IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Excise Appeal No.59 of 2009

(Arising out of Order-in-Original No.25/MP/Aykut/2008 dated 30.10.2008 passed by Commissioner of Central Excise, Patna)

M/s Indian Oil Corporation Limited
(Barauni Refinery, PO-Barauni, Dist.-Begusarai-851112)

Appellant

VERSUS

Commissioner of CGST & Central Excise, Patna
(C.R.Building, Birchand Patel Path, Patna)

Respondent

APPERANCE :
S/Shri V.Lakshmikumaran, Sr.Advocate,Rahul Tangri, Deepro Sen & Shovit Betal, for the Appellant
Shri P.K.Ghosh, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.76060/2025

DATE OF HEARING : 16 APRIL 2025

DATE OF PRONOUNCEMENT : 01 MAY 2025

Per Ashok Jindal :

This appeal is taken for hearing in remand proceedings. The appellant is in appeal against the impugned order.

2. The facts of the case are that the Appellant is a Government of India Undertaking. It manufactures petroleum products at its refineries situated in different parts of the country. The instant appeal relates to the Appellant's Barauni Refinery.

2.1 The Appellant is engaged in selling these petroleum products to various dealers and Oil Marketing Companies (OMCs). The instant dispute relates to valuation of the goods cleared/sold to the OMCs for the purpose of levy of excise duty.

2.2 Till 31-03-2002, the pricing of the petroleum products was fixed in terms of the Administered Price Mechanism (APM). W.e.f. 01-04-2002, APM was discontinued, to maintain uninterrupted supplies to the consumers and in public interest, the Government of India directed OMCs to enter into an agreement so that an OMC having refinery in a particular area may sell the petroleum products to another OMC having the nearby marketing facilities at the Import Parity Price.

2.3 Thus, an agreement was entered into among the Appellant and the other OMCs, viz. BPCL and HPCL on 31-03-2002 in form of a Memorandum of Understanding (MOU). Under the said MOU, all the OMCs agreed to sell and purchase the subject petroleum products [viz. High Speed Deisel (HSD) and Motor Spirit (MS, petrol)] to each other by charging the prices based on "Import Parity Price", suggested by the government.

2.4 In terms of said agreement, the Import Parity Price (IPP) was taken as the sale price even though the goods were actually manufactured indigenously. The agreement defines IPP as the sum of landed cost of the product at the nearest port, the transportation cost from the port to the storage point of the selling OMC and the terminal charges.

2.5 In terms of the said agreement the OMCs started buying petroleum products from the refineries located near to their respective marketing establishments at the "Import Parity Price". All such transactions of purchase and sale were on principal-to-principal basis and at arm's length.Apart from the said price, the Appellant Company did not receive any additional consideration in monetary terms or otherwise from the OMCs in relation to sale of such petroleum products. An affidavit in this regard is enclosed with the Appeal Paper Book.

2.6 At times, the IPP was less than the price at which goods were sold to the dealers and at times, it was more than the dealer's price as well. However, the Appellant always adopted the IPP only for discharge of excise duty liability. Even post the introduction of specific excise duty on these products w.e.f. March 2008, the transactions between the OMCs are on IPP only.

2.7 The SCN dated 30.11.2007 was issued alleging that the Appellant had undervalued the subject goods (viz. Diesel and Motor Spirit) cleared to various Oil Marketing Companies (OMCs) during the period 01-11-2006 to 15-03-2007. It was alleged that the Appellant had paid duty by adopting IPP in terms of MOU dated 31-03-2001 which was lower than the value at which the same goods were cleared to the dealers.

2.8 It was alleged that the assessable value for transfer of subject goods to OMC has deliberately been kept lower than the assessable value for sale to the OMC's customers (viz. dealers). Further, the payment for the goods sold by OMCs to each other is settled by accounting adjustment considering the pan-India supplies, with the money settlement only for short/ excess quantity by the relevant OMC. Therefore, it was alleged that the subject goods transferred under the MoU are not actually sold.

2.9 Accordingly, the SCN invoked Rule 4 of the Valuation Rules, 2000 read with Section 4(1)(b) of the Central Excise Act, 1944 to determine the assessable value of the subject goods supplied by the Appellant to other OMCs, by adopting the sale value of goods supplied to dealers as the assessable value of subject goods supplied under the MoU.

2.10 The demand amount has been worked out by calculating the difference between the dealer sale price and the IPP and multiplied with the quantity of petroleum products cleared to the OMCs.

2.11 The demand proposed in the SCN came to be confirmed vide Order-in-Original dated 30-10-2008.

2.12 Being aggrieved by the Order-in-Original, the Appellant preferred the present appeal before this Tribunal. This appeal was disposed off in favour of the Appellant by setting aside the demand by relying upon the Appellant's own case in CCE, Mumbai-IV vs. IOCL, 2014 (308) ELT 502 (Tri-Mumbai)vide Final Order No. FO/77002/2018 dated 28-11-2018.

2.13 The Revenue being aggrieved by such order challenged it before the Hon'ble Supreme Court vide Civil Appeal No. 5516 of 2019. This appeal formed part of the batch wherein arising out of different order of this CESTAT. The Hon'ble Supreme Court vide its judgment dated 20-01-2025 was pleased to dispose of the batch of petitions by holding that the <u>price fixed under the MoU cannot be taken as transaction value in terms of Section 4(1)(a) of the Central Excise Act, 1944 since price was not the sole consideration for sale</u>. Accordingly, the following order was passed:

> "40. Hence, we pass the following order:
>
> i) Civil Appeal No.5642 of 2009 is hereby allowed. The impugned orders, including the order dated 8th December 2007 passed by the Commissioner of Central Excise, Nashik are hereby set aside;

ii) In the remaining appeals, the impugned judgments are hereby quashed and set aside, and the appeals are remanded to the concerned Tribunals to decide the same in accordance with the law laid down in this judgment and accordingly, the appeals are partly allowed;

iii) We make it clear that after remand, the Tribunal will decide the cases in the light of the findings recorded in this judgment; and

iv) There will be no orders as to costs."

2.14 The present proceeding is pursuant to the remand direction passed by the Hon'ble Apex Court.

3. The ld. Sr. Advocate for the appellant submits that Rule 4 of the valuation rules, 2000 cannot be invoked in the instant case when the hon'ble supreme court while remanding the instant matter held that 'price is not the sole consideration of sale'.

3.1 It is submitted that in the instant case the impugned order has confirmed the demand by invoking Rule 4 of the Valuation Rules, 2000 read with Section 4(1)(b) of the Central Excise Act, 1944 to determine the assessable value of petroleum products sold to OMCs. The demand amount has been quantified by calculating the difference between dealer sale price and the IPP and multiplied with the quantity of petroleum products sold to OMCs.

3.2 The Hon'ble Supreme Court while remanding the instant matter held that price is not the sole consideration for sale, and therefore the price fixed under MOU cannot be adopted as the transactional value in terms of Section 4(1)(a) of the Central Excise Act, 1944. Relevant finding/observation in the ruling is extracted hereunder for the purpose of reference:

> *"28. Therefore, after taking into consideration the aforementioned parts of the MOU, it is crystal clear that the arrangement reflected from the MOU is essentially for ensuring that every OMC gets smooth and uninterrupted supply all over India, irrespective of whether an OMC has a refinery or otherwise in a particular part of India. Thus, from a plain reading of the MOU, we find that the real consideration for the MOU was to ensure an uninterrupted supply to all the OMCs at various places in India. The MOU incorporates mutual arrangements made by MNCs for an uninterrupted supply of petroleum products so that MNCs can further sell the products to their dealers.* ***By no stretch of the imagination, it can be said that the price fixed under the MOU was the sole consideration for the sale by one OMC to the other. Hence, we concur with the conclusion in the impugned judgment that the price was not the sole consideration for sale."***

3.3 It is submitted that Rule 4 of the Valuation Rules, 2000 would be applicable in cases where there is no sale of goods involved and in the absence any price *per se*, the price of such goods sold nearest to the time of removal of goods under assessment, is adopted.

3.4 In the instant case, Rule 4 has been invoked in the SCN and relied upon in the OIO to confirm the demand by finding that goods were not sold to the OMCs by the Appellant. However, the Hon'ble Supreme Court did not dispute the sale of goods to the OMCs but rejected the transaction value only on the ground that price is not the sole consideration for sale between the Appellant and the OMCs. Even as per Section 2(h) of the Central Excise Act, which defines sale to mean 'transfer of possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration', the transaction between the Appellant and other OMCs qualifies as 'sale'.

3.5 Once the Hon'ble Supreme Court has held that there is sale of goods but transactional value as per Section 4(1)(a) cannot be adopted since price is not the sole consideration for sale, then the only Rule to be applied in the instant case is Rule 6.

3.6 It is submitted that Rule 6 is applicable in a scenario where price is not the sole consideration for sale but where goods are sold by an assessee, for delivery at the time and place of the removal and where the assessee and the buyer of the goods are unrelated.

3.7 It is submitted that since Rule 6 is specifically applicable to the facts and circumstances of the instant case, Rule 4 cannot be applied and the demand confirmed invoking Rule 4 is liable to be set aside. Non-invocation of Rule 6 of the Valuation Rules, 2000 in the SCN is fatal to the instant proceedings.

3.8 It is submitted that since Rule 6 has not been invoked in the Show Cause Notice or relied upon in the impugned order, the instant demand is liable to be set aside as the said rule cannot be relied upon to confirm the present demand.

3.9 To support this, he relied on the decision of this Tribunal in the case of ***M/s. SAIL vs. Comm. of C.Ex., Bolpur*** vide **Order No. FO/A/77328/2018 dated 17.12.2018**.

3.10 Further reliance is placed on the following rulings wherein it has been held that OIO cannot travel beyond the SCN:

- Hindustan Polymers Co. Ltd. vs. Commissioner of Central Excise, Guntur 1999 (106) E.L.T. 12 (SC),

- Comm. of C.Ex., Nagpur vs. Ballarpur Industries Ltd, 2007 (215) E.L.T. 489 (S.C.)
- Precision Rubber Industries (P) Ltd. vs. Comm of C.Ex., Mumbai, 2016 (334) E.L.T. 577 (S.C.)
- Commissioner of Central Excise vs. Gas Authority of India Ltd. 2008 (232) E.L.T. 7 (SC), and

3.11 It is further submitted that in ***SACI Allied Products Ltd. vs. CCE, Meerut, 2005 (183) E.L.T. 225 (S.C.)***, the Hon'ble Supreme Court has held that Tribunal cannot sustain case of Revenue against assessee on a ground not raised by Revenue either in show cause notice or in the order.

3.12 In light of the above, at this stage Rule 6 cannot be relied upon to confirm the demand when the same was never invoked by the department in the SCN or the Order-in-Original.

3.13 In light of the above, the instant demand cannot be sustained and is liable to be set aside.

3.14 It is further submitted that without prejudice to the submissions made above, value for the additional consideration of 'uninterrupted and smooth supply of the subject goods cannot be quantified, making rule 6 unworkable. Therefore,there cannot be any addition to the IPP charged by the Appellant from the OMCs.

3.15 As held by the Hon'ble Supreme Court, the 'ensuring uninterrupted and smooth supply' of subject goods among the OMCs was additional consideration in the transaction of sale of subject goods under MoU. Rule 6 requires conversion of additional consideration in money value and add the same with the transaction value agreed between the parties.

3.16 In the instant case, given the abstract nature of the additional consideration viz. 'ensuring uninterrupted and smooth supply of subject goods', it is not possible to quantify the additional consideration in money value under the appropriate rule. A bare look at the Explanation 1 of Rule 6 of the Valuation Rules also provides an insight of what all additional considerations are capable of being worked out and added to the price of excisable goods. It provides for the apportioned value of of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods to be the money value of additional consideration flowing directly or indirectly from the buyer to the assessee:

(i) value of materials, components, parts and similar items relatable to such goods;

(ii) value of tools,dies,moulds, drawings, blueprints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, artwork, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

3.17 Further, the proviso to Rule 6 (though inserted w.e.f. 11.07.2014) throws light on when additional consideration can be sought to be added to arrive at the value of excisable goods. It clearly provides that only in cases where there is flowback of consideration from the buyer to the seller can there be any addition to the assessable value of the goods.The same has been held by the Hon'ble Supreme Court in the case *of* ***D.J. Malpani vs. CCE, Nashik, 2019 (366) E.L.T. 385 (S.C.).*** Apart from the Import Parity Price the Appellant Company did not receive any additional consideration in monetary terms or otherwise from the OMCs in relation to sale of the petroleum products. An affidavit in this regard is enclosed with the Paper Book.

3.18 In the instant case, in the absence of any flowback of consideration from the OMCs to the Appellant and also in the absence of any money value of additional consideration of 'smooth and uninterrupted supply of subject goods', the machinery of the valuation Rule 6 of the Valuation Rules fails and thus, no further value can be added to the IPP in the instant case.

3.19 In this regard, reliance is placed on the following judgments, wherein it has been held that where under the law there is no valuation mechanism for working out the value of the taxable event, the levy would fail:

- ***Suresh Kumar Bansal vs. Union of India, 2016 (43) STR 3 (Del.)*** – in the context of the absence of any provision to determine the value of services covered under Section 65(105) (zzzh) pertaining to construction of residential complex services.
- ***Vasudha Bommireddy vs. Assistant Commissioner of S. T., Hyderabad, 2020 (35) G.S.T.L. 52 (Telangana)*** – in the context of absence of any provision for determination of value of service portion in composite contract of sale involving not

only service component but also sale of built up area along with undivided share of land and also sale of goods included in total consideration paid for purchase falling in clause (b) of Section 66E.

- ***Sal Steel Ltd. vs. Union of India, 2020 (37) G.S.T.L. 3 (Guj.)*** – in the context of absence of machinery provision for valuation of services of ocean freight where the liability to pay service tax in case of CIF contracts was fixed on the importer of goods, who is not even the recipient of services.

3.20 Therefore, when the money value of the additional consideration is not capable of being derived, the valuation mechanism of Rule 6 fails and consequently, the demand has to be set aside.

3.21 The department's working of treating the difference between the IPP and sale prices to dealer as differential value for charging excise duty (though while invoking Rule 4 and not Rule 6) can also not be treated as the money value of the additional consideration of 'smooth and uninterrupted supply' of subject goods, for the following reasons:

(i) As evident from the details furnished, there have been number of instances where the IPP is more than the dealer's price, making such additional consideration 'negative', which is not possible. Thus, the methodology of Rule 4 adopted by department will give incongruent results if applied for Rule 6.

(ii) The volume of supplies by the Appellant to the OMCs (which are bulk customers) is far more than the volume of supplies made by the Appellant to an individual dealer (which is a retail customer), making the OMCs and the dealers a different class of customers, leading to expected commercial variance between the two on account of volumes as well.

(iii) The Appellant could not have recovered a penny more than the Import Parity Price from the OMCs, since other OMCs could have imported the subject goods at that price, leading to drain of precious foreign exchange reserves on India (due to which the MoU was entered into upon directions of the Government of India)

(iv) Dealers price is at variance than the IPP since the same involves marketing and selling costs as well, which are not required for sale among OMCs.

3.22 Thus, the demand in the instant case is not legally sustainable.

3.23 He further submitted that there was no short payment of duty, if the entire FY 2006-2007 is considered.

3.24 It is submitted that if the entire FY 2006-2007 is considered, then IPP has been greater than the dealer sale price in 7 months whereas, the present demand has been raised only for the period (i.e., 5 months) when IPP has been less than the dealer Sale price. Accordingly, the Appellant had paid excess excise duty amounting to Rs. 3,86,92,959/- which is much higher than the demand amount. Hence, the instant demand is not sustainable.

3.25 Reliance in this regard is placed on:

(i) Pr. Commr. of CGST & CE vs. Godrej Consumer Products Ltd.2019 (5) TMI 222 - MADHYA PRADESH HIGH COURT

(ii) Hindalco Industries Ltd. vs. Commissioner of Central Excise, Bhubaneswar-II – 2023 (5) TMI 720 – CESTAT Kolkata

(iii) M/S. Sail, Alloy Steel Plant vs.Commissioner of Central Excise, Bolpur 2023 (5) TMI 861 - CESTAT KOLKATA

3.26 He submitted that when demand is not sustainable, demand of interest and penalty is also liable to be set aside.

3.27 The Hon'ble Supreme Court in its remand order has held that neither the extended period of limitation is invocable in the batch of the cases before it nor penalty is imposable under Section 11AC, in as much as the revenue was always aware of the MoU between the OMCs. Accordingly, the penalty under Section 11AC imposed in the impugned order is also not sustainable.

3.28 As regards the interest liability, the Appellant submits that:

(i) Till the issuance of the Hon'ble Supreme Court's order dated 20.01.2025, the Hon'ble Supreme Court on the same issue, in cases of ***Commissioner vs. Hindustan Petroleum Corpn. Ltd. - 2006 (196) E.L.T. A72 (S.C.)*** and ***Commissioner vs. Kochi Refineries Ltd. - 2015 (320) E.L.T. A33 (S.C)*** had accepted the IPP as transaction value.

(ii) The appellant relied on these judgements and had a bona fide belief that the transaction value adopted by OMCs is correct.

(iii) The above is strengthened by the fact that the same methodology is applied while procuring/ selling petroleum products from/ to private refiners and standalone refiners.

(iv) MoF itself agreed to the transaction value adopted by OMCs while giving response to CAG Audit Para as mentioned in 57th PAC (2007-2008).

(v) CBIC vide instruction dated 14.02.2007 on Valuation of MS and HSD stated that pending cases and future assessment of said products should be decided based on the decision of Supreme Court in the case of ***Hindustan Petroleum Corpn. Ltd. (supra)***.

3.29 The above facts point to the unambiguous conclusion that prior to the Hon'ble Supreme Court's remand order dated 20.01.2025, the issue of valuation was settled in favour of the Appellant vide Board' clarifications, Apex Court Rulings as well as the Ministry of Finance's views. Accordingly, in the event of any demand being confirmed against the Appellant in the present proceedings, the interest liability would arise only w.e.f. 20.01.2025, and not before that.

3.30 In this regard, the reliance is placed on the judgment of the Hon'ble Supreme Court in the case of ***CCE, Hyderabad v. Associated Cement Companies Ltd., 2005 (180) E.L.T. 3 (S.C.)*** wherein the assessee was allowed the credit of duty paid on fuel by the ruling of this Tribunal. However, on appeal before the Hon'ble Apex Court, the same was disallowed on account of the retrospective amendment vide Section 112 of the Finance Act, 2000. The Hon'ble Apex Court held that before the retrospective amendment denying credit to the assessee, the CESTAT's order holding in its favour was holding the field, which was being set aside by the Hon'ble Apex Court in the said case. Accordingly, it was held that the interest liability would commence from the date of the order of the Hon'ble Apex Court in the said case.

3.31 Relying on the above, it is humbly submitted that no interest should be levied on the Appellant for the period upto 20.01.2025.

4. On the other hand, the ld.A.R. for the Revenue submitted that in this case, the Hon'ble Apex Court has held that the price is not sole consideration of the sale. In that circumstances, the appellants are liable to pay duty at the price the goods were sold to the dealers.

5. Heard both the parties and considered the submissions.

6. We find that in this case, the Hon'ble Apex Court remanded the matter to this Tribunal with the following observations :

> *"Therefore, after taking into consideration the aforementioned parts of the MOU, it is crystal clear that the arrangement reflected from the MOU is essentially for ensuring that every OMC gets smooth and uninterrupted supply all over India, irrespective of whether an OMC has a refinery or otherwise in a particular part of India. Thus, from a plain reading of the MOU, we find that the real consideration for the MOU was to ensure an uninterrupted supply to all the OMCs at various places in India. The MOU incorporates mutual arrangements made by MNCs for an uninterrupted supply of petroleum products so that MNCs can further sell the products to their dealers. By no stretch of the imagination, it can be said that the price fixed under the MOU was the sole consideration for the sale by one OMC to the other. Hence, we concur with the conclusion in the impugned judgment that the price was not the sole consideration for sale."*

7. In view of the remand proceedings, we have gone through the various provisions, which are relevant for adjudication of the case. Section 4 of the Central Excise Act, 1944 is very much relevant, which reads as under :

> "***SECTION [4. Valuation of excisable goods for purposes of charging of duty of excise. —*** *(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;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed."

8. Further, in this case, in the show-cause notice, the Rule 4 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 was invoked and as per the direction of the Hon'ble Apex Court, Rule 6 of the said Rules, is also applicable, which read as under :

"RULE 4.*The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable.*

RULE 5...

RULE 6.*Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee."*

9. We find that in this case, initially the show-cause notice has been issued to the appellant by invoking the provisions of Section 4(1)(b) of the Central Excise Act, 1944 read with Rule 4 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. As per the observations made by the Hon'ble Apex Court, it is held that the transaction value in terms of Section 4(1)(a) of the Central Excise Act, 1944, cannot be adopted and the price is not the sole consideration for sale. We find that Rule 4 of the Valuation Rules is applicable in this case where there is no sale of goods involved and in the absence of any price *per se*, the price of such goods sold nearest to the time of removal of goods under assessment is to be adopted. On the basis of this, the demand has been confirmed in the impugned order, but the Hon'ble Apex Court observed that the price is not sole consideration for sale. Therefore, where the price is not the sole consideration for sale, Rule 6 of the Valuation Rules is applicable. Admittedly, in this case, Rule 6 of the Valuation Rules has not been invoked in the show-cause notice and the Rule 4 of the Valuation Rules is not applicable as per the observations of the Hon'ble Apex Court while remanding the matter back to this Tribunal.

10. In that circumstances, the demand in question is to be set aside as Rule 4 of the Valuation Rules is not applicable to the facts and circumstances of the case as observed by the Hon'ble Apex Court in the case of Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Limited (supra), wherein the Hon'ble Supreme Court has observed as under :

> *"**21.** Before concluding, we may mention that, in the present case, the second and the third show cause notices are alone remitted. The first show cause notice dated 21-5-1999 is set aside as time-barred. However, it is made clear that Rule 7 of the Valuation Rules, 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show cause notices. It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule."*

11. Further, in the case of Precision Rubber Industries (P) Ltd. Vs. Commissioner of Central Excise, Mumbai (supra), the Hon'ble Apex Court has held as under :

> *"**11.** In so far as the present appeal is concerned, it is the case of the Revenue in the show cause notices that the goods are classifiable under Chapter Heading 4016.99. Therefore, no new case could have been set up or decided contrary to the show cause notices that the goods fall under Chapter Heading 8448.00 without issuing a fresh show cause notice to the assessee in this regard."*

12. Again, in the case of Commissioner of Central Excise Vs. Gas Authority of India (supra), the Hon'ble Apex Court has held as under :

> *"**7.** As repeatedly held by this Court, show cause notice is the foundation of the Demand under Central Excise Act and if the show cause notice in the present case itself proceeds on the basis that the product in question is a by-product and not a final product, then, in that event, we need not answer the larger question of law framed hereinabove. On this short point, we are in agreement with the view expressed by the Tribunal that nowhere*

> *in the show cause notice it has been alleged by the Department that Lean Gas is a final product. Ultimately, an assessee is required to reply to the show cause notice and if the allegation proceeds on the basis that Lean Gas is a by-product, then there is no question of the assessee disputing that statement made in the show cause notice.*
>
> ***8.*** *We express no opinion on the merits of the question framed hereinabove. We are dismissing these appeals only on the facts of the present case and only on the ground that there is no allegation made in the show cause notice that Lean Gas is the final product."*

In this case, as directed by the Hon'ble Apex Court, the appropriate Rule is Rule 6 of the Valuation Rules and Rule 6 of Valuation Rule has not been invoked, therefore, we hold that as Rule 6 of the Valuation Rules, is not invoked in this case, therefore, on merit, the demand is not sustainable by invoking Rule 4 of the Valuation Rules.

13. But we are duty bound to follow the direction of the Hon'ble Apex Court while remanded the matter to this Tribunal holding that the price is not the sole consideration for sale, therefore, we have to find out whether the appellant has received any consideration of over and above transaction value or not ?

14. To this effect, the appellant has filed an Affidavit. The same is taken on record. For better appreciation, the same is extracted below :

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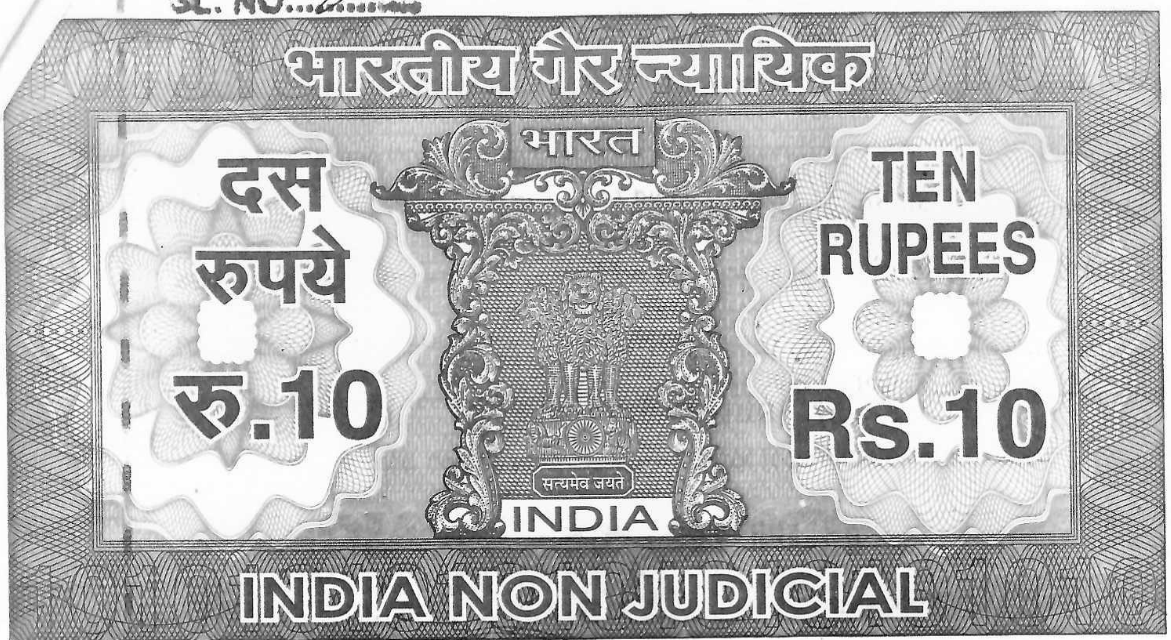
SL. NO....21..... ANNEXURE- '1' 15



পশ্চিমবঙ্গ पश्चिम बंगाल WEST BENGAL 971792

ASIS KR SEN NOTARY Regd. No.-13802/18

AFFIDAVIT

I, Shri Ravi K Agarwal, son of Shri Omprakash Agarwal, aged about 42 years, by occupation service, working for gain at M/s. Indian Oil Corporation Limited, do hereby solemnly affirm and state as follows: -

1. That I am the Deputy General Manager (Finance) of the Appellant Company's Refineries Division and as such a principal officer thereof. I am acquainted with the facts and circumstances of the case out of which the instant Appeal No. E/59/2009 arises and have been duly authorized by the Appellant Company to sign and affirm this affidavit on its behalf.
2. During the period in question i.e., from 01-11-2006 to 15-03-2007, the Appellant Company sold petroleum products (viz. Motor Spirit and High Speed

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Diesel) to various Oil Marketing Companies (OMCs) at the Import Parity Price (IPP) in terms of the Memorandum of Understanding dated 31-03-2002.

3. Apart from the said price the Appellant Company did not receive any additional consideration in monetary terms or otherwise from the OMCs in relation to sale of such petroleum products.

4. I declare that the contents of this affidavit are true and correct to the best of my knowledge and belief, and that no part of it is false or concealed.

NOTARY KOLKATA
ASIS KR SEN
NOTARY
Regd. No.-13802/18
EXPIRY DATE
31.12 28
Govt. of India

Indian Oil Corporation Ltd.
Authorised Signatory

DEPONENT

RAVI K. AGARWAL

Prepared in my office

(RAHUL TANGRI)

Advocate

Solemnly affirmed and declared
Before me on Identification

ASIS KUMAR SEN
City Civil Court
Kolkata
Reg. No. 13802/18 Govt. of India

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As per the Affidavit, the appellant did not receive any additional consideration in monetary terms or otherwise from the OMC in relation to the sale of such petroleum product and the Revenue has also not alleged in the show-cause notice that the appellant has received any amount in monetary terms or otherwise over and above the transaction value from the OMC in relation to the sale of the goods in question. Therefore, Rule 6 is not applicable on merit in the facts and circumstances of the case.

15. We further take note of the fact that the demand in this case is for the period 01.11.2006 to 15.03.2007, wherein the appellant affected to sale to OMC on the basis of IPP. Admittedly, there was instances where IPP price is more than the dealer's price and the only instance where IPP price is less than the dealer the dealer's price, the demand has been raised against the appellant, if whole of the sale is taken into consideration, then the appellant has paid the excess duty which is much higher than the demanded amount in question. To appreciate the said facts, the details of sales being affected by the appellants are as under :

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ANNEXURE- "2"

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Instances where Sales price of OMC is Higher as compared to Other Retail Customers

Period From	Period to	Product	OMC Price	Dealer Price	Price Diff. per KL
4/1/2006	4/15/2006	HSD	24,481.45	21,762.47	-2,718.98
4/16/2006	4/30/2006	HSD	26,391.79	21,762.47	-4,629.32
5/1/2006	5/15/2006	HSD	28,665.28	21,762.47	-6,902.81
5/16/2006	5/31/2006	HSD	28,194.78	21,762.47	-6,432.31
6/1/2006	6/15/2006	HSD	28,206.27	21,762.47	-6,443.80
6/16/2006	6/30/2006	HSD	29,188.86	21,762.47	-7,426.39
7/1/2006	7/15/2006	HSD	29,188.86	23,412.72	-5,776.14
7/16/2006	7/31/2006	HSD	29,188.86	23,412.72	-5,776.14
8/1/2006	8/15/2006	HSD	29,191.58	23,412.72	-5,778.86
8/16/2006	8/31/2006	HSD	29,163.65	23,412.72	-5,750.93
9/1/2006	9/15/2006	HSD	28,645.57	23,412.72	-5,232.85
9/16/2006	9/30/2006	HSD	27,334.40	23,412.72	-3,921.68
10/1/2006	10/15/2006	HSD	24,084.98	23,412.72	-672.26
10/16/2006	10/31/2006	HSD	23,960.52	23,412.72	-547.80
11/1/2006	11/15/2006	HSD	22,804.77	23,412.72	607.95
11/16/2006	11/30/2006	HSD	22,813.75	23,412.72	598.97
12/1/2006	12/15/2006	HSD	23,361.47	23,412.72	51.25
12/16/2006	12/31/2006	HSD	23,060.96	23,412.72	351.76
1/1/2007	1/15/2007	HSD	22,763.03	23,412.72	649.69
1/16/2007	1/31/2007	HSD	21,495.00	23,412.72	1,917.72
2/1/2007	2/15/2007	HSD	21,311.29	22,412.00	1,100.71
2/16/2007	2/28/2007	HSD	22,074.00	22,412.00	338.00
3/1/2007	3/15/2007	HSD	22,021.31	22,412.00	390.69
3/16/2007	3/31/2007	HSD	23,472.23	22,054.64	-1,417.59
4/1/2007	4/15/2007	HSD	23,472.23	22,054.64	-1,417.59
4/18/2007	4/30/2007	HSD	23,807.54	22,054.64	-1,752.90
5/1/2007	5/15/2007	HSD	25,096.52	22,054.64	-3,041.88
5/16/2007	5/31/2007	HSD	25,028.43	22,054.64	-2,973.79
6/1/2007	6/15/2007	HSD	24,475.16	22,054.64	-2,420.52
6/18/2007	6/30/2007	HSD	24,217.47	22,054.64	-2,162.83
4/1/2006	4/15/2006	MS	21,437.62	20,797.63	-639.99
4/16/2006	4/30/2006	MS	23,226.65	20,797.63	-2,429.02
5/1/2006	5/15/2006	MS	25,982.94	20,797.63	-5,185.31
5/16/2006	5/31/2006	MS	26,871.20	20,797.63	-6,073.57
6/1/2006	6/15/2006	MS	27,322.60	20,797.63	-6,524.97
6/30/2006	6/30/2006	MS	28,570.00	20,797.63	-7,772.37
7/1/2006	7/15/2006	MS	28,770.00	20,797.63	-7,972.37
7/16/2006	7/31/2006	MS	28,570.00	20,797.63	-7,772.37
8/1/2006	8/15/2006	MS	27,428.58	20,797.63	-6,630.95
8/16/2006	8/31/2006	MS	27,664.21	20,797.63	-6,866.58
9/1/2006	9/15/2006	MS	24,146.63	20,797.63	-3,349.00
9/16/2006	9/30/2006	MS	24,829.01	20,797.63	-4,031.38

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10/1/2006	10/15/2006	MS	23,884.88	20,797.63	-3,087.25
10/16/2006	10/31/2006	MS	22,886.53	20,797.63	-2,088.90
11/1/2006	11/15/2006	MS	19,235.70	23,884.77	4,649.07 ●
11/16/2006	11/30/2006	MS	18,889.14	23,884.77	4,995.63 ●
12/1/2006	12/15/2006	MS	19,609.08	23,884.77	4,275.69 ●
12/16/2006	12/31/2006	MS	20,519.88	23,884.77	3,364.89 ●
1/1/2007	1/15/2007	MS	21,131.82	23,884.77	2,752.95 ●
1/16/2007	1/31/2007	MS	19,486.69	23,884.77	4,398.08 ●
2/1/2007	2/15/2007	MS	18,295.44	23,884.77	5,589.33 ●
2/16/2007	2/28/2007	MS	19,347.14	21,454.00	2,106.86 ●
3/1/2007	3/15/2007	MS	20,536.92	21,454.00	917.08 ●
3/16/2007	3/31/2007	MS	23,742.90	21,097.90	-2,645.00
4/1/2007	4/15/2007	MS	22,901.08	21,097.90	-1,803.18
4/16/2007	4/30/2007	MS	23,858.43	21,097.90	-2,760.53
5/1/2007	5/15/2007	MS	24,119.76	21,097.90	-3,021.86
5/16/2007	5/31/2007	MS	24,463.93	21,097.90	-3,366.03
6/1/2007	6/15/2007	MS	25,050.98	21,097.90	-3,953.08
6/16/2007	6/30/2007	MS	23,608.33	21,097.90	-2,510.43

● is the period of demand

	Rs.
For FY 2006-07	
Excess Duty paid on HSD considering Dealer prices as Assessable Value	**39,429,171**
Short Excise Duty paid on MS considering dealer price as assessable value	-736211.965
Total Excess ED paid in FY 2006-07	**38,692,959**

16. In that circumstances also, the demand is not sustainable against the appellant as held by this Tribunal in the case of M/s Hindalco Industries Limited Vs. Commissioner of Central Excise, Bhubaneswar II reported in 2023 (5) TMI 720-CESTAT, Kolkata, wherein this Tribunal has observed as under :

> *"10. The next issue for decision is on the quantification of differential duty. Even though there is no provisional assessment in the present case, the duty determination on the inter-unit transfer is made on annual costing. As such when the Department arrived at cost on annual average basis the duty liability, excess or shortage has also to be determined on such basis. It is not tenable while for arriving at per unit duty liability the whole year data is considered for costing, for total duty liability only months when short payment was noticed were considered. In other words when CAS-4 based annual costing formed basis for arriving transaction value, the overall duty liability/short payment should be arrived at after considering duty already paid during that year on such goods. We find the reasoning given by the Original Authority against adjustment of already paid duty as untenable. Section 11B has no application in such situation, when the appellants duty liability is determined on annual CAS-4, the duty already paid during said period has to be adjusted. The question of unjust enrichment has no relevance here. There is no refund considered here. The point that the duty paid in excess in certain months has been availed as credit by sister unit hence, cannot be adjusted towards short payment also not tenable. The demand arose based on annual costing. Such cost price in terms of Rule 8 will apply to all clearances made during the relevant year. Admittedly, duty already discharged has to be considered for arriving at overall short payment. Selectively applying the said cost price only for months when the clearances were below such cost price is not legally sustainable."*

17. Further, in the case of M/s SAIL, Alloy Steel Plant Vs. Commissioner of Central Excise, Bolpur reported in 2023 (5) TMI 861-CESTAT-Kolkata, again this Tribunal has observed as under :

> *"10. The Learned Commissioner vide the impugned Order has raised the demand for excise duty by ignoring the transactions where higher excise duty has been paid, when compared to the duty payable as per Rule 8 valuation. Further, transactions where excise duty paid is lower than the duty payable on application of Rule 8 has been selected. By adopting such methodology of pick and choose, the excise duty demand has been arrived at. This bench finds that the approach of the Ld. Commissioner in confirming the demand by considering the annexures relating to short payment of excise duty alone is legally erroneous. The Ld. Commissioner ought to have allowed the adjustment of excess excise duty paid against the short payment, prior to raising any demand on the Appellant. We are in agreement with the long range of judgments referred to by the Appellant wherein such adjustment has been allowed in the context of identical matters, matters involving CAS-4 valuation, matters involving provisional assessment and matters involving SSI exemptions. Some of the judgments which are directly applicable to the present case are referred hereunder:*
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> *(a) Pr. Commr. of CGST & CE Vs. Godrej Consumer Products Ltd. 2019 (367) ELT 985 (MP) – wherein the Hon'ble High Court upheld the Tribunal's order relying on the following observations made in the case of Essar Steel India Ltd. v. Commissioner, 2017 (345) ELT 139 (Tribunal):*
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>> *"10. The next issue for decision is on the quantification of differential duty. Even though there is no provisional assessment in the present case, the duty determination on the inter-unit transfer is made on annual costing. As such when the Department arrived at cost on annual average basis the duty liability, excess or shortage has also to be determined on such basis. It is not tenable while for arriving*

at per unit duty liability the whole year data is considered for costing, for total duty liability only months when short payment was noticed were considered. In other words when CAS-4 based annual costing formed basis for arriving transaction value, the overall duty liability/short payment should be arrived at after considering duty already paid during that year on such goods. We find the reasoning given by the Original Authority against adjustment of already paid duty as untenable. Section 11B has no application in such situation, when the appellants duty liability is determined on annual CAS-4, the duty already paid during said period has to be adjusted. The question of unjust enrichment has no relevance here. There is no refund considered here. The point that the duty paid in excess in certain months has been availed as credit by sister unit hence, cannot be adjusted towards short payment also not tenable. The demand arose based on annual costing. Such cost price in terms of Rule 8 will apply to all clearances made during the relevant year. Admittedly, duty already discharged has to be considered for arriving at overall short payment. Selectively applying the said cost price only for months when the clearances were below such cost price is not legally sustainable."

b. Jindal Steel & Power Ltd. Vs. CCE, Raipur-I 2016 (342) ELT 253 (Tri.-Del.) – wherein in identical set of facts as in the present case, the following observations were made:

"2. ……………………………We find the reasoning given by the lower authority as devoid of merit. In the present case, the appellant was not allowed to have provisional assessment and the department now proceeds to demand of duty selectively for periods within the same financial year wherever the value is less than the Rule 8 value and refused adjustment within the same financial year when the value is determined higher than the Rule 8 value. It is apparent that the duty liability as already discharged on the basis of value

which is not final. The net excess or shortage will have to be considered. In the present case, admittedly, no refund has been claimed or under consideration for the impugned period even though overall payment by the appellant for the whole year is much higher than the actual liability."

11. It is observed that demand raised vide the impugned order is not sustainable as during the relevant period the Appellant had paid the correct duty arrived at in terms of Rule 4 of the Valuation Rules. Moreover, the Appellant has paid much higher duty than what is demanded in the impugned order and in such factual circumstances, adjustment of excise duty must have been allowed instead of raising any further demand."

18. As the appellant paid excess duty in whole of the period in dispute, therefore, the impugned demand is not sustainable. In view of this, we observe as under :

(a) As Rule 4 of the Valuation Rules is not invokable as observed by the Hon'ble Apex Court, therefore, the demand proposed in the show-cause notice by invoking Rule 4 of the Valuation Rules, is not sustainable ;

(b) As per the direction of the Hon'ble Supreme Court, Rule 6 of the Valuation Rules, has not been invoked in the show-cause notice (which is the appropriate Rule), it is seen that the appellant has not received any amount in monetary terms or otherwise over and above of the transaction value, in that circumstances, Rule 6 is not applicable in the facts and circumstances of the case and

(c) As, in whole of the period in question, the appellant has paid excess duty as demanded after adjustment, in view of this, no demand of duty is sustainable against the appellant. Consequently, no interest is payable by the appellant and no penalty is imposable on the appellant.

19. In view of the above observations, we set aside the impugned order and allow the appeal filed by the appellant.

(Pronounced in the open court on **01.05.2025**)

(Ashok Jindal)
Member (Judicial)

(K.Anpazhakan)
Member (Technical)

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