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 : 31/07/2017.
DATE OF DECISION : 17/08/2017.

Service Tax Appeals No. 2302-2303 and 3856 of 2012

[Arising out of the Order-in-Appeal No. 89/S.Tax/D-II/2012 dated 26/04/2012, No. 99/S.Tax/D-II/2012 dated 01/05/2012 and No. 168/S.Tax/D-II/2012 dated 11/09/2012 all passed by The Commissioner (Appeals), Central Excise, New Delhi.]

M/s Aviacon (India)]
Shri Bahadur Chand Gupta] Appellants
Mrs. Bhateri Devi]

Versus

CCE, Delhi – I Respondent

Appearance

Shri Atul Gupta, C.A. – for the appellants.

Shri Amresh Jain, Authorized Representative (DR) – for the Respondent.

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

Final Order No. 55900-55902/2017 Dated : 17/08/2017

Per. B. Ravichandran :-

All these three appeals are dealing with inter-connected matters and are accordingly taken up for disposal together. The brief facts of the case are that M/s Aviacon India, a proprietorship firm owned by Shri Bahadur Chand Gupta, entered into a lease agreement with M/s Frankfinn Institute of Air Hostess Training. The agreement provided for a leasing out 550 sq. yards of premises and fuselage of Airbus 300 Aircraft for commercial use of a lessee for advertisements, promotion and imparting basic cabin crew/cabin crew/hospitality/travel and tourism training of the institute run by the lessee. M/s Aviacon received consideration in terms of such lease agreement. As the land which was leased out, was co-owned by the proprietor of M/s Aviacon alongwith his mother, she was paid 50% of land rent by Aviacon. Proceedings were initiated against M/s Aviacon and Mrs. Bhateri Devi, who received rent towards co-owned land/building from Aviacon, to demand and recover service tax under the category of business support service and renting of immovable property service. Based on the details provided by the main appellant, the service tax demand under the category of business support service was made on the consideration attributable to leasing of Air bus aeroplane alongwith infrastructural facilities and under the category of renting of immovable property for leasing of land with certain office room to the lessee (M/s Frankfinn). Service Tax demands of Rs. 12,66,020/- for the period 01/05/2006 to 31/03/2008 and Rs. 11,56,896/- for the period earlier 2008 to March 2009 were confirmed on M/s Aviacon India. A service tax demand of Rs. 2,23,098/- was confirmed under the category of renting of immovable property against Mrs. Bhateri Devi co-owner of the land, leased out.

2. The learned Consultant contesting the findings of the lower authority submitted on the following lines :-

(a) M/s Aviacon entered into an agreement with M/s Frankfinn. The said agreement is for leasing out the fuselage of Airbus alongwith the connected premises of land. The Revenue cannot split up artificially the said lease into two categories to tax under BAS and renting of immovable property ;

(b) leasing out the aircraft cannot be called as business support service. The aircraft is fixed to the earth. Leasing of such facility cannot be considered, either business support service or renting of immovable property service. The lessee is not using the property for any commercial purpose and, as such, no service tax liability can be demanded from the appellants ;

3. The learned AR submitted that the aircraft which was earlier a functional Airbus 300 is now kept by the main appellant in his own premises and leased out to the training institute for commercial use of advertisement, promotion, training etc. There is no basis in the claim of the appellant that the property is not used for commercial purpose. The agreement categorically states that the lessee shall use it for commercial purpose. Regarding consideration being taxed under two categories it is submitted that the appellant gave the details under different headings and accordingly the demands were made. The aircraft is used as a training premises and it contains all the requirements for such training to give the real effect of the actual aircraft. Apart from aircraft, infrastructural facilities as listed in Schedule II of the

agreement like Oxygen, Mask, life saving jacket, service trolly, public address system, floor lighting system etc. were also provided by the main appellant to the training conducted by the lessee. These activities are squarely covered by the statutory scope of business support service.

4. Regarding renting of immovable property service, the learned AR submitted that the land alongwith certain office room has been provided on lease rent basis to the lessee who will use it in conjunction with the training, advertisement and other commercial purposes in terms of the agreement. The said activity is clearly covered under renting of immovable property for commercial purpose.

5. We have heard both the sides and perused the appeal records. We note that the main appellant has entered into an agreement with M/s Frankfinn on 05/01/2005. We have perused the agreement in detail. The scope of the agreement is as below:-

> "WHEREAS for LESSOR has represented himself to be the joint owner alongwith his mother Mrs. Bhateri Devi (Consenting Party) of the land situated at Block – A, Sector – 8, Opp. CRPF Camp, Dwarka, New Delhi – 110 075, having Khasra No. 4/13, Village Bagdola admeasuring 550 sq. yards, hereinafter called "**THE PREMISES**" and the (fuselage) MSN 111 Airbus 300 B2 Ex VT-EFW, upon that premises, (hereinafter called "**The Airbus**").
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> AND WHEREAS the Premises has been owned jointly by the LESSOR and his mother, Mrs. Bhateri Devi and Mrs. Bhateri

Devi has no objection of any nature, whatsoever for carrying out activities enumerated in this agreement in the Premises by the LESSEE.

AND WHEREAS the lessor further represents that he can use the Airbus and the premises for commercial purposes.

AND WHEREAS the LESSEE is a leading institute in India that provides basic cabin crew/cabin crew training for aspiring Air Hostesses & Flight Stewards/Air Hostesses & Flight Stewards.

AND WHEREAS the first party intend to give an exclusive lease basis the commercial use of the Airbus alongwith the premises to the lessee for advertisements, promotion and imparting Basic Cabin Crew/Cabin Crew/Hospitality/Travel & Tourism Training of its institute namely Freankfinn Institute of Air Hostess Training".

6. It is very clear from the above scope that there are two distinct properties which are given on lease. The lease rental contribution attributable to each one of the property has been categorically stated by the main appellant when the enquiry was conducted. There is no dispute about the consideration attributable to each one of the property. We do not agree with the appellant that the consideration has been artificially split up and brought under tax liability under two tax entries. When two properties are specifically, identified considering the nature and scope of service for which lease rent is received, we find that the lower authorities are correct in their conclusion.

7. The Airbus 300 is apparently not in a flying condition. The same is parked and immobilized in the premises of the main appellant. The said aircraft is put to use as an extension of training class for imparting training to cabin crew and others. In other words, the aircraft is an extended premises of training facility of the lessee. With this background, when we examined the statutory definition of business support service as provided under Section 65 (104c) it is clear that this activity will be covered by the said tax entry. "Support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers …….. infrastructural support services ………. The explanation below the tax entry gives the scope of the expression "infrastructural support services". The same will include providing office alongwith office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet, telecom services, pantry and security. In the present case, the terms of the agreement clearly stipulate that the main appellant shall maintain the property alongwith required equipments, as mentioned in Schedule II of the agreement. The Schedule II lists out various equipments and facilities which are to be provided by the main appellant. These are oxygen masks, life saving jackets, doors, escape shuts, service trolley, public address system, floor lighting system for emergency evacuation etc. These are nothing but infrastructural support for business or commerce of M/s Frankfinn. It is clear that the aircraft premises and the other

equipments are very essential and imperative infrastructure for providing training to the participants and also to make publicity about the status of the training institute. As already noted, the training of cabin crew is imparted both in the class rooms and inside the aircraft for practical exposure. The aircraft in possession of the main appellant serves this very basic infrastructural requirement of the training by the lessee. As such, we find that lease rent attributable to this activity is rightly taxable under business support service.

8. The second property indicated in the lease agreement is 550 sq. yards of the appellant, we note that the lessee is also to have an office premises of their choice location within the leased out land. The lessee is also allowed to use the land with office for commercial purpose as listed in the agreement. The said activity is specifically covered by the tax entry renting of immovable property services in terms of Section 65 (105) (zzzz) readwith Section 65 (90a). The property lease out by the main appellant is for the furtherance of business and commerce and accordingly liable to tax. As such, we hold that the lower Authorities are correct in confirming the tax liability of the main appellant as well as Mrs. Bhateri Devi under the category of renting of immovable property service on the consideration received by them and clearly admitted by them.

9. In view of the above, discussion and analysis, we find no merit in the submission made by the appellant against the

service tax demands. However, considering that renting of immovable property service has been a subject matter of substantial litigation, and also the tax entry was interpreted to mean only services "in relation to" renting of not renting per-se by the Hon'ble Delhi High Court in **Home Solutions Retail Ltd. vs. Union of India – 2011 (21) S.T.R. 109 (Del.)**. Later, amendments were brought in, in the statutory definitions alongwith retrospective changes also. A specific provision was also made in Section 80 (2) of the Finance Act, 1994 for waiver of penalty in respect of renting of immovable property service. Considering this factual and legal background, we hold that penalties imposed on the appellants can be waived by invoking provision of Section 80 of the Finance Act, 1994 as there was reasonable cause for non-payment of service tax during the material time.

10. In view of the above discussion and analysis, we uphold the tax liabilities confirmed by the lower Authorities. The appeals are dismissed except to the extent of setting aside the penalties, as stated above.

(Order pronounced in open court on 17/08/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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