::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
Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/7 & 10 /EA2/GDM/2017	**05/2017 04/2017**	**03/03/2017 03/03/2017**

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

KCH-EXCUS-000-APP-014-TO-015-2018-19

आदेश का दिनांक / Date of Order: **10.05.2018** जारी करने की तारीख / Date of issue: **16.05.2018**

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

अधिसूचना संख्या २६१७ दिनांक (.टी.एन) .शु.उ.के-२०१७/.१० २०१७.के साथ पढ़े बोर्ड ऑफिस आदेश सं . दिनां .टी.एस-२०१७/०५क १६के अनुसरण में २०१७.११., श्री सुनील कुमार सिंह ,आयुक्त, केंद्रीय वस्तु एवं सेवा कर एवं केन्द्रीए उत्पाद शुल्क,, गांधीनगर, को वित्त अधिनियम १९९४ की धारा८५केंद्रीय उत्पाद शुल्क , के ३५ की धारा १९४४ अधिनियमअंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-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 अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम/ भावनगर। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
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 Hindustan Petroleum Corporation Ltd., Kharihor, Kandla. Kutch-370 220

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
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) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
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) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असार्वा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

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

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 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/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतगेत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 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/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

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.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है

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

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

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:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
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-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
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) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
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) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनिबम (न॰ 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
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) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
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) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / 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) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
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) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
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) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
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 Hindustan Petroleum Corporation Ltd., Kharirohar, Kandla	10/EA2/GDM/2017	05/2017 dated 03.03.2017
02	M/s Hindustan Petroleum Corporation Ltd., Kharirohar, Kandla	7/EA2/GDM/2017	04/2017 dated 03.03.2017

The subject appeals are filed by Assistant Commissioner, Central Excise Division, Bhachau (hereinafter referred to as 'the appellant' or 'the department') against Order in Original No. 04/2017 and Order in Original No. 05/2017 both dated 03.03.2017 (hereinafter referred to as 'the impugned orders') passed by the Assistant Commissioner, Central Excise Division, Bhachau (hereinafter referred to as 'adjudicating authority') in the case of M/s Hindustan Petroleum Corporation Ltd., Kharirohar, 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 Sprit (MS), High Speed Diesel (HSD) and Superior Kerosene Oil (SKO) and subsequent clearance 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 BPCL. 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 dismantled 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 an arm's length and didn't confirm 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 Sprit during the period from June-2002 to July-2002. The SCN also proposed recovery of Interest under Section 11AB and penalty under Rule 25 of the Central Excise Rules, 2002. The said show cause notices were 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) EST 479 and Board's Instruction No. 06/21/2003-C.Ex, I (part I) dated 14.02.2007.

Sl. No.	SCN No.	Period of demand	Demand of C. Ex duty (Rs.)
1	IV/16-01/PI/2002-03 dated 04.07.2003	June-2002	13,41,651/-
2	IV/16-01/PI/2002-03 dated 21.07.2003	July-2002	4,24,272/-

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 judgment 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-C.Ex.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. 913/03/2010-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 formations 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 orders passed by adjudicating authority do not appear to be legal and proper and required to be set aside.

7. The respondent filed cross-objections dated 08.03.2018 against both the department appeals, wherein they have contended that:

(i) They may be permitted to file a common objection against the aforesaid two appeals since the issue involved in both the appeals filed by the Department are similar, although they cover the same issue during the month of June 2002 and July 2002.

(ii) In their own case for a different branch, titled as Hindustan Corpn. Ltd. vs. Commr. Of C. Ex., Visakhapatnam-I 2005 (187) E.L.T. 479, the Hon'ble CESTAT Bangalore held that Petroleum products by Refinery to OMCs at the import parity price as per the agreement and directed by the Government in public interest is correct transaction value.

(iii) The department appeal against the above decision has also been dismissed by the Hon'ble Supreme Court as reported in Commissioner v. Hindustan Petroleum Corpn. Ltd. -2006 (196) E.L.T A72 (SC). The Appellant have not mentioned this fact that Hon'ble Supreme Court has rejected the appeal filed by the Department against the above mentioned case in their present appeal.

(iv) While pronouncing the Orders in Original, the Adjudicating Authority has duly recognized the above fact-as covered in para no. 21.

(v) Against the decision given to them by the CESTAT Mumbai Bench, M/s BPCL has filed the appeal before Hon'ble Supreme Court and the same is admitted and is pending in the Hon'ble Supreme Court as reported in 2015 (326) ELT A 33 (SC). The subject BPCL decision was dissented by the same CESTAT Bench as reported in 2014 (308) ELT 502 (Tri.) in the case of CCE, Mumbai IV vs. Indian Oil Corporation.

(vi) The above issue has been settled in the favour of the Respondent in this same jurisdiction by Hon'ble Commissioner (Appeals) vide order in appeal no. 388/2005/169 (RAJ)/Commr. (A)/DK/Raj against order-in-original 05/AC/2004 dated 20.05.2004 passed by the Assistant Commissioner, Central Excise Division, Bhuj.

(vii) The issue involved has been settled in the Respondents' favour by other jurisdictions also by various OIOs.

(viii) The issue is decided in favour of the Respondents at different jurisdiction of CESTAT Benches across India and also by the Hon'ble Apex Court in the form of dismissal of the appeal filed by the Dept. against one such CESTAT decision and on the other hand, one stray instance of the CESTAT decision deciding the issue against the Oil Company against which the appeal is admitted in the Hon'ble Apex Court.

8. Personal hearing in the matter was fixed on 27.03.2018, 17.04.2018 but no one appeared for the same. Further Persona hearing was again fixed on 01.05.2018 which was attended by Shri K. Balagunathan, GM Finance-NWZ and reiterated the cross-objection filed by them against both the department appeals. Further, he submitted a copy of citation 2014(308) E.L.T. 502 (Tri. Mumbai) passed in the case of CCE, Mumbai-IV vs Indian Oil Corporation Ltd. and pleaded to dismiss the appeal filed by Department.

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 central excise duty, mentioned above, on the differential value on clearances of Motor Sprit, during the period from June 2002 to July, 2002."

10. It is observed that the show cause notices alleged 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. The price agreed upon in terms of the above agreement was not at an arm's length and didn't 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 product 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 word, 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 each removal of the goods, such value shall -*

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of 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) amongst them 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 sold 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. 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 receiving 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 forced 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 A 33 (SC), wherein Hon'ble Supreme Court has dismissed the Civil Appeal No. 10585-10591 of 2010 filed by Commissioner of Central Excise, Cochin against CESTAT's Final Order No. 906-912/2010. The CESTAT, South Zonal Bench, Bangalore in its order by following its earlier decision in case of HPCL vs CCE as reported at 2005 (187) 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 Kochi Refineries Ltd disagreed the Hon'ble CESTAT Mumbai decision passed in the case of BPCL vs CCCE, Nasik as reported at 2009 (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. Be that as it may, it is a settled law that once a particular view which has been taken by the Bench and has been affirmed 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 inthe 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 502 (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-2009

(242) 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 BCPL 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 this 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 be 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 2016 (342) E.L.T. 602 (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 law relating to 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 clearance 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 and at the same point of sale.
>
> 5. In absence of any evidence to show that the buyer and seller were mutually interested to make gain at the cost of Revenue, undervaluation of clearances is inconceivable. Accordingly, order of the authority below does not sustain. Appeal is thus 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 adopted 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 OMCs 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.

10.5.18

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

By Regd. Post AD

F. No.: V2/7/EA2/GDM/2017
V2/10/EA2/GDM/2017

Date: 10.05.2018

To,

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

Copy to:

(1) The Chief Commissioner, CGST & Central Excise, Ahmedabad.
(2) The Commissioner (Appeals), CGST & Central Excise, Rajkot
(3) M/s. Hindustan Petroleum Corporation Limited, Kharirohar, Kandla, Kutch
(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. V2/10/EA2/GDM/2017 in case of M/s HPCL, Kharirohar, Kandla
(8) PA to Commissioner of CGST & Central Excise, Gandhinagar.
(9) Guard file.