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

Appeal(s) Involved:

Appeal No.	**OIO & OIA**
E/866/2008	3/CCE/2008 / 5.9.2008
E/27699/13	MYS-EXCUS-000-DIVN-APP-BRC-002-13-14 / 14.6.2013
E/27700/13	MYS-EXCUS-000-DIVN-APP-BRC-002-13-14 / 14.6.2013
E/27701/13	MYS-EXCUS-000-DIVN-APP-BRC-002-13-14 / 14.6.2013
E/27702/13	MYS-EXCUS-000-DIVN-APP-BRC-002-13-14 / 14.6.2013
E/22580/14	MYS-EXCUS-000-DIVM-APP-HAB-061-2014 DATED 20.06.2014
E/21159/17	MYS-EXCUS-000-APP-001 & 002-17-18 / 18.4.2017
E/21160/17	MYS-EXCUS-000-APP-001 & 002-17-18 / 18.4.2017
E/21242/17	MYS-EXCUS-000-APP-15-17-18/ 2.05.2017
All Appeals are passed by Commissioner of Central Excise, Mysore	

M/s. MSPL GASES LTD,
C/O VISP PREMISES (SAIL) NEW TOWN
BHADRAVATI
AP-577301

Appellant(s)

Versus

C.C.,C.E.& S.T-MYSORE
S1-S2...VINAYA MARGA,
SIDDHARTHA NAGAR,
MYSORE
KARNATAKA
570011

Respondent(s)

Appearance:

M.S. NAGARAJA, Advocate
T. RAJESWARA SASTRY &
ASSOCIATAES.
NO.1010, 2ND FLOOR,
ABOVE CORP.BANK, 26TH MAIN, 4TH
T BLOCK, JAYANAGAR
BANGALORE
KARNATAKA
560 041

For the Appellant

Dr. J.Harish, AR

For the Respondent

Date of Hearing: 13/12/2018
Date of Decision:10/01/2019

CORAM:

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

Final Order No. 20022-20030/2018

Per : P. ANJANI KUMAR

Appeal No	Impugned Order	Period of dispute	Duty / Penalty (Rs)
E/866/2008	3/CCE/2008 / 5.9.2008	Aug 06 - Sept 07	1,07,05,948/ equal penalty
E/27699/13	MYS-EXCUS-000-DIVN-APP-BRC-002-13-14 / 14.6.2013	Oct 07 – Nov 08	1,00,78,550/ 7,000
E/27700/13	MYS-EXCUS-000-DIVN-APP-BRC-002-13-14 / 14.6.2013	Dec 08 -Jun 10	81,21,550/ 95,000
E/27701/13	MYS-EXCUS-000-DIVN-APP-BRC-002-13-14 / 14.6.2013	July 10 –May 11	53,81,750/ 55,000
E/27702/13	MYS-EXCUS-000-DIVN-APP-BRC-002-13-14 / 14.6.2013	Jun 11 – Mar 12	38,04,221/ 50,000

E/22580/14	MYS-EXCUS-000-DIVM-APP-HAB-061-2014 DATED 20.06.2014	Apr 12 – Jul 12	16,31,520/ 5000
E/21159/17	MYS-EXCUS-000-APP-001 & 002-17-18 / 18.4.2017	Aug 12 – Mar 14	81,57,600/ 10,00,000
E/21160/17	MYS-EXCUS-000-APP-001 & 002-17-18 / 18.4.2017	Apr 14 – Mar 15	48,99,180/ 20,00,000
E/21242/17	MYS-EXCUS-000-APP-15-17-18 / 02.05.2017	Apr 15-Mar 16	49,50,000/ 20,00,000

Briefly stated the facts of the case are that M/s MSPL, the Appellants, have entered into an Agreement on 11.08.2005 with SAIL-VISP for installation of Air Separation Unit of 50 TPD capacity on "Build-Own-Operate" (BOO) basis for manufacture and supply of Oxygen, Nitrogen and Argon gases. SAIL leased vacant land measuring approximately 100M x 75M within their factory to the Appellants to install the Plant and other ancillary equipment for manufacture of Oxygen, Nitrogen and Argon gases. In addition to the Air Separation Unit and other ancillary equipment for manufacture of gases, the Appellants were contractually required to provide certain fixed facilities within the factory of SAIL-VISP for their exclusive use. The Price of gases manufactured and supplied were determined in accordance with Article 12 of the Agreement, on which the Appellants have paid excise duty. In addition to the sale price of the gas, SAIL was also required to pay Fixed Facility Charges of Rs. 47.5 Lakhs per month from 1st month to 60th month and Rs. 33 Lakhs from the 61st month till termination of the agreement towards cost of installation, operation and maintenance of various facilities for exclusive use by SAIL. SAIL-VISP was required to pay the Fixed Facility Charges irrespective of the supply of gases.

2. Commissioner of Central Excise, Mysore issued SCN C No V/28/15/76/07 Adjn dated 14.02.2008 for the period from August 2006 to September 2007 to the assesse proposing to include the aforesaid "Fixed Facility Charges" paid by SAIL – VISP in the price of Oxygen gas supplied to SAIL – VISP. The same was confirmed vide Order-in-Original No.3/CCE/2008 dated 5.9.2008. Subsequently, 8 periodical SCNs were issued by lower authorities and were confirmed and upheld by Commissioner (appeals). Hence, these 9 appeals were filed.

3. The Ld. Counsel for the appellants submitted that as per the Agreement dated 11.08.2005 with SAIL-VISP; the appellants provided the fixed facilities as follows.

(a). Storage Tanks for Gaseous Oxygen, Liquid Oxygen [100 KL and

10 KL capacity), Liquid Nitrogen and Liquid Argon, Pumping and Vaporization systems for Oxygen, Nitrogen (MP) and Argon. (**Article 9.1 of the Agreement**)

(b). Storage tanks, pumps, vaporizers for liquid Oxygen, Nitrogen and Argon and maintaining a minimum safety stock as indicated at Annexure-V for meeting the fluctuating demand pattern and to provide back up for uninterrupted supply of Gases during shut down/break down periods of production facilities and during power interruptions. (**Article 9.3.1**)

(c). Flow meters/flow computer for measuring gases and maintain, repair and replace them. (**Article 9.4.1& 9.4.3**).

(d). Instruments of Gas Purity Analyzer and Gas pressure. (**Article 9.4.2**).

(e). the testing, calibrating equipment and standard gas during joint calibration of the meters and installation of transmitters/meters etc, in duplicate and powered through UPS. (**Article 9.4.4**)

(f). Installation, operation and maintenance of pipelines from the gas manufacturing plant (MSPL boundary) to various consumption points in the factory of VISP at own cost (6" MS Pipes – 928 Mt, 3" MS Pipe – 410 Mt, 1 ½ inch Pipe – 400 Mt etc. with valves, Flow Transmitters, 124 Flow Indicators, Flow Meters, etc.).

The installation of these fixed facilities was confirmed by the Superintendent of Central Excise, Bhadravathi Range, vide letter O C No 359/2008 dated 25.7.2008, addressed Commissioner of Central Excise – (**Page 140**) - and joint statement of the Officers of SAIL – VISP recorded on 8.6.2008 – **Page 143 to 144**).

3.1. Ld. Counsel further submitted that as per Article 13 of the Agreement, the Buyer shall pay Fixed Facility Charges of Rs. 47.5 Lakhs per month from 1st month to 60th month and Rs. 33 Lakhs from the 61st month till termination of the agreement. As per Para 1.21 of the Agreement dated 11.8.2005, *"Fixed Facility Charges" means the monthly charges to be paid by BUYER to SELLER in accordance with this Agreement for the supply of Gases to Buyer."*
The fixed charges are irrespective of supply of gases. As per
Article 15.3 of the Agreement

15.3 – "In case of lower demand, BUYER shall continue to pay monthly Fixed Facility Charge and the Price of the gases supplied on actual consumption basis subject to minimum off take of 50% of the capacity of one Unit for Oxygen (50 TPD Plant consisting of three Units of 600 Cum per hour synchronised to a single output line) and Argon.

If due to any reason, BUYER is not able to consume any Gas, the Buyer shall pay monthly Fixed Facility Charges only".

The Joint statement of the Officers of SAIL – VISP recorded on 8.6.2008 (**Page 143 to 144)** also confirms that the "*Fixed Facility Charges are paid independent of the quantum of supply of gas*".

Article 12 of the Agreement determines the sale price of Gases supplied by the assesse to SAIL. It was @ Rs. 5.70 NM3; agreement also provides for increase/decrease in the sale price of gases in case of any increase or decrease in the cost of power. It was revised in December 2015, April 2016 and April 2017

3.1. Ld. Counsel submitted that Ld. Commissioner concluded erroneously (in Para 41.3 of OIO) that in accordance with Article 1.21 of the Agreement, the FFC are paid for the supply of gases the commencement of payment is also linked to the start of regular supply of gases. The Agreement should be read as a whole to understand the pith and substance or purpose of the Agreement. The Price of Gases is determined in terms of Article 12 and the Fixed Facility Charges are payable as specified in Article 13. The FFC is payable irrespective of whether the Oxygen and other gases was supplied or not and irrespective of the quantum of gas supplied. There is no nexus between oxygen gas sold and the FFC received by the appellants.

3.2. The Commissioner concluded in (Para 41.4) that the Fixed Facilities include the plant and equipment for producing Oxygen with all accessories like storage tanks, pipe lines, flow meters, instruments for analyzing purity of gases, pumps, etc and these facilities are within the boundaries of MSPL. The findings are clearly contrary to evidence on record. Air Separation Unit and other ancillary equipment required for manufacture of gases were within the area leased to MSPL for setting up the plant and has nothing to do with the facilities described in Article 9 as being in the "SELLER'S SCOPE OF WORK AND RELATED OBLIGATIONS" and listed above. Statement by the Officers of SAIL and Verification Report by the jurisdictional Superintendent submitted to the Ld Commissioner clearly establish that the finding of the Ld Commissioner that the Fixed Facilities were installed within the boundary of MSPL and form part of the Production Facility is patently erroneous and has to be rejected. **The Appellants submit that the Fixed Facilities were partly inside the MSPL premises and substantially in the premises of SAIL-VISP.** The Fixed Facilities, as required by SAIL-VISP and as specified in the Agreement dated 11.8.2005, were installed, operated and maintained at own cost by MSPL gases for exclusive use by SAIL-VISP; since the gas manufacturing plant and associated equipment was installed within the factory of SAIL-VISP the debate whether the Fixed Facilities were within the premises of MSPL or SAIL – VISP becomes irrelevant because the entire premises constitute a "factory" of SAIL-VISP.

3.3. He submitted that the Ld Commissioner finds (Para 41.5) referring to Article 15.6 that the Price of Gases as per Article 12 and FFC as per Article 13 are only for supply of gas and consist of fixed component in the form of monthly Fixed Facility Charges and variable component on the basis of actual quantity supplied. Both the payments were for supply of gases only and not for any other purposes; Commissioner finds (Para 41.6) that FFC is an additional consideration for the Oxygen gas supplied and differential duty has been demanded accordingly. The Appellants submit that perusal of Article 15.6 of the Agreement would clearly show that the Price of gases and FFC determined in terms of Article 12 and 13 respectively are independent of each other. The installation, operation and maintenance of various facilities as specified in Article 9 of the Agreement for exclusive use by SAIL-VISP, a major portion of which were for connecting the gas pipe lines to the consumption points, for which FFC is payable has no nexus with the "manufacture" of gases in the Air Separation Unit within the boundary of MSPL and sale of gases thereof. The manufacture and sale of "gases" and installation, operation and maintenance of various Fixed Facilities for use by SAIL – VISP are separate transactions independent of each other. The finding that the FFC is an additional consideration for the sale of Oxygen gas is completely misplaced.

4. The Ld. counsel submitted that the SCN and the adjudicating authority have not doubted or rejected the transaction value/ price of Oxygen gas determined in terms of Article 12 of the Agreement on which excise duty has been paid. The Appellants submit that Rule 6 of the Central Excise Valuation Rules, 2000 provides that where the price is not the sole consideration for sale, the assessable value of the goods would be deemed to be the transaction value plus any amount received by the seller as additional consideration directly or indirectly from the buyer. Therefore, in order to include any amount as additional consideration in terms of Rule 6 of the Central Excise Valuation Rules, 2000it must be shown that:

(i) the price or transaction value received is not the sole consideration and hence the value cannot be determined in terms of Section 4 (1) (a) of the CEA, 1944 and that the value is to be determined in terms of Section 4 (1) (b) read with the Central Excise Valuation Rules, 2000,

(ii) the amount proposed to be included in the value of goods manufactured and sold is an additional consideration received by reason of or in connection with the goods sold.

4.1. The Appellants submit that the Facilities as made available in terms of Article 9 of the Agreement are not part of the Air Separation Plant or Oxygen Plant for manufacture of gases. They are the additional facilities made available to SAIL–VISP for their use in their factory at their request. Therefore, the manufacture and supply of gas and provision, operation and maintenance of specified facilities within the factory of SAIL-VISP are separate transactions independent of each other. The sale price of Oxygen determined as per Article 12 of the Agreement is the sole consideration or transaction value of the gas sold on which duty has been paid. The FFC received from SAIL-VISP as per Article 13 is in the nature of rentals for the installation, operation and maintenance of the specified facilities provided by the Appellants for exclusive use by SAIL in terms of the Agreement as brought out above. The FFC is admittedly payable by SAIL-VISP irrespective of whether the Gas was supplied or not and irrespective of the quantity of gas supplied. Therefore, the Fixed Facility charges have no nexus with the sale price of Oxygen and hence the same is not liable to be treated as additional consideration for the sale of gas and included in the value of gas sold. The Appellants enclosed a STATEMENT showing supply and price of gases as per Article 12 on which duty has been paid, FFC received and value of gases by inclusion of the FFC as contended in the impugned order, from August 2006 to March 2017.

4.2. The Counsel submitted that the assessable value of Oxygen, as per SCN, by inclusion of the FFC varies widely from month to month **from Rs.11.65/NM3 in March 2007, Rs. 62.46/NM3 in November 2008;** FFC was paid even when there was no supply of gases for the entire months of November 2012 and December 2012**; value as per department comes to Rs. 82/NM3 in April 2013, Rs. 250.66/NM3 in May 2013, Rs. 177.48/NM3 in July 2018, Rs. 1761.14/NM3 for September 2013, to an** absurd high value of **Rs.4527.3/NM3 in November 2013; Rs. 183.10/NM3 in October 2014, Rs. 242/NM3 in November 2014;** Rs. 274.32/NM3 in May 2015 and **Rs. 1889.26/NM3 in February 2017**, etc. The data clearly shows that the **inclusion of FFC in the sale price of Oxygen leads to absurd high values and levy of excise duty on the FFC even when there was no supply of Oxygen gas**. There are a number of periods when there was no supply of gas at all. Still VISP has paid FFC as per the terms of the Agreement. In such a situation, it cannot be said that the price of Oxygen gas was not the sole consideration and that FFC is an additional consideration for the gas sold. When **there was no manufacture and sale of Gas the mere payment of the FFC by SAIL – VISP cannot be treated as additional consideration and subject the same to levy of excise duty**. Therefore, it is conclusively ***established that the there is no nexus with the***

price of Oxygen gas sold and ***Fixed Facility Charges.***

5. The Hon'ble Supreme Court in the case of ***CCEVs Indian Oxygen Ltd - 1988 (36) ELT 730 (SC)***, has held that –

"It is well-settled that the levy under the Act, is on the manufacture. In the instant case the respondent are manufacturers of gas which is subject to excise duty, but this gas is supplied in gas cylinder. The activity of supply of cylinders is not an activity of manufacturing of gas therefore anything charged for it would not be a price for manufacture of gas. These might be profits or gains, if any, of any ancillary or allied venture. Therefore as per the principles of Section 4(1) (a) these would be excluded while computing value of excisable goods."

5.1. The Hon'ble Tribunal in the case of ***BOC India Ltd Vs CCE - 2004 (183) ELT 475 (T)*** was examining an identical issue wherein, the BOC India Ltd was the manufacturer of Oxygen, Nitrogen and Argon gases/liquids. The assesse was supplying through pipelines to TISCO and TELCO. The assesse supplied the gas from their factory to the buyer's factory into the Vacuum Insulated Storage Tanks (VIST). In such cases, the assessee, at their own cost and expense, erected and installed Vacuum Insulated Storage Tanks at the factories of the buyers concerned. The assesse had also installed measuring meters in case of supplies made to TELCO and TISCO. The assesse charged Fixed Charges/Facility Charges on monthly basis from the customers to whom the said facilities were provided. The facility charges are payable irrespective of whether any gases or liquids were purchased by the customers during the month concerned and irrespective of the quantum of purchases. For facility charges, the assessee raised bill on monthly basis to customers concerned irrespective of as to whether the said customer purchased any goods during the month concerned. The Hon'ble Tribunal observed (in ***Para 3)*** the assessee was maintaining the VIST and pipelines and for that the assessee was charging Fixed Facility Charges. The Tribunal held that the facility charges have nothing to do with and was not in any way related to manufacture or sale of gases by the assessee. The facility charges were not dependent upon sale or supply of the goods during the month concerned. These were payable on monthly basis irrespective as to whether the buyer had purchased any goods from the appellant during the month concerned and irrespective of the quantum of the goods purchased. (in **Para 4)** fact that the ***facility charges have nothing to do with and are not in any way related to the sale of the goods has been accepted by the Central Excise Authority in the Appellant's own case at Mumbai, Chennai and Bangalore***. The Tribunal recorded that the CCE, Mumbai III in his Order-in-Original No 2/YGP/7/2000 dated 29.01.2000 has held that this charge cannot in any way be considered as a condition of sale of the goods. It is a ***component related to installation and maintenance of the facilities and has no nexus with the manufacture of gases***. The Tribunal has recorded that similar view was taken by the Commissioner of Central Excise (Appeals) Chennai in his Order-in-Appeal No 666/6/M-1 dated 24.10.2001 and by the Additional Commissioner of Central Excise, Bangalore III in his Order No 19/2002 dated 31.07.2002. The Tribunal has recorded that the Department has accepted the order passed by the Commissioner, Mumbai II. The Tribunal further relied on the judgment in the case of *Indian Oxygen Ltd (supra)* and *Grasim Industries Ltd - 2004 (164) ELT 257 (T)*and held that the judgment of the Hon'ble Supreme Court even after 01.07.2000 applies to the facts of the case. The Tribunal relying on the judgment of the Mumbai Bench in the case of ***Inox Air Products Ltd. v. CCE, Mumbai-VII - 2002 (144) E.L.T. 359 (Tri.-Mumbai)*** and ***Grasim Industries*** *(infra)* held that the fixed facility charges are not liable to excise duty.

5.1. The Appellants further rely on the following judgments:

(i) ***CCE, Indore Vs Grasim Industries Ltd 2014 (304) ELT 310 (T-Del)***

(ii) ***CCE, Raigarh /Belapur Vs Inox Air Products 2016 (336) ELT 316 (T)***

(iii) ***Goyal M G Gases Ltd Vs CCE, Ghaziabad 2014 (309) ELT***

327 (T-Del) Approved - Commissioner v. Goyal M.G. Gases Pvt. Ltd. - 2016 (342) E.L.T. A223 (SC).

(iv) ***Grasim Industries Ltd vs. CCE, 2004 (164) ELT 257 (T). This decision was referred to the larger Bench of the Hon Supreme Court – 2009 (241) ELT 321 (SC).***

5.2. The Counsel submitted that the Constitution Bench of 5 judges have decided the issues in the case of **Commissioner of Central Excise, Indore Vs Grasim Industries Ltd –2018(360) ELT 769 (SC).** The Hon'ble Supreme Court was examining whether the amounts collected under different heads viz., packing charges, wear and tear charges, Facility Charges, service charges, delivery and collection charges, rental charges, repair and testing charges are liable to be included in the value of the goods sold in terms of Section 4 of the CEA, 1944. The decision of the Tribunal in the case of BOC India (Supra) was also one of the Appeals under challenge before the Apex Court. The Apex Court in Para 20 has concurred with the earlier decision of the Supreme Court in the case of Bombay Tyre International Ltd. In Para 21, it is held that Section 4 (3) (d) defines "transaction value" by specifically including all value additions made to the manufactured article prior to its clearance as permissible additions to the price charged for the purpose of the levy. The relevant portion in Para 22 is extracted below:-

22. *This would bring us to a consideration of the decision of this Court in Acer India Ltd. (supra). The details need not detain us. Soft wares, which were duty free items and could be transacted as software, came to be combined with the computer hardware which was a dutiable item for purposes of clearance. The Revenue sought to take into account the value of the computer software for the purposes of determination of 'transaction value' with regard to the computer. This Court negatived the stand of the Revenue taking the view that* ***when software as a separate item was not dutiable its inclusion in the hard-disk of the computer cannot alter the duty liability of the software so as to permit the addition of the price/value of the software for the purpose of levy of duty****. It is in the above context that the decision of this Court in Acer India Ltd. (supra) has to be understood. The observations made in paragraph 84 thereof to the effect that 'transaction value' defined in Section 4(3)(d) of the Act would be subject to the charging provisions contained in Section 3 of the Act will have to be viewed in the context of a situation where an addition of the value of a non-dutiable item was sought to be made to the value of a dutiable item for the purpose of determination of the transaction value of the composite item. This* *is the limited context in which the subservience of Section 4(3)(d) to Section 3 of the Act was expressed and has to be understood. If so understood, we do not see how the views expressed in paragraph 84 of Acer India Ltd. (supra) can be read to be in conflict with the decision of Bombay Tyre International Ltd. (supra).*

23. *Accordingly, we answer the reference by holding that the measure of the levy contemplated in Section 4 of the Act will not be controlled by the nature of the levy.* ***So long a reasonable nexus is discernible between the measure and the nature of the levy both Section 3 and 4 would operate in their respective fields as indicated above****. The view expressed in Bombay Tyre International Ltd. (supra) is the correct exposition of the law in this regard. Further, we hold that "transaction value" as defined in Section 4(3) (d) brought into force by the Amendment Act, 2000, statutorily engrafts the additions to the 'normal price' under the old Section 4 as held to be permissible in Bombay Tyre International Ltd. (supra) besides giving effect to the changed description of the levy of excise introduced in Section 3 of the Act by the Amendment of 2000. In fact, we are of the view that there is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price'.*

5.3. The Appellants submit that the above judgment of Supreme

Court lays down that (i). when there are two items, one dutiable and the other duty free, addition of the value of the non-dutiable item in the value of dutiable item is not permissible; (ii). So long a reasonable nexus is discernible between the measure and the nature of the levy both Section 3 and Section 4 would operate in their respective fields; (iii). The principles laid down in the case of Bombay Tyre International Ltd is concurred with; (iv). the transaction value as defined in section 4 (3) (d) with effect from 1.7.2000 statutorily engrafts the additions to the normal price under old Section 4 as held permissible in Bombay Tyre International Ltd. There is no discernible difference in the statutory concept of "transaction value" and the judicially evolved meaning of "normal price'. (v). the judgments rendered in the context of old Section 4 would therefore, be valid even after amendment of Section 4 from 1.7.2000.

5.4. The Appellants submit that the activity of manufacture of gas and making available certain facilities for use by SAIL-VISP are separate and independent transactions. The FFC payable for installation, operation and maintenance of various facilities for use by SAIL – VISP on Build-Own-Operate basis by itself is not liable to excise duty. Since the FFC is payable even when there is no supply of gas and irrespective of the quantum of gas sold the inclusion of

FFC in the value of gas results in disproportionate and absurdly high values as demonstrated above. This clearly establishes that there is no nexus between the price of gas and providing facilities to the buyer for separate charges collected as Fixed Facility Charges. In the absence of nexus between the price of gas sold and the FFC, the same cannot be included in the value of gas manufactured and sold and subjected to levy of excise duty. Therefore, the principles laid down in the case of CCE Vs Indian Oxygen Ltd –1988 (36) ELT 730 (SC) that the manufacture and sale of gas and renting of cylinders are separate and independent transactions and that the rental would not be price for the manufacture and would not constitute assessable value is valid and binding. This decision has been followed consistently since then. Since the Fixed Facility Charges are rentals/consideration for the pipelines, storage tanks, flow meters, etc provided to SAIL – VISP for their use the same is not a consideration for the gas manufactured and sold and hence cannot be included in the value of gas. The impugned order contrary to the facts and law is required to be set aside.

5.5. The Counsel further submitted that the Department has contended in a number of similar cases that the Fixed Facility Charges have no nexus with the volume or value of gas supplied because the FFC is payable irrespective of the quantity of gas supplied and even when gas is not supplied. Such charges are purely rental and maintenance charges for the storage tanks. Therefore, the excise duty paid on such FFC was admissible as credit to the recipient. The Appellants rely on ***(i). CCE Hyderabad Vs Aurobindo Pharma Ltd 2010 (261) ELT 1066 (T)*** and ***(ii). Modern Steels Ltd Vs CCE 2007 (212) ELT 531 (T).***

6. The Ld. Counsel further submitted that the Notification No 67/1995-CE dated 16.03.1995 grants exemption from payment of duty to goods manufactured in a ***factory*** and used within the factory of production in or in relation to the manufacture of final products. In the present case, as per the agreement, SAIL has leased land measuring 100 M x 75 M within their factory for installation of the Oxygen plant comprising of Air Separation Unit and other ancillary equipment for manufacture of Oxygen, Nitrogen and Argon gases. This is clear from ***Articles 1.36, Article 4, Article 9.6(iii) and Article 10.0.*** The Appellants submit that the Oxygen Plant is installed ***within the factory of SAIL-VISP.*** The Appellants submit that they manufacture Oxygen in the said plant and supply the same to SAIL-VISP. It is submitted that the Oxygen (and later Argon) supplied is in turn used by SAIL-VISP within the same factory in the manufacture of steel, a dutiable final product.

Oxygen Plant of the Appellants situated inside the "factory" of SAIL - VISP can be considered as being within the "factory" of SAIL even though they have obtained separate Central Excise Registration under the Central Excise Act, 1944. In the case of ***Dhampur Sugar Mills Ltd Vs CCE - 2001 (129) E.L.T. 73 (Tri –Del***) and affirmed by the Supreme Court in ***2007 (216) E.L.T. A23 (S.C)*** it was held that "number of registrations, in our view, will not decide the number of factories unless and until they are situated in different premises. It is very clear from the definition of the term "factory" that all the three units will be regarded as one factory as all the excisable goods are manufactured in the same premises." The relevant portion of the judgment is reproduced below:

"*We have considered the submissions of both the sides. As per Section 2(e) of the Central Excise Act "factory" means any premises, including the precincts thereto, wherein or in any part of which excisable goods other than the salt are manufactured, or wherein or in part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on. It has not been disputed by the Revenue that all the three plants manufacturing different excisable goods are situated in the same premises. The Revenue is treating them as different factory only on account of appellants taking three* *registrations under Rule 174 of the Central Excise Rules. The number of registrations, in our view, will not decide the number of factories unless and until they are situated in different premises. It is very clear from the definition of the term "factories" that all the three units will be regarded as one factory as all the excisable goods are manufactured in the same premises. Similar views were expressed by the Appellate Tribunal in the case of J.K. Synthetics Ltd. (supra) wherein it was held that as two units fall within the same premises within one boundary wall encircling the entire area of the land allotted to the appellants in the industrial area the appellant is entitled to obtain one consolidated licence for the manufacture of its goods within its factory complex as the object behind the grant of consolidated licence is that any person manufacturing different excisable goods within one factory area is entitled to obtain one licence instead of different licences for different commodities."*

6.1. The Appellants submit that the Verification Report dated 25.07.2008 of the Superintendent of Central Excise reinforce the fact that the Gas plant is situated within the factory of SAIL-VISP and inter-connectivity of the plant and machinery. The Hon High Court of Karnataka in the case of ***Commissioner of C Ex & ST, Belgaum Vs Mukund Ltd -2015 (324) E.L.T. 387 (Kar.)*** in the context of shared use of inputs used by 3 Units, but CENVAT credit taken by a single Unit, has relied on the judgment in the case of Biocon Ltd (supra) and held that though there are 3 separate Units with separate registrations, the entire raw material is being converted in to final products in a continuous, inter connected and integrated process conforming to the definition of a single factory under Section 2 (f) of the Central Excise Act, 1944 and therefore, no substantial question of law arises. The Appellants also submit that the Hon'ble Supreme Court in the case of ***Vikram Cement Vs. CCE – 2006 (197) E.L.T 145 (SC)*** held that if the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory, the Modvat/Cenvat credit on capital goods would be available. The Supreme Court relied on this judgment in the case of ***Madras Cements Ltd. Vs CCE, Chennai - 2010 (257) ELT 321 (SC)*** to hold that if the Mines are captive mines so as to constitute one integrated unit with concerned cement factory, Cenvat/Modvat credit available on the capital goods. The Appellants submit that in view of the fact that the Oxygen gas manufactured in the factory is supplied for captive consumption to SAIL – VISP in the same factory, the gases are eligible for exemption under Notification No 67/95-CE dated 16.03.1995 and no duty is payable on captive consumption of gas manufactured and consumed in the same factory and therefore, the question of inclusion of the FFC in the sale price of gases would not arise.

7. The Appellants submit that they had filed an application dated 06.08.2008 before the Jurisdictional Superintendent of Central Excise, Shimoga Range to include the service of "Supply of Tangible Goods" in the Service Tax Registration to enable them to pay service tax on the Fixed Facility Charges for various facilities installed, operated and maintained by the Appellants within the factory of SAIL - VISP. The Appellant's letter dated 19.8.2008 (**Page 158**) refers in this connection. The Appellants submit that they have installed, operated and maintained various pipelines, storage tanks, flow meters, Flow Indicators, etc on Build-Own-Operate (BOO) basis for use by SAIL – VISP in terms of the Agreement dated 11.8.2005. The goods and facilities are under the possession and control of the Appellants. There is no transfer of right to use, or possession or control over the goods. On termination of the Agreement, the goods have to be removed from the factory of VISP. Therefore, the said activity for a consideration payable in the form of FFC amounts to rendering of taxable service under the classification of "Supply of Tangible Goods" as defined under Section 65(105)(zzzzj) of the Finance Act, 1994 from 16.05.2008. The Commissioner has recorded his finding in this regard in **Para 41.13** of the impugned order rejecting the contention that the activity was liable to service tax on the ground that the goods and facilities fixed to earth were not goods and when they are removed and dismantled they will no longer be goods. The findings of the Commissioner are contrary to facts and law. The pipelines, storage tanks, flow meters, flow indicators, etc installed in the factory of VISP are duty paid goods and their assembly for operational and functional purposes does not amount to rendering them to be immovable property. Admittedly, on termination of the Agreement, the goods have to be removed from the factory of VISP. Therefore, the equipment fixed to earth for the purposes of operation do not become immovable property. The facilities could easily be dismantled in to their respective components and disposed of.

7.1. The Appellants rely on the judgments and the CBEC Circular:

(i) Sirpur Paper Mills Ltd Vs CCE, Hyderabad 1998 (97) ELT 3 (SC)

(ii) CCE, Ahmedabad Vs Solid and Correct Engineering Works

2010 (252) ELT 481 (SC)

(iii) CBEC Order No 53/2/98 – CX dated 2.4.1998

The above judgment and the CBEC Order clearly specify that the plant and machinery fixed to the earth for safety and operational purposes are not immovable property. The finding of the Commissioner in this regard is clearly erroneous. On similar facts, the Hon Tribunal in the case of **Air Liquide North India Pvt Ltd Vs CCE, Jaipur – 2017-TIOL-2433-CESTAT-DEL** has held that setting up and maintaining gas storage tanks, pipelines, gauges and other accessories in the premises of the buyer of gases is an infrastructural support activity and "supply of tangible goods" has relevance to the transactions. The Appellants submit that the rejection of the voluntary request for payment of Service Tax on the FFC on renting of the facilities is clearly erroneous.

8. The Appellants submit that the Oxygen/Argon gas manufactured by them is an input to SAIL – VISP. The entire duty paid would be available as CENVAT Credit to SAIL-VISP. It is submitted that SAIL discharges duty on a much higher value added product like Steel. It is also on record that in terms of Article 12.5 of the Agreement, the statutory levies such as excise duty and sales tax for the gases supplied to the BUYER shall be paid for by the BUYER against documentary evidence. Since the entire duty paid by the Appellants is available as CENVAT Credit to SAIL-VISP and reimbursed by VISP as per the agreement, the situation is revenue neutral and there cannot be contravention of the provisions of the Central Excise Act, 1944 or Rules with intention to evade payment of duty. The Appellants rely on the following judgments:

(i) ***Nirlon Ltd Vs CCE, Chennai – 2015 (320) ELT 22 (SC)***

(ii) ***Punjab Tractors Ltd, Chandigarh Vs CC 2005 (181) ELT***

380 (SC)

(iii) ***CCE Vs Narayan Poly plast 2003 (179) ELT 20 (SC).***

8.1. The Appellants submit that it is now well settled law that where payment of duty results in a situation of revenue neutrality, there is no justification for demanding duty. Therefore, the finding in the impugned order is capricious and unsustainable.

9. The Appellants submit that the SCN issued on 14.2.2008 proposed to demand differential duty on the FFC for the period from August 2006 to September 2007 by invoking the larger period of limitation. The issue relates to valuation of gases and classification of the activity by the Appellants. It is submitted that the judgments referred above clearly show that the activity of installation, operation, maintenance of storage tanks, vaporizer, pipelines, flow meters, measurement gauges, etc. for exclusive use by SAIL – VISP on BOO basis is a service and the Fixed Facility Charges are in the nature of rentals. The Appellants had voluntarily applied for issue of Service Tax Registration under "supply of tangible goods" on 06.08.08 to the Jurisdictional Superintendent of Central Excise, Shimoga. The Department however, rejected the application primarily on the ground that a SCN for demand of excise duty was already issued. The grounds for rejection in the impugned order are also contrary to law. The voluntary application for payment of service tax on the Fixed Facility Charges would show that there could not have been any intention to evade payment of duty. The Appellants have also brought out above the contradictory stands of the Department holding that the FFC collected for providing similar facilities was only rental and not additional consideration or price of gas supplied.

9.1. The Appellants have submitted a copy of Agreement dated 11.8.2005 with SAIL – VISP to the Office of the ACCE, Hassan at the time of obtaining the Central Excise Registration in March 2006. Shri R Sridhar, Deputy Manager in his statement recorded on 1.11.2007 has ascertained and confirmed this fact. Without the said Agreement on record and verification of the manufacturing premises by the jurisdictional Officers the registration of the premises for installation of the Oxygen Plant within the factory of SAIL – VISP would not have been granted. The Appellants have been submitting monthly ER 1 Returns for payment of duty from August 2006 onwards. The Jurisdictional Superintendent has his office within the vicinity of the factory of SAIL – VISP. The reference by the Commissioner to the Joint Statement of the Officers from SAIL – VISP recorded on 6.8.2008 is evidently after issue of SCN dated 14.2.2008 and submission of the reply dated 14.4.2008. The statement has also been mis-quoted in the findings. The said Statement was in the form of verification of certain details and submissions made by the assesse in the reply to the SCN. Therefore, the finding of the Commissioner in Para 42 of the impugned order is completely devoid of merit and a ruse to justify invoking of the larger period of limitation.

9.2. The Appellants further submit that the decisions in the case of Grasim Industries Ltd, Indian Oxygen Ltd, BOC India Ltd, (supra) and other judgments referred above clearly settles the issue in favour of the assesse. The Tribunal in the Stay Order has also recorded that prima facie the case is covered by the decision of the Tribunal in the case of BOC India Ltd. Therefore, the Appellants believe bona fide that the FFC was not liable to excise duty. Further the judgment of the Tribunal in the case of BOC India and Grasim Industries (supra) was taken before the Hon Supreme Court and the issues therein were referred to the larger Bench of the Hon Supreme court. The Larger bench in the case of Grasim Industries (supra) has now held that there is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price' and has concurred with the views in the case of Bombay Tyre International Ltd. It is thus clear that the method of valuation of the goods was hazy and subject matter of prolonged litigation. Therefore, the Appellants could not be faulted for believing that the FFC was not liable to excise duty. The Appellants rely on the following judgments:

(i)Sanjay Industrial Corporation Vs CCE, Mumbai 2015 (318) ELT 15 (SC)

(ii) Jaiprakash Industries Ltd Vs CCE, Chandigarh 2002(146)ELT 481(SC)

(iii) Kiran Ispat Udyog Vs CCE, Rajkot 2015 (321) ELT 182 (SC)

(iv) Larsen & Toubro Ltd Vs CCE, Pune 2007 (211) ELT 513 (SC)

10. The Ld. Counsel further submitted that the grounds and the basis for the demand of excise duty on the Fixed Facility Charges remain the same for the entire period from August 2006 to March 2016 in the above proceedings. The SCNs have uniformly stated that the Fixed Facility Charges are related to the sale of Oxygen, Nitrogen and Argon gases and is an additional consideration for the sale value of such gases supplied to SAIL-VISP. The SCNs have proposed re-determination of the value of gases and demanded differential excise duty on the Fixed Facility Charges. The demand of differential duty as proposed in the SCNs has been confirmed irrespective of the quantity of gases supplied and even when there was no supply of Oxygen and Argon gases during several periods as evident from the records.

11. Further, since the entire duty paid by the assesse is available as CENVAT Credit to SAIL-VISP and reimbursed by VISP as per the agreement, the entire situation is Revenue Neutral and there cannot be contravention of the provisions of CEA, 1944 or Rules with intention to evade payment of duty. There was no deliberate suppression of facts or contravention of the CEA, 1944 with intent to evade payment of duty. Therefore, the larger period of limitation cannot be invoked. For the same reasons the ingredients of Section 11 AC are not satisfied and hence the equal penalty imposed there under cannot be sustained.

12. The Ld. AR has submitted that in the agreement between M/s MSPL and M/s SAIL dated 11.08.2005 the clause 1.21 regarding facility charges reads as follows" *means the monthly charges to be paid by the buyer to seller in accordance with this agreement for the supply of gases to the buyer*" Further as per clause 1.35 the facility or production facility" *means the Air separation units(ASU), stores, interconnecting pipelines up to the battery limits and ancillary equipment installed by the SELLER for supply of oxygen , Nitrogen and Argon gases to SAIL-VISL".* Clause 13.1 defines the quantum of FFC payable till the end of the contract period. From the comprehensive reading of the aforesaid clauses it clearly emanates that the appellant has set up a production facility including an AIR SEPERATION UNIT from which the atmospheric air is separated out into the constituent gases and the same is supplied to M/s SAIL-VISL beyond the Battery limits through pipelines. The total set up of manufacture, storage tanks, measuring meters, analysis equipment are all located within the premises of the appellant as confirmed vide Para 2 of the Commissioner's letter dated 11.08.2008 (page 141 of APPEAL PAPER BOOK) which is based on the Range Superintendent verification report. Thus the said facility set up is an independent facility on the rented /leased out land provided for manufacture of gases. This is made clear by the appellant having obtained the requisite approvals , licenses and Central Excise Registration towards the activity of manufacture .The assesse has also availed the Cenvat Credit towards the facility to the extent of Rs 1,10,32,894/- as is discussed by the Commissioner at Para 41.7 of the impugned order. The appellant has been harping on the non availment of Cenvat credit as verified by the Range Superintendent which is towards the interconnecting pipelines beyond the premises of MSPL and the same is only as per law as the said goods are not within the premises of the Manufacturer. Also there is no dispute about the aforesaid Cenvat credit amount of Rs. 1, 10, 32,894 being towards the Oxygen plant set up in the registered premises of the manufacturer. Thus the cost recovery being done towards this plant which they are operating on BOO (Build-Own -Operate) basis the amount being charged as the Fixed Facility charges and this is definitely additional consideration being charged towards the activity of manufacture and therefore warrants inclusion to the declared value under Section 4(1)(a) of the Central Excise Act , 1944 read with Rule 6 of the Central Excise Valuation Rules ,2000. This view is upheld by the Larger Bench decision of the SC in the case of Grasim Ltd. wherein the nexus with manufacture if proved would warrant the value addition under Rule 6.

12.1. The appellant has tried to make out a case for consideration of the Fixed facility charges paid as towards the Supply of Tangible goods service and has stated that the same would be chargeable to Service Tax for the period post 16.5.2008. This argument has been rightly rejected by the adjudicating authority as the ownership of the goods are with the appellant and the same have not been sent out of the registered premises of the appellant for use by the Buyer. The equipment having been installed, with due availment of CENVAT Credit towards the same as brought out in the previous paras is part of the production facility of the appellant and has **not been given out for use** by the buyer. In the scenario of Supply of Tangible goods, the production/manufacture or service rendered by using the said goods will happen at the receiver's end who is entitled to use the said goods. The supplier of the Tangible goods will have no ownership of the produce/ activity emanating from such goods. In the instant case the appellant retains total control over the production facility and the produce thereof. This is obvious from Clauses 4.11 and 5.5 of the aforesaid agreement and the appellant undertaking to pay the Central Excise duty on the produce generated during manufacture using the said goods.

12.2. Further in the case law of M/s AIR LIQUIDE NORTH INDIA PVT LTD V/s CCE JAIPUR 2017-TIOL-2433-CESTAT-DEL, cited in support, the issue pertains to providing of mostly gas storage facilities at the premises of the buyers as is referred to at Para 8 of the said judgment unlike in the present case where a manufacturing facility has been set up. Further the assessee in the said case had even considered the same as deemed sale and paid VAT thus considering the goods to have been transferred to the buyer. Thus the said decision would have no applicability to the present case.

12.3. Regarding the applicability of Notification 67/95 he submitted that at the outset this is a fresh ground being taken now in appeal before CESTAT and has not been agitated before the adjudicating authority. The said notification would be inapplicable as the assessee being an independent manufacturer has not produced any interim inputs which go into a taxable final product to avail exemption. The Assessee has manufactured Gases from Air and there are no interim inputs. The arguments and case laws cited in support of the fact that FACTORY has to be considered towards all units within the same premises can be distinguished as follows.

(i). ***Dhampur sugar mills -2001(129) ELT 73-TRI-del:*** The said case covers a scenario of multiple divisions of the same entity who have obtained independent central excise registrations. In the instant case we have two different entities functioning under independent registrations.

(ii). **Commr of CEx Vs Mukund Ltd-2015(324)ELT 387 Kar:** The said case deals with the availment of Cenvat Credit by one of the Steel manufactures on the gases supplied as inputs by M/s PRAXAIR. Thus there is no duty exemption claimed towards the gases generated as in the current case. Further, in that case there is a formal Strategic alliance agreement between the steel manufacturing units for the integrated production of steel. Thus prima facie the dispute is about the inter se Cenvat availment between the steel units and not about the taxability of the gases manufactured.

(iii). ***VIKRAM CEMENTS V/s CCE 2006(197) ELT 145 and MADRAS CEMENTS V/s CCE 2010(257) ELT321***: Both these cases deal with the issue of Cenvat Credit eligibility of Inputs used for Captive consumption in an integrated facility which is not the situation as the two entities are independent in the current case and the issue is not about eligibility to credit.

12.4. Also the said production facility also envisages a sale of surplus quantity to outside buyers also as per clause 9.3.3 of the agreement and hence the same will not fall within the ambit of the above said case laws.

13. The adjudicating authority has given enough basis at para 42 of the order for invoking the extended period for non-supply of the Fixed facility charges agreement to the department and the non-declaration of the Fixed Facility charges INVOICES or the amount in the ER-1 Returns. The commissioner has raised the following issues and has discussed and has given findings on each of them.

(i). Whether the 'Fixed Facility Charges' paid by SAIL towards installation, operation and maintenance of the pipe lines, storage tanks for gaseous and liquid forms of gases, pumps and vaporising systems, flow meters, Flow Indicators, Flow Computers for measurement, Gas purity analysers, etc, for supply of Oxygen, Nitrogen and Argon gases within the factory of SAIL-VISP for exclusive use by SAIL-VISP has any nexus with the manufacture, sale/supply and value of Oxygen gas cleared by the Appellants for consumption by SAIL and are liable to be included in the assessable value of Oxygen gas as held in the impugned order?

(ii). Whether manufacture and supply of gases by setting up Air Separation Unit within the factory of SAIL – VISP for captive consumption by SAIL-VISP is exempt from payment of duty under

Notification No 67/95 CE dated 16.3.1995?

(iii). Whether the activity of installation, operation and maintenance of the pipe lines, storage tanks, flow meters, etc.in connection with supply of Oxygen, Nitrogen and Argon gases for exclusive use by SAIL-VISP in their factory is an independent activity/transaction liable to levy of service tax as claimed by the assesse?

(iv). whether the larger period of limitation is invokable and justified in the facts and circumstances of the case?

(v). whether imposition of equal penalty under Section 11 AC of the CEA, 1944 is justified?

14. Ld. Counsel for the appellants has submitted the following, in a rejoinder to certain points raised by AR.

14.1. The AR referred to Article 1.35 of the Build-Own-Operate Agreement dated 11.8.2005 with SAIL – VISP which gives the meaning of "Production Facility" to contend that the Fixed Facility Charges ware payable for the said Production Facility. The Appellant has clarified that the said "Production Facility" means the Air Separation Unit, the plant/machinery which manufactures gases by using atmospheric air, and inter-connecting pipelines up to the Battery Limits and other ancillary equipment installed within the premises/land taken on rent from SAIL-VISP within the factory of

SAIL - VISP. These are manufacturing facilities used for manufacture of gases. In addition to the manufacturing facilities for manufacture of gases, the Appellants have installed, operated and maintained at their own expense equipment and facilities for exclusive use by SAIL-VISP as brought out earlier. It is to reiterate that the same is borne out by the verification report, dated 25.7.2008, by the jurisdictional Superintendent of Central Excise and joint statement of the Officers from SAIL – VISP on 6.8.2008.

14.2. The Fixed Facility Charges are payable irrespective of the supply of gases and even when there is no supply of gases as evident from Article 15.3, 15.4 and 15.6 of the Agreement. As submitted, there were very wide variations in the quantities of Oxygen supplied from August 2006 onwards and supply of Argon, which commenced from July 2011. There were several months when there was no supply of Oxygen and/or Argon. Demand of excise duty was made on the entire amount of Fixed Facility Charges without showing any correlation with the quantity and value of Oxygen and/or Argon gases supplied and without apportionment of the Fixed Facility Charges on the quantity and value of Oxygen and Argon gases actually supplied. It is also shown vividly that inclusion of the Fixed Facility Charges in the value of Oxygen leads to absurdly high and disproportionate values, as tabulated and demonstrated. As shown, Fixed Facility Charges payable are not an additional consideration for the Oxygen and Argon gases supplied and hence not excisable.

14.3. The AR disputed the submission that the installation, operation and maintenance of the storage tanks, pipelines up to consumption points, vaporizers, pumps, flow meters, flow regulators, etc. without transferring the right of possession and effective control is an independent transaction of service provided to SAIL – VISP and liable to levy of service tax under "Supply of Tangible Goods" as defined in Section 65 (105) (zzzzj) of the Finance Act, 1994 attracting levy of service tax from 16.5.2008 and as "service" from 1.7.2012. The Appellants submit that Section 65 (105) (zzzzj) of the Finance Act, 1994 defines "supply of tangible goods" service as *"Taxable service" means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring the right of possession and effective control of such machinery, equipment and appliance.* The Appellants submit that installation, operation and maintenance of the storage tanks, pipelines up to consumption points, vaporizers, pumps, flow meters, flow regulators, etc., constitute provision of the service of supply of tangible goods. The Appellants are the owners and continue to retain the possession and control over the said facilities since they have undertaken their installation, operation and maintenance. On termination of the BOO Agreement, the Appellants are required to remove the said facilities from the factory of SAIL. The Appellants had admittedly submitted application on 6.8.2008 to the jurisdictional authority for inclusion of the said service in their Service Tax Registration and also made the same request to the Commissioner vide letter dated 19.8.2008 (Page 145). The Commissioner however, rejected the request for payment of Service Tax on the ground that the said plant and machinery fixed to earth are not goods as recorded in Para 41.13 of the impugned order (Page 56 of Memo of Appeal). The same ground has been followed in all the subsequent proceedings. The Appellants have brought out during the hearing that the said pipelines for supply of gases, flow meters, flow regulators, vaporisers, pumps, etc. installed, operated and maintained by them are not immovable property.

14.4. The AR has contended that the Appellants have not manufactured Argon gases. The Appellants submit that the supply of Argon gas to SAIL – VISP commended from July 2011. The Liquid Argon was procured and converted in to gaseous form and supplied to SAIL – VISP through pipelines on payment of duty on the invoice price/transaction value as mutually arrived at. The SCNs issued from August 2012 onwards have proposed re-determination of the value of Oxygen and Argon by including the Fixed Facility Charges though there is no apportionment of the said charges in the quantity and value of the Oxygen and Argon gases actually supplied.

14.5. The AR has contended that the claim for exemption under Notification 67/1995 CE dated 16.3.1995 is not permissible since the Appellants have neither manufactured capital goods nor inputs and used the same within their own factory. The AR contended that the premises of MSPL within the factory of SAIL and the factory of SAIL are independent factories. The Appellants submit that the premises where MSPL has set up the gas manufacturing plant on 100 M x 75 M land taken on rent from SAIL is admittedly within the factory of SAIL – VISP. The Site Plan was also shown. The assesse has claimed exemption on the gases manufactured and supplied through pipelines for captive use by SAIL – VISP under Notification 67/1995 CE dated 16.3.1995. In the instant case, the premises where the Appellants have manufactured the gases in their premises and supplied to SAIL-VISP for use as "inputs" in or in relation to manufacture of dutiable steel as final product constitute a single "factory". The premises of the MSPL Gas plant within the factory premises of SAIL – VISP constitute a single "factory" irrespective of the separate Central Excise Registrations by both the entities. The gases manufactured in a "factory" and used within the "factory of production" in or in relation to the manufacture of the dutiable final product are eligible for exemption. Therefore, the inputs (gases) manufactured in a factory (by MSPL Gases – the Appellants) and used within the factory of production (by SAIL – VISP) in or in relation to manufacture of dutiable steel as final products are eligible for exemption under the said Notification No 67/95 CE. The judgments relied on are squarely applicable. Therefore, when no excise duty is payable on the Gases supplied the question of treating the Fixed Facility Charges as additional consideration and levy of excise duty does not arise.

14.6. The Appellants have also submitted that the issue in the instant proceedings involves interpretation of law. The Appellants were of the *bona fide* belief that there was no warrant for payment of excise duty on the Fixed Facility Charges being a consideration for the service rendered, applied for registration for payment of service tax when the "Supply of Tangible Goods" service became taxable from 16.5.2008, the Hon Tribunal vide Stay Order No 125/2009 dated 17.2.2009 granted unconditional stay against recovery of dues on the ground that the Appellants have strong case on merit and similar stay was granted in subsequent proceedings, the issue of whether the Fixed Facility charges are liable to be included in the value of gases manufactured and supplied was one of the issues referred to the larger Bench of the Hon Supreme Court in the case of ***CCE Vs. Grasim Industries Ltd***, etc. Therefore, there is no basis either to invoke the larger period of limitation in the first proceedings (E/866/08) and imposition of penalties in any of the proceedings. The Appellants submit that the larger period of limitation is not invokable and penalties in all the proceedings are required to be set aside.

15. Heard both sides and perused the records of the case. Brief issues involved in the appeals are as to whether

(i). The Fixed Facility Charges received by appellants from Ms SAIL have any nexus with the value of the gases supplied by the appellants to M/s SAIL?

(ii). the Fixed Facility Charges includible in the Assessable Value of the Gases supplied by the appellants?

(iii). the Appellants argument that they are rendering the service of 'Supply of Tangible Goods' tenable?

(iv). the alternate argument of the appellants that as the gases are produced and consumed in the factory of SAIL, the benefit of Notification No 67/95, in respect of Capital Goods, is acceptable?

15.1. To evaluate the Question at No. (i) above, it is important to go through the agreement between M/s. SAIL and the Appellants. Relevant articles of the agreement are as below:

1*.21. "Fixed facility charges" means the monthly charges to be paid by the BUYER to SELLER in accordance with this agreement for supply of gases to BUYER.*

1.36. "SELLERS WORKS" means bounded premises held by SELLER located inside SAIL- VISL Plant including Ancillary equipment to be installed thereon.

Article 4

4.1. For supply of Oxygen, Nitrogen and Argon gas continuously to SAIL on payment of cash price and fixed facility charges, the SELLER shall install the plant inside BUYERS works within a stipulated period of 52 weeks from the date of agreement by the SELLER under this agreement and subject to schedule mentioned in Article 11.4 here below.

Article 7:

7.2. As and from the date of successful commissioning and thereafter continuously during the subsistence of and in accordance with the stipulations of this agreement, SELLER shall supply gases to BUYER and shall purchase from SELLER its requirement of Oxygen, Nitrogen and Argon.

Article 9:

9.1. The scope of work of the SELLER shall be to supply the *required quantity of Gases, of specified purified purities, at required pressure range, at the Battery Limit by setting up oxygen Plant of 50 TPD capacity consisting of 3 units of 600 CuM per hour synchronized to a single output line as specified in Annex.-II. Provision for storage of the gaseous Oxygen, LOX, LIN & LAR, vaporization system as described in Annex-V, operation and maintenance of production facilities, and supply of Gases of specified purity at the required pressure on continuous basis is to be ensured as per Annex.-IV.*

9.3 STORAGE OF CAPACITIES

9.3.1. SELLER shall install storage tanks, pumps, vaporizers for liquid Oxygen, Nitrogen and Argon and maintain a safety stock as indicated at Annex,-V for meeting the fluctuating demand pattern as well as to provide back-up for uninterrupted supply of Gases during shut down/break down periods of the Production Facilities and also during power interruptions.

9.3.3. If there is any surplus after meeting requirement of SAIL-VISL and maintaining minimum agreed storage level, the SELLER may sell the surplus Gas/Liquid. SELLER shall pay to the BUYER an amount equal to Fixed Charge/tonne x the quantity of Gases and as per formula given below on monthly basis:

$$\text{Fixed Charge/ Tonnage} = \frac{\text{Total Fixed Charge}}{\text{Tonnage capacity of single unit}}$$

9.4.1. Flow meter. Flow computer

SELLER shall at their own expense provide and install flow meter/ flow computer for measuring Gases and maintain, repair and replace the meters as necessary. The meter shall be of electronic Flow meter/ flow computer with automatic pressure and temperature compensation and shall have two sets of totalizers (one re-settable and one non-re-settable). The measurement will be volume, the unit of which shall be Normal cubic Meter (Nm3) per hour.

The SELLER shall provide facility for measurement of output from this meter for hooking it up with MIS of the Plant.

9.4.2. Oxygen Purity Analyzer & Pressure Measuring Instrument

The instruments of Gases Purity analyser and Gases pressure shall be provided, installed and maintained by SELLER. The calibration records of these instruments shall be shown to BUYER on demand, documentary evidence of purity of Gases and pressure shall be furnished by SELLER to BUYER whenever required.

9.4.3. The flow meter/flow computer, Gases purity analyser and pressure measuring instruments shall be installed at the joint meeting room near Battery limit. The meter house shall have provision for double-lock system to avoid any controversy.

9.4.4. All this equipment shall be calibrated at an interval of six *months by the SELLER. Periodic joint calibration shall be carried out at, mutually agreed upon date. SELLER shall provide all the testing/calibrating equipment/standard gas during the joint calibration to the meters, SELLER shall also provide the calibration certificates of each calibrating equipment duly certified from reputed organization with tractability of the calibration Certificate to national Physical Laboratory (NPL)/National Test House.*

In addition to above the calibration shall be carried out at the request of either the BUYER or the SELLER. If the calibration is done at BUYER'S request and the metering equipment is found within the permissible limit as per Indian/International standard, then the cost of such calibration shall be borne by the BUYER and otherwise by the SELLER. In case calibration is done at SELER's request, the cost of such calibration shall be borne by the SELLER.

All the transmitters/ Meters etc. in connection with measurement of flow and purity shall be installed in duplicate.

For Oxygen Purity Analyzers and Flow meter/flow computer, lead time to repair/replace and setting the system workable shall be considered as 5 (five) working days from the date of outage. During the outage period of both the meters, Gases Purity and flow shall be measured on average of preceding 24 hours of consumption rate.

All the meeting instruments shall be powered up through UPS.

The SELLER shall provide facility for measurement of output from this meter for hooking it up with MIS of the Plant.

11.5 …………

The BUYER shall buy from SELLER, the Gases as produced during Commissioning period at the rate indicated in Article-12 provided the Gases meet required quality parameters (Purity & Pressure). However, Fixed Facility Charges shall not be payable during this period.

12.0. PRICE FOR GASES SUPPLY

12.1 Oxygen……….. @Rs.5.70/Nm³

Nitrogen MP…. @Free of Cost

Argon ………….@Rs.86/Nm³ for supply from the sellers Own source of Supply and Alternatively Rs.3 per Tonne per KM if sourcing of LAR is done by Buyer.

12.5. Statutory levies such as excise duty and sales tax for the Gases supplied to the BUYER shall be paid for by the BUYER at actual against documentary evidence. In case of waiver/concession of statutory taxes and duties admissible under Law/Act, for which SELLER will make sincere efforts, the benefit of the same shall be passed on to the BUYER. SELLER shall provide necessary documents to the BUYER for availing of CENVAT credit.

13.1. BUYER shall pay a Fixed Facility Charge of Rs.47.5 Lakh per month (Rupees Forty-Seven Lakh Fifty Thousand) per month for 1st *month to 60th month and Rs.33 Lakh (Rupees Thirty-Three Lakh) from 61st month to till the end of the Contract period commencing from the date of start of regular supply of Gases after successful Commissioning of the Production Facility.*

15.2. Fixed Facility Charges shall be paid on monthly basis against invoice. Fixed Facility Charge shall be paid from the date of start of regular supply of Gases after successful commissioning of the Production Facilities.

15.3. In case of lower demand, BUYER shall continue to pay monthly Fixed Facility Charge and the Price for Gases supplied on actual consumption basis subject to minimum off take of 50% of the capacity of one unit for Oxygen (501 PD Plant consisting of three units f 600 CuM per hour synchronized to a single output line) and Argon.

However, if

due to any reason, BUYER is not able to consume any Gas, the BUYER shall pay monthly Fixed Facility Charge only.

15.6. The monthly payment for supply of gas shall be made in the form of reimbursement of the Fixed Facility Charge as per Article-13 and price for Gases supply as specified in Article-12. The Fixed Facility Charge as specified in Article-13 shall remain fixed for the entire contract period. Price for Gases supply as specified in Article-12 shall be paid based on the actual gas supplied by SELLER *to SAIL-VISL subject to minimum off take of 50% of the capacity of one unit for Oxygen (50TPd Plant consisting of three units f 600 CuM per hour synchronized to a single output line) and Argon.*

However, if due to any reason, BUYER is not able to consume any Gas, no price for Gases supply as specified in Article-12 shall be payable.

16. We find that the appellant's main argument is on the ground that the Fixed Facility Charges are for the installations the appellants have made in the premises of SAIL-VISP and that as per the agreement, it is clear that Fixed Facility Charges are independent of the supply of Gases and in terms of the agreement, the price of Gases supplied is fixed separately. The appellants have also argued that even during the months in which there was no supply of Gases Fixed Facility Charges were payable by SAIL-VISP. The Department has proposed to distribute the Fixed Facility Charges on the quantity of Gases supplied during the particular month. They submitted that it lead to abnormal value of the per unit of the Gases and such prices were absurd and nobody will buy and sell the Gases at that rate in the market.

The Counsel submitted that the assessable value of Oxygen, as per SCN, by inclusion of the FFC varies widely from month to month **from Rs.11.65/NM3 in March 2007, Rs. 62.46/NM3 in**

November 2008; Rs. 82/NM3 in April 2013; Rs. 250.66/NM3 in May 2013; Rs. 177.48/NM3 in July 2018; Rs. 1761.14/NM3 for September 2013; to an absurd high value of **Rs.4527.3/NM3 in November 2013; Rs. 183.10/NM3 in October 2014; Rs. 242/NM3 in November 2014;** Rs. 274.32/NM3 in May 2015 and **Rs. 1889.26/NM3 in February 2017**, etc. The data clearly shows that the **inclusion of FFC in the sale price of Oxygen leads to absurd high values and levy of excise duty on the FFC even when there was no supply of Oxygen gas**. There are a number of periods when there was no supply of gas at all. Still VISP has paid FFC as per the terms of the Agreement.

16.1. However, the appellants have also relied upon the case of BOC India Vs. CCE, Jamshedpur (supra). The facts of the case are narrated in Para 2 & 3 of the Order and are reproduced below:

> *"The Appellant is a manufacturer of Oxygen, Nitrogen, Argon gases/liquids. They have a number of plants located at different places in country. In Jamshedpur, one factory is situated at Mona Road, Jamshedpur and at Burma Mines Long Tom area, Jamshedpur. The present appeal relates to Burma Mines factory. The Appellant is manufacturing Oxygen, Nitrogen and Argon in liquid form and the products are sold and supplied to the customer in the following manner:*
>
> *Supplies through pipelines are made to Tata Iron & Steel Co. (in short TISCO) and Tata Engg. and Locomotive Co. (in short*

TELCO). The product in liquid form are pumped through the pipeline in gaseous form. The other mode of supply of gases in liquid form are made through Vacuum Insulated Transport Tanks (in short VIST). The supplies are made from appellants' factory to buyers' factories and emptied there in Vacuum Insulated Storage Tank (in short VIST). In such cases, the appellant at this cost and expenses erects and installs VISTs at the factories of the appellants concerned. Such customers buying the goods from the Burma Mines factory are Usha Martin Industries, Chittaranjan Locomotive Works, Eastern Railway, Kanchrapara etc. There are also several buyers who simply buy the goods from the said Burma Mines factory. In such cases, the appellant has not installed any VISTs at the buyers' factories nor has installed any pipelines. Such buyers are Alloy Steel Plant, Deputy Controller of Stores of Eastern Railway, etc. In view of the extremely hazardous nature of the products, there has to be a continuous checking and monitoring of the said facilities so as to ensure that there is no leakage at any point. The Appellant's Engineers and Technicians keep a constant check and watch over the entire facilities on a day-to-day basis. Only huge maintenance expenses are incurred by the appellant. In case of TISCO and TELCO to whom the supplies are made through pipelines, the appellant had also installed measuring meters. In case of TISCO, it is installed within the appellants factory itself and in case of TELCO it is installed in the TELCO's factory. The appellant charges fixed charges/facility charges on monthly basis from the customers to whom the said facilities are provided by the customer. These charges are payable by the Customers at the agreed rates on monthly basis. The facility charges are payable irrespective of fact whether any gases or liquids were purchased by the customers during the month concerned and irrespective of the quantum of purchases. For *facility charges, the appellant raises bill on monthly basis to customers concerned irrespective of as to whether the said customer purchased any goods during the month concerned. The appellant enters into contracts with all its major buyers and if any of the aforesaid facilities like erection and maintenance of VIST or Pipeline is required to be provided by the appellant, the agreed Facility Charges payable to the appellant on monthly basis are also mentioned. These are separately mentioned in all the contracts. The buyers are not relative to the appellant in any manner, directly or indirectly. On the instance of Central Excise authority having jurisdiction over the factories of the appellant, the appellant paid various amount towards duty on the facility charges/fixed charges under protest. The Central Excise Authorities issued show cause notices to appellant on various dates. The appellant filed the reply. The adjudicating authority confirmed the demand as mentioned above.*

16.2. From the above, it is seen that the facts of the case are slightly different whereas in the above case, the appellants therein have installed VSIT Tanks or Pipelines and Flow Meters in the premises of their customers. Such installations are maintained by M/s. BOC; in that context, it was held that the Fixed Facility Charges are not includable in the assessable value of the Gases supplied. In the instant case, the entire unit of the appellants is installed in the premises of SAIL-VSIL. The Pipelines and facilities are in continuous nature in the appellant's unit as well as the customers' premises. On going through the agreement, it is seen that the clause 15.6 stipulates that "the monthly payment for supply of gas shall be made in the form of reimbursement of the Fixed Facility Charge as per Article-13 and price for Gases supply as specified in Article-12. Clauses **at 1.21; 1.35 and 15.6 of the Agreement** make it amply clear that the consideration paid, including the Fixed facility charges, is towards the supply of gases. The agreement does not make it very categorical as to whether the Fixed Facility Charges are in respect of Pipelines, Flow Meters, Valves, etc. installed in the premises of SAIL-VISP and maintained by the appellants. Therefore, there is some element of doubt which exists as to whether the Fixed Facility Charges are also for the installations which are primarily in the premises of the appellants and for production of Gases. The verification report by the Superintendent, Central Excise of the concerned range gives only an impression that the appellants have not availed CENVAT credit of the installations which are beyond the battery house (the boundary of the appellant's unit). The said report neither affirms the stand of the Department nor the stand of the appellants as far as the Fixed Facility Charges are concerned. The joint statement of SAIL-VISP also is of no use as it does not clearly bring out the nature of Fixed Facility Charges vis-à-vis the facility for production and the facility for supply etc. In case if a portion of the Fixed Facility Charges pertained to the production facilities installed in the premises of the appellants, it has to be understood to have some nexus with the production of Gases. No prudent customer would pay such charges for the production of the material in the appellant's factory and to purchase the same at the market price. It is pertinent to note that the Ld. counsel for the appellants has submitted that **the Fixed Facilities were partly inside the MSPL premises and substantially in the premises of SAIL-VISP.** Further, as per clause 1.35, the Fixed facility charges being paid are for the production facility which is defined to be <u>up to the battery limits.</u> In that case, a portion of Fixed Facility Charges is for the production facility and therefore, the same is to be absorbed in the cost of production being incurred by the appellant.

16.3. The said case law of BOC was in the context of setting up of storage tanks in the buyers premises/ pipelines between the assesses factory and buyers premises and was not for a production facility set up like in the present case. So the cost being incurred/ being paid was beyond the place of production whereas in the present case the reimbursement of Fixed facility charges is toward the production facility charges being recovered over a period of time and as worded in the agreement is for the supply of gases and therefore would have to be essentially part of the value and added as additional consideration to the value being charged for the gases. Also, the said decision was one of the decisions under consideration by the Larger bench of the Apex court in the Grasim industries case wherein the principle of value addition if attributable to the goods under manufacture, especially after the amendment to the valuation provisions under Central Excise Act and Rules post 2000 have been specifically upheld.

16.4. In view of the above, it is evident that if any of the Fixed Facility Charges are attributable to have a nexus with the production facility the charges thereof need to be apportioned towards the cost of the Gases on the lines of established methods of costing, in view of the Hon'ble Supreme Court's decision in the case of Grasim Industries (supra). We find that the same has been done in a very gross manner leading to the valuation of Oxygen in certain months to an absurd level. Also, we find that the Authorities have not apportioned the charges separately to Oxygen and Argon Gases in the months in which both of them were supplied.

16.5. Therefore, while upholding in principle that Fixed Facility Charges attributable to production facilities within the factory of the appellants and having nexus with the costing of Gases supplied to M/s. SAIL-VISP are includable in the assessable value of the gases, we find that the entire issue of costing has to be gone into afresh. The Fixed Facility Charges have to be apportioned properly between the production facilities in the appellant's factory as well as in the customers' premises. Thereafter, if any such charges are attributable to the production of Gases supplied to the customers, the charges may be included in the value of the Gases supplied by the appellants. For this purpose, issue in respect of all the SCNs required to be looked into afresh by the concerned authorities. Therefore, the matter requires to be remanded to the Original Adjudicating Authorities. It is suggested that, if need be, the said authorities would utilise the services of a Cost Accountant for this purpose.

16.6. Coming to the Appeal at S.No. 1 i.e. E/866/2008, we find that SCN issued on 14.02.2008 covering a period August 2006 to September 2007. It is on record that the appellant has submitted a copy of the agreement dated 11.08.2005 with SAIL-VISP to the office of the Asst. Commissioner, Central Excise, Assam at the time of obtaining registration in March 2006. The appellants have also been submitting ER-1 Returns from the month of August 2006 onwards. Moreover, the jurisdiction of Superintendent has an office within the vicinity of SAIL-VISP. Therefore, we find that extended period cannot be invoked in respect of that SCN and the demand needs to be restricted to normal period.

16.7. The appellants have contended that their activity of providing facilities to their customers comes under "supply of tangible goods" as defined under Section 65 (105) (zzzz) of the Finance Act, 1994 from 16.05.2008. We find that Ld. Commissioner has given a finding that as the ownership of the goods are with the appellant and the same have not been sent out of the registered premises of the appellant for use by the Buyer. The equipment having been installed, with due availment of CENVAT Credit towards the same as brought out in the previous paras is part of the production facility of the appellant and has **not been given out for use** by the buyer. In the scenario of Supply of Tangible goods, the production/manufacture or service rendered by using the said goods will happen at the receiver's end who is entitled to use the said goods. The supplier of the Tangible goods will have no ownership of the produce/ activity emanating from such goods. In the instant case the appellant retains total control over the production facility and the produce thereof. This is obvious from Clauses 4.11 and 5.5 of the aforesaid agreement and the appellant undertaking to pay the Central Excise duty on the produce generated during manufacture using the said goods. We are in agreement with the findings of the Commissioner and we find no reason to consider the submissions of the appellants in this regard.

16.8. The appellants have also submitted that their unit as well as SAIL-VSIP are to be treated as a single factory together and as such the benefit of Notification No. 67/95 for captively consumed goods should be made applicable. The Ld. AR submitted that this is a fresh ground being taken now in appeal before CESTAT and has not been agitated before the adjudicating authority. The said notification would be inapplicable as the assessee being an independent manufacturer has not produced any interim inputs which go into a taxable final product cleared by themselves to avail exemption. The Assessee has manufactured Gases from Air and there are no interim inputs. The appellants cited certain case law. We find that in ***Dhampur sugar mil***ls (Supra), a case of multiple divisions of the same entity who have obtained independent central excise registrations were discussed. In ***Mukund Ltd*** (Supra) availment of Cenvat Credit by one of the Steel manufactures on the gases supplied as inputs by M/s PRAXAIR was discussed. In ***Vikram Cements and Madras Cements*** the issue of Cenvat Credit eligibility of Inputs used for Captive consumption in an integrated facility was discussed.

14. In view of the above, all the impugned orders are set aside and appeals are allowed by way of remand in view of the discussion above for afresh consideration and proper apportionment of the

Fixed Facility Charges to the cost of the gases supplied by the appellants. Further, it is directed in respect of the impugned order in Appeal No. E/866/2008, the demand will be restricted to normal period.

(Order was pronounced
in Open Court on **10/01/2019**)

P. ANJANI KUMAR	**S.S GARG**
TECHNICAL MEMBER	**JUDICIAL MEMBER**

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