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/50579/2017-DB

[Arising out of Order-in-Original No. DLI-SVTAX-002-COM-431--16-17 dated 30/12/2016 passed by Commissioner of Service Tax, DELHI-II, New Delhi]

HIMALAYAN HELI SERVICES PVT LTD Appellants

Vs.

CCE-DELHI-II Respondent

Appearance:
Shri A.S. Hasija, Consultant for the Appellant
Shri Sanjay Jain, DR for the Respondent

CORAM:
Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

FINAL ORDER No. 53349/2018

Per Anil Choudhary:

The appeal is directed against Order-in-Original No. DLI/SVTAX-002-COM-431-1617, dated 30.12.2016 passed by Commissioner of Service Tax, Delhi-II, Nehru Place, New Delhi.

2. Acting on intelligence that the appellant, M/s. Himalayan Heli Services Pvt Ltd, having registered office at 104, 7, Local Shopping Centre, Madangir, New Delhi, are engaged in providing taxable services under the category of "Supply of Tangible Goods for Use" and were not discharging service tax liability thereon, investigations were initiated by the anti-evasion wing of the Service Tax Commissionerate-II, at New Delhi. Though the appellant was registered with the Department vide Service Tax / Registration No. AAACH7948DSD002, for providing

various taxable services viz 'Tour Operator Service', 'Maintenance or Repair Service', 'Survey and Exploration of Mineral', 'Transport of Passengers by Air.' On the basis of investigations conducted, a Demand-cum-Show Cause Notice No. 365/AE/Group-2/2013-14 dated 24.10.2013 for Rs.7,11,46,287/- was issued by the Commissioner of Service Tax, New Delhi for the period FY 2008-09 to 2011-12 involving the extended period of limitation. Further two Demand-cum-Show Cause Notices dated 20.05.2014 of Rs. 2,60,26,090/- for the period from 01.04.2012 to 31.03.2013 and No. 07/ST/Div-Vi/2014-15 dated 29.05.2015 for Rs.1,30,89,760/- for 2013-14 were issued by the Commissioner of Service Tax, New Delhi. In all these show cause notices, it was proposed to re-classify the services rendered by the appellant under the category of "Supply of Tangible Goods for Use" as defined under Section 65(105)(zzzj) of the Finance Act, 1994, instead of "Transport of Passenger by Air'. 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.2,49,68,379/- 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, keeping an effective control and possession of the said helicopter/ aircraft with them. The Revenue view was that the said service is classifiable under the category of "Supply of Tangible Goods for Use". Cenvat credit taken by the appellant on inputs (spares, etc.)

but not availed was also sought to be denied. All the three Show Cause Notices were adjudicated vide the impugned order and the service tax demands as mentioned above were confirmed by holding that the services rendered by the appellant merited classification under "Supply of Tangible Goods for Use of Service" instead of 'Transport of Passengers by Air Service'. Interest on the amount of demand confirmed was also confirmed. Cenvat credit on inputs was disallowed. Various penalties were imposed as proposed.

3.1. The appellant has contested the stand taken by the department from the beginning of the investigation(s) in the matter. The correspondences made by the appellant, are admitted in the impugned order. The appellant has contested that the appellant owns several helicopters, has a Non Scheduled Operators Permit No. 1/2002 (NSOP) issued by the Directorate General of Civil Aviation (DGCA) and is engaged in providing services of transportation of the passengers/goods. The appellant has classified the services provided under the category of "transport of passengers by air service", and has paid Service Tax w.e.f. 1-7-2010, when the scope of taxable service was extended to include 'domestic air travel'. The Department's contention is that the services are in the nature of "supply of tangible goods for use service" ("SOTG"), taxable w.e.f. 16-5-2008, which is only change of opinion under the admitted facts.

3.2. The Learned Commissioner has adjudicated the case relying on the majority judgment by 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), wherein it has been held that the services provided by the appellant are classifiable

under the category of "supply of tangible goods for use service" ("SOTG"), taxable w.e.f. 16-5-2008, & not under 'Transport of passengers by Air Service'.

3.3 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 of the Larger Bench 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. He contested the demand and penalties imposed on the following grounds:-

3.4 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 (1) of the Finance Act, 1994.

3.5 That it is undisputed fact that the Appellant submitted the information/documents vide various letters ibid, including letter dated 13 September, 2013 and 15 October 2013. The Appellant submitted bifurcation of gross income of Rs. 61,83,30,556/- received from services provided in the State of Jammu & Kashmir. Year wise details of services, with client names was provided with the appeal. Same were also submitted before the Learned

Commissioner, vide various correspondences admitted in the impugned order, but Ld. Commissioner have erroneously observed that the same has not been submitted, with supporting documents. That extended period of limitation is invoked for the subsequent period also, which is contrary to law. The extended period has been invoked against the Appellant on the basis that they have contravened the provisions of the Act, by will fully 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 the 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 by Revenue, the appellant deposited Rs. 38,00,000/- towards payment of service tax, including interest. The Ld. Commissioner has appropriated the same as correct in the impugned order.

3.6 In the facts and circumstances penalty is not imposable under Section 76,77,78 of the Finance Act, 1994 that as stated above, the Appellant did not pay tax for the reasons mentioned above, and since the same under a bona fide belief, penalty under section 76 for non-payment of tax, under section 77 for failure to file ST-3 in a proper manner and under Section 78 for deliberately suppressing the facts, is not leviable under the Finance Act, 1994.

3.7 That the Appellant did not utilize available CENVAT Credit of Rs. 4,01,847/- for the payment of Service tax liability of the concerned period. Thus, the available CENVAT credit should have been

adjusted against Service tax liability, if any, for the period 2008-09 and 2011-12. This fact had also been intimated to the department vide letter dated 13 September, 2013 and 15 October 2013. Copy of CENVAT Credit Register was annexed with the reply to the Show Cause Notice dated 24.10.2013 and is **placed & annexed in Vol.2. of Appeal paper-book.**

3.8 That the CENVAT Credit Rules, 2004 do not impose any restriction regarding as to the time limit during which CENVAT credit availed at a particular point of time, could be utilized by manufacturer or provider of output service, towards the payment of output duty/tax liability, as the case may be. The only limitation provided in terms of proviso to Rule 4(7) of CENVAT Credit Rules, 2004 is that "while paying duty of excise or service tax, as the case may be, the CENVAT credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be".

3.9 That the liability of Service Tax confirmed against the Appellant in respect of expenses incurred in Foreign Currency is Revenue Neutral.

Foreign currency expenditure consists of two parts:

- The value of material and parts used for maintenance of aircraft.
- A pilot was appointed or employed by the company whose salary was disbursed in foreign currency.

3.10 That the Appellant incurred expenditure in foreign currency for

the repair and maintenance of the helicopters and for purchase of spare parts thereof, needed for the repair of the helicopters. It is settled law that the liability to pay Service tax does not arise on the value of goods/materials used and/or supplied in execution of repair and maintenance. Bifurcation of amounts were submitted before the Learned Commissioner vide various correspondence as mentioned in the impugned order and that Service Tax amounting to Rs 31,45,915/-has been paid on service component and the salary of pilots under Reverse Charge Mechanism (RCM), and Cenvat Credit of the said amount is admissible, but the learned Commissioner has recorded finding that the appellant has not submitted the said details..

3.11 That it is pertinent to point out here that in **the impugned order** it is admitted that *"the assessee has rightly claimed exemption for providing services in J & K which appears to be admissible. Further assessee has also furnished the details of Foreign Currency Expenditure. As per the details of the Foreign Currency Expenditure the assessee has imported spare parts of the helicopters which are non taxable and expenditure plus reimbursement for training and air tickets for travel, also appears to be out of purview of Service Tax as per Rule 6 of Place of Provision of Service Rules, 2012. Further with regard to pilot salary expenses in foreign currency, the party is liable to pay Service Tax on import of service under Notification No. 30/2012-ST dated 20.06.2012 read with Section 68(2) of the Finance Act, 1994".*

But the Learned Commissioner confirmed the demand in respect of all the items or heads mentioned above.

3.12 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 23.10.2008 is beyond the scope of the SCN.** Further two SCN dated 20.05.2014 and dated 29.05.2015 were issued covering the period up to 31.03.2013 & 31.03.2014 respectively. The extended period of limitation has been invoked for the subsequent periods 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 of wrongful availment of CENVAT credit and consequent short payment of service tax and that the Appellant did not submit the information when called for. The Allegations are contrary to the facts of the case on record. The appellant has been contesting right from the beginning the issue of classification of the service provided by the appellant, and this fact

is undisputed in the impugned order. It is case of bonafide belief which was finally settled by the majority judgment of the Larger Bench of the CESTAT in the case of Global Vectra Helicopter Ltd Vs Commissioner of S.T Mumbai-II-2016(42) STR 118 (Tri-Mumbai), wherein one members held that the service provided by the appellant are not classifiable under the category of "supply of tangible goods for use service" but under the category of 'Transport of Passenger Travel by Air'.

3.13. Penalty cannot be imposed Under Section 76, 77 And 78 Under The Finance Act, 1994 That as 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 Finance Act, 1994.

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

4.1 The appellant had entered into agreements with clients on charter basis to supply helicopters for use by them, without parting with the right of possession and effective control of such helicopters. Supply of tangible goods including machinery, equipment and appliances for use, without transferring the right of possession and effective control of such machinery, equipment and appliance became liable to service tax with effect from 16-5-2008. However, the appellant did not pay any service tax under the said service. Therefore, SCNs were issued to the appellant. Subsequently, the appellant started paying service tax under the category of

"transport of passengers by air" which covered all domestic air passengers embarking in India w.e.f. 1st July, 2010. The appellant did not pay Tax under Supply of tangible goods even after being informed by the department and rather contested the classification under the said category, thus avoiding payment of Service Tax under correct classification. Therefore, extended period is applicable even though the appellant has now accepted the classification under the Supply of tangible goods Services.

4.2 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.

4.3 That the details given in respect of payment made in Foreign Currency for Maintenance and repair of helicopters do not show bifurcation of value of spare parts and service components, Therefore, the total value is chargeable to Service Tax under Reverse Charge Mechanism (RCM) as confirmed in the impugned order.

4.4 That penalties have correctly been imposed.

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

5.1. Since the appellant in view of the majority judgment of 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), did not contest the issue of re-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, we refrain from deciding the issue of classification of Service

provided by the appellant.

5.2. From the perusal of details available in respect of service claimed to be provided in J&K, it is observed in the impugned order that though the detail was year wise and client wise, it contained invoice numbers, names of individuals and some travel agents and amount charged, but did not contain supporting documents like 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. Similarly perusal of details of payments made in Foreign Currency in respect of Maintenance and Repair of helicopters, revealed that it contained invoice numbers, name of the parties, spare parts, service charges, etc and did not contain supporting documents/ invoice showing the item name/details of spare parts, etc 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 service provided in J& K and also in respect of payment made in foreign currency for spare parts, etc under Maintenance and Repair during next hearing.

5.3. Next hearing was held on 03.10.2018 when appellant submitted the required sample invoice. Sh Hasija explained that under the agreement with Shri Amarnath Shrine Board, it 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 already on record as mentioned above and each invoice was supported and tallied with corresponding passenger manifests, which proved the claim of the appellant that the service originated and terminated in J&K, and is not chargeable Service Tax under Section 64 of Finance Act, 1994.

5.4. Perusal of invoices submitted evidences that they contain invoice numbers, amount and name of the parties, which tallied with the details already on record mentioned above. The invoices contained details of spare parts like name of the individual parts and their value, etc. It observed that the learned Commissioner in para 41 of the impugned order has admitted as- *"The Noticee in their reply letter dated 13.9.2013 and 15.10.2013 submitted the bifurcation. The details submitted revealed that they had incurred expenditure on 'repair and maintenance', 'salary', 'air ticket expenses reimbursement', 'professional charges', 'purchase of parts', 'fees of parts installation', and 'software' etc. The proforma invoice/ Delivery Note-HNB 2008162 dated 04.09.2008 for 24507440 in respect of 'Main Rotor Head Overhauled' and Delivery Note HNF 2009058 dated 14.4.2009 for 6596000 in respect of 'Main Gear Box Overhauled' and permission no. DGCA ref no. 5/1400/200-AI(2) dated 14.12.2007 in respect of Major Maintenance of LAMA SA 315B for 215502271 buttress the fact that the Noticee incurred the said expenses in Foreign Currency on account of maintenance and repair of their helicopter'.*

But the Learned Commissioner has not tried to determine the value of parts used in the said service of 'maintenance and repair'

and as per law the value of parts and spares used cannot be charged to Service Tax for the said service.

The appellant was directed to submit year wise details of value of service provided in J&K, the value of parts and spares used, service component, salary etc on the next hearing.

5.5. Next hearing was held on 18.10.2018 and the appellant submitted the required year wise details of value of service provided in J&K, the value of parts and spares used, service component, salary etc as below:-

Charter and other services in J&K

Year	Value of services in J&K (Rs)	Service tax charged (not chargeable) (Rs)
2008-09	95865232	11848943
2009-10	137993471	14213328
2010-11	91301189	9404022
2011-12	107778732	11101209
2012-13	90318873	11163413
2013-14	94951450	11735999
Total	**618208947**	**64466914**

Details of expenses incurred in foreign currency

Year	Pilot salary	S.Tax on pilot hiring (Rs)	Spare & parts (Rs)	Service amount (Rs)	S.Tax paid under RCM (Rs)
2008-09	-	-	9202742	11168208	1380390.53
2009-10	3405295	350745.39	15860507	20845	2147.04
2010-11	3352941	345352.92	14040833	1764081	181700.34
2011-12	4324681	445442.14	20557762	275082	28333.45
2012-13	642911	66219.83	11422200	86508	8910.32
2013-14	2723892	336673.05	21665199	-	-
Total	**1444972**	**1544433.**	**10374924**	**13314724**	**1601481.6**

	0	**05**	**3**		**8**

5.6. We 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 he admitted in the impugned order that the appellant submitted all the details vide various letters. In para 80 of the Impugned order "is admitted that *"the assessee has rightly claimed exemption for providing services in J & K which appears to be admissible"* But confirming the demand in respect of service provided in J&K, he recorded a finding that the appellant did not supply details along with supporting evidence, and applied 'Place of Provision of Service Rules, 2012'. The Place of Provision of Service Rules, 2012 were introduced vide Notification No. 28/2012 dated 20.06.2012 and were made effective from 01.07.2012. There is nothing in the said notification that these Rules will be applied retrospectively. Therefore, the said rules cannot be applied for the period prior to 01.07.2012. The appellant had all the supporting documents like invoices, names of the passengers and the passenger manifest to support their claim, that the flights originated and terminated in J&K as discussed in the preceding paras. Therefore, Service Tax is not chargeable on the value of services provided in J&K as per Section 64 of the Finance Act, 1994 and demand of Rs. 6,44,66,914/- is held not sustainable under the law and is set aside.

5.7. As discussed above, the Learned Commissioner has admitted in para 41 of the impugned order that the appellant claimed that Service Tax is not chargeable on the value of parts and spares

used in providing the service under 'Maintenance and Repair service' and in para 80 of the impugned order has admitted that Service Tax is not chargeable on the value of parts and spares used in the said service, but has not ascertained the value of parts and spares used and instead confirmed the demand on total value of service including parts, pertaining to Maintenance and Repair Service. The appellant had submitted all the details and the documents in support of their claim. The appellant has provided as above, the total value of parts and spares used for maintenance and repairs was Rs. 10,37,49,243/- This amount is not chargeable to Service Tax and the demand of Rs. 1,12,46,921/- in respect of value of parts and spares is not sustainable under the law and therefore is set aside. The appellant has paid Service tax of Rs 31,45,915.01 under Reverse Charge Mechanism, in respect of service of pilot hiring and service component under Maintenance and Repair Service. We hold that the CENVAT Credit of the same is admissible to the appellant.

5.8. The appellant has contested that unutilised Cenvat credit of Rs. 4,01,847/- should have been adjusted against the Service tax liability for the concerned period, if any.

5.9. That for providing charter services, the Appellant had availed various input services on which Service tax has been paid by the Appellant. These input service included Flying charges, Chartering charges, Airport services, Space License Fee at Delhi Intl. Airport, Aircraft parking charges, Housekeeping Services, Maintenance Charges of Helicopter/ Aircraft, Loaning of Pilots, Inspection charges of hardware of Helicopters/Aircraft, Flight handling charges, Freight & Customs charges for import of parts of

Helicopter/ Aircraft, Monthly routine charges of inspection of Helicopter/Aircraft, Hiring of Helicopters, Transportation of passengers charges, QC coverage of Helicopter/ Aircraft, Aircraft Handling charges, Insurance Services, Ground handling charges, Lounge/ vehicle charges on flight, Crew accommodation charges, Equipment usage charges, Telephone charges. The input credit on these input services is admissible under the law.But the Appellant did not utilize available CENVAT Credit of Rs. 4,01,847/- for the payment of Service tax liability of the concerned period. Thus, the available CENVAT credit should have been adjusted against Service tax liability, if any, for the period 2008-09 and 2011-12. This fact has also been intimated to the department vide letter dated 13 September, 2013 and 15 October 2013 and admitted in the impugned order. But the Ld Commissioner of Service tax has returned a finding that the Appellant has not submitted the details and evidence of availing the CENVAT credit and therefore CENVAT Credit is not admissible to the Appellant, which is contrary to the facts on record.

5.10. We find that the appellant had submitted vide the above said correspondences, as admitted in the impugned order, documents in support of their claim of the said amount. We find that the input services claimed by the appellant are relatable to the output services provided by the appellant. The Learned Commissioner though admitted in the impugned order that the appellant had claimed the Cenvat Credit on above said inputs, but has not returned any finding that the said inputs were not relatable to the service provided by the appellant. The learned Commissioner could have ascertained the details from the copy of the RG-23 Register

submitted by the appellant. As per Rule 4(7) of CENVAT Credit Rules, 2004, CENVAT Credit of service tax paid can be taken at any point of time on or after the date of payment of service value and tax thereon. Rule 4(7) as existed prior to 01.04.2011 provides as follows:

"The CENVAT Credit in respect of input service shall be allowed on or after the day on which payment is made of the value of input service and the service tax paid or payable, as is indicated in the invoice, bill or as the case may be ,challan referred in the Rule 9 of the CENVAT Credit Rules,2004."

On the reading of the same, it is clear that CENVAT credit for the input services availed can be utilized for the payment of Service tax liability on or after the date on which payment for input services has been made by the assessee. Therefore we hold that the CENVAT Credit of Rs Rs. 4,01,847/- is admissible to the appellant.

5.11. The appellant has contested that Extended Period of Limitation is not invokable in the present matter, because the appellant has not suppressed any information with the 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. The show cause notice is dated 20,10.2013. Thus the demand from 01.04.2008 to 23.10.2008 is beyond the scope of the SCN. Further two SCN dated 20.05.2014 and dated 29.05.2015 were issued covering the period up to 31.03.2014 invoking the extended period of limitation which is contrary to the law.

5.12. We find that the appellant contested the stand taken by the department in respect of the classification of the service provided under the category of 'Supply of Tangible Goods Service' right from the beginning of the investigation vide various letters as mentioned in the impugned order has had been supplying all the information asked for by the department time to time. It is admitted in the impugned order that the Appellant is registered with Service Tax Department under the provisions of Section 69 (1) of the Act for providing various taxable service i.e. "Tour Operator Services, 'Maintenance or Repair Services', 'Survey and Exploration of Mineral', 'Transport of Passengers Embarking on Domestic/ International Journey by Air' as defined under the Act vide Service tax registration code no. AAACH7948DSD002. Thus the activities were known to the department. There is no allegation in the impugned order that the Appellant provided any services other than those for which the Appellant was registered with the Department. Only issue involved is whether the service of 'Transport of Passengers Embarking on Domestic/ International

Journey by Air' is classifiable under the category of 'Supply of Tangible Goods service' or 'Transport of Passengers by Air Service'.

There is no allegation in the impugned order that the appellant did not cooperate with the investigation undertaken by the Department. The Appellant has duly complied with all the requisitions of the Department and has duly submitted all documents/ information as and when demanded by the Department. The Appellant through various letters and correspondences was in communication with the department and all the documents were submitted to the department. No case has been made out against the appellant that the appellant has suppressed any facts or fraud committed with intention to evade payment of Service Tax.. Thus, the allegation of suppression or fraud with intention to evade payment of Service Tax cannot be sustained.

In the case of Commissioner of Central Excise, Chennai Vs Chennai Petroleum Corporation Ltd.-2007 (211) ELT 193 SC**,** the Apex Court has held that where the department was aware of the activities of the assessee, the extended period of limitation could not be invoked on the basis of the bold allegation of suppression on the part of the assessee.

In Anand Nishikawa Co. Ltd. Vs Commissioner of Central Excise , Meerut-2005 (188) ELT 149 (SC) the Hon'ble Supreme Court observed as below:-

" ……..we find that 'suppression of facts' can have only one meaning that the correct information was not disclosed deliberately

to evade payment of duty. When facts were known to both the parties the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression"

5.13. The ratio of the above said judgments is applicable in the case in hand. The invocation of extended period of limitation is set aside. Since the appellant has accepted 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) wherein it was held that services of providing helicopter/ air craft on charter basis along with pilot and other flying staff is classifiable under the category of 'Supply of tangible Goods Service', we hold that the demand for the normal period of one year is chargeable from the appellant. The appellant should calculate the demand for normal period of one year and deposit the same, if already not deposited. The Commissioner should verify the correctness of the calculation, and point out discrepancy, if any.

5.14. The appellant has contested that penalty cannot be imposed Under Section 76, 77 And 78 Under The Finance Act, 1994.

As discussed above, the appellant did not pay service tax under the category of Supply of Tangible Goods Service but suo moto paid the tax under the category of 'Passenger Travel by Air' and contested the issue from the beginning of the investigation, as discussed above and did not suppress any information from the department. Thus 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 held not leviable under the Finance Act, 1994.

In Tecumseh Products India Ltd. V. CCE, 2004(167) ELT 498 (S.C) , the Hon'ble Supreme Court held that in the circumstances where there was bona fide dispute between the parties in regard to the legal interpretation of law, penalty cannot be imposed on Appellant-assessee. The ratio of the said judgment is applicable in the case in hand. Therefore penalties imposed are also set aside.

To sum up-

i. Demand for extended period is set aside.

ii. Only demand is payable for the normal period.

iii. Appellant is entitled for Cenvat Credit on salary of pilots and service charges for repair and maintenance, including paid under Reverse Charge Mechanism.

iv. Service tax is not chargeable on spare parts, as held by the Ld. Adjudicating Authority.

v. All penalties are set aside.

vi. Held entitled to cenvat credit on input services.

6. Thus the impugned order is set aside, and the appeal is partly allowed as discussed in the preceding paras.

(pronounced in the open court on 30.11.2018)

(Bijay Kumar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

Rekha