

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.1**

Excise Appeal No.88 of 2008

(Arising out of Order-in-Original No.45/Commr./CE/Kol-II/Adjn/2007-08 dated 18.12.2007 passed by Commissioner of Central Excise, Kolkata-II.)

M/s. Indian Oil Corporation Ltd.

(Marketing Division, Eastern Region, Mourigram Terminal, Vill: Panchpara, PO:Radhadasi, Distt: Howrah-711317.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-II

.....Respondent

(15/1, Strand Road, Custom House, M.S. Building, Kolkata-700001.)

APPEARANCE

Ms. Shreya Mundhra, Advocate for the Appellant (s)
Shri P.Das, Authorized Representative for the Revenue

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

FINAL ORDER NO. 77365/2025

DATE OF HEARING : 20.08.2025
DATE OF DECISION : 20.08.2025

Per : ASHOK JINDAL :

The appeal is being listed before us in pursuance to the order of the Hon'ble Apex Court in Civil Appeal No.8025-8027/2010 vide judgement dated 20.01.2025.

2. The facts of the case are that –

2.1 The appellant, a Public Sector Undertaking, is engaged in manufacturing petroleum products at its refineries situated in different parts of the country. The instant appeal relates to a warehouse at Mouritgram Terminal, Panchpara, Radhadasi, Howrah under Central Excise Registration No.AAACI1681GXM060.

2.2 Prior to 01.04.2002, petroleum product pricing was regulated under the Administered Price Mechanism (APM) where prices were fixed by the Oil Coordination Committee (OCC). For

levy of Central Excise duty, ex-storage sale prices fixed by OCC were considered uniformly.

2.3 With effect from 01.04.2002, APM was dismantled and Oil Marketing Companies (OMCs) namely IOCL, HPCL and BPCL entered into a Memorandum of Understanding (MOU) dated 31.03.2002 at the behest of Ministry of Petroleum & Natural Gas for product sharing arrangements.

2.4 Under the MOU, OMCs agreed to sell and purchase petroleum products among themselves at Import Parity Price (IPP) – defined as the landed cost of products at the nearest port plus transportation costs from the port to the storage point of selling OMC and terminal charges – to ensure smooth and uninterrupted supply of petroleum products across India.

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

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. The said methodology is still continuing even after introduction of Specific duty of excise.

2.7. Further, the adoption of IPP was also done at the time of supply of petroleum products by private parties to the appellant.

2.8 In this regard, a show cause notice dated 30.03.2007 was issued to the appellant, wherein it was alleged that :

- a. IOCL contravened provisions of Rule 6 of Central Excise Rules, 2002 by failing to correctly assess duty

payable on clearances to OMCs during 01.04.2002 to 30.09.2004.

b. The IPP adopted for clearances to OMCs was not in conformity with section 4 of Central Excise Act, 1944 as price was not the sole consideration for sale.

3. The MOU arrangement showed mutuality of interest between OMCs making them related parties, with flow-back of additional consideration not reflected in assessable value [Reference made to Rule 6 of Central Excise Valuation (determination of price of excisable goods) Rules, 2000].

d. Hence, the valuation has to be determined in accordance with section 4(1)(b) of the Central Excise Act, 1944 read with Rule 9 further read with Rule 11 of the Central Excise Valuation (determination of price of excisable goods) Rules, 2000.

e. IOCL suppressed the MOU from the Department with intent to evade duty, warranting invocation of extended period under proviso to Section 11A(1).

2.9 The appellant submitted a detailed reply to the show cause notice, supporting its claim with various judicial pronouncements.

2.10 However, without appreciating the factual position and the legal principles, the Adjudicating authority passed the Order-in-Original dated December 18, 2007, on the following grounds:

- The appellant, while clearing petroleum products to other OMCs under the MOU, adopted Import Parity Price (IPP) which was substantially lower than the price charged to their own dealers/customers. The Commissioner held that this differential pricing indicated that price was not the sole consideration for sale as the OMCs had entered into mutual arrangements for product sharing/assistance.
- The Commissioner rejected appellant's contention that IPP represented the correct transaction value under Section 4(1)(a) of the Central Excise Act, 1944. Instead, it

was held that the MOU arrangement showed mutuality of interest between OMCs, making them related parties as they were “so associated that they have interest, directly or indirectly, in the business of each other” under section 4(3)(b)(iv) of the Act.

- The Commissioner held that since price was not the sole consideration for sale, the assessable value should be determined under section 4(1)(b) read with Rule 11 of the Valuation Rules, 2000. He then applied the principles of Rule 4 of the Central Excise Valuation Rules, 2000, holding that the value of goods sold by the assessee to their own dealers for delivery at any time nearest to the time of removal should be adopted as the assessable value for clearances to OMCs.

- In case of price available at the depots, the Commissioner noted that principles of Rule 7 could be applied. Further, since the OMCs were so associated with each other having interest directly in the business of others, the Commissioner held that valuation could be done by adopting provisions of Rule 9 which deals with goods sold through related persons.

- The Commissioner invoked Rule 6 of the Central Excise Valuation Rules, 2000, holding that there was flow-back of additional consideration between OMCs which was not reflected in the assessable value, as each company gained when they received petroleum products at subsidized rates from other OMCs and subsequently sold them at higher prices to dealers.

- The appellant had suppressed the MOU from the Department and willfully misdeclared the price for payment of duty, thereby suppressing material facts with deliberate intention of duty evasion, warranting invocation of extended period under proviso to section 11A(1).

- Accordingly, the demand of duty amounting to Rs.5,15,31,627/- under section 11A(2) of the Central excise Act, 1944, was confirmed along with equal penalty of Rs.5,15,31,627/- under section 11AC read with Rule 25 of the Central Excise Rules, 2002 and interest under Section 11AB of the Act.

2.11 Aggrieved by the said Order, the present appeal was filed before the Tribunal. This appeal was disposed of in favour of the appellant by setting aside the demand by relying upon the decision in ***Hindustan Petroleum Corporation Ltd. V. Commissioner*** reported in **2005 (187) ELT 479 (Tribunal)**, which was upheld by the Hon'ble Supreme Court in ***Commisioner v. Hindustan Petroleum Corporation Ltd.*** reported in **2006 (196) ELT A-72 (SC)** and accepted by the Central Board of Excise and Customs vide its letter dated 14.02.2007, as per ***Final Order No.M-267/S-483/A-668/KOL/2009 dated 15.10.2009.***

2.12 The revenue being aggrieved by such order challenged it before the Hon'ble Supreme Court vide Civil Appeal Nos.8025-8027/2010. This appeal formed part of the batch matters arising out of different order of the Tribunal. The Hon'ble Supreme Court vide its judgement dated 20.01.2025 was pleased to dispose of the batch of petitions by holding that the 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. Further, it was held that the extended period of limitation under the proviso to section 11A(1) of the 1944 Act could not be invoked as the Department was already aware of the MOU through the Board's Circular dated 14th February 2007 and the Tribunal's decision in Hindustan Petroleum Corporation Ltd. (supra). 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 judgements 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 judgement and accordingly, the appeals are partly allowed;***
- (iii) *.....*
- (iv) *There will be no orders as to the costs."*

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

3. The Ld.Counsel for the appellant submits that the period involved in this matter is 01.04.2002 to 30.09.2004, whereas the show cause notice was issued on 30.03.2007, therefore, the impugned demand is barred by limitation as the Hon'ble Apex Court itself held in its judgement dated 30.01.2025 that the extended period of limitation is not invocable. It is further submitted that the issue relating to valuation of the cleared/sold to the OMCs for the purpose of levy of excise duty is no longer *res integra* and has been decided in the appellant's case reported in **2025 (6) TMI 356-CESTAT-KOLKATA**, therefore, the impugned order is to be set aside.

4. Heard the parties, considered the submissions.

5. We find that the issue whether the Central Excise duty is liable to be paid on petroleum products cleared under Oil Exchange Agreement to other oil marketing companies at Import Parity Price has been allegedly resulted in short payment of duty under section 11A along with interest under section 11AB and penalty under section 11AC of the Central Excise Act, 1944 is tenable or not and the period involved in this case is from 01.04.2002 to 30.09.2004, whereas show cause notice has been issued on 30.03.2007. The said issue has been decided by the

Hon'ble Apex Court in the case of **Bharat Petroleum Corporation Ltd. v. Commissioner of Central Excise, Nashik Commissionerate [2025 (1) TMI 989 – Supreme Court]**. After examining the said issue the Hon'ble Supreme Court has observed as under:

"30. Now, we come to the Circular issued by the Board on 14th February 2007. The circular refers to the decision in the case of Hindustan Petroleum Corporation Ltd.¹ Though the circular mentions that pending cases and future assessments of the product should be decided based on the said decision, it was observed that the facts of the case decided by the Tribunal may be gone through properly in order to apply to the pending cases as well as future assessments. Therefore, even the Circular noted the requirement of applying the ratio to the facts of each case. Thus, the finding of the fact recorded by the Tribunal in Civil Appeal No.5642 of 2009 that price was not the sole consideration cannot be faulted with.

Was the extended period of limitation under the proviso to Section 11-A(1) of the 1944 applicable?

31. Section 11A reads thus:

"Section 11A-Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded-

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty or excise has not been levied or paid or has been short-levied or short-paid or

erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this act or of the rules made thereunder with an intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect as if, for the words "one year", the words "five years" were substituted :

Explanation : Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be."

(emphasis added)

Show cause notice dated 12th March, 2007 was issued to BPCL. The demand in the show cause notice was for the period from 1st April, 2002 to 5th September, 2004. As per sub-section (1) of Section 11-A, a notice of demand could have been issued within one year from the relevant date. The demand could be for a short levy, short payment, non-levy, non-payment, or erroneous refund. The period of one year is to be calculated from the relevant date as defined in sub-section 3(ii) of Section 11-A. There is no dispute that the demand notice was not issued within the stipulated period provided under sub-section (1) of Section 11-A, and therefore, an extended period of limitation was invoked by the revenue.

32. Under the proviso to sub-section (1) of Section 11-A, an extended period of limitation can be invoked when there is a nonlevy or non-payment or short levy or short payment of the excise duty by a reason of fraud or collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of 1944 Act or the rules made thereunder with the intent to evade payment of duty. The show cause notice referred to the statements recorded of BPCL officers and other OMCs. No detailed reasons have been recorded in support of invoking the extended period of limitation by the Commissioner in his order. The High Court, in the impugned order, has confirmed the extended period of limitation by recording the following findings in paragraph 44:

"44. On the question of time bar, we find that the show cause notice has alleged that the contents of the MOU were not brought to the notice of the Commissionerate and that M/s. BPCL has misled the Department into believing that the dual pricing adopted by them has been done on the directive of the Govt. of India. This has not been contested by the appellants. Their only defence is that mere non-submission of the MOU cannot be a ground for invoking the extended time limit and there should be some positive act of omission/commission for the same. Withholding the MOU from the Department, and making the Department believe that the dual pricing was adopted as per the directive of the Government cannot be considered to be innocent acts. This is definitely a positive act, for which the extended time limit has been rightly invoked.

(emphasis added)

33. Thus, the first ground is withholding or suppressing the MOU. We are dealing with a public sector undertaking. It is pertinent to note that the impugned judgment incorporates the letter dated 14th February, 2007 issued by the Board. The letter itself records that to ensure a regular supply of petroleum products, the Oil PUSs (OMCs) entered into an MOU at the behest of the Petroleum and Natural Gas Ministry. It also refers to the decision of the Tribunal in the case of Hindustan Petroleum Corporation Ltd.¹ by stating that the said decision records that the sale price, as per the MOU, correctly represents the transaction value. Therefore, the department was aware of the MOU even before the date on which the show cause notice was issued. As noted earlier, the date of the MOU is 31st March 2002. Moreover, as indicated in the said letter, MOU was referred to in the decision of the Tribunal in the case of Hindustan Petroleum Corporation Ltd.¹. It is pertinent to note that the date of the said decision is 28th February, 2005. In fact, in the said decision, a submission of the revenue has been recorded that the agreement between the oil companies indicates that the price of petroleum agreed thereunder is not a normal price and, therefore, is not a transaction value. Hence, the first ground taken to support the invocation of the extended period of limitation cannot be sustained.

34. *The second ground is that BPCL made the department believe that dual pricing was adopted as per the directions of the Government. A careful perusal of the show cause notice shows that it is not alleged that any such misrepresentation was made by BPCL that the pricing as provided in the MOU was adopted by the BPCL as per the directions of the Central Government. The reply to the show cause notice submitted by the BPCL contains no such representation. In the show cause notice, statements recorded of officers of BPCL and other OMCs have been referred to and relied upon. However, it is not alleged that any of the officers stated that the price of the goods sold under the MOU was fixed as per the directives of the Central Government. We have also carefully perused the order passed by the Commissioner on the show cause notice. Even in the order, no specific reference has been made to any such contention raised by BPCL or other OMCs. Even the order also refers to statements of the officers of BPCL and other OMCs. Hence, both the grounds in support of invoking an extended period of limitation cannot be sustained, and only on that ground, the demand cannot be sustained."*

6. Admittedly, in this case the show cause notice has been issued by invoking the extended period of limitation, therefore, following the decision of the Hon'ble Apex Court in the case of **Bharat Petroleum Corporation Ltd.** (supra), we hold that whole of the demand is barred by limitation. Accordingly, no demand is sustainable against the appellant.

7. In view of this, we set aside the impugned order and allow the Appeal with consequential, if any, as per law.

(Operative part of the order was pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)