

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

**S.T.Appeal No.21/08**

(Arising out of Order-in-Original No.16-17/S.Tax/Commissioner/07 dated 08.11.2007 passed by the Commissioner of Central Excise & S.Tax, Jamshedpur)

M/s BOC India Ltd.

Applicant (s)/Appellant (s)

**Vs.**

CCEx & S.Tax, Jamshedpur

Respondent (s)

**Appearance:**

Shri N.K.Kothari, C.A. & Ms.Saheli Dasgupta, Manager (Taxation) for the Appellants(s)

Shri S. S. Chattopadhyay, Supdt. (A.R.) for the Revenue

**CORAM:**

**HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)**  
**HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)**

Date of Hearing : 13.11.2018

Date of Decision : 13.11.2018

ORDER NO...FO/A/76940/2018

**Per Bench :**

The present appeal is against the Order-in-Original No.16-17/S.Tax/Commissioner/07 dated 08.11.2007.

2. The appellant is a manufacturer of various gases including oxygen, nitrogen, argon etc.. They entered into an agreement with M/s Tata Steel Ltd., situated adjacent to their manufacturing factory, for supply of oxygen gas through pipe lines. As per the agreement entered, the appellant installed pipe line supply systems within the premises of its customers. For such supply of gas through pipe lines,

the appellant charged from its customer – (a) variable charges depended upon the quantum of gas supply and (b) monthly charges in the form of “Fixed Facility Charges” as per terms of the agreement. The quantum of gas supplied through pipe lines was measured by making use of meter installed at the boundary wall between the appellant’s factory and their customers. Excise duty was being paid by the appellant on the quantity of oxygen gas supplied as ascertained through the meter. Department was of the view that Fixed Facility Charges recovered from the customers was consideration for service of transportation of gas through pipe lines and the same will be liable to payment of service tax under the category of “transport of goods through pipe lines or other conduit” defined under Section 65 (105)(zzz) of the Finance Act, 1994. Accordingly, after issue of show-cause notice, the impugned order was passed ordering payment of service tax along with interest and penalty under various Sections of the Finance Act, 1994. This order is under challenge in the present appeal.

3. With the above background, we heard Shri N.K.Kothari, Id.C.A. assisted by Ms.Saheli Dasgupta, Manager (Taxation) of the Appellant Company and Shri S.S.Chattopadhyay, Id.D.R. on behalf of the Revenue.

4. The arguments advanced on behalf of the appellant are summarized below :

(i) For the supply of gas through pipe lines to M/s Tata Steel Ltd., the appellant is paying Central Excise duty on the value of gas upto the point of removal, which in this case is the boundary wall

where a meter is fixed. This assessable value includes the cost of gas and a portion of facility charges upto the boundary wall. Excise duty is being paid on such assessable value in terms of the clarification given by CBEC vide Instruction F.No.6/03/2013/CX.1 dated 10.11.2014. For the charges recovered and the supply of gas within the premises of the customers, the appellant has also discharged the service tax under the category of "transportation of gas pipe lines". As such, he submitted that the Department is not justified in demanding service tax on the entire facility charges recovered from the appellants.

(ii) The doubt regarding whether Central Excise duty is to be paid or service tax is to be paid for the facility charges recovered, was requested to be clarified from the jurisdictional Commissioner of Central Excise, BBSR II through the appellant's letter dated 07.01.2014. In respect of their Rourkela Plant, it has been clarified by the Department through their letter dated 21.02.2014 as follows :

"To

*M/s Linde India Ltd.,  
HIG-12, Gangadhar Meher Nagar,  
Jaydev Vihar,  
Bhubaneswar-765013*

*Sub.: Clarification on applicability of Central Excise duty or Service tax on Fixed Facility charges recovered from customers towards setting up production facility for supply of gas-reg.-*

Dear Sirs,

*Reference is invited to your letter dated 07.01.2014 addressed to the Commissioner of Central Excise, Bhubaneswar II Commissionerate, on the above subject.*

*In this connection, it is to inform you that in this case the fixed facility charges recovered from the buyer would be a part of*

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*"transaction value" for the purpose of levy of Central Excise duty, as per your information & documents submitted on this issue.*

*Thanking you,*

*Yours faithfully,*

*Sd/*

*(B.K.Nayak)*

*Assistant Commissioner (Tech),  
Central Excise, Customs & S.Tax,  
Bhubaneswar II"*

(iii) A similar dispute came up before the Delhi Bench of the Tribunal in the appellant's plant situated in Rajasthan. The Delhi Bench vide its Final Order Nos.57664-57665/2017 dated 01.11.2017 took the view that no service tax will be payable once the facility charges are included in the assessable value for payment of Central Excise duty in line with clarification issued by CBEC.

(iv) He also submitted that the Central Excise duty was paid under protest during the period of the present dispute i.e. 16.06.2005 to 30.09.2006 by including facility charges in the assessable value. Since the issue has been clarified by CBEC, the appellant withdraws such protest but submitted that the service tax liability as ordered by the Id.Commissioner is not payable.

5. The Id.D.R. for the Revenue justified the impugned order. He submitted that similar issue in the appellant's own case for an earlier period was decided by this Tribunal Bench in respect of Excise valuation dispute in the case of BOC India Vs. CCEx., Jamshedpur reported in 2005 (183) ELT 475 (Tri.-Kolkata). The Tribunal decided that the facility charges are not includible in the assessable value for payment of Excise duty. He added that if the charges are not

includible in the assessable value, they will be liable to payment of service tax as ordered by the lower authority.

6. Heard both sides and perused the records.

7. As per the facts of the present case, gases are being supplied through pipe lines by the appellant to the customer, M/s Tata Steel Ltd., which is situated in adjacent premises. For this quantum of gases supplied, Excise duty is paid on the quantity measured through meter at the boundary wall between the two factories. It is submitted on behalf of the appellant that all the expenses including portion of the facility charges attributable to gas upto the delivery point i.e. boundary wall, is includible in the assessable value for payment of service tax. Accordingly, it has been argued that no service tax liability arises for the facility services, which is already included in the assessable value. It is further submitted that for the portion of the facility charges attributable to supply of gases within the factory premises of the customers, the service tax stands already paid. We find that an identical dispute pertaining to the appellant's own other unit situated in Rajasthan, came up before Delhi Bench of the Tribunal. The facts in that are slightly different inasmuch as the delivery of gases was not through pipe lines, but through tankers. We find that the ratio of such decision can be applied to the present case. The Tribunal observed in the above case as follows :

*"2. The Id. Consultant appearing for the appellant submitted that the issue has been taken up by a similar manufacturer M/s. Inox Air Products Ltd. with the Government. The Board vide their letter dated 10.11.2014*

*clarified that such fixed facility charges are to form part of the transaction value for the purpose of Central Excise duty. In fact, they also referred the matter to the Jurisdictional Commissioner with reference to their unit at Bhubaneswar. The Commissioner of Central Excise, Bhubaneswar vide his letter dated 24.02.2014 clarified that fixed facility charges are part of transaction value for the purpose of Central Excise duty. The facts and circumstances dealt with in these references are similar to the one under consideration. Accordingly, he submitted that the impugned orders are liable to be set aside.*

*3. The Id. AR reiterated the findings of lower authority and submitted that the applicability of Board clarification dated 10.11.2014 has to be examined.*

*4. We have heard both sides and perused the appeal records. The appellants are engaged in manufacture & supply of gases liable to Central Excise duty They have put up storage facilities inside the clients premises to store such gases for subsequent consumption. For such activity, they are collecting fixed facility charges apart from the sale consideration for the gas. Admittedly, the clarification dated 10.11.2014 issued by the Board on similar set of facts, as well as, the clarification dated 24.04.2014 issued in respect of appellant's unit in Orissa are applicable to the present dispute.*

*5. Accordingly, we hold that the impugned orders are without merit. The same are set aside and the appeals are allowed."*

8. The issue regarding inclusion of fixed facility charges for transportation of gases through pipe lines was clarified by CBEC in respect of M/s Inox Air Products Ltd., Bombay. It was clarified that such fixed facility charges are to form part of the transaction value for the purposes of Central Excise duty.

9. By following the decision in an identical circumstance, by the Delhi Bench of the Tribunal, we conclude that there is no justification for demand of service tax.

10. In the result, the impugned order is set aside and the appeal is allowed.

(Dictated and pronounced in the open court)

Sd/  
**(P.K.Choudhary)**  
**Member (Judicial)**  
mm

Sd/  
**(V.Padmanabhan)**  
**Member (Technical)**