CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 52591 OF 2016

(Arising out of Order-in-Original No. DLI-SVTAX-003-COM-44-15-16 dated 31.03.2016 passed by the Commissioner, Service Tax, New Delhi)

Commissioner, Service Tax **...Appellant**
Commissionerate Delhi-III,
New Delhi

Versus

M/s. Spicejet Ltd. **...Respondent**
Cargo Complex, Near Steel Gate Bus Stop,
Indira Gandhi International Airport
Terminal-I, New Delhi- 110037

APPEARANCE:

Shri Prashant Kumar Sinha, Authorized Representative for the Department

Shri B.L. Narasimhan and Shri Shashvat Arya, Advocates for the Respondent

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 18.05.2023
Date of Decision: 03.07.2023

FINAL ORDER NO. 50807/2023

JUSTICE DILIP GUPTA:

This appeal has been filed by the department to assail the order dated 31.03.2016 passed by the Commissioner of Service Tax, Delhi-III, Commissionerate, New Delhi[1] by which the demand of service tax of Rs. 4,01,27,641/- in respect of the excess baggage charges recovered from the passengers by M/s. Spicejet Ltd.[2] has been dropped and the respondent has been allowed CENVAT credit of Rs. 21,54,80,008/-.

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1. **the Commissioner**
2. **the respondent**

2. The respondent was primarily engaged in business of transport of passenger by air, which was earlier exempt from service tax. Accordingly, the respondent adopted rule 6(3A) of the CENVAT Credit Rules, 2004[3] for availing CENVAT credit in proportion to the dutiable services it was providing. In terms of rule 6(3A), the assessee was required to reverse the CENVAT credit every month as per the ratio of dutiable and exempted services provided in the previous financial year, and then by 30th June of following year, re-computation of CENVAT credit was required to be done as per the ratio of current financial year. It was after this that differential amount, if any, was determined and adjusted.

3. For the months of April, May and June of financial year 2010-11, the respondent was reversing 95% of CENVAT credit each month, as adopted from the ratio of dutiable and exempted services for the previous financial year. However, w.e.f., 01.07.2010, transport of passenger by air was made chargeable to tax for first time, making the primary service provided by the respondent taxable. Hence, from July 2010 onwards, the respondent reversed CENVAT credit on the actual basis by adopting ratio of dutiable and exempted services available for each month, which was about 10.69%.

4. During the audit of records of the respondent conducted from 02.05.2012 to 08.05.2012, it was interalia noticed by the department that for the months from July 2010 to March 2011, the respondent had not reversed 95% of CENVAT credit taken by adopting the ratio for the previous financial year, resulting in excess availment of CENVAT credit amounting to Rs. 21,54,80,008. Further, on another

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3. 2004 Credit Rules

issue, it was observed that the respondent had received payment of Rs. 38,95,88,747 towards excess baggage charges from passengers, for which service tax amounting to Rs. 4,01,27,641 was required to be paid in terms of section 65(105)(zzn) of Finance Act, 1994[4] but such tax had not been paid by the respondent. It was also noticed that with effect from 10.09.2004 the services provided by an aircraft operator, in relation to transport of goods by aircraft, came within the ambit of service tax.

5. The respondent submitted a detailed reply dated 03.01.2013 to the audit paragraphs and explained that no excess credit had been availed by the respondent and that the excess baggage charges were not leviable to service tax.

6. However, a show cause notice dated 21.10.2014 was issued to the respondent, proposing the abovementioned demand of CENVAT credit and service tax, by invocation of the extended period of limitation contemplated under section 73(1) of the Finance Act with interest and penalty.

7. The respondent filed a detailed reply dated 14.09.2015 and denied the allegations made in the show cause notice.

8. The Commissioner, by order dated 31.03.2016, dropped the entire demand proposed in the show cause notice. The Commissioner framed the following three main issues to be decided:

(i) Whether CENVAT credit was not allowable as per the provisions of rule 14 of the 2004 Credit Rules read with section 11A of the Central Excise Act, 1944 and penalty under section 15(3) of the 2004 Credit Rules was

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4. the Finance Act

imposable or not for contravention of rule 6(3A) of the 2004 Credit Rules?

(ii) Whether service tax on excess baggage charges recovered from passengers should be leviable or not?

(iii) Whether the provisions of section 73(1) of the Finance Act was invokable for suppression of facts?

9. With respect of the **first issue**, the Commissioner concluded as follows:

> "Here, in this case, the service of "Transport of passengers by Air" was introduced in July, 2010 for the first time. Thus, in the previous year, it was exempted from levy of Service tax. The assessee had computed the tax on the basis of the actual figures (current financial year ration) Rule 6(3A)(h) of the Cenvat Credit Rules, 2004 lays down that in cases where services are being made chargeable to service tax for the first time in the current financial year i.e. in the previous year 100% services were exempt, then in that case no reversal was required to be made of Cenvat and in other words 100% of Cenvat was available for set off against the Output tax. However, at the end of the financial year re-computation was required to be done.
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> In view of the above, I am of the view that the assessee is correct in stating that the ration of the previous year should not be adopted for the purpose of reversing the Cenvat credit in respect of exempted services. Also as per the above Rule, reversal of Cenvat credit is required to be determined on actual basis after end of the financial year as on 30th June and adjustment is required to be made for excess/shortage in reversal of Cenvat credit for exempted services and differential amount is determined to be payable or is adjusted against the final liability. Therefore, if a view is taken to apply the previous year's ratio, then in view of 6(3A)(h), no Cenvat would be available in the current year, if in the previous year 100% services were exempt. Further, as per Rule 6 (3A)(g) of the Cenvat Credit Rule, 2004 information for adjustment is required to be given to the department

within 15 days from the date of such adjustment. The assessee had made the adjustment of tax on 30/06/2012 and accordingly informed the department on 12/7/2012 (within 15 days from the date of adjustment).

Thus, from the above, I am of the view that the demand of Rs. 21.55 crores which has been raised for excess claim of Cenvat during the period July, 2010 to March 2011 is not tenable."

10. With respect of the **second issue**, the Commissioner observed as follows:

"Thus, in the light of the above mentioned facts & in view of the Hon'ble CESTAT's decision, I agree with the assessee's contention that the transport of passenger baggage is indirectly related to the service "Transportation of Passengers by Air Service" and, therefore, charges collected towards excess baggage should be included in the turnover pertaining to "Transportation of Passengers by Air Service". As Service tax on the services of "Transportation of Passengers by Air Service" became applicable w.e.f. 01.07.2010 only, accordingly the demand for the period prior to 01.07.2010 is liable to be dropped. However, for the period 01.07.2010 to 2011-12, service tax was payable at the rate of 10% or Rs. 100 per journey whichever is less. For the said period, the assessee has contended that the benefit of Notification No. 26/2010-ST dated 26.02.2010 was available to them, wherein, it has been clearly mentioned that service tax is chargeable at 10% of the gross value of the ticket or Rs. 100/- per journey, whichever is less. As service tax has been paid by the assessee @ Rs. 100/- per ticket on the total number of tickets sold, even if the consideration towards excess baggage was added in the total value of services, there would be no change in the number of tickets and the service tax amount would be no change in the number of tickets and the service tax amount would remain the same. I agree with this contention of the assessee and hold that the demand of Rs. 4.01 crores raised by the department in relation to excess baggage charges collected from passengers is not sustainable and hence requires to be dropped."

11. With respect of the **third issue** relating to the invocation of the extended period of limitation under section 73(1) of the Finance Act, the Commissioner observed as follows:

> "In view of the discussions in the aforesaid paras extended period of limitation cannot be invoked."

12. In the present case, the show cause notice was issued on 21.10.2014. In regard to the demand of CENVAT credit taken in excess of rule 6(3A) of the 2004 Credit Rules, the period of dispute is from July 2010 to March 2011. In regard to the demand of service tax short paid on excess baggage charges, the period of dispute is from April 2009 to March 2012. In the present case, the entire demand is for the extended period of limitation. The Commissioner has recorded a categorical finding of fact that the extended period of limitation could not have been invoked in the facts and circumstances of the case. This finding has not been assailed by the department in this appeal and the challenge is only to the findings recorded by the Commissioner for dropping the demand proposed in the show cause notice. Thus, in the absence of any challenge to this finding, the extended period of limitation could not have been invoked. When the entire demand proposed in the show cause notice is for the extended period of limitation, the demand proposed in the show cause notice has to be set aside, irrespective of the challenge by the department to the issues on merit.

13. The audit of the statutory records of the respondent was conducted from 02.05.2012 to 08.05.2012. The same issues and demand were suggested in the audit report. The respondent had also been filing ST-3 returns. However, the show cause notice was only

issued on 21.10.2014, i.e. after more than two years of the facts coming to the knowledge of the department. The department could have issued the show cause notice within the normal period of limitation. The extended period of limitation could, therefore, not have been invoked by the department.

14. Thus, for the reasons stated above, the appeal filed by the department deserves to be dismissed and is dismissed.

(Order pronounced on **03.07.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

.JB, Shreya

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(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Shreya