CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/496/2008-DB, ST/973/2009, ST/1874/2010, ST/1339/2011, ST/664/2011, ST/2959/2012

[Arising out of following impugned order:

(i) Order-in-Original No.15/2007 dated 15/10/2007 passed by the Commissioner of Customs and Central Excise, Jamshedpur.

(ii) Order-in-Original No.90/2009-Commr.LTU dated 25.08.2009 passed by the Commissioner of Central Excise, Large Tax Payer Unit, Bangalore.

(iii) Order-in-Original No.39/2010-LTU dated 20.5.2010 passed by the Commissioner, Larger Tax Payers Unit, Bangalore.

(iv) Order-in-Original No.16/2011-ST (Commr.) dated 14.2.2011 passed by the Commissioner of Custom, Central Excise & Service Tax, Large Taxpayers Unit, Bangalore.

(v) Order-in-Appeal No.51/2010 dated 10.12.2010 passed by the Commissioner (Appeals), Large Tax Payer Unit, Bangalore.

(vi) Order-in-Original No.90/2012-ST (Commr.) dated 30.07.2012 passed by the Commissioner of Central Excise & Service Tax, Large Taxpayers Unit, Bangalore.]

PRAXAIR INDIA LTD
PRAXAIR HOUSE,
NO.8 ULSOOR ROAD,
BANGALORE.
KARNATAKA

Appellant(s)

Versus

The Commissioner of Central Excise & Service Tax BANGALORE-I
POST BOX NO 5400
CR BUILDINGS,
BANGALORE – 560 001.
KARNATAKA

Respondent(s)

Appearance:

Mr. B. V. Kumar, Advocate
103, 17th 'C' Main Road,
5th Block, Koramangala,
Bangalore – 560 095.

For the Appellant

MURALI &CO
#102, HAUDIN HOUDIN HOUSE
#5, HAUDIN ROAD,
BANGALORE – 560 042.
KARNATAKA

Mrs. Ezhilmathi, AR For the Respondent

Date of Hearing: 25.09.2018
Date of Decision: 03.10.2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, JUDICIAL MEMBER

Final Order No. 21485 - 21490 /2018

PER: P. ANJANI KUMAR

M/s. Praxair India Pvt. Ltd., the appellants are engaged in the manufacture and supply of liquid oxygen, liquid nitrogen and gaseous nitrogen, etc. The appellants have air separation plants and pump filling stations across the country for the manufacture and supply of the said products. The appellants have registered themselves with Service Tax. The appellants also erect storage tanks at the premises of their customers to facilitate storage of their products. The appellants also construct oxygen nitrogen plants at the customers' premises and lease it out to iron and steel, copper units. They also undertake maintenance and repair of such plants. The appellants have entered into an agreement with Usha Martin Ltd. (UML) and Usha Alloys and Steels Division, a division of Usha Beltron Ltd, over a period of time.

2. The Revenue contended that the appellants are engaged in banking and other financial services, management maintenance or repair service, storage and warehousing service. Initially, a show-cause notice dated 6.2.2007 was issued to the appellants covering the period August 2005 to August 2006 and demand of service tax raised therein were confirmed. Subsequently, show-cause notices were issued for further periods and the demands were confirmed by the adjudicating authorities along with interest and penalties. Details of orders passed, amounts demanded and appeals preferred by the appellants are as follows:

Appeal No	**OIO /OIA No. /Date**	**Period**	**Amounts demanded under various Heads (INR)**		
			Banking & Other Financial Services	**Management& Maintenance or Repair Services**	**Storage and warehousing Services**
ST/496/2008	15/2007 9.10.2007	August 2005 to August 2006	32,40,622	20,18,865	72,452
ST/973/2009	90/2009 25.8.2009	August 2007 to September 2008	1,00,13,752	26,01,609	2,20,626
ST/1874/2010	39/2010 20.05.2010	September 2006 to July 2007	25,74,993	21,61,762	

Appeal No	OIO /OIA No. /Date	Period	Amounts demanded under various Heads (INR)		
			Banking & Other Financial Services	Management& Maintenance or Repair Services	Storage and warehousing Services
ST/664/2011	51/2010 30.11.2010	August 2007	2,86,379	2,00,476	-
ST/1339/2011	16/2011 14.2.2011	October 2008 to March 2010	1,42,04,493	-	-
ST/2959/2012	90/2012 30.7.2012	April 2010 to March 2011	1,06,08,507	-	-

3. The learned counsel for the appellants submitted with reference to 'Banking and Other Financial Services' that the same were brought under tax net w.e.f. 16.7.2001 and in terms of the amendment, body corporates were included only w.e.f. 16.8.2002. The learned counsel based his submissions mainly on the following points:

(i) The agreement with UML came into existence earlier to the effective date and in view of Board's Circular F. No.B-II/I/2001-TRU dt.9.7.2001. The appellants have not satisfied the conditions i.e.,

a. Agreement must be entered/executed prior to 16.7.2001 and

b. The lessee must have received the goods prior to 16.7.2001.

(ii) The lease agreement they have entered into with M/s. UML is not a financial lease but an operating lease.

(iii) Subsequently, Tribunal in various judgments held that the lease entered into by the appellants cannot be held to be a taxable under 'Banking and Other Financial Services'.

3.1 The learned counsel submitted that the fact that the plant was already erected in the premises of the appellants before February 2001. It is pertinent to note that the Department has detained the plant on 1.2.2001 itself. Vide letter dated 13.7.2001, the Superintendent of Central Excise clearly recorded that the detention of the plant and equipment installed in the premises of M/s. UML has been lifted. It clearly indicates that the transaction of the lease was affected and also M/s. UML has received the goods and installed the VPSA (Vacuum Pressure Adsorption Plant). The appellants have commissioned the VPSA plant on 13.7.2001 and have started the operations and have also started charging for the lease, operations and maintenance of the equipment on and from 13.7.2001. A reference to the agreement dated 11.7.2001 would clearly indicate that the effective date would be the date on which the agreement was signed i.e., 11.7.2001. In terms of the agreement, the oxygen plant would at all times remain with the appellants only. The nature of the agreement also would indicate that the appellants have given to the lessee the plant on purely a lease-rent basis. Agreement dated 29.12.2006 also had similar clauses as mentioned in the agreement dated 11.7.2001 except for the fact that lease rent per month was revised.

3.1.1 The learned counsel submitted that the Ld. Commissioner has observed that the equipment is whether operational or financial are covered under 'Banking and Other Financial Services' and therefore, taxable. Ld. counsel has brought the attention of the Bench to Accounting Standards AS-19 to distinguish between a 'finance lease' and 'operating lease'.

> "A Finance Lease is a lease that transfers substantially all the risks and rewards incident to ownership of an asset."
>
> "An operating Lease is a lease other than a finance lease."
>
> "A lease is classified as a finance lease, if it transfers substantially all the risk and rewards incident to ownership. Title may or may not eventually be transferred. A lease is classified as an operating lease if it does not transfer substantially all the risks and rewards incident to ownership."

3.1.2 The Ld. counsel also referred to the circular DOF No.334/1/2007-TRU dt.28.2.2007 in which the finance lease as given by International Accounting Standards Committee has been quoted as:

> "Lease that transfers substantially all the risks and rewards incidental to ownership of an asset, title may or

> may not eventually be transferred. Financial lease is a way of purchasing an asset with the help of the loan and the lessee uses the asset. Risks and rewards incidental to ownership of an asset is also with the lessee. All the lease transactions particularly sale and lease back transactions are to be examined carefully on the basis of this clarification."

3.1.3 In this regard, reference was invited to Hon'ble Supreme Court's decision in the case of ***Association of Leasing and Financial Service Companies vs. UOI: 2010 (20) STR 417 (SC)*** wherein Hon'ble Supreme Court has clearly defined a difference between financial lease and operational lease. The Tribunal in the following cases has held that definition of 'Banking and other Financial Services' in terms of Section 65(12) of Finance Act, 1994 would not cover operating leases.

- ***Kansal Nerolac Paints Ltd. vs. CCE, Mumbai: 2017 (52) STR 334 (Tri.-Mum.)***
- ***CCE, Indore vs. Gajra Gears Pvt. Ltd.: 2017 (49) STR 437 (Tri.-Del.)***
- ***CST, Delhi vs. Luftansa Technik Service India P. Ltd.: 2013 (31) STR 730 (Tri.-Del.)***
- ***Flex Industries Ltd. vs. CCE, Indore: 2014 (36) STR 659 (Tri.-Del.)***
- ***Inox Air Products Ltd. vs. CCE, Nagpur: 2015 (37) STR 1024 (Tri.-Mum.)***
- ***Inox Air Products Ltd. vs. CCE, Nagpur: 2015 (38) STR 191 (Tri.-Mum.)***
- ***CCE, Pune-II vs. Mohanrao Shinde SSK Ltd.: 2016 (46) STR 742 (Tri.-Mum.)***

3.1.4 The Tribunal in the case of ***Kansai Nerolac Paints Ltd. vs. CCE, Mumbai*** cited supra held that *'Banking and Other Financial Services' provided by a banking company or a financial institution or a non-banking financial company or any other service provider similar to a bank or a financial institution are liable to service tax under Section 65(105) (zm) of the Finance Act, 1994. Department of Posts is not similar to a bank or a financial institution and hence does not fall within the category of any other similar service provider."* (Para 4). The counsel submitted that the appellants not being a "Banking Company or a Financial Institution including a non-banking financial company, or any other body corporate or (any other person) in relation to banking and other financial services". Therefore, in respect of both the plant (1) leased out prior to 16.7.2001 and plant (2) set up in terms of agreement dated 29.12.2006, so service tax is leviable in terms of Section 65(105) (zm) of the Finance Act, 1994.

3.2 Ld. Counsel submitted regarding demand of service tax on Management, Maintenance and Repair services is concerned, the appellant entered into a separate agreement dated 30.12.2006 for operation and maintenance of the oxygen plant set up by them and owned by them. As per para 2 of the agreement, the appellants will maintain the oxygen plant themselves and M/s. UML shall pay the appellants the operations and maintenance charges at the rate of Rs.15,40,000/- per month during the first year, Rs.10,00,000/- per month during the second year and from third year onwards Rs.13,40,000/- per month. The appellants being the owners of the oxygen plant set up and they only undertake managing, maintenance and repair services. Thus, they are providing services to themselves and not to any other person. Therefore, no service tax is leviable under this Heading.

3.3 With reference to the demand of warehousing and storage services, the learned counsel for the appellant submitted that the appellants have entered into an agreement dated 1.8.1999 with M/s. UML to deliver liquid oxygen into appellant's storage installations and would permit M/s. UML to use the storage facility subject to Clause 10 of the agreement, as per which M/s. UML would use the facility exclusively. The Ld. counsel submitted that there is no service involved in allowing the usage of the facility owned by the appellants. The Tribunal in the case of ***Indian Oil Corporation Ltd. vs. CCE, Goa: 2014 (35) STR***

431 (Tri.-Mum.) wherein it has held that from the facts mentioned earlier it would be clear that all the operations of the outlets are under the control of the dealers and not of the appellant. It is not as if the dealers bring their goods to the appellant for storing or warehousing and thereafter, clear the goods so stored. Appellant only owns and leases facilities to the dealers for their use. Keeping in view the nature of transaction, the service provided cannot be considered as 'storage and warehousing service' provided by the appellant and we accordingly, hold so (Para 6). In the case of ***CCE, Ghaziabad vs. Goyal MG Gases Pvt. Ltd.: 2014 (36) STR 1165 (Tri.-Del.)***. The Tribunal observed that there is also no dispute that the respondent had also supplied the storage tanks to KHRC and in terms of the agreement with the Hospital were responsible for its maintenance of the tank and its regular inspection as per provisions of Explosives Act..... The Respondent cannot be treated as storage or warehouse keeper in respect of the oxygen stored in the tank installed in the premises of KHRC (Para 6).

4. The learned Authorized Representative has reiterated the findings of the OIO/OIA.

5. Heard both sides and perused the records of the case. Brief issues involved in the present set of appeals are:

(i) whether the lease rentals received by the appellants from M/s. UML would fall within the definition of 'Banking and Other Financial Services' or would fall within the meaning of 'Operating Lease'.

(ii) Whether the service tax demanded on 'Management, Maintenance or Repair Service' is sustainable in law.

(iii) Whether the service tax demanded on 'Storage and Warehousing Service' is sustainable.

5.1 Coming to the issue No. (i), the learned Commissioner has contended that CBEC vide letter F. No.B-11/1/2001-TRU dt.9.7.2001 clarified that agreements entered before 16.7.2001 will not be liable to service tax provided the property/goods have also been received by the lessee prior to 16.7.2001. The Commissioner contended that the stamp paper on which the said agreement was made was purchased on 4.9.2001 as per the endorsement on the reverse side of the stamp paper. He contended that therefore, by any stretch of imagination, the agreement could not have been concluded before 16.7.2001 and that Shri Asith Gangopadhyaya in his statement dated10.8.2005 has admitted that the agreement was not signed on 11.7.2001. The appellants contended that it is not denied that the stamp paper was purchased on 4.9.2001, however, the agreement dated 13.7.2001 superseded an earlier agreement entered in the year 2000. The Ld. Commissioner was under the assumption that there does not exist any oral or written agreement. The Indian Contract Act recognizes both written and oral contracts. The appellants have submitted the following documents along with written submissions to substantiate their argument that the contract was effectively before 16.7.2001.

- Acknowledgment from Entrepreneurial Assistance Unit of Ministry Commerce and Industry dated 9.6.2000.
- Chartered Engineer’s Certificate dated 9.8.2000 for one oxygen compressor for oxygen plant for UML.
- Letter dated 10.8.2000 from Praxair to Ministry of Industry, Department of Industrial Development requesting to grant permission from Bharuch to Jamshedpur for installing at UML.
- Letter dated 11.8.2000 from Praxair to Ministry of Industry, Department of Industrial Development informing that a contract has been signed by UML to set up an oxygen plant at Jamshedpur.
- Letter dated 20.9.2000 addressed to Praxair from the Ministry of Industry & Commerce, calling for additional information.
- Letter dated 19.10.2000 addressed to Praxair from the Ministry of Industry & Commerce, calling for additional.
- Letter dated 6.4.2001 from UML addressed to Praxair informing that the goods brought for setting up VPSA Plant are under detention by Central Excise Department and unless release

letter is obtained the equipment for the Plant cannot be utilized.

- Letter dated 19.4.2001 from Praxair to DC, Customs, CH, Mumbai requesting to intimate CCE, Jamshedpur to release the goods.
- Detention Certificate dated 1.2.2001 issued by Inspector of the Central Excise, Headquarters Preventive Jamshedpur.
- Letter dated 13.7.2001 from CCE, Jamshedpur addressed to Praxair releasing the plant and equipment detained on 1.2.2001.

5.1.1. We find that the above documents are not denied by the Department. Moreover, there is incontrovertible evidence that the plant was installed in the premise of M/s. UML before 16.7.2001.

(i) Detention Certificate dated 1.2.2001 issued by Inspector of Central Excise, HQrs. Preventive, Jameshedpur.

(ii) Letter dated 11/13.7.2001 from Superintendent of Central Excise, Jameshedpur to the appellants for releasing the plant and equipment.

5.1.2 Shri Asith Gangopadhyaya in his statement cited above has also stated that the plant was detained by Excise Officers on 1.2.2001, which was vacated on 13.7.2001. The complete plant was ready for operation from early July itself but could not be commissioned because the plant was under detention. It was commissioned after the stay was vacated and hence, the agreement effective from 11.7.2001 was signed. However, the actual signature was taken at a later date. Going by the circumstances of the case, it is evident that the plant was in existence in the premises of M/s. UML well before 16.7.2001. Therefore, in view of the Board Circular cited above, the appellants cannot be charged to pay service tax under the heading 'Banking and Other Financial Services' for leasing of the plant to M/s. UML.

5.1.3. The counsel for the appellants has also taken a plea that the services rendered by them was only for leasing of the equipment and was not a financial lease. Therefore, they cannot be categorized under 'Banking and Other Financial Institutions'. They have tried to differentiate between finance lease and operating lease by taking recourse to Accounting Standards AS19 as cited above. We find that the Tribunal in the case of ***G.E. India, Industries Ltd.: 2008 (12) STR 609*** in a similar situation where extrusion material was given on lease to Jain Irrigation, the Tribunal after looking into the terms and conditions of the agreement which are similar to the present agreement, set aside the demand. The Tribunal held as under: -

4. Since the Finance Act, 1994 does not define what is financial leasing, the Commissioner (Appeals) has relied upon the Accounting Standard published by ICAI. According to the accounting standards, the leasing is classified as a financial leasing if the ownership of the assets on lease is transferred to lessee by the end of the lease term and this opinion is created at the inception of the lease itself. In the instant case, the agreement is only for the period of 35 months during which a monthly user charge is required to be paid and agreement does not provide for transfer of the assets at the end of the term. Further from the agreement it is also seen that all risks and rewards incidental to the ownership have also not been transferred and ownership of the asset and effective control of the assets remain with the applicant in this case. Further, lease is for a short period of 35 months extendable to another period of 2 years and has no relation to the economic life of the asset which is invariably a consideration in lease. Further, the Board in Circular B/II/I/2000/TRU, dated 9-7-2001, has clarified as follows:

"2.1 Financial leasing including equipment leasing and hire-purchase:

2.1.1 ....

2.1.2 In the case of leasing or hire purchase, it is understood that the general business practice is as follows :
The service provider enters into a leasing or hire-purchase agreement with the lessee or hire-purchaser. At the time of entering into the agreement, they collect a charge called lease management fee or processing fee or documentation charges or by any other name, which is usually a percentage of the transaction value. The lease rental or hire purchase amount is recovered in Equated Monthly Installments (EMI) over the period of lease or hire-purchases as indicated in the agreement through post-dated cheques and no separate bills are raised for the monthly recovery. Every agreement bears a unique number.
2.1.3 The EMIs consist of recovery of principal amount (towards the original cost of the equipment) and finance/interest charges. The allocation between the principal and the finance/interest charges are known to and agreed upon by both the parties. The customer repayment schedule contains the details of the EMIs with the break-up for the principal and the interest. In respect of leasing and hire purchase, the amount recovered as principal is not the consideration for services rendered but is credit to the capital account of the lessor/hire-purchase service provider. The interest/finance charges is the Revenue or income and is credited to the Revenue account. Such interest or finance charges together with the lease management fee/processing fee/documentation charges is the consideration for the service rendered and therefore, they constitute the value of taxable service and Service Tax is payable on this value. Accordingly, it is clarified that Service Tax in the case of financial leasing including equipment leasing and hire purchase will be leviable only on the lease management fee/processing fee/documentation charges (recovered at the time of entering into the agreement) and on the finance/interest charges (recovered in equated monthly installments) and not on the principal amount."

5.1.4 On going through the agreement, for establishment of VPSA based oxygen plant between M/s. Usha Beltron Ltd. (M/s. UML) and the appellants, we find at para 1.7 that subject to other provisions of this agreement, title to all oxygen plant equipment will remain vested in Praxair. Praxair shall remain at all times the sole and absolute owner thereof and no right, ownership, title or interest therein (save and accept for the lease hold rights aforesaid) shall pass to USAD. Praxair shall be entitled to put its name plates or markings on any part of the oxygen plant or oxygen plant equipment indicating Praxair's title and interest therein. USAD shall at no time contest or challenge Praxair's sole and exclusive ownership of the oxygen plant equipment or any part thereof.

5.1.5 Going by the above and the differentiation brought in by the decisions of various judgments of the Tribunal, we are inclined to hold that the appellant's case is that of a equipment lease rather than financial lease. We find that the Tribunal has decided the case in favour of the appellants. Therefore, we find that the demands raised against the appellants for leasing the oxygen plant equipment are not sustainable in law.

5.2 Coming to the issue of 'Management, Maintenance or Repair Services', we find that the appellants have entered into an agreement dated 30.12.2006 for establishment of VPSA based oxygen plant with M/s. UML. Para 2 of the agreement deals with operation and maintenance of the plant. As per the agreement, for OM service rendered by the appellants, M/s. UML will pay the appellant the amounts specified in Schedule 4 of the agreement. The appellants contended that they are not doing any service to others since the plant is owned by them, they are rendering the services but to themselves. However, in terms of the agreement, we find that the appellants are rendering OM services to the plant which is under lease to M/s. UML. The appellants are also charging M/s. UML for this particular O&M services. If it were the case of the appellant that the service rendered was to themselves, there was no need whatsoever for M/s. UML to pay the appellants for O&M charges in terms of the agreement. Therefore, we do not find any reason to interfere with the impugned orders as far as demand in respect of 'Management, Maintenance or Repair Services'.

5.3 Coming to the issue of demands under 'Storage and Warehousing Service', we find that the appellants have entered into an agreement dated 1.8.1999 with M/s. UML. As per the agreement, PIPL deliver liquid oxygen into the storage installations and would permit the buyer (UML) to use the storage facility subject to clause 10 of the agreement regarding the use of the installation exclusively by M/s. UML. It is evident that the appellants have not rendered any warehousing services. It is not the case where the appellants hold a storage facility in their own premises and customers will come with their goods to the facility to deposit /store the goods for a period of time. No warehousing activities are involved as the appellants have built an oxygen tank in the premises of their customers and have leased the same to the customers. The appellants are not concerned with the receipt, storage and clearance of the goods stored in the tanks. They do not maintain any accounts for that matter in this regard. They have only leased out the tanks for a certain period of time for a consideration. This in itself will not constitute warehousing and storage operations, therefore, the demands raised against the appellants on this count are not maintainable. We find that the ratio of Tribunals judgement in ***Indian Oil Corporation Ltd. vs. CCE, Goa(Supra) and*** CCE, Ghaziabad vs. Goyal MG Gases Pvt. Ltd(Supra) are squarely applicable.

6. In view of the above, the impugned orders are sustained only to the extent of demand of service tax on

'Management, Maintenance or Repair Services. However, as the issue relates to interpretation of the provisions of service tax, penalties are set aside. As far as other services are concerned, the demands are set aside.

(Order was pronounced in Open Court on **03.10.2018.)**

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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