notice was adjudicated by the adjudicating authority vide impugned order wherein he dropped the demand by relying upon the decision of CESTAT in the case of HPCL vs CCE Visakhapatnam-I-2005 (187) ELT 479 and Board's Instruction No. 06/21/2003-CX.I (part I) dated 14.02.2007.

Sr. No.	SCN No.	Period of demand	Demand of C. Ex duty (Rs.)
1	V. 84(j)/AR Khambhalia / ADC / SCN No.008/2004 dated 4.10.2004	June 2002	34,83,438/-
2	IV/16-11/PI/2002-03 dated 21.07.2003	July-2002 to Nov-2002	41,57,620/-

6. Aggrieved with the impugned orders, the department filed above mentioned appeals on the following grounds:

(i) The adjudicating authority decided the matter relying upon the judgement of Hon'ble Tribunal in the case of HPCL vs CCE, Visakhapatnam-I-2005 (187) ELT 479 and in view of Board's instruction vide F. No. 06/21/2003-CX.I dated 14.02.2007. However, the said circular has been withdrawn by the Board on the basis of decision in the case of M/s BPCL vs CCE, Nasik-2009 (242) ELT 358 T vide Board's Circular No. 911/01/2010-CX dated 3.2.2010.

(ii) In another case on the same subject in the case of M/s BPCL vs CCE, Nasik-2009 (242) ELT 358 T, the Hon'ble CESTAT has decided the case in favour of department and M/s BPCL has filed the appeal in Hon'ble Supreme Court which is still pending. Accordingly, the field formation were directed to consign all the pending show cause notice on the issue to the call book

pending a final verdict from the Supreme Court. Therefore, the order passed by adjudicating authority does not appears to be legal and proper and required to be set aside.

7. The respondent filed cross-objections dated 08.02.2018 against both the department appeals, wherein they have contended that:

(i) The department appeal on issue involved has been dismissed the Hon'ble Supreme Court twice and the issue is no more res integra. First time on 03.11.2020- the department appeal against CESTAT Bangalore decision in the case of BPCL vs CCE, Visakhapatnam-I reported at 2005 (187) E.L.T. 479 has been dismissed by Hon'ble Supreme Court as reported at 2005 (190) E.L.T.A72 (SC).

(ii) Second time on 13.12.2010 the department appeal against CESTAT, Bangalore decision in case of CCE, Cochin vs Kochi Refinery Ltd. 2011 TIOL-276-CESTAT Bangalore has been dismissed by Hon'ble Supreme Court as reported at 2015 (320) E.L.T. A33 (S.C.).

(iii) Hence, adjudicating authority by relying on BPCL case (2005 (187) E.L.T 479) has correctly and properly passed the OIO No. 02/2017 and 03/2017 both dated 09.03.2017 as the decision of Hon'ble Supreme Court is binding on the lower adjudicating authorities.

(iv) The decision of CESTAT, Mumbai in BPCL vs CCE, Nasik as reported in 2005 (242) E.L.T. 158 (Tri-Mumbai) clearly dissented by CESTAT while deciding following cases in favour of assessee after considering Hon'ble Supreme Court decision.

(a) IOCL vs CCE GOA -2009 (235) ELT 702 (Tri-Mumbai)
(b) CCE Cochin vs Kochi Refinery Ltd.-2011 TIOL-276 CESTAT-Bangalore. Department appeal against this decision has been dismissed by Hon'ble Supreme Court-2015 (320) ELT-A33 (SC)
(c) IOCL vs CCE, Allahabad-2014 (300) ELT 535 (Tri-Del)
(d) CCE, Mumbai-IV vs IOCL-2014 (308) ELT 502 (Tri-Mumbai)

(v) Further, in a recent decision, CESTAT, South Zonal Bench, Chennai, in the case of BPCL vs CCE, Coimbatore as reported at 2016 (342) E.L.T. 502 (Tri-Chennai) while allowing the appeal of the assessee has held that Revenue contending that price charged from normal buyers to be taken for valuation since goods cleared at lower price to marketing companies which were rejected as appellant-no evidence that marketing companies are appellant

related to each other and mutually interest to make profit in absence of any evidence of goods. Section 4(1)(b) of CEA, 1944 not applicable

(vi) The Judicial Authorities are entrusted with the responsibility of interpretation of law and decide the dispute between parties which means that they need to act within the four corners of law. In this regard, it is to be appreciated that Hon'ble Supreme Court and various other Hon'ble CESTAT have clearly established that in case of sale to OMCs, the transaction value adopted by the respondent is correct value on which duty needs to be discharged and therefore, the position of law is very clear. In view of this, appeal filed by the Department is liable to be rejected.

(vii) They would like to draw attention to CBIC instruction vide F. No. 390/Misc/67/2014-TC dated 18.12.2015 wherein CBEC has directed for withdrawal of cases when Supreme Court decision is available on the identical matter.

(viii) It is settled principle of law that in cases where the original demand is not sustainable, interest cannot be levied. In view of the aforesaid submissions, it is clear that they are not liable to pay any duty hence the question of recovering interest under section 11AB of the CEA, 1944 does not arise at all. Further, when the demand of duty is not sustainable, the question of imposing penalty does not arise.

8. Personal hearing in the matter was fixed on 23.03.2017 however, on telephonic request of respondent, the same was rescheduled on 28.03.2018 and on their further request, the same was postponed and held on 27.03.2018 which was attended by Shri V. Badrinath, Senior Manager (Finance (Taxation). Shri Badrinath appeared and reiterated the cross objection filed by them against both the department appeals. Further, he has put forth a written submission in respect of both department appeals. In the written submission, Shri Badrinath has reiterated the submission made by them in their cross-objection filed against abovementioned department's appeals.

9. I have carefully gone through the impugned orders passed by adjudicating authority, the submission made by the appellant department in the appeal memorandum, the cross-objection filed by the respondent against the department's appeals as well as by the representative of respondent at the time of personal hearing. I find that the limited issue to be decided is –

"Whether the respondent assessee had undervalued the goods cleared to other Oil Marketing Companies, at a lower rate than the sale to their own

dealers, and thereby evaded normal excise duty, mentioned above, on the differential value on clearances of Motor Grill, during the period from June 2002 to November, 2002."

10. It is observed that the show cause notices e gged that the price at which the product was sold to OMCs was based on Import Parity Price (IPP) and thus the assessable value on which duty was being discharged in case of OMCs was lesser than the assessable value for sale to dealers and other customers. The price agreed upon in terms of the above agreement was not at an arm's length and did not confirm to the transaction value as defined under Section 4(1)(a) of CEA, 1944.

10.1 It is observed that Import Parity Price (IPP) represents the price that importers would pay in case of actual import of products at the respective Indian ports and includes the elements of Free on Board (FOB) price + Ocean Freight + Insurance + Custom Duties + Port Dues, etc. In other words, the IPP is landed cost of product for the product worked out from the daily FOB price quotes of the respective product in the international market. Hence, the adjudicating authority has correctly held that the prices in the international market are by no means controlled by the respondent and other OMCs and the same can be considered as an arm length transaction.

10.2 Further, it is observed that Section 4(1)(a) of CEA, 1944 for valuation of excisable goods for purpose of charging of duty of excise states that:

"Section 4: (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on such removal of the goods, such value shall –

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

10.2.1 From the definition of Transaction Value given under Section 4 above, it is clear that for any sale it must have following important characteristics:

(i) The assessee and buyer must not be related to each other

(ii) The sale price must be the sole consideration for the sale.

10.2.2 It is further observed that a person would be treated as 'related' if he is covered by any of the requirements referred under Section 4 (3)(b)(i) to (iii) of CEA, 1944. The said sub section is reproduced below:

"Section 4 (3)(b): persons shall be deemed to be 'related' if –

(i) they are inter-connected undertakings;
(ii) they are relatives;
(iii) otherwise than the buyer is a relative and a distributor of the assessee or a sub-distributor of such distributor; or
(iv) they are so associated that they have interest, directly or indirectly, in the business of each other."

In the case of inter-connected undertaking, if the relationship as defined in the clause (ii), (iii) or (iv) of sub-section (3) of Section 4 of CEA, 1944 does not exist and the buyer is also not a holding company or a subsidiary company; then the assessment purpose they will not be considered related. In such situation, 'Transaction Value' will form the basis of valuation subject to satisfaction of conditions i.e. price is for delivery at the time and place of removal and the price is the sole consideration for the sale.

10.3 In the instant case, it is observed that although OMCs are inter-connected undertakings, they are not related persons as there is no mutuality of interest in the business of each other as mentioned under Section 4(3)(b) of CEA, 1944. As submitted by the respondent, it is clear that the MOU entered between the OMCs was basically an arrangement of exchange of petroleum products so as to make available to an OMC i.e. the contract of sale. The Import Parity Price (IPP) actually paid or payable, for the sales covered by Section 4(1)(a) of the CEA, 1944, constitutes the real transaction value for charging central excise duty on sales to marketing OMCs. Therefore, it is illogically correct to say that just because there were two different assessable values adopted by respondent i.e. one for their own dealers and another for OMCs, the higher price should be adopted for payment of central excise duty. Further, there is no record in the findings of the adjudicating authority that the agreement between OMCs was the result of the directive from the Government of India which results in optimum utilization of the marketing facilities of various OMCs and reduction in the cost of transportation.

10.4 It is further observed that the issue is no more res-integra in view of the judgement of Hon'ble Supreme Court in the case of Commissioner vs Kochi Refineries Ltd, as reported at 2015 (320) ELT 3 (SC), wherein Hon'ble Supreme Court has dismissed the Civil Appeal No. 10886-10891 of 2010 filed by Commissioner of Central Excise, Cochin against CESTAT's Final Order No. 905-912/2010. The CESTAT, South Zonal Bench, Bangalore in its order by following its earlier decision in case of BPCL vs CCE as reported at 2013 (297) ELT 479 (Tri-Bang.) held that clearances to OMCs based on Import Parity Price to be regarded as assessable value. The CESTAT, Bangalore while passing the order in favour of respondent assessee disagreed the Hon'ble CESTAT Mumbai decision passed in the case of BPCL vs CCE, Nasik as reported at 2010 (242) ELT 358 (Tri-Mumbai).

While disagreeing the said decision, the CESTAT, at para 14 of the decision, has held that:

> "14. We would also like to put on record that when the matter of BPCL was argued before the coordinate Bench in Mumbai it seems that the decision of dismissal of civil appeals by the Apex Court was not brought to the notice of the Bench. However as it may, it is settled law that once a particular view which has been taken by the Bench and not interfered by the Hon'ble Supreme Court, nothing survives in the case for the revenue to argue unless there are different set of facts. The facts in the case before us and in the case of HPCL are identical, and in view of this we hold that reliance placed by the revenue in the decision of the BPCL (supra) will not carry their case any further."

"Emphasis Supplied"

11. It is further observed that Hon'ble Tribunal, WZB, Mumbai in the case of CCE Mumbai vs Indian Oil Corporation Ltd.-2014 (308) ELT 302 (Tri-Mumbai), while deciding the same issue, has held that transaction value of Air Turbine Fuel sold to Oil Marketing Companies (OMCs) based on Import Parity Price (IPP) as per Memorandum of Understanding (MoU) accepted as assessable value by adjudicating authority. The Tribunal has further held that reasoning adopted in BPCL case-2005 (192) ELT 358 (Tri.) that IPP is an artificially fixed notional value is flawed and not acceptable as IPP is actual price at time and place of import and it cannot be influenced by marketing companies in India. The Hon'ble CESTAT, at para 4.1 of the order, has held that:

> "4.1 In particular, we have noted that para 19 of the BPCL case order relied upon by the Revenue, it has been held that IPP based price cannot be considered as transaction value as it was an artificially fixed notional value. In such an agreement, price was definitely not the sole consideration for sale. It is based on that reasoning, it was held in the BPCL case that sale price to OMC cannot be accepted as sole consideration for sale. However, we find that the reasoning adopted is flawed as Import Parity Price is not an artificially fixed price. It is an actual price at the time and place of import which is also place for the sales effected by the Refinery or OMC to another OMC. To say that such a price is an artificially fixed notional value is completely contrary to facts. Import price cannot be influenced by the marketing companies situated in India. Therefore, there is a major flaw in the reasoning adopted in the order relied upon by the Revenue. On the contrary, in the orders relied upon by the learned Counsel, it has been clearly held that import price agreed between one OMC and another based on the MOU reached between them can be considered as a transaction value and such a finding was also upheld by the Hon'ble Apex Court in the case of HPCL (supra). This order prevails over all other decisions."

"Emphasis Supplied"

12. It is also observed that CESTAT, South Zonal Bench, Chennai in the case of BPCL vs CCE, Coimbatore as reported at 2015 (340) E.L.T. 662 (Tri-Chennai) while allowing the appeal of the assessee, at para 4 and 5 of the order, has held that:

> "4. So far as the relationship aspect is concerned, there is nothing on record to establish that the marketing companies whether in any way related to the appellant

satisfying any of the elements of Section 4(3)(b) of The Central Excise Act, 1944. Accordingly the rejection of Section 4(1)(b) of the Central Excise Act, 1944 is not applicable in the present context of the case. The fundamental law relating to valuation is that the clearances at the point of sale and a point of time is criteria. There is no material brought by the adjudicating authority to show discriminatory price was charged during the same time period at the same point of sale.

5. In absence of any evidence to show that the buyer and seller were mutually interested to make good the loss of Revenue, undervaluation of clearances is inconceivable. Accordingly, order of the authority below does not sustain. Appeal is hereby allowed."

13. These case laws are squarely applicable to the present case as the facts of all these cases are same. In view thereof, I find that the respondent had correctly accepted the Import Parity Price (IPP) for payment of duty and the price charged was the sole consideration for the sale and the sale was on principal to principal basis, the price at which the goods were supplied to other BPCL in terms of agreement, is the correct transaction value and Section 4(1)(a) of the Central Excise Act, 1944 is applicable. Therefore, I hold that there is no short payment of duty as the 'Transaction Value' based on which the excise duty was paid by the respondent assessee was in accordance with law. Accordingly, I dismiss both the appeals filed by the department as the same are not maintainable on merits.

14. Both the appeals filed by the department stand disposed of in above terms.

(Shiv Kumar Singh)
Commissioner (Appeals),
Commissioner,
CGST & Central Excise,
Gandhinagar

By Regd. Post AD

F. No.: V2/8/EA2/GDM/2017 Date: 17.04.2019
V2/9/EA2/GDM/2017

To,

The Commissioner, CGST & Central Excise,
Kutch (Gandhidham)
'Central Excise Bhavan', Plot No.82, Sector-8,
Opp. Kamdhenu Maidan, Gandhidham.

Copy to:
(1) The Chief Commissioner, CGST & Central Excise, Ahmedabad.
(2) The Commissioner (Appeals), CGST & Central Excise, Rajkot
(3) M/s. Bharat Petroleum Corporation Limited, Khanpohar, Kandla
(4) The Assistant Commissioner, CGST & C. Ex., Division-Bhachau
(5) The Assistant Commissioner (Systems), CGST, Rajkot.
(6) The Superintendent, CGST & Central Excise AR-I, Bhachau.
(7) Appeal F. No. V2/8/EA2/GDM/2017 in the case of M/s BPCL, Kandla
(8) PA to Commissioner of CGST & Central Excise, Gandhinagar.
(9) Guard File.