(2025) 01 SC CK 0073

Supreme Court Of India

Case No: Civil Appeal Nos. 5642 Of 2009, 8025, 8026, 8027 Of 2010, 5686 Of 2014, 9838 Of 2017, 5516 Of 2019, 10890 Of 2024

Bharat Petroleum Corporation Ltd		APPELLANT
	Vs	
Commissioner of Central Excise Nashik Commissionerate		RESPONDENT

Date of Decision: Jan. 20, 2025

Acts Referred:

- Central Excise Act, 1944 - Section 4, 4(1)(a), 4(3)(d), 11A(1), 11A(2), 11AB, 11AC
- Central Excise Rules, 2002 - Rule 7, 11
- Central Excise Valuation Rules, 2000 - Rule 4

Hon'ble Judges: Abhay S Oka, J; Pankaj Mithal, J

Bench: Division Bench

Advocate: Parijat Sinha, B. Krishna Prasad, Mukesh Kumar Maroria, Gurmeet Singh Makker, V. Lakshmikumaran, Mahesh Agarwal, Rishi Agrawala, M.S. Ananth, Abhinabh Garg, E. C. Agrawala, Abhinav Agrawal, Parijat Sinha

Final Decision: Allowed

Judgement

Abhay S. Oka, J

FACTUAL CONTROVERSY

CIVIL APPEAL NO.5642 OF 2009

1. The appellant in Civil Appeal No. 5642 of 2009 is Bharat Petroleum Corporation Ltd. (for short, â€˜BPCLâ€™). It is a public-sector undertaking.

BPCL has a refinery in Mumbai and an extensive network of installations and depots nationwide. Similarly, Indian Oil Corporation Ltd. (for short,

â€˜IOCLâ€™), Hindustan Petroleum Corporation Ltd. (for short, â€˜HPCLâ€™) and Indo-Burma Petroleum Company Ltd. (for short,

â€˜IBPâ€™) also have refineries, installations and depots at different places in the country. Later on, IBP merged with IOCL. We refer to BPCL,

IOCL and HPCL as the Oil Marketing Companies (for short, â€˜the OMCsâ€™) for convenience.

2. On 30th June 2000, the Central Board of Excise & Customs, Ministry of Finance, Department of Revenue, Government of India (for short, â€˜the

Boardâ€™), issued a circular clarifying the meaning of the expression â€˜transaction valueâ€™ as defined under clause (d) of Section 4(3) of the

Central Excise Act, 1944 (for short, â€˜the 1944 Actâ€™). Up to 31st March 2002, the price of petroleum products was fixed based on the

Administered Price Mechanism (for short, â€˜APMâ€™). This system was done away with effect from 1st April 2002. On 31st March 2002, a

Memorandum of Understanding (for short, â€˜the MOUâ€™), which was named as the Multilateral Product Sale-Purchase Agreement, was

executed by and between the OMCs at the behest of the Ministry of Petroleum and Natural Gas for a period of two years commencing from 1st April

2002. Under the MOU, it was mutually agreed that the OMCs should sell and purchase petroleum products among themselves and/or to one another

at the Import Parity Price (for short, â€˜IPPâ€™), which is defined as the landed cost of the products at the nearest port, plus the cost of

transportation from the said port to the storage point of the selling OMC. IPP also includes terminal charges. Purchase and sale transactions of

petroleum products between OMCs were to be made based on the MOU. The receiving OMC would further sell the petroleum products to their own

dealers. The price fixed in accordance with the IPP was lower than the price at which the selling OMC sold its petroleum products directly to its own

dealers. It was alleged that the purpose of the said MOU was to ensure the smooth supply and distribution of petroleum products, to avoid any

disruption in supply all over India, and to save on transportation costs of the OMCs, when compared with procuring petroleum products solely from

their respective refineries.

3. Between 2002 and 2005, the Department issued several show-cause notices to the OMCs. The show cause notices proposed to arrive at the excise

duty payable under the 1944 Act by referring to the price at which an OMC sold petroleum products to its own dealers rather than the price at which

the OMCs sold petroleum products to one another and/or among themselves, i.e., the IPP. The appellant contends that some show cause notices were

dropped, and some were confirmed. In those cases where show cause notices were dropped, the Commissioners accepted the IPP as the

â€˜transaction valueâ€™, and the Department did not challenge the same.

4. In the case of the show cause notices which were not dropped, demands were confirmed, which led to the OMCs approaching the Customs, Excise

& Service Tax Appellate Tribunal (for short, â€˜the Tribunalâ€™) after confirmation of the demands. In one such appeal in Hindustan Petroleum

Corporation Ltd. v. Commissioner of Central Excise (2005) 187 ELT 479 (Tri-Bang), by judgment dated 28th February 2005, the Tribunal set aside

the Order-in-Original. This judgment was carried before this Court by way of a civil appeal, which was summarily dismissed vide order dated 3rd

January 2006.

5. On 12th March 2007, the Commissioner of Central Excise and Customs, Nashik, issued a show cause notice to BPCL alleging that provisions of the

1944 Act and Central Excise Rules, 2002 have been contravened. The differential duty payable from 1st April 2002 to 5th September 2004 was

quantified at Rs. 119,11,49,418/-(Rupees one hundred nineteen crores, eleven lakhs, forty-nine thousand, four hundred and eighteen only). Demand for

education cess, interest, and penalty was also raised in the show cause notice. BPCL filed its reply to the show cause notice.

6. The demand was confirmed by the Commissioner vide order dated 8th December 2007. The extended period of limitation was invoked, and a

penalty was also imposed under Section 11AC of the 1944 Act. Being aggrieved by the order of the Commissioner, the appellant preferred an appeal

before the West Zonal Bench of the Tribunal. The Tribunal upheld the order dated 8th December 2007. That is how BPCL has preferred Civil Appeal

No. 5642 of 2009.

Civil Appeal Nos. 8025-8027 of 2010

7. Civil Appeal Nos. 8025-8027 of 2010 have been preferred by the Revenue. The respondent is IOCL. In this case, a show cause notice was issued

on 30th March 2007 alleging that the assessee had adopted two different assessable values for the same product to compute excise duty. The first

value taken was the price used for sale to their own dealers, and the second was the IPP used for sale to other OMCs. It was alleged that IOCL had

suppressed the MOU. The Commissioner invoked the extended period of limitation and confirmed the demand. Being aggrieved by the demand, IOCL

preferred an appeal before the Tribunal. The Tribunal interfered with the demand by the impugned judgment. The Tribunal relied upon its own

decision in the case of Hindustan Petroleum Corporation Ltd. (2005) 187 ELT 479 It was pointed out that this Court summarily dismissed an appeal

preferred by the Revenue against the decision in Hindustan Petroleum Corporation Ltd. (2005) 187 ELT 479 Therefore, in this case, the Revenue

is in appeal.

Civil Appeal No.5686 of 2014

8. Civil Appeal No.5686 of 2014 is also preferred by the Revenue. The respondent is again IOCL. Even in this case, a similar order was passed by the

Commissioner where the extended period of limitation was invoked, and the Commissioner confirmed the demand. The Tribunal set aside the order of

the Commissioner on the basis of the decision of the Tribunal in the case of Hindustan Petroleum Corporation Ltd (2005) 187 ELT 479. Therefore,

the Revenue is in appeal.

Civil Appeal No. 9838 of 2017

9. As far as Civil Appeal No. 9838 of 2017 is concerned, the assessee is BPCL. Three show cause notices were served upon BPCL, and the demand

in the show cause notices was made absolute by the Commissioner. It is to be noted that the Commissioner invoked the extended period of limitation

for one such show cause notice bearing Sl. No. 10/2004 dated 26.10.2004. The Tribunal interfered by observing that in the facts of the case, the

adjudication on the basis of show cause notice has travelled beyond the show cause notice. As the Tribunal interfered, the Revenue is in appeal.

Civil Appeal No.5516 of 2019

10. Civil Appeal No.5516 of 2019 is again preferred by the Revenue. A similar show-cause notice was issued to IOCL. The demand in the show

cause notice was made absolute under Section 11A(2) of the 1944 Act, i.e., without invoking the extended period of limitation. The Tribunal interfered

in an appeal preferred by IOCL again by relying upon its own decision in the case of Hindustan Petroleum Corporation Ltd (2005) 187 ELT 479 .

Therefore, the Revenue is in appeal.

Civil Appeal No.10890 of 2024

11. In Civil Appeal No.10890 of 2024, IOCL is the respondent, and Revenue is the appellant. In this case, the Commissioner did not confirm the

demand under the show cause notices against which the Revenue preferred an appeal before the Tribunal. While the Commissioner did not adjudicate

on the question of limitation, it appears that the extended period of limitation was invoked in the show cause notices for only parts of the demand. The

order of the Commissioner was confirmed by the Tribunal by relying upon the decision in Hindustan Petroleum Corporation Ltd. (2005) 187 ELT

479 and other similar decisions. Therefore, the Revenue is in appeal.

12. We may note here that the MOU that is the subject matter of these appeals is the same.

SUBMISSIONS

13. The learned senior counsel, Shri S.K. Bagaria, argued on behalf of BPCL. Shri V. Lakshmikumaran appeared for OMCs, and Shri Balbir Singh,

ASG, represented the Revenue.

14. In support of Civil Appeal no.5642 of 2009, learned senior counsel pointed out that this Court is concerned with Section 4 of the 1944 Act as

amended with effect from 1st July 2000. He relied upon the interpretation put by this Court to Section 4 in the case of CCE v. Grasim Industries Ltd.

(2018) 7 SCC 733, CCE v. Ispat Industries Ltd .(2016) 1 SCC 631, and CCE v. CERA Boards and Doors (2020) 9 SCC 662. He submitted that by

virtue of the substitution of Section 4 with effect from 1st July 2000, the concept of â€˜normal valueâ€™ has given way to the concept of

â€˜transaction valueâ€™. He submitted that the actual price paid or payable on each removal of goods becomes a transaction value, as defined in

sub-section 3(d) of Section 4. It means the price actually paid or payable for the goods. The submission of the learned senior counsel is that Section 4

permits the assessee to charge different prices from different buyers. He submitted that if different prices were charged for different removals, prices

actually paid or payable for each removal become the value for the levy of excise duty. Further submission of the learned senior counsel is that it is

lawful for BPCL to charge different prices to OMCs for sales made to them vis-Ã -vis their own dealers.

15. The learned senior counsel relied upon the terms of the MOU, which incorporate a price fixation formula in MOU based on IPP, which is defined

to mean the landed cost of a product at a particular port, which would include all applicable elements.

16. The learned senior counsel relied upon a decision of this Court in the case of D.J. Malpani v. CCE (2019) 9 SCC 120 in the context of putting

narrow construction. The learned counsel submitted that, in addition to the price actually paid or payable for the goods, transaction value includes any

additional amount the buyer is liable to pay to the assessee. He submitted that in the instant case, over and above the invoice price actually charged, no

amount, either in cash or otherwise, was paid or payable by the OMCs to the appellant, and the price charged was always the sole consideration for

the sale. He submitted that the sales to OMCs were made for delivery at the time and place of removal. He submitted that the parties to the MOU

were not related to each other, and therefore, Section 4(1)(a) was squarely applicable. He also relied upon a Circular dated 30th June 2000 issued by

the Board. He submitted that the MOU was entered into based on a letter dated 21st August 2001 from the Additional Secretary, Government of

India. He also relied upon a Circular dated 14th February 2007 issued by the Government of India, Ministry of Finance, which records that the MOU

was entered into between different PSUs, i.e., OMCs herein, at the behest of the Ministry of Petroleum and Natural Gas. He submitted that the

decision in the case of Hindustan Petroleum Corporation Ltd (2005) 187 ELT 479, was affirmed by this Court by summary dismissal of appeal

preferred by Revenue by a Bench of three Honâ€™ble Judges by order dated 3rd March 2006. He submitted that in view of the judgment of this

Court in the case of V.M. Salgaocar and Bros. Pvt. Ltd. v. CIT (2000) 5 SCC 373, the decision of the Tribunal has merged into the order of this

Court. Hence, the Tribunal could not have made a departure from the view taken in the said case as the Tribunal was bound by it. He pointed out that

the decision in the case of Hindustan Petroleum Corporation Ltd (2005) 187 ELT 479Â has been followed by the Tribunal in several cases.

17. He submitted that the decision to invoke an extended period of limitation under proviso to Section 11A (1) of the 1944 Act was completely

erroneous. He submitted that the instructions of the Board dated 14th February 2007 referred to the MOU, and therefore, there was no question of

withholding the MOU from the Department. He submitted that this was not a case of fraud, collusion or any wilful mis-statement or suppression of

facts and, therefore, the extended period of limitation could not be invoked. Hence, there was no reason to impose a penalty under Section 11 AC.

18. The learned counsel appearing for IOCL in Civil Appeal Nos. 8025-27 of 2010 has also made detailed arguments. He also argued the issue of the

merger of the decision of the Tribunal in the case of Hindustan Petroleum Corporation Ltd (2005) 187 ELT 479Â with the order of this Court

summarily dismissing the appeal. In support of his contention based on the merger, he relied upon a decision of this Court in the case of

Kunhayammed & Ors v. State of Kerala & Anr. (2000) 6 SCC 359.

19. He submitted that the sale price based on IPP when the petroleum products are sold to OMC should be taken as transaction value, especially

when the transaction is on a principal-to-principal basis at armâ€™s length. In his submission, this would show that the price is the sole consideration

for the sale. He pointed out that as provided in Article 4 of the MOU, there was, in fact, a sale of petroleum products. He submitted that the IPP is

not a notional price but an armâ€™s length price. Relying upon a decision of this Court in the case of Commissioner of Central Excise, Hyderabad

v. Detergents India Ltd. (2015) 7 SCC 198, he submitted that it is permissible to sell the same product at different prices to different parties. In such

a case, the actual sale value will be taken as transaction value. He submitted that apart from the fact that no extra-commercial consideration flows

from the MOU, the same has been executed as per the directions of the Ministry of Petroleum and Natural Gas. He also submitted that recourse

could not have been taken to the extended period of limitation as there was no suppression of material facts by IOCL.

20. Shri Balbir Singh, learned ASG appearing for the Revenue submitted that neither in the case ofH industan Petroleum Corporation Ltd(2005)

187 ELT 479Â nor in the case of Bharat Petroleum Corporation Ltd. v. Commissioner of Central Excise, Nashik (2009) 242 ELT 358 (Mumbai),

the interpretation of various clauses in the MOU has been made. Moreover, there is no finding recorded in both the decisions of the Tribunal on the

issue of whether the price was the sole consideration for the sale. He submitted that even assuming there was a merger of the decision in the case of

Hindustan Petroleum Corporation Ltd. (2005) 187 ELT 479Â with the order of the Supreme Court summarily dismissing the appeal, the Tribunal

has not considered whether the price fixed under the MOU was the sole consideration for sale. He submitted that in the impugned judgment that is the

subject matter of Civil Appeal no.5642 of 2009, the Tribunal had considered the various clauses of the MOU in detail and has recorded a finding of

fact that the price was not the sole consideration for sale. He pointed out that by the letter dated 21st August 2001, the Ministry of Petroleum and

Natural Gas has only directed that there has to be an MOU for product sharing arrangements between OMCs so that region-wise and company- wise

supply-demand balance could be arrived at. He submitted that the question here is whether price is the sole consideration of sale, even assuming that

the MOU has been drawn in terms of the directions of the Ministry. He submitted that the OMCs did not produce a copy of the MOU, and, therefore,

there was justification for invoking the extended period of limitation on the ground of suppression of material facts.

OUR VIEW IN CIVIL APPEAL NO.5642 OF 2009

21. The issues involved can be broadly summarised as under:

(i) Whether the price was the sole consideration of sale?

(ii) Whether the revenue was entitled to invoke an extended period of limitation under the proviso to Section 11A(1) of the 1944 Act?

(iii) Whether the revenue was entitled to levy a penalty under Section 11AC of the 1944 Act?

WHETHER PRICE WAS THE SOLE CONSIDERATION FOR SALE

22. Section 4(1) of the 1944 Act reads thus:

â€œ4. Valuation of excisable goods for purposes of charging of duty of excise.â€" (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 shallâ€

(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.â€

(emphasis added)

23. Therefore, for applicability of clause (a) of Section 4(1), the following conditions must be fulfilled:

a. The assessee sells the goods for delivery at time and place of the removal;

b. The assessee and the buyer are not related; and

c. The price is the sole consideration for the sale.

Only if all three conditions are fulfilled, the value of the goods for the purpose of computation of excise duty will be the transaction value. In a given

case, if it is not proved that the price was the sole consideration for sale, clause (a) of Section 4(1) would not apply.Â In that case, clause (b) of

Section 4(1) would apply.

24. We have perused the MOU dated 31st March 2001. IOCL, HPCL, BPCL and IBP are the parties to the MOU. As stated earlier, IBP later

merged with IOCL. Recital nos. (i), (ii) and (iii) are very relevant, which read thus:

â€œ(i) All the above Oil Marketing Companies except IBP are engaged in the business of refining crude .. and for this purpose have established â€¦./associate

refineries and all the above Oil Marketing Companies are engaged in the business of marketing or petroleum products and for this purpose have established large

product handling & marketing infrastructure.

(ii) All the above Oil Marketing Companies are desirous to avail of product sharing/assistance from each other in order to ensure smooth supply and distribution

of POL products and to avoid any kind of disruption of supply all over India.

(iii) At present, the parties to this Agreement are Government of India Undertakings and for their mutual benefit, the parties had various discussions among

themselves and reached agreement of using the available product of each other on the terms and conditions contained hereinafter. Further, if during the agreement

period, any of the parties undergoes disinvestment of their Government equity holding, then subject to Government of Indiaâ€™s residual equity holding

continuing in the party/parties, this Agreement shall hold good.â€

(emphasis added)

As seen from clause (ii), the MOU has been executed so that the OMCs can avail of product sharing/assistance from each other. Product

sharing/assistance was required to ensure the smooth supply and distribution of petroleum products and to ensure that there is no disruption in the

supply of petroleum products to OMCs all over India. Recital no. (iii) sheds light on the real nature of the transaction reflected in the MOU. The

object is to use the available products of each OMC on the terms and conditions set forth in the MOU. Thus, the object of the MOU is not to sell

petroleum products on a commercial basis to other OMCs. The real object is to ensure that each OMC gets a smooth supply of petroleum products

and any disruption of supply is avoided. Therefore, the emphasis is on allowing individual OMCs access to each otherâ€™s products and facilitating

the sale of petroleum products to their respective dealers/customers. The sale of products under the MOU is for the benefit of the respective business

activities of the OMCs.

25. Clause 2.10 defines â€œGroup of Refineriesâ€ as IOCL and its associates, including different companies/ refineries, as stated therein. The group

of refineries also include Reliance Petroleum Limited (for short, â€˜RPLâ€™). Clause 2.14 defines an â€œIndustry Logistics Plan (ILP)â€ as an All

India Supply and Distribution Plan jointly drawn by the OMCs based on the industryâ€™s product availability and market demands for particular

months. Thus, the All India Supply and Distribution Plan, known as ILP, was jointly drawn by the OMCs, considering the market demand and

availability.

26. Clause 4.1 of the MOU provides that OMCs agree to sell and purchase the products to each other in such quantities as determined based on the

principles laid down in the ILP procedure. The ILP procedure is drawn jointly by the OMCs to ensure that adequate supply for each one of them is

available.

27. Clause 4.3 of the MOU reads thus:

â€œ4.3 It is agreed that any shortfall in actual upliftment quantity ex RPL versus Monthly reassessed Quantity of Oil Marketing Companies, shall be reduced by the

excess quantity of the Product that RPL has delivered in the month to any other Oil Marketing Company against its respective Monthly Quantity.â€

27.1 Clause 4.6 of the MOU reads thus:

â€œ4.6 Coastal movement shall be as per the detailed procedure, as mutually agreed, as placed at Annexure B.â€

Clause 4.6 refers to coastal movement. Clause 2.4 defines â€œCoastal Planâ€ which implies that a plan for tanker loading, movement and discharge

was prepared jointly by OMCs.

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.

THE DECISION OF THE TRIBUNAL IN HINDUSTAN PETROLEUM CORPORATION LTD(2005) 187 ELT 479.

29. Now, we turn to the decision of the Tribunal in Hindustan Petroleum Corporation Ltd. (2005) 187 ELT 479, an appeal against which has been

summarily dismissed by this Court. We have carefully perused the said decision. Apart from mentioning that the MOU was executed according to the

direction of the Government of India, the Tribunal has not looked into the contents of the MOU. There is a vague reference to HPCL's agreement

with other oil companies. There is no specific finding recorded therein, after considering the terms and conditions of the MOU, that the price was the

sole consideration for the sale. Therefore, the decision of the Tribunal ignores a crucial ingredient of Section 4(1)(a) of whether the price was the sole

consideration for the sale. The Tribunal has not adverted to the question of whether the third condition in Section 4(1)(a) was complied with. Even

assuming that there is a merger of the decision in the case of Hindustan Petroleum Corporation Ltd(2005) 187 ELT 479Â with the order of this

Court, the order of this Court does not constitute a binding decision on the issue of compliance with the third condition in Section 4(1)(a) as the

Tribunal had not decided the said issue.

THE CIRCULAR DATED 14TH FEBRUARY 2007

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. (2005) 187 ELT 479Â 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 Act 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 of 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.â€

(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 non-levy or non-payment or

short levy or short payment of the excise duty by a reason of fraud or collusion or any wilful 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:

â€œ44. 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.â€

(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 PSUs (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. (2005) 187 ELT 479Â 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. (2005) 187 ELT 479. 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 products 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.

WHETHER SECTION 11AC WAS APPLICABLE?

35. Then, we come to the penalty imposed under Section 11AC of the 1944 Act. Section 11AC reads thus:

â€œ11AC. Penalty for short-levy or non-levy of duty in certain cases

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-

statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty, the

person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined:

Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days

from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this

section shall be twenty-five per cent. of the duty so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the

period of thirty days referred to in that proviso:

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be,

the court, then, for the purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the

court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five

per cent. of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes

effect.

Explanation.--For the removal of doubts, it is hereby declared that--

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior

to the date on which the Finance Act, 2000 receives the assent of the President;

(2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall

be adjusted against the total amount due from such person.â€

(emphasis added)

36. In this case, there is no allegation made by the Revenue of fraud, collusion or any wilful mis-statement on the part of the appellant. The stand

taken is that the MOU was suppressed, and therefore, Section 11AC will apply. In view of the findings recorded above on the issue of the invocation

of the extended period of limitation, the penalty could not have been imposed.

37. In paragraph 40 of the impugned judgment, it is mentioned that BPCL did not submit any argument on the valuation method adopted by the

Commissioner, who has adopted Rule 11 read with Rule 7. However, the Tribunal found that Rule 4 of the Central Excise Valuation Rules, 2000, is

the correct provision to be applied for valuation.

38. Therefore, the said appeal preferred by the BPCL deserves to be allowed by setting aside the entire demand on the ground that the extended

period of limitation could not be invoked.

OTHER APPEALS

39. As far as the other appeals are concerned, the OMCs have succeeded before the Tribunal. Therefore, in the light of the findings recorded by us in

Civil Appeal No.5642 of 2009, these appeals will have to be remanded to the Tribunal for fresh adjudication.

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.