

(2012) 07 BOM CK 0040

In the Bombay High Court

Case No : Central Excise Appeal (L) No. 19 of 2012

Inox Air Products Ltd.

APPELLANT

Vs

Commissioner of Central Excise and Customs, Nagpur

RESPONDENT

Date of Decision : 09-07-2012

Acts Referred:

Finance Act, 1994 — Section 67

Citation : (2012) 286 ELT 26 : (2012) 28 STR 570 : (2012) 36 STT 431

Hon'ble Judges : R.Y. Ganoo, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : V. Shridharan and Jas Sanghavi, for the Appellant; Pradeep S. Jetly and J.B. Mishra, for the Respondent

Judgement

J.P. Devadhar, J.—Whether the CESTAT was justified in directing the appellant to deposit Rs. 1 crore for entertaining the appeal against the order-in-original dated 22nd September 2009 is the question raised in this appeal. The appeal is admitted on the above question and taken up for hearing by consent of both the parties to the appeal. The appellant - assessee is inter alia engaged in setting up air-separation plant (equipments for short) at the customers premises. The said equipments are used for manufacturing the oxygen which is ultimately used by the customers in manufacturing their final products. The equipments owned by the assessee are leased to its customers and the assessee enters into an agreement with the respective customer for operating and maintaining the equipments given on lease at a consideration mutually agreed upon by and between the assessee and its customers.

2. The dispute in the present case relates to the service tax liability of the assessee in relation to the amounts received by the assessee for maintaining and operating the equipments for production of oxygen at the premises of its customer namely Sunflag Iron and Steel Company Limited, Bhandara and M/s. Lloyds Steel Industries, Wardha. It is not in dispute that the oxygen manufactured from the equipments, operated and maintained by the assessee,

at the premises of the customers were used by the said customers in the production of iron and steel items, which are dutiable finished goods.

3. As per the contract entered into by and between the assessee and the steel companies for operating and maintaining the equipment, the assessee had received fixed amount as service charges. The said service charges received by the assessee were liable for service tax and accordingly the assessee had paid service tax on the amount received from the steel companies.

4. By a show-cause notice dated 9th April 2009, the assessee was called upon to show-cause as to why service tax amounting to Rs. 3.31 crore should not be recovered from the assessee on the ground that the assessee was receiving electricity free of cost from the steel companies and since the services could not be rendered without the electricity, the cost of electricity supplied by the customers ought to have been included in the value of taxable service. In other words, by the said show-cause notice, the assessee was called upon to show-cause as to why the value of taxable service should not be enhanced by including the cost of electricity supplied free of cost to the assessee by the customers in the course of rendering the services. The assessee contended that the electricity supplied free of cost was not a consideration received by the assessee for rendering the services and, hence, the same was not includible in the taxable service.

5. By an order-in-original dated 22nd September 2009, the Adjudicating Authority rejected the contention of the assessee and confirmed the tax demand amounting to Rs. 3.31 crores with interest and penalty. Challenging the aforesaid order, the Revenue filed an appeal and the CESTAT by the impugned order dated 16th November 2011 directed the assessee to deposit Rs. 1 crore for entertaining the appeal.

6. On perusal of the order passed by the CESTAT, it is seen that the CESTAT has ordered pre-deposit mainly on the ground that the electricity supplied free of cost by the customers to the assessee being used in the course of rendering the services, the cost of electricity supplied free of cost would form part of the consideration received by the assessee and, therefore, such cost would have to be included in the value of the taxable services.

7. Section 67 of the Finance Act, 1994, reads thus :

67. (1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation. - For the purposes of this section, -

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

8. Rule 3 of Service Tax (Determination of Value) Rules, 2006 reads as under. -

Subject to the provisions of Section 67, the value of taxable service, where the consideration received is not wholly or partly consisting of money, shall be determined by the service provider in the following manner. -

(a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;

(b) where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall in no case be less than the cost of provision of such taxable service.

9. Perusal of the aforesaid provision would show that where the consideration for the services rendered is in terms of money, then the gross amount charged by the service provider would be the value of taxable service. But, where the

consideration for rendering the service is charged partly in terms of money and partly in kind, then, the value taxable service would be the money actually received plus the money equivalent to the consideration received in kind. In the present case, it is the case of the Revenue that since the electricity is supplied free of cost for maintaining and operating the equipments, the cost of electricity supplied shall form part of the consideration received in kind and, hence, the cost of electricity supplied free of cost is liable to be included in the taxable service.

10. Prima facie, we find it difficult to accept the argument of the Revenue that the electricity supplied free of cost is a consideration in kind received by the assessee from its customers. Admittedly, the electricity supplied free of cost is meant to be consumed in the manufacture of oxygen and admittedly the oxygen so manufactured is used by the customers in the manufacture of their final product. It is the customers of the assessee who clear the final product on payment of duty and no benefit accrues to the assessee on such clearances. Thus, the electricity supplied free of cost by the customers to the assessee does not in any way amount to additional consideration received by the assessee in kind.

11. The fact that the cost of electricity used in the manufacture of oxygen has to be considered in determining the excise duty payable on oxygen does not mean that the cost of electricity used in the manufacture of oxygen has also to be considered in determining the value of taxable services because the excise duty is on manufacture, where as, service tax is on the value of consideration received in cash or kind for the services rendered. Therefore, unless the cost of electricity supplied free of cost constitutes the consideration received by the assessee, the cost of electricity would not be includible in the value of taxable service.

12. Instead of supplying the electricity free of cost for the manufacture of oxygen, if the customers were to permit the assessee to purchase electricity from third parties and the customers were to reimburse the cost of electricity, it could not be said that the cost of electricity reimbursed constituted consideration received by the assessee for rendering the services. Similarly, if electricity is supplied free of cost for the manufacture of oxygen and the said oxygen belongs to the customer, then, it cannot be said that the cost of electricity constitutes the consideration in kind received by the assessee.

13. In these circumstances, we are prima facie of the opinion that the sustainability of the demand raised against the assessee being in doubt, it is a fit case for entertaining the appeal without any pre-deposit. Accordingly, the impugned order is set aside and the CESTAT is directed to hear the appeal on merits without insisting on any pre-deposit. We make it clear that our view expressed herein above is a prima facie view and the CESTAT shall pass order on merits without being influenced by this order. All contentions of both the parties are kept open. 15. The appeal is accordingly disposed of in the above terms with no order as to costs.