CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 159 of 2009

(Arising out of Order-in-Original No.108/2008-Commr. LTU passed by the Commissioner of Central Excise and Service Tax, Large Taxpayer Unit, Bangalore.)

Praxair India Private Limited **Praxair House, No.8,** **Ulsoor Road,** **Bangalore – 560 042.** **Karnataka.**	Appellant(s)

Versus

The Commissioner of Central Excise and Service Tax Large Tax Payers Unit, JSS Towers, 100ft Ring Road, Banashankari III Stage, Bangalore – 560 085.	Respondent(s)

Appearance:

Mr. Hemanth Kumar, Advocate	For the Appellant
Mr. H. Jayathirtha, Superintendent (AR)	For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20989 /2023

Date of Hearing: 09.10.2023
Date of Decision: 09.10.2023

Per : DR. D.M. MISRA

This is an appeal filed by the appellant against Order-in-Original No.108/2008-Commr.LTU dated 14.11.2008 passed by the Commissioner of Central Excise and Service Tax, Large Tax Payers' Unit, Bangalore.

2. Briefly stated the facts of the case are that the appellants are manufacturers of Industrial gases viz., oxygen, nitrogen, argon gases falling under Chapter Heading 28 of the Customs Tariff Act, 1985. During the relevant period, they entered into an agreement with M/s. Tata Steel Ltd. to build, own and operate 'Air Suspension Plant' at the site of M/s. Tata Steel Ltd. for manufacture and supply of oxygen, nitrogen and argon gases to M/s. Tata Steel Ltd. subject to the conditions stipulated in the said agreement. They have also entered into similar agreement with other customers during the period from November 2006 to October 2007. Show-cause notice was issued on 28.1.2007 to the appellants demanding duty of Rs.1,14,56,420/- for the period from November 2006 to October 2007 alleging that the facility charges collected on monthly basis, escalation charges, etc., are includable in the assessable value of the gases manufactured and supplied to M/s. Tata Steel Ltd. and others. On adjudication, the demand was reduced to Rs.1,11,28,100/- with interest and penalty of Rs.5,00,000/- was imposed under Rule 25 of the Central Excise Rules, 2002. Hence, the present appeal.

3. The learned advocate for the appellant submits that the demand confirmed in relation to clearances to M/s. Tata Steel Ltd. i.e., Rs.1,09,20,900/- has been paid by them with interest. He submits that this amount is not contested in the present appeal. However, the clearances made to other customers, the agreement with them being not in accordance with the agreement entered with M/s. Tata Steel Ltd., therefore, they

contest the duty on such facility charges and escalation charges. On the previous date of hearing i.e., on 11.1.2023, the appellant was directed to place on record the agreement entered into with other customers which they have failed to produce and sought adjournments on 5.6.2023, 18.7.2023, 10.8.2023 and 13.9.2023 and today on 9.10.2023, however, they could not produce the said agreements till date. Further, adjournment would not yield any result. Hence, the case is decided on the basis of evidences available on record.

4. Per contra, the learned Authorised Representative for the Revenue submits that the same issue has been considered by this Tribunal earlier in their own case referring to the Board Circular dated 10.11.2014 issued in this regard. He placed the Board's Circular dated 10.11.2014. It is his contention that the facility charges recovered from their customers are includable in the assessable value of the gases in view of the decision in their own case of **BOC India Ltd. Vs. CCE, Jaipur: 2018 (10) G.S.T.L. 309(Tri-Del.)**.

5. Heard both sides and perused the records.

6. We find that the short issue involved in the present appeal is inclusion of facility charges recovered from the customers by the appellant during the relevant period November 2006 to October 2007. Appellant has not contested inclusion of said charges in the value of the gases in the case of M/s. Tata Steel Ltd.; they have discharged applicable duty with interest. However, they are contesting the payment of duty on facility

charges recovered from other customers claiming that the agreements are different. However, they could not place agreements before the original authority nor before us even though sufficient opportunities have been accorded to them. Therefore, we proceed with the case based on the documents available on record. We find that the issue is no more *res integra* and the issue is covered by the judgment of this Tribunal in the case **BOC India Ltd.** (supra). This Tribunal after taking note of the Board Circular dated 10.11.2014 and 24.4.2014, observed as follows:

> "4. We have heard both sides and perused the appeal records. The appellants are engaged in manufacture & supply of gases liable to Central Excise duty. They have put up storage facilities inside the clients premises to store such gases for subsequent consumption. For such activity, they are collecting fixed facility charges apart from the sale consideration for the gas. Admittedly, the clarification dated 10-11-2014 issued by the Board on similar set of facts, as well as, the clarification dated 24-4-2014 issued in respect of appellant's unit in Orissa are applicable to the present dispute."

6.1 We do not find any reason not to follow the aforesaid judgment of this Tribunal. Hence, the facility charges, escalation charges, etc., collected from all customers are includable in the value of gases sold/supplied to their customers. However, in the facts and circumstances of the case, we do not find any reason to confirm the penalty imposed on the appellant. Consequently, the impugned order is modified to the extent of setting aside the penalty of Rs.5,00,000/- under Rule 25 of the Central Excise Rules, 2002 and duty amount confirmed along with interest is upheld.

7. Appeal is disposed of on above terms accordingly.

(Order dictated and pronounced in Open Court.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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