IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

EXCISE APPEAL NO.1534/2011

(Arising out of Order-in-Original No.36/BR-36/Th-1/2011 dated 21.07.2011 passed by the Commissioner of Central Excise, Thane I)

M/s. Inox Air Products Ltd .....**Appellant**
7th Floor, Ceejay House,
Dr. Annie Besant Road, Worli,
Mumbai 400 018

Vs.

Commissioner of Central Excise, Thane-I ...**Respondent**
4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (W)
Mumbai 400 028

<u>Appearance</u>

Shri Gajendra Jain, Advocate for the appellant

Shri Ajay Kumar, ADC (AR) for the respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

ORDER NO. A/87046/2019

Date of hearing : 18.06.2019
Date of decision : 18.06.2019

Per : **Shri P Anjani Kumar**

The appellants, M/s Inox Air products, engaged in the manufacture of Nitrogen Gas falling under 2804 3000 of CETA, have entered into an agreement dated 24.11.2003 with JSW Steel Company Limited (hereinafter referred as “JSW”) for twelve years starting from 19.1.2004 for continuous supply of nitrogen gas on principal to principal basis. The appellants installed a Cryogenic Nitrogen Plant in the space provided by JSW. The appellants use two distinct streams of production of nitrogen supplied to M/s JSW i.e. (i) By separating nitrogen from atmospheric air and (ii) by Conversion of bought out liquid nitrogen into nitrogen gas by heat exchange process, when there is power failure. In order to maintain uninterrupted nitrogen gas supply to JSW, the appellants keep a stock of liquid nitrogen purchased and maintained in the vacuum insulated storage tank at a temperature of – 196 deg C (which is its boiling point).

2. The agreement provides for different pricing of Nitrogen emanating from different streams i.e. Rs.1.90 per cubic meter in case of conversion from air and Rs.14.19 per cubic meter in case of conversion from liquid nitrogen. During the period April 2006 to August 2010, the quantum of different streams of nitrogen, supplied to M/s JSW, was 2,06,98,792 (99.56%) and 91,906 (0.44%) cubic meters respectively. As per department, the appellants have procured liquid nitrogen gas @Rs.7 to Rs.10 per cubic meter and sold the same at Rs.1.90 per cubic meter and therefore the appellants have undervalued the nitrogen gas sold to JSW and as such transaction value is liable to be rejected and the actual value requires to be re-determined under residuary rule i.e. Rule 11 of the Valuation Rules, 2000. Show Cause Notice dated 21.4.2011, covering the Period April 2006 to August 2010, seeking recovery of excise duty of Rs 1,20,22,633, was issued to the appellants. Commissioner of Central Excise, vide impugned order dated 21.7.2011, confirmed the demand along with equal penalty under section 11AC of CE, act, 1944.

3. Learned counsel for the appellants submits that the appellants have manufactured and cleared the final products to their customers for a price; therefore, the assessable value of the final product is to be determined in terms of Section 4(1) (a) of the Central Excise Act, 1944 for payment of excise duty on the basis of transaction value; appellants have cleared nitrogen gas at the rate of 1.90 per cubic meter and in case of power failure at the rate of Rs.14.19 per cubic meter i.e. price agreed between the appellants and JSW and have paid excise duty on the correct transaction value; when the transaction value itself is available, the there is no need to determine the assessable value in terms of Section 4(1)(b) read with Rule 11 of the Valuation Rules; value determined on the basis of the purchase price of liquid nitrogen cannot be applied to the quantity of nitrogen gas manufactured from atmospheric air; value has to be determined in respect of each removal.

4. Learned counsel for the appellants further submits that the entire demand is based on assumption and presumption and therefore impugned Order-in-Original is liable to be set aside; the assumptions of the department appear to be that the entire quantity of nitrogen gas is manufactured out of liquid nitrogen and that one cubic meter of liquid nitrogen is used for the manufacture of one cubic meter nitrogen gas; department conveniently ignored that fact that they manufactured substantial quantity i.e. 99.56% of total production of nitrogen and only a negligible quantity i.e. 0.44% was produced from liquid nitrogen when there is no electricity supply; department has not produced any evidence to show that entire quantity of nitrogen gas was manufactured from liquid nitrogen; department has not produced any technical literature to show that one cubic meter of liquid nitrogen is used for the manufacture of one cubic meter nitrogen gas; in one process no input is required i.e. liquid nitrogen is not required whereas in the other process, liquid nitrogen is required; department cannot apply the value determined on the basis of the purchase price of liquid nitrogen to the quantity of nitrogen gas manufactured form atmospheric air; in view of Apex Court's judgement in Oudh Sugar Mills Ltd Vs UOI – 1978 (2) ELT (J172) (SC), the order is bad in Law; further, the department has not determined the assessable value in accordance with the best judgement assessment; department assumes cost which was never ever incurred; there is no place for nationality in Section 4 valuation & much so in best judgement assessment.

5. Learned counsel for the appellants also submits that Appellants have already discharged excise duty, of Rs.39,15,033, in respect of water and electricity supplied free of cost by JSW and therefore the appellants have complied with Rule 6 of the Valuation Rules. Alternatively, appellants submit that entire nitrogen gas supplied by the appellants is captively consumed by JSW in the manufacture of final product and therefore, no duty is required to be paid by the appellants in terms of Notification No.67/95-CE dated 16.3.1995. Moreover, entire exercise of demanding differential duty from the appellants in respect of nitrogen gas cleared to sister units in the present case is revenue neutral as the recipient units are taking credit of duty paid by the appellants and also recipient units are paying duty in respect of the finished goods cleared by them. Hon'ble Supreme Court in the following decisions held that when demand raised for differential duty is clearly revenue neutral exercise then such demand is not sustainable; Hence, the demand of interest is liable to be set aside.

(i) CCE & C (Appeals) Ahmedabad Vs Narayan Polyplast 2005 (179) ELT 20 (SC)

(ii) CCE & C Vadodara Vs Narmada Chemtur Pharmaceuticals Ltd. 2005 (179) ELT 276 (SC)
(iii) CCE Vs. Textile Corporation 2008 (231) ELT 195 (SC)
(iv) CCE Vs. Jamshedpur Beverages 2007 (214) ELT 321 (SC)
(v) CCE Vs. Coca Cola India (Pvt.) Ltd. 2007 (213) ELT 490 (SC)
(vi) SRF Ltd Vs CCE – 2007 (220) ELT 201 (T) (affirmed by the Hon'ble Supreme Court 2016 (331) ELT A138 (SC);
(vii) CCE Vs. Special Steel Limited – 2015 (329) ELT 449 (T) (affirmed by the Hon'ble Supreme Court (334) ELT A123 (SC).
(viii) Siddeswar Textile Mills Pvt. Ltd Vs CCE – 2009 (93) RLT 143. (affirmed by the Hon'ble Bombay High Court 2015 (320) ELT 524 (Bom.)
(ix) CCE Vs. Textile Corporation Marathwada Ltd. – 2008 (232) ELT 195 (SC).

6. He further submits that CESTAT in the following cases held that demand raised on one factory of the assessee was held to be not sustainable since the same is available as credit to the other factory of the same assessee in which the first factory had cleared the goods:

(i). Mafatlal Industries Ltd Vs CCE Daman 2009 (90 RLT 238 (T) (Affirmed by Supreme Court reported as 2010 (255) ELT A77 (SC))
(ii). CCE Vs. Crystal Quinone (P) Ltd 2009 (233) ELT 499 (T)

7. Learned Counsel further submits that the demand beyond the normal period of limitation is not maintainable; there is no suppression of fact and much less with intent to evade payment of duty; no evidences have been produced by the department to show that the appellants have willfully suppressed any fact or misstated any fact or had acted fraudulently with an intention to evade payment of duty; in the absence of any such evidence, the appellants submit that the allegation of deliberate intent to evade payment of duty is not sustainable; present case is one of pure interpretation on question of law and accordingly, the demand beyond normal period of limitation is not maintainable; they have maintained all the records and also filed statutory returns from time to time; no suppression of fact in the records or returns filed by them was alleged; hence, extended period of limitation cannot be invoked; Hon'ble Supreme Court in the case of CCE Vs. Nirlon Limited – 2015 (320) ELT 22 (SC) held that extended period of limitation cannot be in case of revenue neutral situation; all the material facts relating to the nature of goods and valuation practices adopted by the appellants were known to the department; records were always available for scrutiny to the department; appellants have not contravened any provisions of the Rules; issue involved is an interpretation of the permission of the law. Therefore, no penalty is imposable on the appellants.

8. Learned AR, appearing for the Revenue, reiterates the findings of the OIO and submits that the appellant are a startup unit in the premises of M/s. JSW Ltd (JSWL) which was consuming the whole N_2 as per agreement made by them with IAPL for onsite supply of gases and this agreement was valid for 12 years; as per agreement the Appellant is taking water, electricity, and Structure/building facility free of charge for supply of N_2 gas to M/s. JSW Ltd; Appellant procured the gas from M/s. Essar Steel Ltd (ESL) and other units located at Patal Ganga, Pen, and Raigarh District; Appellant procured the N_2 gas from ESL at the rate ranging from Rs.7/- to 10/- per M3 unit of sale; in the event of failure of electricity and contingencies charged electricity bill as well as diesel charges to the assessee and in such a situation IAPL charged JSWL@ 9.25 per M3 on payment of central excise duty; so there exits commercial relationship in which IAPL and JSWL where IAPL is clearing the N_2 Gas to JSWL at the rate Rs.7/- to 10/- per M3 which is not a commercially feasible.

9. Learned AR further submits that in view of the above**,** the transaction value under Section 4(1) (a) is rejected and resort to Rule 11 (Reasonable method) read with Rule 8 (Cost construction basis) of Central Excise Valuation Rules 2000 is taken for to arrive at the value. Learned AR explains the manner of calculation based on the price of liquid nitrogen and submits that the additional consideration is the difference between the rates of N2 from Rs.1.90 per M^3 to Rs.7.83 per Sq.M^3; there is violation by the assesse in this case is in terms of Rule 4(1) (b) Read with Rule 11 read with Rule 6 r/w Rule 7 and Rule 8 of the Central Excise Valuation Rules 2000 and liable for interest and penalty as confirmed in O/O; during the period from 2006-07 to 2010-11 (up to August 2010), appellants cleared N_2 (Nitrogen) gas of quantity of 2,07,90,698 M^3 to JSWL and the total value works out to be Rs.16,27,91,165; accordingly the central excise duty at different rates work out to be Rs.2,12,36,233/- out of which the amount of Rs.93,13,699/- is already paid Rs.1,20,22,633/- required to be paid by them.

10. The appellants did not disclose, the additional consideration received by them, to the department and thus have suppressed the material facts from the department with intent to evade the duty on the said excisable goods; these facts would have not been revealed but for scrutiny of the records; hence, proviso to section 11A(1) of the Central Excise 1944 is invokable and accordingly the appellants are liable to pay interest under Section of 11AB of CEA, 1944 and Penalty under Section 11AC ibid. he relies upon the following cases in support of department's contention:

(i). Tamil Nadu Petro Products Ltd V/s CCE Chennai 2006(205) ELT 1002 (Tri- Chennai) & (2007(216) ELT A133 (S.C.)

(ii). CCE Nagpur Vs PC Pole Factory 2006 (199) ELT 865 (Tri-Mumbai)

(iii). Commissioner V/s Eicher Motors Ltd 2007 (216) ELT A133 (S.C.)

11. Heard both sides and perused the records of the case. Brief issue involved in the case is to decide whether the appellants are required to discharge Central Excise duty on the Nitrogen Gas manufactured and cleared by them to M/s. JSW. The appellants submit that they are manufacturing the said Nitrogen Gas under two different streams. In one stream they are just separating the Nitrogen Gas from the freely available air, whereas in the other they are manufacturing from Liquid Nitrogen purchased by them and preserved at a constant temperature. The second process of manufacture of Nitrogen is sparingly used only in case of electricity failure in the factory. The agreement entered into by the appellant with M/s. JSW provides for differential pricing of the goods i.e. Rs.1.90 when drawn from air and Rs.14.19 for cubic meter when processed from Liquid Nitrogen. The department contends that the appellants have procured liquid Nitrogen Gas at the rate of Rs.7 to Rs.10 per cubic meter and sold the same to M/s. JSW at the rate of Rs.1.90 per cubic meter and thus the appellants have under valued the nitrogen gas sold to M/s. JSW. Department seeks to arrive at the value of the nitrogen supplied by the Appellants to M/s. JSW in terms of Rule 11 of the valuation Rule 2000 and arrived at the value of Rs.7.83 per cubic meter calculating the same at the base value of liquid nitrogen purchased by the Appellants.

12. The Appellants contend that they are paying excise duty on transaction value depending on the source of nitrogen supplied to M/s. JSW. Therefore, in the present case all the circumstances specified under Section 41(a) of Central Excise Act 1944 are satisfied. Therefore, duty should be charged in terms of Section 41(a) only and there was no need to arrive at the assessable value in terms of Section 4(1)(b) of Central

Excise Act, 1944. We find that with effect from 2000 the concept of value has changed in the Central Excise Parlance. The concept of “transaction value” has been put in place instead of the “normal price” existing earlier. It is not the case of the department that different transaction values do not exist for the product. It is clearly brought out by the Appellants that in terms of the agreement itself, different prices are available for the Nitrogen manufactured from different streams. We find that these two are differently identifiable transaction and as such there is no bar under Section 41(a) of Central Excise Act, 1944 for the existing of two transaction values, Although for the same product and for the same receiver. It is not the case of the department that the price paid or payable by M/s. JSW to the Appellants has been suppressed and differential amounts were being paid by M/s. JSW to the Appellants. In the absence of any such evidence the department contention that the sale value adopted by the Appellants do not represent the actual transaction value is not sustainable. The agreement between the appellant and the customer clearly brings out the difference in pricing. The higher price adopted was only in respect of the clearance of Nitrogen is made out of Liquid Nitrogen purchased by the Appellants. The appellants demonstrated that such Nitrogen Gas supplied at higher price constituted a mere 4% of the total supplies. Thus, the department contention to value the entire Nitrogen cleared by the Appellants under a special rates is not acceptable. It has been held by the Tribunal and various courts that each transaction is an independent transaction and has to be viewed as such. Just because there is a variation in one of two consignment the value cannot be adopted to the entire consignment in the particularly in the era of assessment based on transaction value. As stated earlier the department has not put forth any evidence to demonstrate that amounts over and above the transaction value were collected by the Appellants. For this reason we find that the case law submitted by Learned A.R. is not on the facts of the case and hence we find that the same is not applicable.

13. During the course of the argument, the appellants also submitted that wherever certain elements like electricity and water are supplied to the Appellants by M/s. JSW, are taken into consideration and the value has been arrived at following Rule 6 of the Central Excise Valuation Rules 2000 and therefore, it is not correct to invoke Rule 11 of the Valuation Rules. On going through the Show Cause Notice and the adjudication order, we find that the same have not taken into account the fact that appellants have arrived at the value in terms of Rule 6 of Central Excise Valuation Rules 2000. It has also not been brought on record as to why the calculation arrived at by the appellants has not been discussed and disposed off before calculating in a different manner. Under the circumstances we find that the matter requires to travel back to the Adjudicating Authority to arrive at the correct assessable value, considering the observations of the bench as above and the submissions of the appellants.

14. In the result the appeal filed by the Appellants is allowed by way of remand. It is directed that *de novo* proceedings shall be completed within four weeks from the receipt of this order.

(Order dictated and pronounced in open court)

(Dr. D.M. Mishra)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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