

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. II**

**Date of Hearing: 18.10.2018
Date of Decision: 30.11.2018**

Appeal No. ST/ 50890/2017-DB

[Arising out of Order-in-Appeal No. OIO-DLI-SVTAX-002-COM-491-16-17 dated 20/01/2017 passed by Commissioner of Service Tax, DELHI-II, New Delhi]

DHILLON AVIATION PVT LTD

Appellants

Vs.

CCE-DELHI-II

Respondent

Appearance:

Shri A.S. Hasija, Consultant for the Appellant
Shri DR for the Respondent

CORAM:

Hon'ble Shri Anil Choudhary, Member (Judicial)

Hon'ble Shri Bijay Kumar, Member (Technical)

FINAL ORDER No. 53350/2018

Per Anil Choudhary:

1. The appeal is directed against Order-in-Original No. DLI/SVTAX-002-COM-491-1617, dated 20.01.2017 passed by Commissioner of Service Tax, Delhi-II, Nehru Place, New Delhi.
2. Acting on intelligence that the appellant, M/s Dhillon Aviation Pvt. Ltd., E-22, Lower Ground Floor, Greater Kailash_III, Masjid Moth New Delhi-11006, were registered with the Department vide Service Tax Registration No. AACCD1501GST001 for providing "Supply of Tangible Goods Services" and that the appellant had not deposited the Service Tax collected by them with the Government Exchequer, the officers of Directorate General of Central Excise Intelligence, Delhi Zone, conducted search at the office premises of the appellant. During the

search it was revealed that the appellant had been collecting Service Tax from its customers since 2008, but had not deposited the same with the Government Exchequer. The officers resumed certain document relevant for further investigation, under Panchnama dated 03.12.2012. On the basis of investigations conducted, a Demand-cum-Show Cause Notice for Rs.4,90,58,667/- was issued vide F.No.DZU/INV/ST/J/246/012 dated 21.10.2013 for the period of FY 2008-09 to 2012-13. Further another Demand-cum-Show Cause Notices dated 24.4.2015 of Rs. 2,47,20,000/- was issued vide DL-II/ST/R/Dhillon/134/2013-14 for the period FY 2013-14. In all these show cause notices, it was proposed to recover the Service tax alleging that the Service Tax was collected but not deposited in respect of the services rendered by the appellant under the category of "Supply of Tangible Goods for Use". The notices also proposed to recover interest on the service tax demanded and to impose penalties under the provisions of the Finance Act, 1994. A total amount of Rs.38,00,000/- already deposited by the appellant, was proposed to be appropriated.

3. It was alleged that the appellant was supplying the Aircraft/ helicopter belonging to/ owned by them to various entities for their use. The said services were being rendered by the appellant as per agreements entered into with the service receivers on mutually agreed terms and conditions. While providing the said helicopter/ aircraft on charter hire, the appellant supplied its own crew i.e Pilot and Other Flying Staff, along with the said helicopter, keeping an effective control and possession of the said helicopter/ aircraft with them. The appellant had taken registration under the category of "Supply of Tangible Goods for Use". Both the Show Cause Notices were adjudicated vide the impugned order and the service tax demands as mentioned above were confirmed

by invoking extended period of limitation Interest on the amount of demand confirmed was also confirmed. Payment of Service tax through Cenvat credit on inputs was not considered. Various penalties were imposed as proposed. The amount of Rs.38,00,000/- already deposited by the appellant was appropriated.

4. Sh A.S. Hasija, Consultant, appeared on behalf of the appellant and Sh Sanjay Jain, DR, appeared for the Revenue. At the outset Sh Hasija accepted the majority judgment in the Larger Bench judgment of the CESTAT in the case of Global Vectra Helicopter Ltd Vs Commissioner of S.T Mumbai-II-2016(42) STR 118 (Tri-Mumbai) and did not contest the issue of classification of the service provided by the appellant under the category of "supply of tangible goods for use service" ("SOTG"), taxable w.e.f. 16-5-2008 though the appellant had contested the issue in the grounds of appeal. He contested the demand confirmed and penalties imposed on the following grounds:-

4.1. That the Learned Commissioner has confirmed the demand of service tax on the services provided in 'Jammu & Kashmir' whereas service tax is not leviable on the services provided in 'Jammu & Kashmir' under the purview of the Finance Act, 1994, Service tax liability with regard to the same could not be confirmed. The services provided by the appellant originated and terminated in J&K. These services are not taxable under Section 64 of the Finance Act, 1994.

4.2. That Sh. Ajay Vir Singh, Director of the appellant, in his statement dated 03.12.2012 has admitted that the appellant collected service tax from customers and did not deposit the same due to the fact that they had paid service tax on inputs and they were of the impression in that case they need not pay service tax. But when pointed out the appellant deposited Rs. 38,00,000/- towards payment of service

tax collected from tax including interest. The learned Commissioner has appropriated the same as correct. The appellant has paid entire Service Tax from CENVAT Credit for which they maintained RG-23 Register except on the value of services rendered in J&K which is exempt under Section 64 of Finance Act, 1994.

4.3. That the Learned Commissioner has erred in taking or gross receipts from the balance sheets of the appellant, and treated the same as taxable turnover to calculate the Tax liability.. Further the Learned Commissioner has taken value for the year 2013-14 by applying Best Judgment method as prescribed under Section 72 of Finance Act, 1994. The actual value is much less than the value taken for calculating the tax liability.

4.4. That extended Period of Limitation is not invokable in the present matter. The Appellant has not suppressed any information with intent to evade payment of Tax. As per Section 73(1) of the Act, in a normal case SCN can be issued at any time within one year from the relevant date. Proviso to Section 73(1) of the Act provides that SCN can be issued at any time within five years from the relevant date, if service tax was not paid or levied **by reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any provisions of the Act or Rules with intent to evade payment of service tax**. Thus the extended period of limitation is applicable only if any of the ingredients specified above exists. Further, in case a periodical return was required to be filed, then the relevant date will be the date on which such return was filed or last date of filing the return.

In the present case the demand in respect of SCN dated 24.10.2013 is for the period 01.4.2008 to 31.03.2012. **Thus the demand from 01.04.2008 to 20.10.2008 is beyond the scope of**

the SCN. The extended period of limitation has been invoked for the subsequent period also which is contrary to the law. The extended period has been invoked against the Appellant on the basis that they have contravened the provisions of the Act by willfully suppressing the fact, that they collected Service tax from their clients but did not deposit the same with Government exchequer, whereas the fact is that Sh Ajay Vir Singh, Director of the appellant, in his statement dated 03.12.2012 has admitted that the appellant collected service tax from customers and did not deposit the same due to fact that they had paid service tax on inputs and they were under the impression in that case they need not pay service tax. But when pointed out the appellant deposited Rs. 38,00,000/- towards payment of service tax collected from tax including interest. The learned Commissioner has appropriated the same as correct.

4.5. Penalty cannot be imposed Under Section 76, 77 And 78 Under The Finance Act, 1994 That as above, the Appellant is not liable to pay tax for the reasons mentioned above, and since the same is for a bona fide reason, penalty under section 76 for non-payment of tax, u/s 77 for failure to file ST-3 in a proper manner and u/s 78 for deliberately suppressing the facts is not leviable under the facts and circumstances.

5. The Id. DR appearing for the Revenue strongly opposed the contentions of the appellant and submitted as follows :

5.1. The appellant had collected Service Tax from its clients but did not deposit the same with the Government exchequer as admitted by Sh Ajay Vir Singh, Director of the appellant, in his statement dated 03.12.2012. Therefore, extended period is applicable even though the appellant has deposited the tax collected with interest.

5.2. That the details regarding service provided in J&K do not show that these originated and terminated in J&K in order to qualify for exemption from Service Tax under Section 64 of Finance Act, 1994.

5.3. That penalties have correctly been imposed.

6. We have carefully considered the submissions made by both the sides. We have also perused the case records.

6.1 From the perusal of the impugned order, in respect of service claimed to be provided in J&K, it was observed that the appellant has not submitted supporting documents like copy of invoice, tickets or passenger manifest to show that the flights originated and terminated in J&K to which Sh Hasija submitted that all these documents were provided to the department during investigation and the same can be submitted again now. Accordingly the appellant was directed to submit four sample invoice, tickets or passenger manifest for each year for the service provided in J& K to substantiate their claim, during next hearing.

6.2 Further hearing was held on 03.10.2018, when the appellant submitted the required sample invoices. Sh Hasija explained that under the agreement with Shri Amarnath Shrine Board, it is obligatory to make 50% booking online and remaining 50% booking are made by local agents situated in Jammu and Kashmir and that is the reason that names of agents and individuals appear on the invoices. On perusal it was observed that invoices contained names of the agent/ passengers booked, amount charged and date of booking. The details tallied with the details in corresponding passenger manifests, which proved the claim of the appellant that the service originated and terminated in J&K and not chargeable to Service Tax under Section 64 of Finance Act, 1994.

But the Learned Commissioner has not determined the value of

exempted service rendered in J&K.

The appellant was directed to submit year wise details of value of service provided in J&K, on the next hearing.

6.3 Next hearing was held on 18.10.2018 and submitted the required year wise details of value of service provided in J&K, as below:-

Charter and other services in J&K

Year	Value of services in J&K (Rs)	Service tax not chargeable (Rs) (included in demand)
2008-09	18338798	2266675
2009-10	52000859	535608
2010-11	70000532	7210055
2011-12	65800725	6777475
2012-13	46020315	5688111
2013-14	42000872	5191308
Total	29,41,62,101	3,24,89,712

The appellant submitted that the required details are also available duly certified by Chartered Accountant at page 129 to 135 of the Appeal Book. And that The Learned Commissioner has also invoked extended period for the subsequent period in respect of the SCN dated 24.04.2015, the same is contrary to the law and in the teeth of the ruling of Hon'ble Supreme Court in Nizam Sugar. The Learned Commissioner has confirmed the demand starting from 01.04.2008 whereas the Service Tax on Supply of Tangible Goods Service came w.e.f. 16.05.2008 and prior to that no service tax was leviable on the said service. Further 1st Show Cause Notice was issued on 21.10.2013, therefore Service Tax for Services provided from 16.05.2008 to 21.10.2008 is beyond the extended period of five years. The value in respect of the year 2013-14 has been taken under Section 72 of Finance Act, 1994, on Best Judgment method. The actual value is less than the assessed value. All details, duly certified by Chartered Accountant are already provided in the appeal book.

6.4 We further find that the Learned Commissioner while confirming the demand in respect of the service provided in J&K has held that the appellant has not been able provide the details, supported by documents whereas the said amounts were reflected in the Balance Sheets, perused by the department. The learned Commissioner has taken total receipts from 01.04.2008 to 31.03.2014 for calculating the Service Tax. Service Tax on Supply of Tangible Goods Service came w.e.f 16.05.2008 therefore receipts before 16.5.2008 were not taxable. Further first Show Cause Notice was issued on 21.10.2013, thus the demand for the period from 16.05.2008 to 20.10.2013 is held beyond the extended period of limitation. Further, it is admitted in the impugned order that the appellant was registered with the Department vide Service Tax Registration No. AACCD1501GST001 for providing "Supply of Tangible Goods Services", therefore it cannot be alleged that the appellant had suppressed anything from the department. The appellant had maintained RG-23 Register and paid tax from CENVAT Credit which the Learned Commissioner has ignored and confirmed the demand on the entire receipts including the value of service rendered in J&K which is exempt under Section 64 of Finance Act, 1994. The Learned Commissioner has assessed the demand for the year 2013-14 applying Best Judgment Method, as prescribed under Section 72 of Finance Act, 1994. Section 72 reads as under:

"SECTION 72. Best judgment assessment. — If any person, liable to pay service tax, — (a) fails to furnish the return under section 70; (b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder,

the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary

and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment"

6.5. It is admitted in the impugned order that the department obtained total receipt value for the preceding years from the appellant. There is no reason that the department could not get the actual receipts details for the year 2013-14 also. This Tribunal in the case of Shubham Electricals Vs Commissioner of C.Ex. & S.T., Rohatak-2015 (40) STR 1034 (Tri-Del) has held that a best judgment assessment should be based on material and data on record. It is not a tool in the hands of the Adjudicating Authority to punish the assessee. The estimation should be fair and reasonable, and not a wild guess work.

The said judgment was confirmed by the Hon'ble Delhi High Court vide 2016 (42) STR K312 (Del).The ratio of the above judgment is applicable to the case in hand.

The appellant has submitted all calculations of admitted tax liabilities, and deposit of Tax, duly certified by a Chartered Account with the appeal.

7. In view of the above it is clear that the impugned order suffers from infirmities as explained and is not sustainable under the law. Therefore the impugned order is set aside and the appeal is allowed.

To sum up:-

- I) Demand for the period prior to 23.10.2008, is set aside, as time

barred .

- II) The 2nd SCN dated 24.04.2015 for the period 2013-14 is bad, held time barred and demand is set aside.
- III) The amount of Rs. 294,162,101, being service provided in the state of J&K is held exempt u/s 64 of the Finance Act.
- IV) The penalty u/s 77, for non-filing or late filing of return is upheld.
- V) Appellant is entitled to Cenvat Credit on spare parts and input services.

(Order pronounced in the open court on _30.11.2018_)

(Bijay Kumar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

Rekha