IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI, PRINCIPAL BENCH NEW DELHI
COURT-I

Date of Hearing : **13.02.2017**

Date of Decision : **28.02.2017**

Appeal No. ST/187/2010 - (DB)

[Arising out of the Order in Original No. 53/PKJ/CCE/ADJ/09 dated 10.11.2009 passed by Commissioner Central Excise, Delhi]

Air India Limited … Appellants

vs.

Commissioner of Service Tax, New Delhi … Respondent

AND

Appeal No. ST/191/2010 - (DB)

Commissioner of Service Tax, New Delhi … Appellants

vs.

NACIL (formerly known as Indian Airlines Ltd.) … Respondent

Appearance:

Rep. by Shri P.K. Sahu, Advocate & Shri R.P. Puri, CA for the Appellant
Rep. by Shri Amresh Jain & Shri Sanjay Jain, DRs for the respondent

Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 51976-51977 /2017 -ST (DB)

Per Mr. V. Padmanabhan

This common order is passed to dispose off two appeals, one filed by M/s. National Aviation Company of India Limited (known as AIL) and other by the Revenue. Both the appeals are directed against OIO No. 53/PKJ/CCE/ADJ/09 dated 10.11.2009.

2. The brief facts of the case are that, in the year 2007, AIL (Air India Limited) and IAL (Indian Air Lines Limited) were merged to form AIL. The dispute in the present case pertains to service tax demanded for the period July 2003 to March 2007. During the said period, AIL had a 100% subsidiary in the name of Airline Allied Services Limited (AASL). AIL and AASL entered into a Memorandum of Understanding dated 29.03.1999 for managing the affairs of AASL. They also entered into three agreements namely, (i) Aircraft Lease Agreement (ii) Engineering and Maintenance Agreement, and (iii) Ground Traffic, other Support Services and Handling Agreement. The MOU and the three agreements were entered into with the objective of overall improvement in the work of AIL. The dispute pertains to the question whether service tax is payable by AIL on the activities performed by AIL for AASL under the said agreements. Revenue was of the view that activities carried out by AIL, as per the above agreements, involve services taxable under Finance Act, 1994. Accordingly, show cause notice dated 24.10.2008 was issued and the case was adjudicated and demand of service tax to the extent of Rs. 15.7 Crores (out of Rs. 18.7 Crore in SCN) was confirmed against AIL by the adjudicating authority for rendering services of Business Auxiliary Services. Recovery of interest was also ordered and penalty of amount equal to service tax was also imposed. However, the adjudicating authority dropped the demand for service tax to the extent of Rs. 103.57 Crores. AIL has challenged the demand for service tax amounting to Rs. 18.7 Crores. The Revenue has filed appeal against dropping of service tax demand amounting to Rs. 103.57 Crores.

3. With the above background, we have heard Shri P.K. Sahu, ld. Advocate appearing for AIL as well as Shri Amresh Jain, ld. DR appearing for the Revenue.

4. The service tax demand confirmed is only in respect of activities carried out by 3rd agreement mentioned above, namely Ground Traffic, other support service and Handling agreement. The demand is confirmed under the head of BAS defined under Section 65(19) of Finance Act, 1994 in respect of activities like sales and marketing net work support, Revenue collection and Credit Administration Support, Billing and Accounting support etc. The tax demanded is relatable to

commissions received under clause 4 and clause 14 of the above agreement totalling to about 4%. The appellant has advanced the following main grounds to challenge the impugned order:-

(a) The show cause notice which has been issued by Additional DG, DGCEI is bad in law. The Addl. DG did not have the jurisdiction to issue the said notice, particularly in view of the decision of the Hon'ble Delhi High Court in the case of *Mangali Impex Limited vs. UOI – 2016 (335) ELT 605 (Del.).*

(b) The relationship between AIL and AASL cannot be considered to be one between the service provider and service recipient, because the latter is a 100% subsidiary unit of the former and the agreement by AIL was one of managing its affairs. In support they have cited decision of the Apex Court in the case of *State of UP vs. Renusagar Power Company – AIR (1998) 4 SCC 59.*

(c) AIL was not able to recover all the expenses incurred by them for operating AASL and the money due from AASL was written-off and consequently, there cannot be any liability. In any case, in terms of the Service Tax Rule 6 at the relevant time, service tax becomes payable only when consideration is received for the services rendered.

(d) Show cause notice dated 24.10.2008 which has been issued for the period July 2003 to March 2007 is time-barred because it is issued beyond the period of one year. It is pleaded that the activities of AIL is in public domain and has been published in the balance sheet. Consequently, the department cannot invoke the extended period for demanding service tax.

5. In the appeal filed by the Revenue against dropping of service tax demand amounting to about Rs. 103 Crores, the following ground has been advanced:-

The adjudicating authority has wrongly dropped the demand for service tax on 'Management, Maintenance and Repair Service' provided by AIL to AASL for the reason that no separate bill was raised for Management, Maintenance and Repair. It was billed as part of Lease charges only. Revenue has argued that as per the lease agreement, AIL had undertook the liability for Management, Maintenance and Repair of Aircrafts given on lease to AASL. Since the services under Management, Maintenance and Repair has been rendered, the service tax is liable to be paid and the onus is on AIL to provide the actual amount charged.

6. Shri P.K. Sahu, ld. Counsel argued the various grounds extensively. He submitted that on the preliminary ground of jurisdiction, the show cause notice issued by ADG, DGCEI is bad in law and liable to be set-aside in view of the decision of the Hon'ble Delhi High Court in the case of Mangali Impex Limited (supra). He submits that AIL could not realize the charges from AASL in view of the losses incurred by the latter. In fact, AIL has been supporting AASL by absorbing its losses. Consequently, it cannot be said that the consideration for the services has been received as per agreement and consequently, there can be no demand for service tax in view of Rule 6 of Service Tax Rules as it stood at the relevant time.

He also argued the ground of limitation by submitting that service tax was not paid as per the bonafide belief on the part of AIL and that Revenue has not produced any evidence to show that AIL has intention to evade payment.

7. Shri Amresh Jain, ld. DR for the Revenue supported part of the impugned order, wherein tax demand has been confirmed. He argued that AIL had collected the payments for the activities rendered on behalf of the AASL. Out of the amounts realized by AIL by ticket sales, they had retained the commission amount due to them from AASL and transferred only the balance by book adjustment. Accordingly, he submits that consideration for the services rendered has been realized by the AIL and will be liable to be paid by AIL. Since AIL and AASL are separate legal entities, service tax is liable in spite of the fact that, one is a 100% subsidiary of the other.

Ld. DR further submitted that the extended period of limitation is available in the present case. The internal auditor of the appellant Company has clearly pointed out non-payment of service tax in respect of considerations received from AASL. In spite of that, AIL has not only failed to pay service tax but have been also wrongly represented that consideration has not been received.

He also argued that the Commissioner has wrongly dropped the demand of service tax of nearly Rs. 103 Crores.

8. At the outset, we propose to deal with the preliminary objection raised by AIL that show cause notice has been issued by ADG, DGCEI without jurisdiction and is bad in law. The decision of the Hon'ble Delhi High Court in Mangali Impex Limited as well as the decision of the Hon'ble Supreme Court in the case of *Commissioner of Customs vs. Sayed Ali – (2011) 3 SCC 537* have dealt with the powers of DRI as well as Commissioner of Customs (Preventive) for demanding customs duty under Section 28 of the Customs Act, 1975. The case has dealt with the provisions of Section 28 as it stood prior to 08.04.2011. In the present case, we are dealing with the show cause notice issued by ADG, DGCEI for demand of service tax under the Finance Act, 1994. We note that CBEC, vide Notification No. 3/2004 dated 11.03.2004 has appointed the ADG, DGCEI as proper officer in terms of Rule 3 of Service Tax Rules, 1994. Accordingly, we find no infirmity in the jurisdication of ADG DGCEI to issue the present show cause notice.

9. The entire dispute pertains to the agreement entered into by AIL with AASL in terms of which the AIL rendered support to AASL for the purpose of Ground Traffic and other Support Services. In terms of this agreement, AASL was required to pay AIL certain consideration amounting to approx. 4%. In terms of this agreement AIL was to execute the entire function of running operations on behalf of AASL. The activities included ticketing, IT Support, Billing and Accounting, Administration of Foreign Exchange Transactions, Revenue collection, Reservation support etc. In return, AASL was to pay AIL equivalent to 4% of the revenue generated by AASL. Even though AIL has been raising bills against the services provided by them to AASL, they were also providing financial help to AASL by way of bearing its loss and further providing financial aid to keep AASL afloat. AIL's ground for non-payment of service tax is that they have not received this consideration in terms of 4% of the revenue earned.

Show cause notice as well as grounds of appeal allege that the practice of accounting between AIL and AASL was such that AIL collected the ticketing charges from passengers and credited the same to the account of AASL after deducting 4% charges payable to them by AASL. If this was a fact then AIL's claim the consideration has not been received would have to be disregarded. However, the fact will need to be independently confirmed.

10. The additional argument advanced is that AASL was not having any separate business but the entire operation of AASL done was by AIL only. The time-table and ticketing of passengers were in the name of AIL and the aircrafts were also owned operated and maintained by AIL. Accordingly, it has been argued that there is no Service Tax liability.

11. We note that even though AASL is a 100% subsidiary of AIL, the two companies are having distinct and separate identities and even registered separately under the Companies Act. Consequently, the two companies have maintained separate books of accounts and their profit and loss account were to be determined separately. Consequently, AASL cannot be considered as a branch or extended arm of AIL. The MOU and the various agreements have created a legal fiction that AASL is a separate entity from AIL and the services were rendered by AIL to AASL for a consideration of 4% commission which was to be retained by AIL. In view of the above, we are convinced that service tax is liable to be paid by AIL for the commission received from AASL in terms of the agreement. However, it has been claimed that the consideration has actually not been received by AIL from AASL. It is also contended that entire consideration is written off for the reason of loss incurred by AASL.

We are of the view that this factum can be settled through a certificate from an independent Chartered Accountant, who may be asked to look into the books of AASL and AIL for the relevant period and may be asked to certify whether such consideration has been received AIL by book transfer or otherwise, as per the terms of the agreement entered into between two companies. If the consideration has been received by AIL, then we are of the view that service tax is liable to be paid by AIL on such receipts. For this purpose, we remand the matter to the adjudicating authority for obtaining such certificate from the Chartered Accountant and to pass a de-novo order in the matter.

12. Next, we consider the ground of limitation raised by AIL. The contention of AIL is that no allegation of suppression can be fastened against them since the activities of AIL were within the knowledge of the department during the relevant period. Specifically the appellant had cited a letter dated 07.03.2006 written to the Joint Director of Service Tax to inform the various heads under which it was raising bills on AASL. Further, it has been contended that AIL had not paid service tax under the bonafide belief that it is not payable since AIL had not received payment from AASL.

In the annual report 2003-04, it is mentioned "Non-charging of service tax on certain services". This implies that even where service tax has been collected the same was not deposited pending registration. It has also been recorded by the statutory auditors that service tax was payable on the services rendered by AIL to AASL. However, on the pretext that consideration has not been received (despite realization of the same from sale of tickets conducted on behalf of AASL). AIL has not discharged the service tax liability. In the light of the observations of the statutory auditors, We are not convinced with the argument taken by appellants that service tax was not paid on the basis of bonafide belief that service tax was not payable. Consequently, we are concluding that Revenue is entitled to invoke the extended period of limitation in this case.

13. Now we turn to the ground advanced by Revenue in their appeal, pertaining to dropping of service tax demand amounting to nearly Rs. 103 Crores in the impugned order. This demand of service tax was raised in the show cause notice on the basis of Aircraft Lease Agreement and the Aircraft Maintenance Agreement. In terms of these agreements, AASL was liable to pay to AIL the Aircraft lease charges. It was also the responsibility of AIL to carry out the aircraft repair under the Aircraft Maintenance Agreement. The ld. Commissioner in the impugned order has come to the conclusion that the consideration received

aircraft lease charges includes the charges for aircraft repair and maintenance under the Aircraft Maintenance Agreement.

We have gone through the relevant clauses of the agreement. These clauses clearly show that lease charges were to include maintenance charges and AIL was under obligation to maintain and repair the aircrafts as part of the lease agreement. Thus this maintenance agreement cannot be considered as an independent and separate agreement. Accordingly, in the impugned order, it has been rightly concluded that the aircraft lease service cannot be subjected to service tax under the category of Management, Maintenance and Repair. Consequently, we find no infirmity in the impugned order on this ground.

14. In view of the above discussion, the following orders are passed :-

(a) The grounds of jurisdiction as well as limitation raised by the appellant are dismissed.

(b) Service tax is liable to be paid on the consideration received by AIL from AASL in terms of Ground Traffic, other support service and Handling service. However, to decide the quantum of service tax payable, the issue is remanded to the Original Adjudicating Authority for de-novo decision after obtaining a certificate from an Independent Chartered Accountant as to whether consideration has been received by AIL from AASL. If so, the quantum of such consideration.

(c) Revenue's appeal also stands dismissed.

The appeal is remanded to the Original Adjudicating Authority for de-novo decision as indicated hereinabove. Needless to mention that proper opportunity of hearing is to be granted to the appellant. Additional evidence, if any, may be admitted as per law.

[Order pronounced in open court on 28.02.2017]

(Justice Dr. Satish Chandra)
President

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

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