

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Excise Appeal No.161 of 2006

(Arising out of Order-in-Original No.CCE/Shillong No.09 &10/2005 dated 26.12.2005 passed by Commissioner of Central Excise, Shillong)

M/s Numaligarh Refinery Ltd.

Numaligarh,P.O.-NRL Complex,Dist.-Golaghat,Assam-785699

Appellant

VERSUS

Commissioner of Central Excise, Shillong

Morellow Compound, M.G.Road, Shillong-793001

Respondent

Appearance:

S/Shri B.L.Narasimhan,Rahul Tangri & Dipankar Majumdar, Advocates for the Appellant

Shri S.Mukhopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER

HON'BLE SHRI P.V.SUBBA RAO, TECHNICAL MEMBER

FINAL ORDER NO.75055/2022

DATE OF E-HEARING : 28.10.2021

DATE OF PRONOUNCEMENT : 01 FEBRUARY 2022

Per P.K.Choudhary :

1. The appellant is in appeal against Order-in-Original/CCE/Shillong No. 09 & 10/2005 dated 26/12/2005 passed by the Commissioner of Central Excise, Shillong.
2. The facts of the case in brief are that the appellant is a Public Sector Undertaking (PSU) and is a subsidiary of Bharat Petroleum Corporation Limited ('**BPCL**'), another PSU. During the relevant period, viz. 2002-03 to 2003-04, the Appellant was engaged in production and sale of petroleum products such as Motor Spirit (MS) and High-Speed Diesel (HSD).
3. Consequent to the phasing out of the Administered Price Mechanism (APM) at which petroleum products were being sold earlier, the oil producing and marketing companies entered into a Memorandum of Understanding (MoU) dated 31.03.2002, called Multilateral Product Sale Purchase Agreement (MPSPA) to ensure smooth supply and distribution of petroleum products across the country. The said

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MoU/ agreement also provided for Pricing of petroleum products for inter-se sale/ purchase by the Oil Marketing Companies (OMCs). Such price was Import Parity Price (IPP) which was based on landed cost of petroleum product at a particular port and other expenses such as transportation, terminal charges, etc. Such price was also referred to as refinery gate price (RGP). Further, the MoU also prescribed the system of settlement, wherein the seller was required to claim payments on a weekly basis, through the mechanism of Joint Certificates and claim sheets. The payments were released to the Appellant within 15 days of signing of the joint certificate.

4. The Appellant sold its products to various OMCs like IOCL, IBP, HPCL and the Appellant's holding company, i.e., BPCL. Such customers of the Appellant affected subsequent retail sales. The Appellant discharged excise duty in terms of Rule 9 of the Excise Valuation Rules for supplies made to BPCL, i.e., Appellant's holding company, being a related party. Thus, value at which the BPCL sells the goods to its customers, viz. ex-Storage Price, is adopted as assessable value by the Appellant for discharging excise duty on supplies made to BPCL.
5. However, in respect of other OMCs (like IOCL, IBP, HPCL etc.), the clearances were made and excise duty was discharged at transaction value which was arrived at in terms of Multilateral Product Sale Purchase Agreement (MPSPA) or MoU dated 31.03.2002, viz. IPP/ RGP.
6. The valuation of goods cleared by the Appellant to BPCL was accepted by the department. However, the valuation of goods cleared to other OMCs (viz. IOCL, IBP, HPCL) was challenged by the department by issuance of the Show Cause Notices (SCNs) dated 27.01.2004 and 27.07.2004. The said SCNs alleged that the Appellant and the OMCs were mutually interested in the business of each other inasmuch as the MoU permitted the Appellant to use the marketing network of the other OMCs, and OMCs also benefited from the MoU.

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7. The SCNs proposed to adopt the value at which the excise duty was paid on clearances made by the Appellant to BPCL, as the assessable value for clearances made to other OMCs. The appellant contested the said SCNs, however, the impugned order dated 26.12.2005 was passed confirming the demand proposed in the show cause notice. The OIO observed that:
- the arrangement as per MoU is so that whatever supply is made by the Appellant/ BPCL to the other three OMCs, they i.e. BPCL get back the same quantity from the respective OMCs under the arrangement of product sharing. The entire quantity of petroleum products is returned by OMCs on loan/ debt basis and for differential quantity, price is adjusted.
 - That no actual sale occurs between the Appellant and the OMCs and no price is paid by OMCs to the Appellant by virtue of the loan/ debt arrangement as per MoU. That there existed no transaction value.
 - The Appellant has mis-declared prices in the invoices for clearance of goods to OMCs since the values shown in the invoices were technical values and did not represent the actual transaction values.
 - There is no question of mutuality of interest in the instant case, since there is no sale and price vis-à-vis assessable value is available otherwise.
 - That valuation adopted by the Appellant for clearance of goods to BPCL, i.e., ex-storage point pricing, shall be applicable in respect of supplies made by the appellant to the other OMCs as well.
8. Aggrieved by the aforesaid order, the appellant is in appeal before us.
9. At the time of hearing, the Ld. Counsel for the Appellant, Mr.B. L. Narasimhan filed written notes of arguments wherein the following points are taken:
- a. The Appellant and OMCs are independent public sector undertakings and have no cross-holding of shares or interest in each other. The MoU has been entered into with the objective to

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ensuring steady supply of the petroleum products throughout the territory of India at all times, depending on the demand. There is neither any allegation nor observation of flow back of any consideration between the Appellant and the OMCs. There is no relationship whatsoever between the Appellant and OMCs which influences the price of the products. The MoU entered and the fixation of the IPP is a perfectly commercial transaction between two unrelated parties, viz. the Appellant and the OMCs.

b. The issue is no longer res integra since the same has been decided in the following cases, (which includes the case of Kochi Refineries, which is another subsidiary of BPCL):

- Hindustan Petroleum Corporation Ltd. V. Commissioner of C. Ex., Visakhapatnam-I [2005 (187) E.L.T. 479 (Tri. - Bang.)], maintained in Commissioner v. Hindustan Petroleum Corporation Ltd. [2006 (196) E.L.T. A72 (S.C.)]
- Commissioner of Central Excise, Cochin v. M/s Kochi Refineries Limited [2011-TIOL-276-CESTAT-BANG]
- Bharat Petroleum Corporation Ltd. V. Commissioner of C. Ex., Coimbatore [2016 (342) E.L.T. 602 (Tri. - Chennai)]
- Commissioner of C. Ex., Mumbai-IV v. Indian Oil Corporation Ltd. [2014 (308) E.L.T. 502 (Tri. - Mumbai)]
- Indian Oil Corporation Ltd. V. Commissioner of C. Ex., Allahabad [2014 (300) E.L.T. 539 (Tri. - Del.)]
- Kochi Refineries Ltd. V. Commissioner of Central Excise, Cochin [2017 (349) E.L.T. 338 (Tri. - Bang.)]

c. The impugned order drops the ground of mutuality of interest which was the only basis for issuance of the SCNs. Further, the impugned order is based on the grounds/ facts which are both beyond the scope of SCN and are also incorrect. A para-wise rebuttal of the impugned order is given by the appellant to substantiate this contention.

10. The Learned Authorized Representative appearing on behalf of the respondent Revenue justified the impugned order and placed primary reliance on the decision of the Tribunal in the case of Bharat Petroleum Corporation Ltd. v. CCE, Nasik, 2009 (242) E.L.T.

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358 (Tri. – Mumbai), which decided the identical issue against the assessee and against which order the appeal of the assessee is pending before the Hon'ble Supreme Court.

11. In rejoinder, the Ld. Counsel for the Appellant pressed the fact that the said decision of the Tribunal, Mumbai Bench being contrary to the decision of the coordinate bench of the Tribunal, Bangalore Bench in the case of Hindustan Petroleum Corporation Ltd. v. CCE, Visakhapatnam-I, 2005 (187) ELT 479 (Tri-Bang.) which was affirmed by the Hon'ble Supreme Court, 2006 (196) ELT A72 (SC), should not be relied upon. Further, the decision in the case of BPCL has been dissented by the Tribunal, Mumbai Bench in the subsequent case of CCE, Mumbai-IV vs. Indian Oil Corporation Ltd., 2014 (308) ELT 502 (Tri-Mumbai). Further, the Ld. Counsel for the Appellant also factually distinguished the said case.
12. Heard both sides through video conferencing and perused the appeal records.
13. The only question before us is whether the petroleum products cleared by the Appellant to the other OMCs are to be valued at Import Parity Price, which should be taken as transaction value or the same should be valued at the price at which such goods cleared to BPCL have been valued.
14. In our view, the Appellant and the other OMCs are independent parties and are not related to each other. Though the SCN alleged the mutuality of interest on the ground that the MoU entered into between the parties benefitted each of them mutually, however, the said ground was relinquished by the adjudicating authority itself, while passing the impugned order. Further, even in our view, merely entering into a mutually beneficial arrangement like MoU in the instant case, cannot make the parties related for the purposes of Section 4(3)(b)(iv) of the Central Excise Act, 1944. For this we rely on the decision of the Tribunal, Bangalore Bench in the case of ***Hindustan Petroleum Corporation Ltd. V. Commissioner of C. Ex., Visakhapatnam-I [2005 (187) E.L.T. 479 (Tri. - Bang.)], maintained in Commissioner v. Hindustan Petroleum Corporation Ltd. [2006 (196) E.L.T. A72 (S.C.)].***

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15. Further, we were taken through the contents of the MoU in detail by the Ld. Counsel Mr. Narasimhan particularly the Article 4 (relating to Sale/ Purchase of products), Article 5 (relating to Pricing for inter-party transactions) and Article 6 (relating to Payment terms), all of which have also been extracted in the impugned order. Having gone through the same, we observe that in terms of the MoU, the transaction between the Appellant and the other OMCs is in the nature of sale, for which appropriate consideration (in the form of Import Parity Price) has been provided. Further, the MoU provides for actual payment of price by other OMCs to the Appellant on the basis of joint certificates and claim sheets, with a credit period of 15 days. Mr. Narasimhan also drew the attention of the bench to the statement of Shri P. K. Barua, Chief Manager (F&A) recorded on 14.05.2004, forming part of the SCN dated 27.07.2004, which is reproduced hereunder:

"Q. No. 14:- How is payment made by the purchasing OMCs for products lifted by them?

Ans:- After the signing of the joint certificate weekly claims are raised by NRL to the respective OMCs. The OMCs get a credit period of 15 days and on expiry of the credit period, payment is made through cheque/ bank transfer."

16. The said statement has not been challenged by the department in the SCNs as well as the impugned order.

17. On the basis of above, we have no hesitation in holding that the findings of the adjudicating authority in the impugned order, to the effect that the transaction between the Appellant and other OMCs is not sale but a product sharing arrangement on load/ debt basis, wherein whatever supply is made by the Appellant/ BPCL to the other three OMCs, they i.e. BPCL get back the same quantity from the respective OMCs, are factually incorrect and do not bear from the terms of the MoU.

18. Further, the prices agreed in terms of the MoU are is neither façade nor merely the technical values. On the contrary, it is a scientifically arrived at price, which is commercially viable to sustain

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the operations of the Appellant and the OMCs. For this, we rely on the following judgments:

- ***Commissioner of C. Ex., Mumbai-IV v. Indian Oil Corporation Ltd. [2014 (308) E.L.T. 502 (Tri. - Mumbai)]***
- ***Indian Oil Corporation Ltd. V. Commissioner of C. Ex., Allahabad [2014 (300) E.L.T. 539 (Tri. - Del.)]***

19. Even otherwise, we note that the aforesaid findings rendered by the adjudicating authority were not based on the facts and case made out in the SCNs issued to the Appellant. The SCNs only alleged the mutuality of interest to treat the Appellant and other OMCs as related and value to be arrived at on the basis of Rule 9 of the Excise Valuation Rules. However, the adjudicating authority has not given any finding on such aspect and categorically observed that the question of mutuality of interest bears no consequence for determination of prices. The relevant portion of the impugned order is reproduced hereunder:

*"3.8.2 NRL has also cited the CESTAT Bangalore Order No. 30, 307/2005 dated 28.02.2005, wherein the Hon'ble CESTAT has dropped the case in absence for lack of evidence to establish that there is mutual interest in the business of each other among the four OMCs. **But under the facts and circumstances in the instant case as discussed in the foregoing paras this case law also gets distinguished, since the question of mutual interest bears no consequence for determination of price.** The price vis-à-vis assessable value is available otherwise."*

20. Therefore, once the adjudicating authority found that the mutuality of interest is not relevant to the instant case, the only conclusion ought to be dropping the SCNs. However, the adjudicating authority went beyond the scope of SCN and made observations which were never alleged in the SCN and have been proved to be incorrect by the Ld. Counsel for the appellant. In our view, such approach of the adjudicating authority of travelling beyond the scope of SCN is legally untenable and held to be a

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violation of natural justice by the Hon'ble Supreme Court in the following cases:

- **CCE, Nagpur v. Ballarpur Industries Ltd., 2007 (215) ELT 489 (SC)**
- **CCE v. Champdany Industries Ltd., 2009 (241) E.L.T. 481 (S.C.)**

21. As regards the reliance placed by the Ld. Departmental Representative on the decision of Bharat Petroleum Corporation Ltd. v. CCE, Nasik, 2009 (242) E.L.T. 358 (Tri. – Mumbai), we observe that the said judgment did not follow the already existing coordinate bench decision of the Tribunal, Bangalore Bench in the case of HPCL, which has been affirmed by the Hon'ble Supreme Court. Further, the said decision has already been dissented by the Tribunal, Mumbai Bench itself, in the case of CCE, Mumbai-IV vs. Indian Oil Corporation Ltd., 2014 (308) ELT 502 (Tri-Mumbai) and even the subsequent decisions of the Tribunal have relied on HPCL's case. Thus, we do not find the reliance of the Ld. Departmental Representative to be legally correct.
22. Following the above cases and also in view of the discussion on the merits of the case, we hold that the Appellant has correctly valued the goods supplied to the other OMCs at transaction value, viz. the Import Parity Price under the MoU. Accordingly, the impugned order dated 26.12.2005 passed by the adjudicating authority is set aside and the appeal is allowed with consequential relief to the Appellant.

(Pronounced in the Open Court on **01.02.2022**)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(P.V.Subba Rao)
Member (Technical)