

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

REGIONAL BENCH – COURT NO.

**SERVICE TAX MISC. APPLICATION NO.85418 OF 2019
in**

SERVICE TAX APPEAL NO.85672 OF 2015

(Arising out of Order-in-Appeal /Original No. 03/ST-VI/RS/2014 dated
19.12.2014 passed by the Commissioner, Service Tax – VI, Mumbai)

Global Vectra Helicorp Limited : Appellant

Hangar No.C-He/Hf
Airport Authority of India, Civil Aerodrome,
Juhu, Mumbai 400 054

VS

COMMISSIONER, SERVICE TAX - VI, MUMBAI : Respondent

115, New Central Excise Building, M. K. Road,
Churchgate, Mumbai 400 020

WITH

SERVICE TAX APPEAL NO.85688 OF 2015

(Arising out of Order-in-Appeal /Original No. 04/ST-VI/RS/2014 dated
26.12.2014 passed by the Commissioner, Service Tax – VI, Mumbai)

Global Vectra Helicorp Limited : Appellant

Hangar No.C-He/Hf
Airport Authority of India, Civil Aerodrome,
Juhu, Mumbai 400 054

VS

COMMISSIONER, SERVICE TAX - VI, MUMBAI : Respondent

115, New Central Excise Building, M. K. Road,
Churchgate, Mumbai 400 020

AND

SERVICE TAX APPEAL NO.85625 OF 2016

(Arising out of Order-in-Appeal /Original No. 04/ST-VI/RK/2015 dated
30.11.2015 passed by the Commissioner, Service Tax – VI, Mumbai)

Global Vectra Helicorp Limited : Appellant

Hangar No.C-He/Hf
Airport Authority of India, Civil Aerodrome,
Juhu, Mumbai 400 054

VS

COMMISSIONER, SERVICE TAX - VI, MUMBAI : **Respondent**
115, New Central Excise Building, M. K. Road,
Churchgate, Mumbai 400 020

Appearance

Shri Narendra Dave, Advocate for Appellant

Shri Bidhan Chandra, ADC & Dilip Shinde, AC(AR) for Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 20.06.2019
Date of decision : 20.06.2019

FINAL ORDER NO. A/86442-86444/2019

Per : Shri P Anjani Kumar, Member (Technical)

Brief facts of the case are that the Appellant is primarily engaged in transportation of passengers by air services, for domestic journeys, and hold a Non-Scheduled Operators Permit ('NSOP') issued by the Directorate General of Civil Aviation (hereinafter referred to as the 'DGCA'). They employ a fleet of around 22 helicopters ('Aircrafts'). The appellants are discharging service tax on the consideration received under the category "Transportation of passengers by Air Services" from 01.07.2010. The appellant also raised debit notes to the customers for reimbursement of Fuel Cost. Being reimbursement outside the purview of service tax, the appellants have not collected service tax on the same. Further, to provide the outside services, the

**Appeal No.ST/Misc/85418 in Appeal No. ST/85672,
85688/2015 & ST/85625/2016**

appellant had taken helicopters on lease from various vendors located outside India. The appellants are rendering services in the non-taxable territory i.e. Jammu & Kashmir. Revenue has issued SCNs on various issues which were confirmed by the OIOs as detailed below. Hence, these appeals.

Sl. No	Appeal No	OIO	SCN date / Period Covered	Issues Raised	Amount Confirmed Rs in Lakhs
1	ST/85625/16	04/ST-VI /RS/ 2015 dated 30.11.2015	17.10.12 (4/2011 to 3/2012)	Supply of Tangible Goods	376.23*
2	ST/85672/15	04/ST-VI /RS/ 2014 dated 19.12.2014	23.04.13 (10/2007 to 03/2011)	do	4.87
				Do (Vectra UK)	72.65
				BAFS (RCM)	78.54
				Re-imburse ment of fuel	62.49
3	ST/85688/15	04/ST-VI /RS/ 2014 dated 26-12-2014	13.05.13 (4/2011 to 3/2012)	do	352.27
				Re-imburse ment of fuel	72.12
				BAFS	7.96
				STGU	4.75
				Reversal u/r 6(3)	21.00

In addition to the duty confirmed Equal penalty under Section 78 and late fee under Section 70 of the Finance Act, 1994 was also.

2. In respect of **Appeal No.ST/85625/16**, the Learned Counsel for the appellants submits that the Appellants are primarily engaged in transportation of passengers by air services, for domestic journeys, and hold a Non-Scheduled Operators Permit ('NSOP') issued by the Directorate General of Civil Aviation (hereinafter referred to as the

'DGCA'). It employs a fleet of around 22 helicopters ('Aircrafts'); the appellants are discharging service tax on the consideration received under the category "Transportation of passengers by Air Services" from 01.07.2010; in the present case, the department called for the details of the transactions and service tax paid thereon for the Financial Year 2011-12. The appellants vide letter dated 04.10.2012 submitted details of the gross receipts and service tax and have also submitted to commissioner that the figures are not final, since the books of accounts are seized by the Anti-Evasion department; once the documents are received back from the department, the final figures will be submitted. However, the department issued the show cause notice dated 17.10.2012, based on the details submitted by the appellants and demanded service tax of Rs.3,76,23,339/- along with interest and penalty under section 76 of the Finance Act, 1994. After receipt of show cause notice, the appellants submitted final figures vide letter dated 15.04.2013 to the department; According to the final figures, the tax payable on the gross receipts was Rs.28,59,045,632; the appellants have discharged the entire service tax liability on the entire gross receipts through Cenvat Credit and Cash. The Ld. Commissioner in the impugned order (at Para 26) noted the contents of the final figures submitted by the Appellants but confirmed the demand in entirety without considering the correct figures and the fact of payment of full service tax and mechanically.

3. In respect of Appeal No No.ST/85672/15, Learned Counsel submits that in respect of demand of Service Tax under Supply of Tangible Goods for Use Services that show cause notice invoked the

extended period; though the appellants submitted detailed submissions, in reply to show cause notice, as to why the extend period should not be invoked, the Ld. Commissioner did not provide any finding on the extended period and mechanically confirmed the entire demand. However, for the demand of Rs.4, 87,560, department took the figures from the reconciliation statement submitted by the appellants, for the period 2009-10 to 2010-11; during the period in dispute the appellants are liable to pay tax on Cash Basis; however, the financials of the appellants were prepared on the accrual basis; due to the difference in practice of ascertaining the revenue, the gross receipts were reconciled; The appellants have paid tax under "Transportation of passengers by Air" w.e.f. 1.7.2010; further the taxable event, in the case of "Supply of Tangible Goods for Use" is the supply, i.e. transfer of custody of goods, that is the date of agreement; the event in the present case is therefore 16.04.2006, i.e. the date when the appellants entered into an agreement for supply of goods; However, the taxable category of "Supply of Tangible Goods for User Services" came into existence from 16.05.2008, much after the event has occurred, i.e. entering of agreement. Therefore, section 65(105) (zzzzj) of the Finance Act, 1994 will not be applicable in the present case.

3.1. In respect of demand of Service tax under Banking and Financial Services, the Counsel submits that department alleges that the appellants have received the "Banking and Financial Services" from the vendor located outside India for leasing of Aircrafts; the appellants entered into a lease agreement with CESNA(UK) on 15.06.2015;the

agreement was amended and clauses related to option to purchase the asset was removed from the agreement Even though, the amended agreement was provided to the Ld. Commissioner, the Ld. Commissioner confirmed the demand relying on the clause of the Old agreement which was deleted in the amended agreement. Further, the demand under Banking and Financial Services is not sustainable in accordance to the judgement of Bajaj Auto Finance Ltd. V. CCE. 2007 (7) S.T.R. 423 (Tri. – Mumbai) affirmed by Hon'ble Apex Court in 2008(10) S.T.R. 433 (S.C.). In addition to the above, the entire situation is revenue neutral. Even if the tax paid by the appellants under reverse charge mechanism, the appellants would be immediately entitled for the Cenvat Credit of the same in terms of Cenvat Credit Rules 2004. To support the aforesaid contention, the reliance is placed on the judgement of Jet Airways Ltd. V.CCE 2016 (44) STR 465 (Tri-Mum)

3.2. In respect of demand of Service tax on Reimbursement of Fuel, the counsel submits that department alleged that the appellants are not discharging service tax on reimbursement of fuel recovered from customer through debit notes. The appellants relied on the judgment of Hon'ble Delhi High Court in the case of Intercontinental Consultants & Technocrats Pvt. Ltd. V/s. UOI 2013 – (29) S.T.R. 9 (Del.) where in the Hon'ble High Court held that expenditure and costs which are incurred by the service provider “in the course of providing taxable service” are not taxable; that Rule 5(1) which purports to include the expenditure and cost incurred in the course of providing service in the value of the service is unconstitutional and ultra vires Section 67 of the Act. The said order has been upheld by the Hon'ble Supreme Court in

UOI vs. Intercontinental Consultants & Technocrats Pvt. Ltd. 2018-TIOL-76-SC-ST. Ld. Commissioner did not consider the aforesaid judgement while passing the impugned order, thus liable to set aside.

4. In respect of Appeal No No.ST/85688/15, Learned Counsel submits, in respect of demand of Service tax under Supply of Tangible Goods for Use Service, that the appellants vide letter dated 15.04.2013 submitted the final figures of gross receipts for the period April 2011 to March 2012; appellants have discharged the service tax liability on the entire gross receipts through Cenvat Credit and Cash; However, the department without considering the same issued show cause notice dated 13.05.2013. The appellants in Para (2.4.3 of reply to SCN) categorically stated that the tax is already being discharged on the entire gross receipts for the period 2011-12. However, even after recording the same, the Ld. Commissioner mechanically confirmed the entire demand. However, for the demand of Rs.4, 75,560/- the department took the figures from the financials, under the head "Provisions" and demanded tax under "Supply of tangible goods for use". The appellants are providing continuous supply of service; in case of continuous supply, service tax is payable at the time of invoices are raised; appellants made provisions for the services for the purpose of accounting in 2011-2012; the invoices of the same were issued in subsequent months and service tax discharged thereafter; merely provisioning for the purpose of accounting does not trigger the service tax liability.

4.1. In respect of demand of Service tax under Banking and Financial Services, Learned Counsel submits that the department alleged that the appellants have received the "Banking and Financial Services" from

the vendor located outside India for leasing of Aircrafts; appellants entered into a lease agreement with CESNA(UK) on 15.06.2005; agreement was amended in 26.4.2006 and clauses related to option to purchase the asset was removed from the agreement; Even though, the amended agreement was provided to the Ld. Commissioner, the Ld. Commissioner confirmed the demand relying on the clause of the old agreement. Further, the demand order Banking and Financial Services is not sustainable in accordance to the judgement of Bajaj Auto Finance Ltd V. CCE 2007 (7) S.T.R. 423 (Tri. – Mumbai) affirmed by Hon'ble Apex Court in 2008 (10) S.T.R. 433 (S.C.). In addition to the above, the entire situation is revenue neutral as submitted above.

4.2. In respect of demand of Service tax on Reimbursement of Fuel, counsel submits that department alleged that the appellants are not discharging service tax on reimbursement of fuel recovered from customers through debit notes; the appellants relied on the judgment of Hon'ble Delhi High Court in the case of Intercontinental Consultants & Technocrats Pvt. Ltd. V/s. (Supra). But Ld. Commissioner did not consider the aforesaid judgment.

4.3. In respect of demand of Reversal of Cenvat Credit under Rule 6(3) of Cenvat Credit Rules 2004, the counsel submits that the demand in the impugned order of Rs.274,937 is incorrect. The appellants have rightly reversed the Cenvat Credit in terms of Rule 6(3A) of Cenvat Credit Rules, 2004.

5. Learned Authorised representative for the department reiterated the findings of Commissioner in different OIO cited above.

6. Heard both sides and perused the records of the case. It is seen that main arguments of the learned counsel for the appellants are that

(i). the appellants are discharging service tax on the consideration received under the category "Transportation of passengers by Air Services" from 01.07.2010; the appellants submitted final figures vide letter dated 15.04.2013 to the department and have discharged the entire service tax liability; The Ld. Commissioner noted the contents but confirmed the demand in entirety without considering the correct figures.

(ii). in respect of demand of Service Tax under Supply of Tangible Goods for Use Services that show cause notice invoked the extended period; though the appellants submitted detailed submissions, in reply to show cause notice, as to why the extend period should not be invoked, the Ld. Commissioner did not provide any finding on the extended period and mechanically confirmed the entire demand.

(iii). during the period the period 2009-10, 2010-11 and 2011-12, the Appellants prepared financials on the accrual basis; due to the difference in practice of ascertaining the revenue, the gross receipts were reconciled; appellants paid tax under "Transportation of passengers by Air" w.e.f. 1.7.2010; the taxable event, in the case of "Supply of Tangible Goods for Use" is the supply, i.e. transfer of custody of goods, that is the date of agreement.

(iv). In respect of demand of Service tax under Banking and Financial Services, the agreement entered into a lease agreement with CESNA(UK) on 15.06.2015 was amended and clauses related to option

to purchase the asset was removed from the agreement. But Ld. Commissioner confirmed the demand relying on the clause of the Old agreement which was deleted in the amended agreement. Further, the demand under Banking and Financial Services is not sustainable in accordance to the judgment of Bajaj Auto Finance Ltd. V. CCE. 2007 (7) S.T.R. 423 (Tri. – Mumbai) affirmed by Hon'ble Apex Court in 2008(10) S.T.R. 433 (S.C.). The entire situation is revenue neutral, as held by Tribunal in Jet Airways Ltd. V.CCE 2016 (44) STR 465 (Tri-Mum)

(v). In respect of demand of Service tax on Reimbursement of Fuel, the counsel submits that department alleged that the appellants are not discharging service tax on reimbursement of fuel recovered from customer through debit notes. The appellants relied on the judgment of Hon'ble Delhi High Court in the case of Intercontinental Consultants & Technocrats Pvt. Ltd. V/s. UOI 2013 – (29) S.T.R. 9 (Del.) which was upheld by SC 2018-TIOL-76-SC-ST. Ld. Commissioner did not consider the aforesaid judgment.

7. Ongoing through the records, we find that there is force in the arguments of the appellants. We find that learned commissioner has not considered the submissions, accounting practices of the appellant and the agreements in totality. It is also seen that the learned Commissioner has not considered the case law submitted by the appellants in so far as the demands raised on certain issues like reimbursement of fuel etc. In respect of appeal no ST/85672/15, appellants' submissions on limitation were not considered. We find that Commissioner should have gone through the submissions of the appellant and give his findings on the same before coming to a

conclusion. In view of the same, we are of the considered opinion that the matter needs to go back to the commissioner for a fresh reconsideration of the issues in the light of the submissions made by the appellant and the interpretation given Tribunal and Courts as submitted by the appellants wherever applicable.

8. In view of the above, the impugned orders are set aside and the appeals are allowed by way of remand. All issues are however, kept open.

(Order pronounced and dictated in court)

(D.M. Misra)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

HM

