IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Misc. Application (ROA) No.420/2012 and
Appeal Nos.ST/155/2007, ST/156 & 157/2007

(Arising out of Order-in-Original No.20/S.Tax/Commr/2006 dated 28.11.06 passed by the Commissioner of Central Excise & Service Tax, Jamshedpur)

Shri Indrajit Mookherjee
Shri N.Ravichandar
M/s. Praxair India Pvt. Ltd.

…APPELLANT(S)

VERSUS

Commissioner of Central Excise & Service Tax, JSR …RESPONDENT (S)

APPEARANCE
Shri C.Murlidhara, Advocate for the Appellant
Shri S.S.Chattopadhyaya, Suptd.(AR) for the Respondent.

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing/Decision : 26.11.2018

ORDER NO.FO/76984-76986/2018

Per Bench :

The Misc. Application has been filed for restoration of appeal which was dismissed on 13.09.2012 vide the Tribunal Final Order No.A-660-662/Kol/2012 for non-prosecution.

2. Ld. Advocate appearing on behalf of the applicant/appellant submits that the Authorised Representative was out of station and accordingly, they could not be present in the proceedings before the Tribunal.

3. Ld. D.R. has no objection in restoring the appeal.

4. In view of the submissions made by the ld. Advocate for the applicant/appellant and the reasons as mentioned in the Misc. Application,

the final order dated 13.09.2012 is recalled and the appeals are restored to its original number.

5. The present set of appeals are against the Order-in-Original No.20/S.Tax/Commr/2006 dated 28.11.06. Vide the impugned order, the adjudicating authority has demanded the payment of service tax from M/s. Praxair India Pvt. Ltd. (PIPL). He has also imposed penalties on PIPL under various sections of the Finance Act, 1994. In addition, personal penalties have been imposed on Shri Indrajit Mookherjee, the then Managing Director as well as Shri N.Ravichandar, the then Manager (Corporate) of the PIPL.

6. PIPL was engaged in the manufacture and supply of Industrial Gases such as Oxygen and Nitrogen. In addition to having air separation plants and pump filling stations across the country, the appellants also erected storage tank at the premises of their customers to facilitate storage of their products. The appellants also construct oxygen and nitrogen plants at the customers' premises and lease it out to the customers. They also undertake maintenance and repair of such plants.

7. The dispute in the present case revolves around the agreement dated 11.07.2001 entered by PIPL with M/s. Usha Martin Ltd. (UML). After scrutiny of the said agreement and books of accounts of PIPL, Revenue was of the view that PIPL was liable for payment of service tax under the category of 'Banking and other Financial Services' falling under Section 65(12) of the Finance Act, 1994; 'Maintenance or Repair Service under Section 65(64) and also 'Storage and Warehousing Service' under Section 65(12) ibid. Show cause notice was issued for demand of service tax under the above categories for the period August 2002 to July, 2005. The impugned order is challenged in the present appeals.

8. Heard Shri C.Murlidhara, Advocate for the Appellant as well as Shri S.S.Chattopadhyaya, Suptd.(AR) for the Respondent.

9. Ld. Advocate submitted that the same dispute with reference to the appellants operations came up before the Bangalore Bench of the Tribunal and was decided vide Final Order No.21485-21490/2018 dated 03.10.2018. The issue came up before the Bangalore Bench since PIPL got themselves registered as with LTU at Bangalore. The dispute in the present appeals is the which was considered by the Bangalore Bench, but for the earlier period. Further submissions of the ld. Advocate is summarized below:

i) By relying on the findings of the Bangalore Bench, he submitted that the service of 'Banking or Financial Service' was brought under the tax net w.e.f 16.07.2001. Board has clarified vide their Circular dated 09.07.2001 (issued at the time of including the above service), that the above service will not cover those agreements which were executed prior to 16.07.2001 subject to the further condition that the goods in question have also been received prior to 16.07.2001. He emphasized the fact that the Bangalore Bench has held that since the agreement is dated 11.07.2001 (i.e. prior to 16.07.2001) and the goods have also been received prior to 16.07.2001, there is no liability for service tax under the category of Banking or Financial Services.

ii) The second issue is pertaining to the Management, Maintenance or Repair service. He submitted that in terms of the agreement with UML, PIPL carried operations as well as management of the oxygen plant at UML. PIPL has already discharged the service tax in respect of the consideration apportionable for maintenance; as such he submitted that the demand for service tax made on the whole amount of consideration (including operation as well as maintenance) is not justified.

iii) With reference to the demand under the category of storage and warehousing service, he relied on the Bangalore Bench decision to the effect that the activity, in terms of the separate agreement with UML is not covered by the definition of storage and warehousing service.

10. Ld. DR justified the impugned order.

11. We have heard both sides at length and perused the appeal records.

12. We have considered carefully the decision of the coordinate Bench at Bangalore vide decision dated 03.10.2018. We note that the dispute revolves around the agreement dated 11.07.2001 entered into by PIPL with their customer UML. The very same agreement was considered by the Bangalore Bench with reference to the service tax demand made against PIPL. The Tribunal held that there is no liability for payment of service tax since the agreement for lease was executed prior to the date of introduction of the Banking or Financial Services i.e. 16.07.2001. Since the very same agreement for an earlier period is before us, we find no reason to take a different view.

13. The second dispute is with reference to the demand under Management, Maintenance or Repair service. In terms of the agreement entered into by PIPL with UML dated 30.12.2006, PIPL was required to carry out operations and maintenance of the plant and by way of consideration, UML will pay PIPL the amounts as specified in Schedule 4 of the agreement. After careful consideration of the agreement the Bangalore Bench upheld the demand of service tax under the above category. Since the dispute in the present case is very same, we find no reason to take a different view.

14. The third limb of the dispute is regarding levy of service tax under the category of storage and warehousing service. In terms of the agreement dated 01.08.1999 with UML, PIPL has delivered oxygen storage installation and permitted UML to use the storage facility subject to Clause-N of the agreement. After considering the agreement the Bangalore Bench has come to the conclusion that the service rendered by PIPL to UML will not come under storage and warehousing service and accordingly has set aside the demand for service tax. Being identical, in the present dispute also we find no reason to take a different view. The detailed finding of the Bangalore Bench are reproduced below leading the conclusions outlined above.

> *"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 ST/496/2008, ST/973/2009, ST/1874/2010, ST/1339/2011, ST/664/2011, ST/2959/2012 12 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 ST/496/2008, ST/973/2009, ST/1874/2010, ST/1339/2011, ST/664/2011, ST/2959/2012 13 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 ST/496/2008, ST/973/2009, ST/1874/2010, ST/1339/2011, ST/664/2011, ST/2959/2012 14 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: - ST/496/2008, ST/973/2009, ST/1874/2010, ST/1339/2011, ST/664/2011, ST/2959/2012 15 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." ST/496/2008, ST/973/2009, ST/1874/2010, ST/1339/2011, ST/664/2011, ST/2959/2012 16 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. ST/496/2008, ST/973/2009, ST/1874/2010, ST/1339/2011, ST/664/2011, ST/2959/2012 17 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 ST/496/2008, ST/973/2009, ST/1874/2010, ST/1339/2011, ST/664/2011, ST/2959/2012 18 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 ST/496/2008, ST/973/2009, ST/1874/2010, ST/1339/2011, ST/664/2011, ST/2959/2012 19 „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."*

15. By following the above decision, we set aside the penalties also.

16. In the result, the Appeal Nos. ST/155-157/2007 are restored and Misc. Application (ROA) allowed. Appeal No.ST/155-156/2007 are allowed. Appeal No.ST/157/2007 is partly allowed.

(Dictated and Pronounced in the Open Court)

S/d. S/d.

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(V.Padmanabhan)
MEMBER (TECHNICAL)

ss