
(2023) 06 CESTAT CK 0043

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No.41124 Of 2013

M/S.Inox Air Products Ltd

APPELLANT

Vs

Commissioner Of GST & Central Excise

RESPONDENT

Date of Decision : 20-06-2023

Acts Referred:

Citation : (2023) 06 CESTAT CK 0043

Hon'ble Judges : Sulekha Beevi C.S., Member (J);Ajit Kumar, Member (T)

Bench : Division Bench

Advocate : Joseph Prabakar, M. Ambe

Final Decision : Allowed

Judgement

Sulekha Beevi C.S., Member (J)

1. Brief facts are that the appellant is registered with the department for providing various taxable services. They are engaged in the manufacture of goods viz. Liquid Nitrogen, Liquid Oxygen and they supply these goods to various customers. The liquid gases are transported by trucks in special vehicle transport tanks and delivered to the customers as per the requirement. The appellant had entered into agreement with various customers for supply of goods (gases) as well as for providing fixed facilities in the nature of Vacuum Insulated Storage Tanks at the customer's site. On verification of agreements entered between the appellant and their customers, it was found that the appellant installed the said tanks at the customer's premises for continuous supply of nitrogen liquid. The customers are required to provide space for installing the said tanks and free access is given to the appellant for supply of liquid nitrogen gas. Appellant was receiving fixed facility charges (FFC) from their customers for providing such storage tanks. The ownership, control, maintenance and insurance are undertaken by the appellant and the customers are restricted to use the said tanks for storage of the products purchased from the appellant alone. It therefore appeared to the department that the appellant is providing services in

the nature of 'supply of tangible goods'. Show cause notice was issued to the appellant demanding service tax along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand, interest and imposed penalty. On appeal, the Commissioner (Appeals) upheld the same. Hence this appeal.

2. Ld. Counsel Sri Joseph Prabakar appeared and argued for the appellant. It is submitted that the appellant has entered into various agreements with the customers for providing supply of liquid gases as well as providing storage tanks. The ownership of the tanks remains with the appellant and the possession and effective control is with the customer during full term of the agreement. Appellant raises a separate central excise invoice for collecting the amount for providing storage tanks as 'Fixed Facility Charges' (FFC). Appellant paid Excise Duty on the same. Moreover appellant has also paid VAT @ 4 % on the Fixed Facility Charges being the transfer of right to use / deemed sale, under the Puducherry Value Added Tax Act, 2007. The demand is now made alleging that the FFC collected by the appellant is a consideration for providing supply of tangible goods service. The appellant having discharged excise duty and paid VAT on the said FFC collected from the customers, the appellant cannot be further burdened with levy of service tax of the same amount. Ld. Counsel adverted to the Board Circular F.No.6/03/2013-CX.1 dated 10.11.2014 to submit that Board has issued clarifications in relation to levy of Central Excise Duty on the Fixed Facility Charges (FFC) and Minimum-Take-Or-Pay (MTOP) collected by the appellant. The said clarification has been issued specifically in the case of the appellant namely M/s.Inox Air Products Ltd. It is clarified in the said circular that appellant has to discharge Central Excise duty on the FFC and MTOP charges collected.

3. The very same issue as to whether appellant is liable to pay service tax on the FFC collected by them was analyzed by the Tribunal in the case of Goyal MG Gases Private Ltd. – 2022-VIL- 189-CESTAT-KOL-ST. The Tribunal in the said case followed the decision of the Hon'ble High Court of Madras in the appellant's own case in Inox Air Products Pvt. Ltd. Vs UOI - 2020 (38) GSTL 158 (Mad.). Ld. Counsel prayed that the appeal may be allowed.

4. Ld. A.R Sri M. Ambe supported the findings in the impugned order.

5. Heard both sides.

6. The period of dispute is from 16.05.2008 to March 2009. The demand of service tax has been raised on the Fixed Facility Charges collected by the appellant for supply of tanks for storing the liquid gases. Ld. Counsel has explained that they are engaged in the manufacture of liquid gases and the said product being in the nature of liquid gas cannot be supplied to customers without arranging the proper facility for storage. The tanks have been thus bought by the appellant which is installed in the premises of the customer. The appellant collects FFC from the customers and as per the Board circular and directions they

have been discharging excise duty on the said charges.

7. The appellant entertained doubts as to whether FFC has to be included in assessable value for discharging excise duty and also whether credit can be availed of such duty. Though letters were issued to department seeking clarifications, there was no response. The appellant then filed W.P before Hon'ble High Court of Bombay and vide W.P (L) No.123 of 2014 order dated 21.02.2014, as reported in 2014 (305) ELT 106 (Bom.), the Hon'ble High Court directed the Board to issue clarification. Pursuant to this, the Board vide circular dt. 10.11.2014 has clarified that FFC charges has to be included in the assessable value for discharging cenvat credit. It was also clarified that appellant would be eligible for availing credit of the duty paid. The said Board circular reads as under :

"M/s.Inox Air Products Limited (hereinafter referred as INOX) have made several representations in relation to inclusion of Fixed Facility Charges (FFC) and Minimum Take Or Pay (MTOP) charges in the assessable value of the gases being manufactured and supplied to their customers for the purpose of charging central excise duty. INOX have also requested for a clarification regarding admissibility of Cenvat Credit to the buyers of gases. The earlier representations were replied vide letter of even number dated 28th May 2014. Thereafter, INOX have again represented vide their letter dated 25.6.2014.

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5. In view of the same, it is clarified that :

(a) In the months where there is a supply of gas, all elements of consideration such as, price of gas at designated rate per unit of gas and FFC would be added to determine the assessable value for payment of Central Excise duty. In those months, where MTOP is charged, the same shall be added to FFC to determine assessable value.

(b) FFC paid for the months when there was no supply of gases is to be added in the price of gas supplied in the subsequent month, in addition to the price arrived for that month as per (a) above.

(c) If FCC is paid for months during which no gas was supplied and there is no subsequent supply of gas, then FCC paid for months for which there was no supply of gases is to be added to the price of gases supplied in earlier month by way of raising a supplementary invoice in addition to the prices arrived for that month as per (a) above.

(d) Where the gases so supplied are used by another assessee as inputs, admissibility of CENVAT Credit of duty paid on gases as reflected in the invoice for all situations covered in para (a), (b) & (c) above, would be decided in accordance with provisions of CENVAT Credit Rules, 2004."

8. Subsequently, the appellant at Chennai was issued SCN proposing to deny the

credit. The appellant filed writ petition before the Hon'ble jurisdictional High Court, and vide judgment reported in 2020 (38) GSTL 158 (Mad.) Hon'ble High Court held that the department is bound by the clarification issued. It can be seen that ownership of the tanks remains with the appellant and the possession and effective control of the tanks is with the customers during full term of the agreement. The definition of "supply of tangible goods" as per section 65 (zzzzj) defines as "any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances". In the peculiar nature of the products, the appellant has to supply tanks before supply of liquid gases to the customers. Thus the assessee is required to include the value of FFC and MOTP in the transaction value of the gases for discharging the Central Excise duty. The said clarification issued by the Board was considered by the Tribunal in the case of Goyal MG Gases Private Ltd. (supra). The issue considered in the said decision by the Tribunal is whether the FFC collected by the assessee would be taxable under Business Support Service (BSS). During the disputed period, the appellant has been discharging excise duty on the FFC which is not disputed by the department. Since it is also clarified by the Board in the appellant's own case that the said charges have to be included in the transaction value for payment of excise duty, we find no reason to hold that FFC charges are in the nature of consideration received by appellant for providing supply of tangible goods. Relevant Board circular is binding on the department.

9. We therefore find that the impugned order cannot sustain and requires to be set aside, which we hereby do. Appeal is allowed with consequential relief, if any.