IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 29/03/2017.
DATE OF DECISION : 19/05/2017.

Service Tax Appeal No. 02 of 2010

[Arising out of the Order-in-Original No. 26/JM/2009 dated 01/10/2009 passed by The Commissioner (Adjudication), Service Tax, New Delhi.]

M/s Japan Airlines International Co. Ltd. Appellant

Versus

CST, Delhi Respondent

Appearance

S/Shri J.K. Mittal and Rajveer Singh, Advocates – for the appellant.

S/Shri Amresh Jain, Govind Dixit and Sanjay Jain, Authorized Representative (DRs) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 53367/2017 Dated : 19/05/2017

Per. S.K. Mohanty :-

The appellants are engaged in the business of operating airlines and are providing services of transport of passengers by air. They are registered with the Service Tax Department under various categories of taxable services like transport of passengers, transport of goods by air, cargo handling services etc. The officers of Service Tax Commissionerate, New Delhi examined the service tax liability of the appellant for the period May 2006 to September 2007. Various details were called for from the appellants. Proceedings were initiated against the appellant by issue of show cause notice dated 01/08/2008. The said show cause notice alleged that the appellants failed to pay service tax on the correct value of taxable services rendered by them and accordingly a demand of Rs. 1,10,86,130/- was made against the appellant. Proposals were also made for imposition of penalties under Section 76, 77 and 78 of Finance Act, 1994, for various violations of the provision of the Act. The appellants filed their defence reply and were represented during the personal hearing conducted by the Original Authority. The case was adjudicated by the Commissioner (Adjudication), Service Tax, New Delhi vide his order dated 01/10/2009. The Commissioner confirmed a demand of Rs. 72,33,753/- towards service tax and cess, short paid by the appellant during the impugned period. He also imposed penalty of Rs. 1,000/- under Section 77 and penalty of equivalent to service tax confirmed, under Section 78 of the Act.

2. The appellants preferred appeal against the said original order. The appeal was decided by the Tribunal vide final order No. 52422 of 2016 dated 08/07/2016. The Tribunal remanded the case to the primary Adjudicating Authority for denovo adjudication with the following directions/findings :-

> "(i) The demand pertaining to the charges mentioned at serial Nos. (v) to (xx) in Para 1 is not sustainable.
>
> (ii) extended period is invokable.
>
> (iii) Totalling mistake in Column 7 in Annexure A to the show cause notice should be taken note of while computing the demand of differential service tax.
>
> (iv) Penalty under Section 76 should not be imposed when penalty under Section 78 is imposed.
>
> (v) The appellant shall be given an opportunity of being heard before *de novo* adjudication".

3. The appellants filed a miscellaneous application on 26/09/2016 stating that the final order dated 08/07/2016 of the Tribunal had errors which are apparent on record and requested for rectification of the same. The miscellaneous application was heard and the Tribunal passed miscellaneous order No. 50020 of 2017 dated 13/01/2017. In the said order, the Tribunal recorded as below :-

> "4. We have heard both the sides and perused the application alongwith the impugned order and appeal records. Admittedly there are certain errors which are apparent on record in the final order now impugned. Certain illustrative examples as already noted above are clear. However, there are various other points which the learned Counsel submits will also fall under the category of apparent errors which requires closer scrutiny. However, suffice it to say that the final order of the Tribunal requires

corrections as it does contain various errors apparent on record. The scope of all the "errors" which the applicant contends are amenable for rectification, however, requires closer scrutiny. We are aware that under the guise of miscellaneous application for rectification of error apparent on record, the Tribunal cannot assume the power of review. Keeping this legal position in mind and also having noticed apparent errors on record, the extent of same to be examined in detail, we find it fit and proper to recall the final order dated 08/07/2016 of the Tribunal allowing the miscellaneous application. The appeal will be listed afresh to examine the scope of all such errors indicated in this miscellaneous application within the provisions of law applicable for such rectification and pass an order. Accordingly, the appeal will be listed on **10th March, 2017**. The miscellaneous application filed by the appellant for rectification of mistake is allowed".

4. In line with the above observation of the Tribunal, the matter was heard on 29/03/2017. The learned Counsel for the appellant as well as the learned AR for the Revenue eloberated their side of the case and submitted written notes also. The following are the main points canvassed by the appellants :-

(a) the Adjudicating Authority had recorded incorrect facts regarding various correspondence between the appellant and the Department. He did not record crucial facts regarding appellant's own voluntary action of amendment of service tax registration on 03/05/2006 itself. Various correspondence which are on record from May 2006 onwards will clearly establish that the appellants were in regular communication with the Jurisdictional officer and the aviation industry as a whole was also engaged with the CBEC for clarification of various disputed issues on their service tax liability ;

(b) the service tax liability of the appellant was contested on the ground that the appellants are having permanent establishment in Japan and tax liability, if any, should be paid by the Indian recipient of service only.

(c) No service tax is payable on the consideration attributable to return journey.

(d) When no penalty was imposed under Section 76, the observation of the Tribunal in para 9 of the final order dated 08/07/2006 is an error apparent on record ;

(e) para 7 of the said final order referred to Custom Department. The whole proceedings starting from verification by the officers has nothing to do with Custom Department ;

(f) the computation of tax was based on erroneous calculation of value without considering the details submitted by the appellant, more specifically with reference to arithmetical/totaling error and also not considering the exact quantum of refund due to cancelled tickets ;

(g) non-consideration of all the facts on record, more specifically the various recorded correspondence between appellants and the Department resulted in the conclusion by the Tribunal, on the impugned original order. By reproducing some of the findings of the Original Authority, an error apparent on record occurred. When date chart of correspondence submitted by the appellant is considered, it will be clear that there is no basis to invoke extended period of demand ;

(h) Board’s Circular dated 18/09/2007 was referred to in the final order by the Tribunal. This is not part of the records. The said Circular was not made available to the appellant at any time of the proceedings.

5. The learned AR submitted that first of all, the Tribunal cannot go into detailed analysis of the merits of the case as there is no power vested with the Tribunal to review its own order. The final order dated 08/07/2016 cannot be subjected to a detailed review in the present proceedings. The miscellaneous application by the appellant is only for rectification of errors apparent on record. The Tribunal has to restrict itself within the legal powers of such rectification of apparent errors. While apparent errors relating to arithmetical calculation or reference to penalty under Section 76 are easily reconcilable, on other technical aspects dealing with the merits of the case, no reappraisal of the evidences or legal position is permitted at this stage. He further submitted that the matter has been remanded to the Original Authority for a denovo adjudication with clear direction by the Tribunal. As such, the said final order cannot be varied at this stage to give a different ruling on reappraisal of evidence.

6. We have heard both the sides. We have perused the appeal records as well as written submissions made by both the sides. Various case laws also referred to by both the sides.

7. On careful consideration of appeal papers, the final order dated 08/07/2016, grounds of appeal by the appellant and the

miscellaneous application filed for rectification of error, we find that there are three points central to the dispute at hand :

(a) the includability of various charges received as consideration by the appellant from passengers, in the valuation for service tax purpose under the category of "transport of passengers embarking in India of International journey by air service". This issue involved legal interpretation of taxable service and value of such taxable service in terms of Section 67 of the Finance Act, 1994. The Tribunal vide the final order dated 08/07/2016 examined 20 components of charges received by the appellant for issuing air travel ticket. After detailed examination of the legal principles and binding precedents of the Tribunal's earlier decisions the Tribunal concluded that out of charges listed from I to XX Sl. Nos. V to XX are not liable to be included in the taxable consideration. This issue has been settled by the Tribunal in the said final order and on close scrutiny of the finding, we note no apparent error on record which requires rectification ;

(b) the second issue is relating to quantification of taxable value. Here the appellants raised various errors not rectified by the Original Authority and also not considered in detail by the Tribunal. These are mainly relating to totaling mistake in Annexure A to the show cause notice. Non-consideration of correct amount of deduction due to cancellation of tickets during the material time. We find that the Tribunal has already noted the error in totaling and directed the Original Authority to rectify the same during denovo adjudication. Since, re-quantification of taxable value has to be done based on supporting documents submitted by the appellant, we are of the view that all issues are to be kept open for correct computation of taxable value in the denovo proceedings. In other words, instead of restricting only to the totaling mistake, the Original Authority should also check up whether the quantification of taxable value has been arrived on correct basis of all the details submitted by the appellant ;

(c) we have noticed that in the appeal as well as in the miscellaneous application and also during the course of arguments, the appellants strongly emphasized on the question of time bar with reference to the proceedings initiated against them. The final order of the Tribunal concluded that extended period is invokable in the present case. However, we note that the said finding is based on the findings of the Original Authority in para 2, 3, 4 of the impugned original order. The Tribunal, based its finding mostly on the facts as recorded in the said paragraphs of the original order. In this connection, we note the chronology of various developments during the material period, as submitted by the appellant in the appeal, as below :

Sl. No.	**Dates**	**Particulars**
1	01.05.2006	Service tax was levied under Section 65(105) (zzzo) on International Air Travel
2	O3.05.2006	The Appellant applied addition of the services under Section 65 (105) (zzzo) in the registration certificate along with ST-1 form and Original Certificate (ST-2)
3	26.05.2006	The Department endorsed the new services under Section 65(105) (zzzo) on the registration certificate ST-2
4	10.08.2006 & 17.08.2006	Joint Commissioner Service Tax New Delhi wrote a letter informing to the Appellant about the levy of service tax on international air travel and sought detailed procedure for charging service tax including the factor/taxes which are excludable from the total value of the ticket while calculating the service tax liability
5	30.08.2006	The Appellant replied to the letter dated 10.08.2006 and specifically informed that only basic fare is taken into account while calculating the service tax. The Department never informed to the Appellant that the practice adopted by it is not

		correct.
6	25.10.2006	First Return (ST-3) for the period May 2006 to September 2006 was filed with in time.
7	09.04.2007	The Department referring to earlier letter dated 17.08.2006 admitted that "contents of your letters have been noted", thus admitted that the Appellant replied to letter dated 10/17.08.2006 through letter dated 30.08.2006.
8	25.04.2007	Return (ST-3) for the period from October 2006 to March 2007 was filed within time.
9	29/30.08.2007	The Commissioner Service Tax sought details of various charges etc. and admitted that a meeting has been called on 10.09.2007 with all airlines about "to discuss the issue related to levy of service tax on airline." Thus, the issue was an industry issues and well known to the Department and there was no directions/ clarification from the department levy of service tax on other than the basic fare, despite knowledge of the facts that since airlines are paying service tax on basic fare only.
10	17.06.2008	Meeting held in the Service Tax Commissionerate, wherein, the Appellant explained and clarified the issues/ discrepancies related to ST-3 return.
11	03.07.2008	Along with letter dated 03.07.2008, the Appellant submitted the abstract details of tickets on paid basis.
12	01.04.2008	It has been admitted by the Department in the Show Cause Notice dated 01.08.2008 particularly in the para 4.1 that the Appellant has submitted the required details in the format as desired by the Department in CD and also time to time visited the Department and replied to their letter also.
13	02.04.2008	With letter dated 02.04.2009, on insistence of the Department, the Appellant again submitted the copy of return filed on 25.10.2006 for the period from May 2006 to September 2006.
14	01.08.2008	Show Cause Notice was issued to Japan Airlines
15	01.10.2009	Impugned order was passed

8. We note that the appellants strongly argued that both Original Authority as well as the Tribunal failed to record these factual details which resulted in the erroneous finding. Admittedly, we find that the final finding of the Tribunal regarding limitation was based on the facts as recorded by the Original

Authority. The Original Authority having not considered all the developments narrated above, in correct prospective, held against the appellant on the question of limitation. Here, we note that the case has been remanded back to the Original Authority by the Tribunal. The finding with reference to extended period which is made based on findings of the Original Authority can be considered as an error apparent on record. Since, the Original Authority himself has not given a detailed finding on the above chronology of events we find it fit and proper that in the denovo adjudication, as directed by the final order of the Tribunal, the issue of limitation is to be examined afresh without any restrictive direction. In other words, the Original Authority should examine afresh the question of limitation also and give his findings on the submissions of various correspondences, as recorded above.

9. The appellants also raised certain other issues for which, they claim clear findings were not recorded in the final order of the Tribunal. It is submitted that the appellants are a registered company in Japan having permanent establishment there and, hence, not liable to service tax in India. Service tax, if any, is to be discharged by the recipient of service in India in terms of Section 66A. We note that the said claim is devoid of merit. Section 66A, Explanation I, clearly states that a person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country. The appellants are having a business establishment (branch) in India

and, as such, are liable to service tax in respect of taxable services rendered by them. Another issue was also raised regarding non-tax liability on return fare of the passengers. We note that the transport of passengers embarking in India for international journey by air is a service, taxed in terms of Section 65 (105) (zzzo) of the Finance Act, 1994. The said tax entry talks about passenger embarking in India for international journey. If the ticket is issued for a round trip/return journey also then apparently it is a total value of the such service which is to be considered for taxation. Board's Circular dated 17/10/2006 also clarified to this extend. The service is a continuous one starting from embarking of passenger in India. We find no merit in the plea of the appellant for exclusion of a part value of the ticket for tax liability.

10. We find that the reference made in para 9 of the final order of the Tribunal, to penalty under Section 76 has no relevance. The proceedings before Original Authority did not result in imposition of any penalty under Section 76 and, hence, the reference to such penalty is an error apparent on record. As such, we hold para 9 of the final order is to be deleted.

11. One more miscellaneous error was pointed out by the appellant in the final order of the Tribunal. In para 7 of the order reference was made to 'Custom Department', we note that the same should be read as 'Department'. The word 'Custom' has to be deleted.

12. On careful perusal of all the issues raised by the appellant and the counter submissions made by the Revenue, we have analyzed the issues with reference to errors apparent on record in the final order dated 08/07/2016 of the Tribunal. The said final order was recalled only for the purpose of rectifying the errors apparent on record, as discussed above. The present order should be readwith the said final order.

13. Accordingly, the final conclusion on the appeal as recorded in para 10 of the final order shall be corrected and will be read as under :-

> "10. In the light of the foregoing analysis, we allow the appeal by way of remand to the primary adjudicating authority for denovo adjudication with the following directions/findings :
>
> (i) the demand pertaining to charges mentioned at Sl. No. (v) to (xx) in para 1 [of the final order dated 08/07/2016] is not sustainable ;
>
> (ii) the question of applicability of limitation for the demand is also to be examined afresh ;
>
> (iii) totaling mistake in column 7 in Annexure A to the show cause notice, and other data submitted by the appellant, should be taken note of while computing the demand of differential service tax ; and

(iv) the appellant shall be given adequate opportunity to present their side of the case before denovo adjudication by the Original Authority.

(Order pronounced in open court on 19/05/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

PK