IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No. 422 of 2012

(Arising out of the Order-in-Appeal No. 43/JSR/2012 dated 30.03.2012 passed by Commissioner of Central Excise & Service Tax, Ranchi.)

M/s NLC Nalco India Limited,
(Now known as Nalco Water India Limited)
DM Water Plant, Power House, 5, Tata Steel Ltd, Jamshedpur,

...Appellant (s)

VERSUS

Commissioner of Central Excise & Service Tax, Ranchi,
605, Mahabir Tower, Main Road, Ranchi-834001.
. ...**Respondent(s)**

APPERANCE :
Shri Arbind Beheti, Advocate for the Appellant
Shri S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...77673/2023

DATE OF HEARING : 01.12.2023
DATE OF DECISION : 01.12.2023

PER K. ANPAZHAKAN :

The present appeal has been filed against the impugned Order-in-Appeal dated 30,03,2012, passed by the Commissioner of Central excise and Service Tax, Ranchi. The present proceedings is limited to the confirmation of demand of Rs. 11,52,192/- along with equivalent penalty for the extended period of limitation.

2. The Appellant M/s. NLC Nalco India Limited had set up a plant inside the premises of Tata Steel and Iron Company Limited (TISCO) for the supply of De-Mineralised water (DM Water) in terms of an agreement dated 06 December 2004. The Appellant sought clarification from the authorities regarding the excitability and classification of the DM Water vide its letter dated 08 December 2005, enclosing therewith a copy of the agreement dated 06 December 2004. As no reply was received from the authorities, the Appellant began to discharge excise duty on the DM

water and duly disclosed the same in the ER -1 returns filed by them for the relevant period. With respect to the “facility charges” recovered from TISCO in terms of Para 7.15.2 of the agreement, since the same is payable towards the fixed assets developed/ deployed and the operation and maintenance of the same, irrespective of the supply of DM water, the Appellant was under the bonafide belief that the same did not merit inclusion in the assessable value. According to the Appellant their belief was supported by the decision in the case of **BOC India Limited vs. CCE, Jamshedpur .**

3. A Show Cause Notice dated 04 January 2007 was issued to the Appellant proposing to demand duty of Rs. 43,20,720/- by including the 'facility charges' in the assessable value of the goods, by invoking the extended period of limitation. The Notice was adjudicated vide order dated 30.11.2007, confirming the demands. The said order was challenged before the Ld. Appellate Authority by the Appellant who remanded the matter back to the adjudicating authority for consideration of the point of limitation. In the de-novo proceedings, the Ld. Adjudicating Authority dropped the demand to the tune of Rs. 11,52,192/- for being hit by limitation and confirmed the demand of Rs. 31,68,528/-.The said de-novo order was challenged before the Ld. Commissioner (Appeals) by the department. The Ld. Commissioner (Appeals), vide his Order-In-Appeal dated 30.03.2012 held that the 'facility charges' are includable in the assessable value and confirmed the demand dropped by the original adjudicating authority on the ground that the letter dated 08.12.2005 did not disclose whether the said charge would form a part of the transaction value or would be collected separately. Aggrieved against the impugned order of the Commissioner (Appeals), the Appellant filed the present appeal.

4. The Appellant submits that there was no deliberate withholding of information from the department so as to justify suppression of facts and the factum of the realization of 'facility charge' was well known to the department pursuant to the sharing of the agreement dated 06 December 2004 vide letter dated 08 December 2005. The contention of the Appellant is that they addressed a letter dated 08.12.2005 to the concerned authorities seeking clarification on the excisability and

classification of the DM water. A copy of the agreement entered into between them and TISCO was also enclosed along with the said letter**.** Para 7.15.2 of the said agreement clearly states that the Appellant would be recovering Facility Charge to the tune of Rs. 17.65 lakhs on a monthly basis from TISCO. As such, the fact of collection of the facility charge was made known to the department vide the letter dated 08.12.2005. The same has also been acknowledged by the Ld. Adjudicating Authority in the de-novo order dated 24.03.2010. Thus, the Appellant contented that there is no suppression of facts involved in this case and the demand confirmed by invoking the extended period of limitation is not sustainable and prayed for setting aside the same.

5. The Ld. D.R. reiterated the findings in the impugned order.

6. Heard both sides and perused the appeal documents.

7. We observe that the issue involved in the present appeal is whether 'facility charges' collected by the Appellant from TISCO is includable in the assessable value or not for the purpose of computing the duty liability. Also, whether extended period of limitation can be invoked or not to demand duty and imposing penalty in this case. The Appellant submits that they sought clarification from the authorities regarding the excisability and classification of the DM Water vide their letter dated 08 December 2005, enclosing therewith a copy of the agreement dated 06 December 2004. As no reply was received from the authorities, they began to discharge excise duty on DM water and duly disclosed the same in the ER -1 returns filed by them for the relevant period. Thus, they contended that there is no suppression of facts involved in this case.

8. We observe that 'facility charges' are recovered from TISCO in terms of Para 7.15.2 of the agreement. These charges are payable towards the fixed assets developed/ deployed and the operation and maintenance of the same, irrespective of the supply of DM water. The Appellant submits that they were under the bonafide belief that the same did not merit inclusion in the assessable value. We observe that contention of the Appellant is supported by the decision of the Tribunal, Kolkata in the case of BOC India Limited vs. CCE, Jamshedpur. In the said decision, the Tribunal kolkata has held that the 'facility charges'

collected by the assessee from those customers on whose factory they have erected and maintained Vacuum Insulated Storage Tank, is not includable in the assessable value as these charges are no way connected with the sale of gases. The relevant part of the said decision is reproduced below:

> ***6.*** *In present case also the supply of services i.e. maintenance, construction of VIST and the pipeline was not a manufacturing activity and was ancillary to the supply of gases but it was not strictly incidental duty. There are classes of persons who can take either these gases without supply of the VIST by the manufacturer. In such cases, the question of charging facility charges would not arise. The present appeal is fully covered by the decision rendered in the case of Inox Air Products Ltd. v. Commissioner of Central Excise, Mumbai-VII reported in 2002 (144) E.L.T. 359 (Tri.-Mumbai) and 2004 (164) E.L.T. 257 Grasim Industries v. Commissioner of Central Excise, Indore. The purported demand of duty of Rs. 4,10,240/-, Rs. 5,12,800/- & Rs. 31,801/- even otherwise is illegal. These demands have been confirmed on the basis that the facility charges from the TELCO/TISCO for the period from April, 2001 to December, 2001 were receivable by the appellant. The agreement dated 13-12-1997 with TELCO was due to expire on 1-12-2001 but it was terminated in advance on 1-4-2001. Similarly, the demands relates to the facility charges allegedly receivable from TISCO, Eastern Railway, Chittaranjan Locomotive Works. Just like in the case of TELCO, the agreement with the aforesaid three parties were also terminated in advance and after such termination neither any facility were rendered nor any maintenance was provided and no such facility charges were charged.*
>
> ***7.*** *It can be concluded that the facility charges are not in any way related to or connected with the sale of gases. We find that the facility charges are payable at all times so long as the installations are being used by the customer irrespective of whether there is a supply of gas and irrespective of the quantity supplied. There is no difference in price of the product in respect of the goods supplied from whom facility charges are not being recovered. So we hold that facility charges need not be included in the assessable value.*

8. In view of the decision cited above, the Appellant submits that they were under the bona fide belief that no duty was required to be discharged on the 'facility charges' recovered from TISCO. We find merit in the contention of the appellant. We find that the decision of the CESTAT, Kolkata in the case of **BOC India Limited Vs. CCE, Jamshedpur** was affirmed by the Hon'ble Supreme Court in the case of **Commissioner of Central Excise Vs. Linde (India) Limited [(2023) 12 Centax 122]**. Thus, we find merit in the contention of the Appellant that there is no suppression of fact involved in this case. We observe that penalty cannot be imposed when the Appellant is acting under a bona fide belief **.** This view has been held by the Hon'ble Supreme Court in the case of **EID Parry Vs. ACCT AIR 2000 SC 551 (SC).** By following the decisions cited above, we hold that extended period of limitation is not invocable in this case and for the same reason no penalty imposable on the Appellant. Accordingly, we set aside the demand of duty confirmed in the impugned order and the penalty imposed, by invoking the extended period of limitation.

9. In view of the discussion above, we set aside the impugned order and allow the appeal filed by the appellant.

(Dictated and pronounced in the open Court)

(R. Muralidhar)
Member (Judicial)

(K. Anpazhakan)
Member (Technical)

Tushar