

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 89286 of 2013

[Arising out of Order-in-Original No: 24/STC-I/SKS/13-14 dated 29th July 2013
of Commissioner of Service Tax-I, Mumbai.]

Go Airlines (India) Ltd
C-1 Wadia International Centre, PB Marg, Worli,
Mumbai - 400013

...Appellant

versus

Commissioner of Service Tax – I
115 New Central Excise Building, MK Road, Churchgate
Mumbai – 400 020

...Respondent

APPEARANCE:

Shri Dinesh Agarwal, Chartered Accountant for the appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

FINAL ORDER NO: A/85801 / 2020

DATE OF HEARING:	29/08/2019
DATE OF DECISION:	11/09/2020

PER: C J MATHEW

This appeal of M/s Go Airlines (India) Pvt Ltd, challenging the
recovery of ₹56,58,312 under section 73 of Finance Act, 1994 read

with section 66A of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, besides imposing penalty of like amount under section 78 of Finance Act, 1994 and ₹10,000 under section 77 of Finance Act, 1994 *vide* order-in-original no. 24/STC-I/SKS/13-14 dated 29th July 2013 of Commissioner of Service Tax-I, Mumbai, is limited to the finding therein that the impugned activity conforms to section 65(105)(zh) of Finance Act, 1994 and not to that in section 65(105)(zzze) of Finance Act, 1994 as claimed by the assessee. It is common ground that the appellant is a recipient of service, provided by M/s Radixx Solutions International Inc., USA, to whom the first payment under the contract was made on 27th June 2006 and that the appellant had discharged tax liability of ₹28,01,753 on payments effected after 16th May 2008 with the incorporation of ‘information technology software’ among the taxable services in section 65(105) of Finance Act, 1994. The liability, for the period of dispute from 26th July 2006 to 31st August 2009, was fastened upon them by the operation of the legal fiction in section 66A of Finance Act, 1994 that deemed the recipient as provider to accord jurisdiction for collection of tax on services procured from outside India. The total liability of ₹73,43,647 for the period was partly adjusted from the voluntary payment of ₹16,85,335 towards the dues from 15th November 2006 to 20th July 2007. As the self-assessed payment of ₹28,01,753 has been discharged, the amount in dispute before us is restricted to ₹28,56,559.

2. Learned Chartered Accountant appearing for the appellant informs that the contract with M/s Radixx Solutions International Inc involved licensing of software that was utilised for management of the data of the appellant for their own enterprise-wide resource programming. It was pointed out that the product licensed to them was being extensively, and exclusively, used for their operations and, by its very nature, was rendered taxable only with the enumeration of ‘information technology software’ service in Finance Act, 1994. The allegation that the contract purported to provide ‘online information database access and retrieval’ service is, according to him, misconstruing of a minuscule component pertaining to the handling of the ‘booking platform’ accessed by their customers and agents. He also distinguished the said product from that involved in the decision of the Tribunal in *Jet Airways India Ltd v. Commissioner* [2016 (44) STR 465 (Tri-Mum)] as control over the data remained with the appellant and was accessed, as well as used, primarily by their employees.

3. Referring to the findings of the impugned order that

‘4.6..... What exactly is relevant is what is the outcome of the service provided by Radiix. For providing any Online Data Access or Retrieval process, there would definitely be some software and some operating system and both need be worked on some server. The particular software appears to be the property of Radiix and Radiix allow them to use by their customer. It is very important to understand that Radiix is not

only giving the software but Radiix also operate the software on their own server which results in to generation of certain outcome....'

Learned Chartered Accountant contends that this clear admission of the nature of the activity should have relieved them of the tax burden from the earlier date proposed in the notice. Further, it is submitted that the due discharge of liability as the recipient of 'information technology software' from June 2008 as well as provision of service, under the classification decided upon in the impugned order, being outside India with consequent exemption from tax is ample evidence of the clear absence of intent to evade tax. The decision, of the Tribunal in *re Jet Airways India Ltd* and upheld by the Hon'ble Supreme Court, that the revenue neutrality inherent in entitlement to CENVAT credit of the duty paid by them on 'reverse charge', according to Learned Chartered Accountant, also suffices to extinguish the intent of evading tax. He, therefore, submits that show cause notice dated 15th December 2009 is barred by limitation for recovery of the any amount prior to their voluntary acceptance of taxability.

4. Learned Authorised Representative contends that the taxability as provider of 'information technology software service' cannot be said to apply to the appellant as the software, and control thereof, remains with M/s Radixx Solutions International Inc and access alone

is afforded to the licensee for uploading, and retrieval, of data which can, thereafter, be manipulated for management of the business of the appellant. Clarifying that the payments are also effected on per transaction basis, he contends that the activity is no different from that which was disputed in *Jet Airways India Ltd v. Commissioner of Service Tax, Mumbai* [2016-TIOL-2072-CESTAT-MUM] and in *British Airways v. Commissioner of Central Excise (Adjudication)* [2014-TIOL-979-CESTAT-DEL] and, the demand therein having been set aside not on the ground of not having been received in India but on the bar of limitation, the impugned order must be upheld. According to him, the voluntary payment for part of the period before assessing themselves as liable to tax under section 65 (105) (zzzze) of Finance Act, 1994 establishes the correctness of the finding of the adjudicating authority. Reliance was placed upon the decision of the Tribunal in *Compton Greaves Ltd v. Commissioner of Central Excise, Aurangabad* [2004 (177) ELT 1032 (Tri-Mumbai)], in *Commissioner of Central Excise, Chandigarh v. Dharampal Prem Chand Ltd* [2011 (265) ELT 81 (Tri-Del)], in *Nitin Spinners Ltd v. Commissioner of Central Excise, Jaipur-II* [2017 (355) ELT 562 (Tri-Del)], *Shree Ranie Gums & Chemicals Pvt Ltd v. Commissioner of Central Excise, Jaipur-II* [2017 (4) GSTL 340 (Tri-Del)] and of the Hon'ble Supreme Court in *Dharampal Satyapal v. Commissioner of Central Excise, New Delhi* [2005 (183) ELT 241 (SC)].

5. The primary contention of Learned Chartered Accountant is that, unlike the finding of leviability, though held as irrecoverable, in *re Jet Airways India Ltd* and in *re British Airways*, the contract entered into with M/s Radixx Solutions International Inc is not one of 'computerised reservation system' but a comprehensive, enterprise-wide software. Undoubtedly, the dispute in the cited decisions pertained to contract for the reservation system providing interface for agents and travelling public but the said decisions did not restrict 'online information database access and retrieval' service to 'computer reservation system' alone. Admittedly, the impugned contract does provide the very same interface and is intended as a travel business solution. In the definition clause of the contract, it is seen that 'Radixx System is

'the Radixx proprietary software system, incorporating the Radixx Software, for use in providing call center and Internet-based consumer reservation and information management services for travel -related business...'

and the hosting of service is to be the responsibility of the licensor of the software. It is also clear from the appended schedules and exhibits that annual payments are to be effected on the basis of 'passenger segment' as the variable.

6. As claimed on behalf of the appellant, it is quite probable that the licensed software is deployed across the functional and operational

spread of the organisation. Nevertheless, the airline industry is entirely dependent on passenger/cargo traffic and it is the booking/reservation system that is at the heart of it. All other functions, notwithstanding their scale of investment or intensiveness of manpower, are auxiliary to the ticketing of passengers/booking of cargo. Hence, the agreement is intended for the deployment of a system of data accumulation, to enable passenger facilitation, and data retrieval which, in turn, ensures optimal deployment of resources. There is also no doubt that the system of 'online information database access and retrieval' interfaces the appellant with intending travellers. This, however, does not exclude the transaction between the appellant and the overseas contractor from the ambit of taxation as it is leviable on

'(zh) to any person, by any person, in relation to on-line information and database access or retrieval or both in electronic form through computer network, in any manner;'

in section 65 (105) of Finance Act, 1994. Though the information and database may be accessed at either end only by the appellant and intending passengers or agents, the taxability is in relation to such performance that can be undertaken only with the software and hosting provided by the overseas entity. The appellant, by entering into the impugned contract, has a customer-supplier relationship with M/s Radixx Solutions International Inc. This, undoubtedly, is in conformity with the taxable service. Therefore, the tax liability

devolves for the receipt of the service throughout the entire period of dispute.

7. The conclusion of the Tribunal that

‘10.7 In our considered view, we have to read the order holistically, i.e. British Airways case; on merit is against the appellant in this case while on the issue of revenue neutrality the order of British Airways supports appellant’s case. The ratio of the Bench applies clearly to the case in hand accordingly respectfully following to ratio we have to hold that the appellant has made out a case in their favour on the question of revenue neutrality. In view of a direct decision on the self same issue, we are not recording any findings on the other case laws relied upon by both sides on the question of revenue neutrality....’

in *re Jet Airways India Ltd* is the ground cited by Learned Chartered Accountant for extending the same benefit to the appellant. Our finding *supra* are not based upon, and did not place reliance on, the decision in *re British Airways*. It is after examining the facts and submission made on behalf of the appellant and subjecting the terms of the contract to scrutiny that the conformity to the description of the taxable service has been determined.

8. On the other hand, the several decisions cited by Learned Authorised Representative establishes that the liability to pay tax during the extended period cannot be extinguished by adopting the plea of revenue neutrality. While revenue neutrality may be pleaded

as evidence of lack of intent to evade tax, it may not, in every circumstance, justify the negation of the scope for invoking the extended period. We find no evidence on record that the appellant had been guided by expert advice to, consciously, be ignorant of the leviability for the said activity. The legal opinion furnished in evidence by Learned Chartered Accountant has been obtained after the issue of default had been raised; moreover, it would appear from the contents therein that it relates to the liability of the appellant under section 66A of Finance Act, 1994 as provider of ‘information technology software service’ and not to the primacy of this service over the one sought to be fastened on the appellant by the tax authorities.

9. It is contended by Learned Chartered Accountant that self-assessment to tax, on incorporation of ‘information technology software service’ in section 65(105)(zzzza) of Finance Act, 1994, is ample evidence of their diligence in discharge of tax liability to exclude the possibility of having contemplated evasion of tax. In terms of the activity that is sought to be taxed by these two entries, the connection with electronic data processing is unmistakable. Considering the mechanism incorporated in the two definitions to render the activity functional, the minor differences between them should have led to a similar speculative reasoning on the part of the assessee and the deliberate discard of applicability after initial

discharge of tax liability should have been justified in the proceedings instead of relying upon decisions of the Tribunal rendered subsequent to the period of dispute. The discharge of tax liability after incorporation of the new levy occurred during the investigations and, therefore, does not obtain for themselves the halo of diligence. The observation of the Hon'ble Supreme Court, in *re Dharampal Satyapal*, that

'25..... A right to claim pro forma/modvat credit against duty on final products was different from the defence of bonafides in a case where circumstances mentioned in the proviso to section 11 A (1) stands proved by the Department for invoking larger period of limitation. The burden to prove the defence of bonafides was on the assessee and the assessee in this case has failed to prove its bonafides...'

leads to the inevitable conclusion that the plea of operation of the bar of limitation cannot be acceptable in the circumstances sought for by the appellant.

10. We take note that the impugned order has imposed penalty of ₹ 56,58,312 under section 78 of Finance Act, 1994. It is seen that appellant has been discharging tax liability since 16th May 2006 and, with payment of taxes amounting to ₹ 16,85,335 at some stage before ceasing to do so in July 2007, the unpaid dues is limited to ₹28,56,559. Accordingly, while upholding the impugned order as being consistent with the law, the penalty under section 78 of Finance Act, 1994 is capped

at this amount.

11. The appeal is, therefore, dismissed save for this modification.

(Order pronounced in the open court on 11/09/2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*