सीमा शुल्क आयुक्त का कार्यालय
नव सीमा शुल्क गृह, पणंबूर, मंगलूर -10
OFFICE OF THE COMMISSIONER OF CUSTOMS
NEW CUSTOM HOUSE, PANAMBUR, MANGALORE – 10

मि. सं. /S-12/02/2004 HPCL Cell पारित दिनांक /Passed on: 03/ 06/2010

क्रम सं. /Sl. No: **02/ 2010 –DC(Appg.)** जारी किये गये दिांक /Issued on: 03/ 06 /2010

मूल आदेश
ORDER-IN-ORIGINAL

श्री ई.सुकुमारन , उप आयुक्त, सीमा शुल्क, मंगलूर सीमा शुल्क आयुक्तालय, से पारित।
Passed by Shri. E. Sukumaran, Deputy Commissioner of Customs, Mangalore Customs Commissionerate

उद्देशिका
PREAMBLE

१. यह प्रति उस व्यक्ति के व्यक्तिगत उपयोग के लिए बेशुल्क दी जाती है, जिसके लिए जारी की जाती है।

1. This copy is granted free of charge for the private use of the person to whom it is issued.

२. कोई भी व्यक्ति जो इस आदेश से व्यथित है, वे इस आदेश के विरुद्ध, सीमा शुल्क और केंद्रीय उत्पाद शुल्क (अपील्स) ायिम 1982 के साथ संलग प्रपत्र फार्म सी.ए.-1/सी.ए.-2 (द्विप्रति में) में आयुक्त (अपील्स), सीमा शुल्क, बेंगलूर को अपील कर सकते हैं । इस आदेश के पावती के दो महीाों के अंदर अपील दायर कराा चाहिए । इस अपील में यायालय शुल्क स्टॉप रु. 1.62/- (रुपये एक और पैसे बासठ मात्र) लगााा चाहिए। उसके साथ मूल आदेश की दो प्रतियाँ, जिसमें से एक प्रमाणित प्रति होाा चाहिए और जिसपर यायालय शुल्क ायिम, 1870 के खंड मुद्दे सं. 6 में विार्दिष्ट के आुसार 2 रुपये (दो रुपये मात्र) की यायालय शुल्क स्टॉप होाा चाहिए ।

2. Any person deeming himself aggrieved by this order may appeal against the order in Form C.A-1/C.A-2 (in duplicate) appended to the Customs and Central Excise (Appeals) Rules,1982 to the Commissioner of Customs (Appeals), Nirmithi Building, MSIL Complex, Airport Road, Bangalore 17. The appeal must be filed within 60 days from the date of communication of this order. An appeal should bear a Court Fee Stamp of Rs.1.62 (Rupee One and sixty two paise only). It should be accompanied by two copies of order in original, one copy of which shall be a certified copy and must bear a court fee stamp of Rs.2/-(Rupees two only) as prescribed under Schedule I, Item 6 of the Court Fees Act 1870.

3. इस आदेश के विरुद्ध अगर कोई व्यक्ति अपील कराा चाहते हैं तो वे अपील करो के पहले लगाये गये दंड तथा माँगे गये शुल्क को भुगताा करें और अपील के साथ ऐसे भुगताा के साक्ष्य प्रस्तुत करें, ाहीं तो सीमा शुल्क अधिायिम, 1962 की धारा 129 ई के उल्लंघा के कारण अपील अस्वीकृत किया जा सकता है।

3. Any person desirous of appealing against this order shall pending the appeal, deposit the duty demanded or penalty levied thereon and produce proof of such payment along with the appeal, failing which the appeal is liable to be rejected for non-compliance of the provisions of Sec 129 E of the Customs Act 1962.

Brief facts of the case:

M/s. Hindustan Petroleum Corporation Limited, Mangalore LPG Import Facility, Village Bala, Via Katipalla, Mangalore - 575 030 (herein after referred to as M/s. HPCL) holders of Private Bonded Warehouse Licence No. 09/96 dated 09.10.1996 and 10/96 dated 05.12.1996, have imported 50303.716 MTs of LPG in 5 consignments (ullage quantity measurement of vessel as per annexure-A enclosed to the show-cause notice) and warehoused. The same cargo was cleared under provisional assessment, executing P.D. Bonds pending production of original documents by the importer and reply to further queries by the Department.

2. On scrutiny of the documents filed by M/s. HPCL in relation to the finalisation of assessment of the said cargos it was found that they have made payment to the supplier of the cargo as per invoice based on Bill of Lading (B/L)/ Manifested quantities. The total B/L quantity in respect of 5 consignments is 50211.030 MTs and M/s HPCL had made payment as per invoices (FOB) based on B/L quantity. The Customs duty payable on total Bill of lading is Rs 10,26,32,047/-. Further, it is noticed that the total shore quantity furnished by the M/s HPCL for five consignments is 50294.797 MTs and has received 83.767 MT of LPG in excess of the declared Bill of Lading/Manifested quantity of 50211.030 MTs. As per Section 12 of the Customs Act, 1962, the duty is leviable on the goods imported into India and M/s HPCL had received undeclared quantity of 83.767 MTs of LPG, which is liable for Customs duty under Section 12 of the Customs Act, 1962. As no transaction has taken place for the declared quantity, value for the same can not be determined under Rule 4 of Customs Valuation Rules, 1988 read with Section 14 of the Customs Act, 1962 and therefore the price is arrived for the undeclared quantity under Rule 5 of Customs Valuation Rules, 1988 read with Section 14 of the Customs Act, 1962 by adopting the price of identical goods imported in the same invoice/ in the same vessel. The duty for the undeclared quantity of 83.767 MTs works out to Rs 189830/-. The party had cleared the five consignments by paying duty of Rs 102353420/-. However duty payable for Shore tank Receipt quantity for five consignments is Rs 102821877/-. Thus the short levy works out to Rs 468457/-.

3. Accordingly, a show-cause notice dated 21.02.2005 was issued to M/s. HPCL, asking them to show cause as to why:

(i) The provisional assessment should not be finalised under Section 18 (2) of the Customs Act, 1962 based on the total quantity received in the Shore tank..

(ii) The Customs duty amounting to Rs. 4,68,457/-should not be recovered which appeared to be short collected from the importer, while arriving at the duty.

4. The importer has not replied to the show-cause notice but requested for further extension of time upto end of October 2006 to file the reply on 23.09.2005. On 01.02.2006, once again they have requested for further extension of time upto end of March 2006. Personal hearing was fixed on 24.05.2006 at 11.30 AM. Since the importer did not attended for the personal hearing as fixed another date for personal hearing was fixed on 22.06.2006. However the importer has not attended for personal hearing on that date also. A final opportunity for personal hearing was granted on 06.07.2006. Sri. Rajan Kuttiyil, Manager (Finance) appeared for the personal hearing on 06.07.2006 and has submitted the written reply No. SZ/NR/TAX/820 dated 18.06.2006 to the show cause notice also during the personal hearing. During the personal hearing he has stated that the quantity to levy the duty was the shore tank quantity as decided by the Supreme court in the case reported in 2002 (142) ELT A 270 as per their reply under para 7; that the value for levy of Customs duty should be proportionate value for the quantity received in the shore tank quantity; that the demurrage was not includable in the assessable value as per the Board's Circular No.5/2006 dated 12.01.2006 and the demurrage was paid in the nature of rent to the port authorities for the port usage but not related to the cargo value; that they had paid some amount towards the differential duty for the pipeline quantity and the same had not been taken into consideration in the show cause notice . Further, due to change of Adjudicating Authority, a personal hearing on 27.09.2007 was also granted.

5. In the written reply to the show cause notice, M/s. HPCL have submitted that

i) they were a Government of India Undertaking engaged in the business of refining of crude and marketing various petroleum products thereof. They have an installation at Mangalore for which they had appropriate registration as a Private Bonded Warehouse vide License No. 09/96 dt. 09.10.1996 and 10/96 dt. 05.12.1996, to receive and store imported as well as indigenous LPG in bulk from MRPL/RIL. From MLIF, LPG was sent to various LPG bottling Plants of HPC, IOC, and BPC in the states of Goa, AP, Kerala and Tamilnadu for bottling and selling cooking gas to the common public through the retail dealers. As and when

LPG consignments were being imported they were filing Into-bond Bills of Entry for warehousing the LPG cargo in the bonded storage tanks at MLIF and later on withdrawals were being made from the bonded tanks by filing Ex-bond Bills of Entry for home consumption and on payment of duty. LPG cleared for distribution as detailed above in accordance with the provisions of Section 68 of the said Act.

ii) Due to insistence from the Customs departments, they had no option but to file Into-Bond B/E as per Ullage quantity, which they did under protest. The assessments were made in earlier imports also adopting the quantities as per ullage survey report instead of Shore tank receipt quantity.

iii) The Department had been contending that the importer should consider quantity on board the ships or as ascertained during the ullage survey at the point of dispatch while the importers have been contending that the quantity as received in the shore tank should be the basis. This issue was finally settled in favour of the importers vide the following decisions.

1) CC vs. HPCL – 2001 (121) ELT 109

2) CC vs. HPCL – 2000 (130) ELT 139

iv) Appeals by the Department were also dismissed by the Supreme Court reported in 2002 (142) ELT A 280. It was contended by the Department that since the importer made payments in terms of Bill of Lading quantity, the same has to be the basis for the payment of duty and this was rejected by the Supreme Court decision as above.

v) The Appellate Tribunal, after considering the various submissions made by importer as also by the Department and following the decisions of the Supreme Court in Union of India vs. Apar Pvt Ltd 1999 (112) ELT 3 (SC), Garden Silk Mills Ltd vs. Union of India 1999 (113) ELT 358 (SC) and Kiran Spinning Mills vs. Collector of Customs 1999 (113)ELT 753 (SC) upheld the stand taken by the Appellant and directed that the actual quantity removed from the shore tank receipted quantities shall only be reckoned for the purpose of assessment of duty of imported LPG removed from such bonded shore tanks In that view of the matter, the Hon'ble Tribunal rejected the Department's contention and held that

the assessment of duty should be made only in respect of the actual quantity removed from the shore tank receipted quantity.

vi) They have now been issued show cause notice proposing to finalise the assessment in respect of the B/Es mentioned above on the basis indicated in the show-cause notice. The basis on which the impugned show cause notice has been issued was that they had made payments of price for LPG received by them through IOC/direct suppliers against the quantity mentioned in the foreign supplier's invoice, which was the Bill of Lading quantity. In the Bills of Entry they had no other option but to declare the value per MT CIF value (based on the invoice) multiplied by the quantity determined as per ships' ullage survey report under protest.

vii) It was on this hypothesis that the Department stated that for the purpose of levy of Customs duty the 'transaction value' as per Rule 4, Rule 9(1)(e) and 9(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988), Section 14 of the Customs Act, 1962 should be adopted and accordingly, it shall be the price actually paid or payable for the goods when sold for export to India and includes freight insurance charges and all other payments actually made as a condition of sales. Therefore, irrespective of the fact whether there is shortage in quantity received compared with the B/L quantity or not, the importer has to pay duty on 'transaction value' i.e., the full value paid for the B/L quantity and no remission for ocean loss, spillage, evaporation etc. can be allowed when the importer has made full payment for the B/L quantity to the supplier.

viii) The impugned show cause notice proposing to raise short levied demand amounting to Rs.4,68,457/- upon finalization of assessment in respect of Into-Bond Bill of entry in question was wholly illegal without jurisdiction and otherwise unsustainable in law for the reasons there under which were without prejudice to one-another.

ix) The method of assessment adopted by the Department was erroneous, contrary to law as also to the principles laid down by the Supreme Court and the Appellate Tribunal in various cases. It is well settled in view of the decisions by the

Supreme Court in Union of India vs Apar Pvt. Ltd 1999 112(ELT) 2 (HC), Garden Silk Mills Ltd., vs. Union of India 1999 (113) ELT 358 (SC), Kiran Spinning Mills vs. Collector of Customs 1999 (113) ELT 753 (SC) and Coromandel Fertilizers Ltd., vs Collector of Customs 2000 (115) ELT 7 (SC), import was interpreted to extend up to the point of time when goods were cleared for home consumption in to the land mass of India and in the case of goods which had been warehoused, import extended up to the stage when the goods were cleared for home consumption and accordingly Customs duty was leviable at the stage when the goods were removed for home consumption from the warehouse. In such cases, it was that quantity of goods which was cleared for home consumption had to be considered as the quantity of goods imported in to India. The show-cause notice totally ignored the law laid down and the principles enunciated by the Supreme Court in the aforesaid judgments. It also ignored the decisions of the Appellate Tribunal laying down the principles and methodology to be adopted for assessment of duty on the imports of crude oil cargo from overseas sources.

x) The Section 14 of the said Act provides that the value of the goods imported shall be deemed to be the price of the goods for the delivery at the time and place of importation in the course of international trade. The value has to be determined with relation to the time when physical delivery to the importer can take place. Physical delivery can take place only after the Bill of Entry, *inter alia*, for home consumption is filed and it is the value at the point of time, which would be relevant. In the case of the goods which are warehoused, the customs barrier would be crossed only when the goods are taken out of the customs and brought to the mass of goods in the country and therefore, it is only the LPG as cleared from the warehouse for home consumption which can be charged to Customs duty. In other words, LPG imports liable to Customs duty would be the actual quantity of LPG cleared from the warehouse for home consumption. The values of such LPG would be based on the price per MT for the amount of LPG actually cleared. The Department has totally mis-interpreted the provisions of Section 14 of the said Act and other provisions referred in the show-cause notice in holding that it was the quantity of LPG that was evidenced by the Bill of Lading/Invoice which should be taken for the purpose of levy and assessed to Customs duty. It is

clearly contrary to the provisions of Section 14, 15 and 16 of the Act read with the principles laid down by the Supreme Court in the aforesaid cases.

xi) The Department has also failed to appreciate that the value of the imported goods was determined by them based on the C&F/FOB price in case of imports on C&F/FOB terms. The position can be explained as under:

i. FOB- The FOB price represents the shower tank receipt quantity multiplied by rate per unit (MT). The unit rate of FOB value for this purpose is determined by dividing the invoice value in dollars by the invoice quantity in MT and converted to rupee value using the exchange rate prevalent on the date of presentation of the Bill of Entry Under Section 46 in accordance with the provisions of Section 14 to arrive at the rupee value to be adopted for the assessment of duty.

ii. Freight: With the above FOB value, freight based on rate per MT for the vessel, arrived at by dividing the freight invoice value by invoice quantity, for the quantity of shore tank receipt is added.

iii. Insurance: To the amount determined as above, insurance premium paid on the shore tank quantity at the rate arrived by dividing the total insurance premium paid for the entire cargo divided by total invoice quantity is added.

iv. Others:- To the amount as above, other charges paid (Other charges applicable herein are Cannalising charges) @ 0.05% of the FOB value is added, for the shore tank quantity.

v. Landing charges: on the total of above 1% landing charges are added.

vi. Assessable value:- The assessable value representing the aggregate of the above is determined and adopted for the purpose of assessment of duty. The duty is paid on the so determined assessable value in relation to the actual shore tank quantity cleared from the warehouse.

xii) The methodology adopted by the Department was totally erroneous, which was not supported by either the provisions of Sections 14,15 or 16 or Rule 4 and 9 of the Valuation Rules or the principles laid down by the Supreme Court as referred to above. The duty proposed to be assessed on the assessable value so determined was relating to the total invoice quantity (in MTs) including the quantity which

had not been actually received and warehoused and not on the actual quantity warehoused and cleared from the warehouse, which, according to the law laid down by the Supreme Court, represented the quantity actually imported into the country.

xiii) The methodology followed by the Department in determining the value for the purposes of assessment of duty on the consignment in respect of which the differential duty demand was manifested was erroneous in law and contrary to the provisions of the said Act and the Valuation Rules and also to the Principles laid down by the Supreme Court in the judgments referred to above. The method of working out the value adopted by them for payment of duty was not only in conformity with the provisions of Section 14,15 & 16 as also Rule 4 and 9 of the Valuation Rules and the dictum laid down by the Supreme Court but also in conformity with the practice hitherto adopted by the Custom House at Mangalore itself and the one followed by other Customs Houses in the country. Therefore, the entire basis for valuation of the import consignment in question on an erroneous hypothesis was manifestly unsustainable in law. The impugned show cause notice which proceeded on erroneous basis and misconceptions and misconstruction of the provisions of Section 14, 15 & 16 of the Act as also Rule 4 and Rule 9 of the Valuation Rules 1998 was therefore liable to be set aside in entirety. It must be appreciated that if as held by the Supreme Court the import can be said to take place only at the point of time when goods are cleared for home consumption into the landmass of India and in the case of goods which are warehoused, import extends up to the stage when the goods are cleared for home consumption. If the import of crude in India takes place only at the points mentioned above, the price paid to the foreign supplier for export of the cargo in terms of the Agreement between the supplier and IOC cannot be the basis for determining the 'value' of the LPG cargo for the purpose of assessment. The price 'paid or payable' as mentioned in Rule 4 read with Section 14 has to be the price determined after the import takes place and not the price payable on exportation at the load port. The price paid to the foreign supplier in terms of the Agreement for the sale of the product has thus no bearing with the 'value' to be determined u/s

14 or Rules 4 and 9 of the Valuation Rules. The basis for assessment of duty by the Department is therefore incorrect and indeed misconceived.

xiv) The show cause notice issued was in fact contrary to the direct decision of the Appellate Tribunal in our own case [CC Vs HPCL 2000(121) ELT 109 & CC Vs. HPCL – 2000(130)ELT 139 . The CBEC has in fact accepted the decision of the Tribunal and has issued a Circular No.96/2002-Customs dtd. 27.12.2002. It is now well settled that if the judgment of the higher Authority is not challenged in appeal, it attains finality and it is not open to the Authorities below to take a stand that all the facts were not placed before the higher Authority and hence it is not bound by that order. This principle has been reiterated by the Tribunal in Central Coal Fields Ltd. Vs CCE Jamshedpur, 2001 (137) ELT 752. The Department has gone beyond the law laid down by the Tribunal in their own case where the facts involved were identical in all material respects and consequently the impugned show cause notice issued by the Department was manifestly illegal and unsustainable in law.

xv) Under Section 23 of the said Act, there was specific requirement for remission of Customs duty if any imported goods have been lost. In our case since the B/L quantity is not the quantity cleared for home consumption, the difference between the Bill of Lading quantity and the quantity cleared for home consumption must be regarded as goods which have been lost. In terms of section 23, the Customs Dept. has no legal rights to recover Customs duty in respect of goods not landed or imported and in terms of section 23, the entire demand made was clearly without authority of law. In fact, under section 116 of the Act, if the quantity unloaded is short of the quantity to be unloaded, penalty at the prescribed rate chargeable on the goods not unloaded is to be recovered from the person in charge of the conveyance. Such penalty having been imposed on the Master of the Vessel in terms of section 116 on the basis of the B/L quantity, it would amount to double taxation if import duty was levied on us in respect of crude oil which, un-disputably, has not been imported to India. If Department's contention was to be accepted, then the very purpose of Sec.13, Sec. 22 and Sec.23 of the Customs Act will get negated.

xvi) The Section 14 of the Customs Act as well as Rule 4 of the Valuation Rules, has to be read harmonious with the scheme of other provisions of the Act. Therefore it would not be appropriate to take a stand that quantity involved in the Bill of Quantity would not be relevant for payment of duty.

xvii) This would also result in levy of duty on non existent goods, which has been held violative of Article 265 of the Constitution by the Mumbai High Court in the case of Indian diary Corporation vs. UOI 1981-08 ELT 926 and Metal Distributors Ltd vs UOI 67 ELT 229.

xviii) The note to Rule 7 under the Head "Interpretative Notes" and Rule 7(1). Under these rules, value of imported goods shall be based on unit price, at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity. In terms of these rules and the Interpretative notes, we contend that if the permitted value is used in the Custom valuation rules 1988, it is meant to indicate the Unit price and hence the permitted transaction value in the Rule 2 (decision) means, the unit price of the goods imported.

xix) Without prejudice to any other grounds and contentions, the show cause notice was hit by bar of time. Assessment in respect of 31 out of the 37 consignments / Bills of Entry for which this SCN was issued have already reached finality by virtue of issue of Show Cause Notices as listed below in respect of Ship ullage Vs Shore tank receipt quantity**:**

S-3/3/184/97 PART VI 11.12.00

S-3/3/184/97 PART VII 03.07.01

S-3/184/97(PT) BONDS-6488 03.09.98

Detailed list of Bills of Entry that are already covered in the above mentioned earlier SCNs was enclosed. The Department cannot once again take up the same Bills of entry after a bar of 3 to 6 years just by use of terms as 'the provisional Bills of Entry were taken up for finalization'. After losing out on the ground of Ship Ullage Vs Shore tank receipted quantity as conceded vide para 2 of the SCN, the Department on an after thought and after lapse of so many years have invented

the issue of transaction value to indirectly cover the whole of the Shipped Quantity thus countering the directive given by the Supreme Court as well as the Board's Circular.

xx) With out prejudice to any of the aforesaid submissions the SCN was issued on erroneous database without considering the duty paid on the PL quantities amounting to Rs.468506/- in the CD paid column.

xxi) The Demurrage paid to the Port Trust can not be added to the Assessable value since it is in the nature of Rent for the Port usage and not related to the cargo value and not paid as a condition of sale in terms of Section 14 read with Rule 4,Rule 9(1)© and Rule 9(2). The Board's circular 5/2006 dated 12.01.2006 clarified this point and also the decision of Supreme Court in the case of M/s IOCL vs. CC 2005-186 ELT A 119(SC).

xxii) In the light of the above, the assessment of duty on the imports covered by the Bills of Entry should be made based on the quantity determined as per shore tank dips as per our workings and not on the basis of the so called transaction value or any other quantity as proposed in the show cause notice and the amount of duty to be finally assessed be revised accordingly. The demand duty of Rs 468457/- by way of short levy under section 18 (2) may also be dropped being wholly unsustainable in law.

6. In view of the aforesaid submissions, M/s. HPCL have requested to drop the proceedings initiated under the show-cause notice.

Findings:

7. I have carefully gone through the records of the case and reply submitted to the show-cause notice, both written and oral submissions made during personal hearing. M/s. HPCL had filed 50303.716 MTs (ullage quantity) and warehoused the cargo in their bonded shore tanks. Vide ex-bond Bills of Entry, the quantity of 50303.716 MTs (ullage quantity) was cleared provisionally. M/s. HPCL had filed the Into bond and Ex-bond Bs/E for warehousing and

clearance. However, on scrutiny of the documents filed by M/s. HPCL during finalisation of the said Bill of Entry, it was noticed that they had made payment to the Bill of Lading holder or the canalizing agency M/s. Indian Oil Corporation Ltd (IOC), as per invoice based on bill of lading quantity. When a consignment imported is shared with other refineries the cost of the total consignment exported i.e. the invoice value for the Bill of Lading quantity is shared in the proportion of the quantity as per derived bill of lading. This is known as derived bill of lading quantity.

10. The crude oil when pumped from oil wells to the shore tank at load ports contains sediments and water normally called as BS &W (Bottom Sediments and Water). The sediments and water present in the crude oil loaded on board the vessel continue to settle down during the voyage and in the shore tank after discharge. The importer has taken load port BS&W% 0.100% relying in industry practice whereas the actual BS&W% allowed at load port by the supplier was 0.385%. In addition to BS& W the importer has deducted free water settled after long settlement time from the gross quantity and arrived the shore tank receipt quantity as 50303.716 MTs (shore tank quantity as per M/s. HPCL). This is not in line with the Apex court's decision in the case of National Organic Chemical India Ltd reported in ELT 2002 (142) A280 (SC) wherein it is held that the shore tank quantity is the quantity ascertained immediately after the crude is pumped into the shore tank and therefore the quantity arrived after allowing long settlement time can not be accepted. It is also seen that the overseas supplier of the cargo at the load port provides allowance for the bottom sediments/sludge and water (BS&W) in arriving at the value of crude oil supplied. Since the water content is already been included and allowed under BS&W, further deduction of free water from the cargo amounts to double deduction and if such deduction is allowed, it would result in duty being assessed on a quantity of crude lower in volume and higher in purity compared to the crude warehoused, which would be inconsistent with the law. The settlement time allowed is only to have uniform liquid surface to take the correct dip measure of the quantity but not to deduct the water settled after long settlement time**.** This issue has been discussed by the Commissioner (Appeals) vide Order No. 36/2004 dated 16.3.2004 issued to the importer and held that "… the original adjudicating authority was right in stating that as the transaction value was for the crude imported including the water content, the same has to be taken for the purpose of assessment; that reduction in transaction value could be considered only if there was a specific provision in the contract for the reimbursement of the amount equivalent to the water content".

11. As per Section 14 of the Customs Act 1962 read with Rule 4, Rule 9(1) (e) and Rule 9(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988, the value of the imported goods shall be the value of such goods, freight and insurance charges and all other payments actually made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable. In the subject case M/s. HPCL have made payment for the consignment of crude oil received (i.e., DBL quantity), to M/s. Indian Oil Corporation Limited (IOCL) who imported the goods from abroad as the designated canalizing agent and supplied to M/s. HPCL. The daughter vessel freight from Vadinar to Mangalore since the consignment is purchased on C&F basis and the same was paid to the IOCL by the refinery without deducting the ocean loss. In terms of Section 14 of the Customs Act 1962 read with rule 4, rule 9 (1) (e) and rule 9(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988, the value of the imported goods shall be the value of such goods, freight, insurance and all other payments actually made as a condition of sale. Therefore for the crude oil consignments imported by M/s. HPCL, the amount actually paid/incurred by them for importing this consignment as aggregate of the C&F value, daughter vessel freight, insurance and other charges paid should be the assessable value. M/s. HPCL have clarified that payments were made to the IOCL for the proportionate invoice value against the DBL quantity. The payment for the cargo to the IOCL is made for the entire DBL quantity irrespective of the quantity actually received. They have also declared that no payment was made for the quantity received more than the derived bill of lading quantity.

12. In the case of Eicher Tractors Ltd., Vs. Commissioner of Customs Mumbai – 2000 (122) ELT 321 (SC), Apex Court made the following observations: *According to Section 14 (1) of the Act, the assessment of duty is to be made on the value of the goods. The value according to Section 14 (1) shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation in the course of international trade. As per Rule 3(i) of the Customs Valuation (Determination of Price of Imported goods) Rules, 1988, " the value of imported goods shall be the transaction value". "Transaction value" has been defined in Rule 2 (f) as meaning the value determined in accordance with Rule 4. Rule 4 (1) in turn states " the transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provision of*

Rule 9 of these Rules". Reading Rule 3 (i) and Rule 4 (1) together, it is clear that a mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods under assessment as the transaction value.

…………………………………………………………………………………………………….

Both Section 14 (1) and Rule 4 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in Section 14 (1) and particularized in Rule 4 (2).

Rule 4 (1) speaks of the transaction value. Utilization of the definite article indicates that what should be accepted as the value for the purpose of assessment to Customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4 (2).

13. Hon'ble CESTAT, Bangalore in Final Order No. 273/2006 dated 6.2.2006 has already stated that so long as the M/s. MRPLL make payment on the basis of Bill of Lading quantity, there is no case for determining the value for assessment purpose on the basis of quantity received in shore tanks. It is further held that 'when the levy is on advalorem basis, Section 14 of the Customs Act comes into play. In the present case, the price actually paid or payable is on the basis of the bill of lading quantity. On account of losses, the appellant is not entitled for any reduction in price. In that case the amount paid or payable on the bill of lading quantity is the transaction value for the purpose of Customs duty irrespective of the fact that the quantity received in the shore tank is different from the bill of lading quantity. In product like petroleum crude, due to various causes, losses occur. This is considered as natural. That is the reason for not giving any reduction in the price payable. In these circumstances, there is absolutely no provision to reduce the value to that attributable to the quantity received in the shore tank". CBEC has also issued a circular No. 06/2006 dated 12.01.2006, wherein it is stated that in all cases where customs duty is leviable on advalorem basis, the assessment of bulk liquid cargo should be based on invoice price, which is the price paid or payable for the imported goods i.e., transaction value, irrespective of quantity ascertained through shore tank measurement or any other manner. Therefore, in view of the CESTAT order and Board's Circular referred above M/S. HPCL have to pay duty on the transaction value arrived at based on the derived bill of lading quantity irrespective of the actual quantity received.

14. As the Crude Petroleum is subject to duty on advalorem basis, the value of the goods shall be the value paid or payable for the imported goods i.e. transaction value plus daughter vessel freight, insurance and other charges. In other words the assessable value will constitute full consideration exchanged for export of the goods as per the derived bill of lading and the corresponding daughter vessel freight, insurance and other charges. This will be the transaction value as defined in Rule 4 of the Valuation Rules, 1988. Hon'ble CEGAT in the case of M/s. Exim India Oil Co. Ltd Vs Commissioner of Customs, Calcutta [2001(131) ELT 207] and M/s. Binani Zinc Vs Commissioner of Customs, Chennai [2001(155) ELT 563] have upheld the assessment based on transaction value in cases where there were losses in transit. In the circumstances it will be strictly in terms of the law to adopt the transaction value paid for the goods consigned for export to India for assessment of duty.

15. It is seen that M/s. HPCL is paid to the M/s. IOCL for the derived Bill of Lading quantity irrespective of the quantity actually received. Hon'ble High Court in the case of Sandip Agarwal Vs. Collector of Customs 1992 (62) ELT 528 (Cal.) has held that if the transaction value i.e. the price actually paid or payable is available, then the assessable value shall be determined by accepting the price actually paid or payable unless it is found to be not genuine.

16. It has been argued by the importer that the ratio of Supreme Court in the case of UOI Vs. Apar Pvt. Ltd is applicable in this case. The plea is not correct. In the said case Apex court considered the date for determining the rate and valuation specified in the Section 15(1) (b) of the Customs Act 1962. This section deals with the relevant date for valuation and rate of duty in different situations. The show cause notice does not deal with the rate of duty applicable and valuation with reference to the relevant date. The show cause notice initiated proceedings to decide the Customs duty due and the correct assessable value to be adopted. M/s. HPCL have paid full invoice value based on the Derived Bill of Lading quantity irrespective of the quantity received. As this payment is the consideration for total crude imported, the same is the relevant amount to decide the transaction value for the import. Hence the case law cited by the importer has no relevance to the proceedings.

17. M/s. HPCL has cited the ratio of Garden Silk Mills Ltd. case 1999 (113) ELT 358 (SC) and has argued that as per the judgment the transaction of import commences when the goods enter the territorial waters of India and is completed when the goods become part of the mass of

goods within the country; that the taxable event being reached at the time when the goods reach the Customs barriers and the bill of entry for home consumption is filed. The Hon'ble Tribunal in Commissioner of Customs, Mumbai Vs HPCL –2000(121) ELT 109 and Commissioner of Customs (Import) Vs M/s.. National Organic Chemical Industries Ltd- 2000(126) ELT 1072(T) after following the judgments of Apex Court in Garden Silk Mills Ltd & Anr VS UOI-1999 (113) ELT 358(SC), Apar Pvt Ltd Vs UOI-1999 (112) ELT 3(SC) & Kiran Spinning Mills Vs CC-1999 (113) ELT 753(SC) held that the goods would be considered to have crossed the Customs barrier only when they are pumped into the shore tanks; that being the taxable event, it is that quantity of goods, which are liable for duty. The said decisions were upheld by the Hon'ble Apex Court vide Order dated 20.2.2002 in Civil Appeal No. 6764/1999 with C.A No. 1098/2001 reported in 2002(142) ELT A 280. The Central Board of Excise and Customs has followed the above decisions in Circular No. 96/2002 Cus dated 27.12.2002. The Commissioner (Appeals) in his Order No. 85/2003 dated 26.2.2003 issued to M/S. HPCL held that "…. *The taxable event for the purpose of levy of Customs duty would have to be reckoned with respect to the quantity pumped into shore tanks, and not on the basis of any other report."* Thus the contention of M/s. HPCL that duty is leviable on the quantity of goods, which are cleared for home consumption, is not tenable.

18. It has been claimed by the importer that the quantity short delivered is eligible for remission in terms of Section 23 of the Customs Act, 1962 and that therefore the demand is without the authority of law. Since the quantity received in Shore Tank is more than the bill of lading quantity, remission of customs duty does not arise and the importers contention is base less.

19. The contention of M/s. HPCL that penalty is imposed against the steamer agent for the short landing quantity under Section 116 of the Customs Act, 1962 on the basis of Bill of Lading quantity and demanding duty on the said quantity again from the importer would amount to double taxation is without basis. In the instant case, when compared to bill of lading/manifested quantity, the quantity received in shore tank is higher. As such the question of invoking Section 116 of the Customs Act, 1962 against the Master/Agent for short landing of goods will not arise at all and therefore, their contention is not tenable.

20. CESTAT, Bangalore in the above cited order No. 273/2006 dated 6.2.2006 discussed this position in response to the appellant's advocate contention that " in certain cases, the quantity received is more and they are paying more duty" The Hon'ble Bench observed that even in those cases where quantity received is more, it is enough if appellants discharge duty liability on the actual amount paid on the basis of the bill of lading quantity and there is no legal sanction for collecting more duty when the levy is ad-valorem. Further, Board also vide Circular No. 06/2006 dated 12.01.2006 stated that where customs duty is leviable on advalorem basis, the assessment of bulk liquid cargo should be based on invoice price, which is the price paid or payable for the imported goods ie, transaction value, irrespective of quantity ascertained through shore tank measurement or any other manner. The binding nature of Board's Circulars on the departmental officers has been decided by the judgment of Hon'ble Supreme Court in the case of Collector of Central Excise, Vadodara versus Dhiren Chemical Industries reported in 2002 (139) ELT 3 (SC) and followed in the case of CC Calcutta versus M/s. Indian Oil Corporation Ltd. in Civil Appeal No 2342-2362 of 2001(reported in 2004(165) ELT. 257(S.C.). In view of the Tribunal's order and Board's circular cited supra, I decide that the duty is leviable only on the transaction value, which is the value paid or payable for the Derived Bill of Lading quantity, to the IOCL in spite of the fact that the quantity received is more than the derived bill of lading quantity. Therefore I drop the duty demand for the excess quantity received over and above the derived bill of lading quantity, but restrict the duty demand for the derived bill of lading quantity for which payment was made to the supplier.

21. As regards M/s. HPCL's contention that the demurrage charges are not includable to the assessable value in view of the Tribunal's decisions in the cases of Indian Oil Corporation Ltd Vs Commissioner –2000(122) ELT 615 & Exim India Oil Co. Ltd Vs Commissioner –2001(131) ELT 207, I find that in the case of Exim India Oil Co. Ltd, the Hon'ble Tribunal decided the case by referring the decision in the case of Indian Oil Corporation Ltd. In the case of Indian Oil Corporation Ltd, the Hon'ble Apex Court has dismissed the department's appeal filed against the above Tribunal case, solely on the ground that the Board's Circular No. 467/21/89-Cus dated 14.08.1991, was binding on the officers at the time of assessment of the Bills of Entry. In the Circular dated 14th August 1991 issued by the Central Board of Excise and Customs (CBEC) held that the demurrage did not form part of the assessable value of the goods imported. Further, vide Circular No. 05/2006 dated 12.1.2006, Board has clarified that in view of the Department's Review Petition in the case of Commissioner of Customs, Calcutta Vs Indian Oil Corporation

Ltd being dismissed by the Hon'ble Supreme court, all pending provisional assessments in respect of importation prior to 02.03.2001 may be finalised according to the decision taken by the Apex court/Tribunal. The binding nature of Board's Circulars on the departmental officers has been decided by the judgment of Hon'ble Supreme Court in the case of Collector of Central Excise, Vadodara versus Dhiren Chemical Industries reported in 2002 (139) ELT 3 (SC) and followed in the case of CC Calcutta versus M/s. Indian Oil Corporation Ltd. in Civil Appeal Nos 2342-2362 of 2001(reported in 2004(165) ELT. 257(S.C.). Therefore, in the present case, demurrage charges paid are not includible in assessable value in view of the Apex court's decision and the Board's Circulars cited supra.

22. It has been reasonably explained in preceding paras that the stand taken by the department in finalisation of the Bills of Entry and related Ex-bond Bs/E mentioned in Annexure 'A' is according to the provisions laid down in the Customs Act, 1962 and various judgments cited supra. Since M/s. HPCL have made payment to IOCL for the DB/L quantity irrespective of the quantity received in the shore tank, they have to pay customs duty for DB/L quantity. Therefore, total duty payable for DB/L quantity is Rs. 102821877/- (Rs Ten Crores Twenty Eight Lakhs Twenty One Thousand Eight Hundred and Seventy Seven only). However, M/s.. HPCL has paid duty amount of 102353420/- (Rs Ten Crores Twenty Three Lakhs Fifty Three Thousand Fourt Hundred and Twenty only) for the quantity in the shore tank vide Ex-bond Bs/E mentioned in the Annexure'A' and a differential duty payable of Rs. 468457/- (Rs Four Lakhs Sixty Eight Thousand Four Hundred and Fifty Seven only) has been endorsed on Into Bond B/E. Therefore total duty paid is 102353420/- (Rs Ten Crores Twenty Three Lakhs Fifty Three Thousand Fourt Hundred and Twenty only). Hence, Short levy of Rs. 468457/- (Rs Four Lakhs Sixty Eight Thousand Four Hundred and Fifty Seven only) has been noticed.

23. Based on the material facts, evidences and record of PH, I pass the following order:

ORDER

i) I finalise the provisional assessments made in the Bills of Entry and related ex-bond Bills of Entry listed in Annexure – 'A' under Section 18(2) of the Customs Act, 1962 based on the transaction value and quantity received in shore tank.

ii) I confirm the total Customs duty amounting to Rs. 468457/- (Rs Four Lakhs Sixty Eight Thousand Four Hundred and Fifty Seven only) short paid by M/s Hindustan Petroleum Corporation Limited, Mangalore.

(श्री ई.सुकुमारन)
उप आयुक्त
मंगलूर सीमा शुल्क आयुक्तालय

सेवा में,

M/s Hindustan Petroleum Corporation Limited **(By RPAD)**
Mangalore LPG Import Facility,
Village-Bala, Via Katipalla,
Mangalore - 575030.

Copy submitted to:
The Commissioner of Customs (Review Section),
New Custom House, Mangalore.

Copy to: Master File (Adjn. Section)