CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>MUMBAI</u>

REGIONAL BENCH - COURT NO. 01

Service Tax Appeal No. 86128 Of 2015

(Arising out of Order-in-Original No. 02/AC/COMMR/Th-II/ST/2015 dated 12.02.2015 passed by Commissioner of Central Excise, Thane-II)

M/s Air India Limited **.....Appellant**
2nd Floor, Finance Building, Old Airport, Kalina, Santacruz (East), Mumbai-400029.

VERSUS

Commissioner of Central Excise and Service Tax, Thane-II **.....Respondent**
3rd Floor, Navprabhat Chambers, Ranade Road, Dadar (West), Mumbai-400028.

<u>Appearance:</u>

Shri Piyush Chhajed, Chartered Accountant for the Appellant
Shri S.K. Mathur, Special Counsel for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M. M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87464/2023

Date of Hearing: 17.11.2023
Date of Decision: 17.11.2023

PER : S. K. MOHANTY

Briefly stated, the facts of the case are that M/s Air India Limited (hereinafter, for short, referred to as 'the Appellants') are engaged in providing various taxable services namely, Transport of passenger by Air, Transport of Cargo by Air, Transport of goods by Road, Airport Services, Supply of Tangible goods, Repair and Maintenance Service, etc. Those services are defined as taxable services under the legal provisions of the Finance Act, 1994. During the course of Audit, the Service Tax Department found that the Appellants had entered into a Memorandum of Understanding (MOU) dated 24.03.2006 with their subsidiary company M/s Air India Charters Ltd. (AICL), which is presently known as Air India Express Ltd. for provision of various Infrastructural Support Services. As per the contents of the MOU, the Department interpreted that the services provided by the Appellants to their subsidiary company AICL should be categorized as taxable services under the category of "Business Support Services (BSS)". Since the Appellant had not paid any service tax on account of such services, the Department initiated show-cause proceedings against the Appellants, seeking confirmation of the service tax demand. The show-cause notice (SCN) dated 22.04.2013 issued in this regard was adjudicated by the Learned Commissioner of Central Excise vide Order-in-Original No. 02/AC/COMMR/Th-II/ST/2015 dated 12.02.2015 wherein service tax demand of Rs. 2,27,24,91,160/- along with interest was confirmed on the Appellants and also penalties were imposed under Sections 77 & 78 *ibid.* Feeling aggrieved with the impugned order, the Appellants have preferred this appeal before the Tribunal.

2. The Learned Chartered Accountant appearing for the Appellants submitted that the services provided by the Appellants to their subsidiary company AICL fall under taxable category of 'airport services' defined under Section 65(105)(zzm) of the Finance Act, 1994 and that the Appellant had already discharged the Service Tax liability under such category of services. He submitted that since, the services provided by the Appellants to the subsidiary company falls under the category of airport services, the said service cannot be categorized under any other taxable service. Thus, he submitted that confirmation of the adjudged demand on the Appellants cannot be sustained on merits. Further, the Learned Chartered Accountant submitted that the show cause proceeding initiated by the Department is barred by limitation of time in terms of sub-section (1) of Section 73 of the Finance Act, 1994. He also submitted that though the show-cause notice had invoked the proviso clause of sub-section (1) of Section 73 *ibid*, but no specific allegations made therein to demonstrate that non-payment of service tax by the Appellant was owing to the reason of suppression of facts, wilful mis-statement, fraud, etc. Thus, he submitted that the shortfall in service tax, if any, should only be demanded under the main provisions contained to sub-section (1) of Section 73 and the proviso clause cannot be

invoked for recovery beyond such normal period. Further, he submitted that the facts regarding execution of the MOU dated 24.03.2006 between both the Appellant and AICL was known to the Department way back in 2009, which is evident from the fact that for non-payment of service tax under the taxable category of Business Support Services, the Department had issued a show-cause notice on 03.06.2009, demanding service tax for the period 2005 to 2007 and placed the said MOU dated 24.03.2006 as one of the relied upon document. Accordingly, he submitted that since the facts of the execution of the MOU and the provision of the services were known to the Department well in advance, the extended period of limitation cannot be invoked. In this regard, Learned Chartered Accountant has relied upon the judgements of Hon'ble Supreme Court in the case of *Nizam Sugar Factory vs. Collector of Central Excise, A.P. reported in - 2006 (197) E.L.T. 465 (S.C.).*

3. On the other hand, Learned Special Counsel appearing for the Revenue reiterated the findings recorded in the impugned order and further submitted that since the Appellant did not co-operate in the show-cause proceedings conducted by the Department, invocation of the extended period by the Department for recovery of service tax which is not paid/short paid is proper and justified.

4. Heard both sides and examined the case records.

5. We find that on the basis of the MOU signed between the Appellant and M/s Air India Charters Ltd (AICL) on 24.03.2006, the Department had issued the show-cause notice dated 01/03.06.2009 for demand of service tax for the period 2005 to 2007. We also find that the amendment made to clause 9 of the said MOU was also mentioned as one of the ground for demand of service tax in the said SCN dated 01/03.06.2009. On similar set of facts, the Department has issued the present show-cause notice on 22.04.2013, seeking confirmation of service tax under the taxable category of Business Support Services from the Appellants. On conjoint reading of both the show cause notices dated 01/03.06.2009 and 22.04.2013, it transpires that the facts regarding provision of services by the Appellant to their subsidiary company and the manner in which the revenue earned is

shared amongst them was well within the knowledge of the Department. Thus, under such circumstances, the proviso clause appended to sub-section (1) of Section 73 *ibid* cannot be invoked alleging suppression of facts, fraud, wilful mis-statement, etc with intent to evade payment of service tax. We find that the Hon'ble Supreme Court in the case of Nizam Sugar Factory (*supra*) has held that when all the relevant facts were in the knowledge of the authority, on the basis of which, the first show cause-notice was issued, the subsequent show cause-notices cannot be issued by invoking the extended period of limitation. The relevant paragraphs in the said judgement are extracted herein below:

> *"8. Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in (2003) 3 SCC 599 = 2003 (153) ELT 14 (S.C.) has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. It was observed in para 14 as follows:*
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> > *14. We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11A of the Act for making the demand for the extended period.*
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> *This judgment was followed by this Court in the case of ECE Industries Limited v. Commissioner of Central Excise, New Delhi reported in (2004) 13 SCC 719 = 2004 (164) ELT 236 (S.C.). In para 4, it was observed:*
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> > *4. In the case of M/s. P&B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in [2003 (2) SCALE 390), the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-*

statement and that therefore, the extended period under Section 11A could not be invoked.

Similarly, this judgement was again followed in the case of Hyderabad Polymers (P) Ltd. v. Commissioner of Central Excise, Hyderabad reported in [2004 (166) E.L.T. 151 (S.C.)]. It was observed in para 6 :

"…………On the ratio laid down in this judgment it must be held that once the earlier Show Cause Notice, on similar issue has been dropped, it can no longer be said that there is any suppression. The extended period of limitation would thus not be available. We are unable to accept the submission that earlier Show Cause Notice was for a subsequent period and/or it cannot be taken into consideration as it is not known when that Show Cause Notice was dropped. If the Department wanted to take up such contentions it is for them to show that that Show Cause Notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore, the Department cannot now urge that findings of the Collector that that Show Cause Notice was on a similar issue and for an identical amount is not correct."

9. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant."

6. Further, on perusal of the case records, more particularly the show cause notice dated 22.04.2013 issued by the Department, we find that no specific allegations were made against the Appellants to show that they had infact indulged into the fraudulent activities like wilful mis-statement, fraud, etc with intent to evade payment of service tax. Further, the proviso clause appended to sub-section (1) of Section 73 has also not been invoked seeking recovery of service tax under the extended period of limitation. Since, invocation of the proviso clause is an exception and the onus naturally lies on the Department to prove that the Appellant has not paid the service tax owing to the reason of suppression of facts, wilful misstatement, etc, in our considered view that service tax, if any, can be demanded within the normal period and extended period cannot be invoked for effecting recovery of the short paid service tax by the Appellant.

7.1. We further find that in respect of the initial SCN dated 01/03.06.2009 issued by the department demanding service tax on the amount of royalty or consideration received by the appellants for withdrawal of flight operations from certain routes, permitting AICL to use their registered brand name 'Air India' and their domain knowledge, which were alleged to be taxable service under the category of Intellectual Property Rights Service, the matter has already been decided by the Principal Commissioner of CGST & Central Excise, Mumbai vide Order-in-Original dated 27/28.09.2022 in *de novo* proceedings. It has been held in the above order that in order to decide the liability of service tax, the legal position of the MOU between the appellant and AICL after its amendment dated 18.03.2008, which has retrospective effect from 01.04.2005, has to be considered. It has also been held in the above order that the amendment to clause 9, made on 18.03.2008 is in synchronization with the project report submitted by the appellant to the Ministry of Civil Aviation in December, 2004, much earlier to the departmental investigation of the present case in January, 2008. After detailed examination of the facts, the learned Principal Commissioner, in the above order dated 27/28.09.2022, had come to the conclusion that the appellant and AICL are two distinct entities and they have come together on a principal-to-principal basis for a common business objective with the intention of sharing revenue in a pre-determined ratio. Thus, he held that the income showed on revenue sharing basis by the appellant will not attract service tax payment and accordingly dropped the demand alleged in SCN dated 01/03.06.2009.

7.2 We also note that the above order dated 27/28.09.2022 has been accepted by the Committee of Chief Commissioner on 21.11.2022 during the process of review, and the department has not appealed against the said order. This fact has been communicated by the jurisdictional Principal Commissioner of CGST & CX, Mumbai East to the special Counsel appearing for Revenue.

7.3 In addition to the above, the appellants have also filed an affidavit duly notarized to the effect that:

> *"1) The service tax demand in the above appeal no. ST/86128/2015 amounting to INR 227,24,91,160/- on amount booked as revenue share of INR 2056,46,00,000/- to Air India Limited from Air India Express Limited (AIXL, formely known as "Air India Charters Limited (AICL)"), subsidiary of Air India Limited. The service tax demand was confirmed vide Order-in-original 02/AC/COMMR/TH-II/ST/2015 dated 12.02.2015 under the*

category of 'Business Support Services' pertaining to period 2007-08 to 2011-12. The amount of revenue share is reported in the respective financial statements [ie. Financial Year 2007-08, 2008-09, 2009-10 and 2011-12) of Air India Limited which is also forming the part of Show Cause Notice no. 813/COMMR/2013-14 dated 22-04-2013 [Show cause notice in the present case].

2) Further, with respect to the earlier financial period i.e. 2005-06 to 2006-07, the tax authority had raised demand for Service tax under the category of Intellectual Property Services for the revenue transferred by AIXL in accordance of Clause '9' of.

3) Memorandum of Understanding vide Show Cause Notice no. V/ST/HQRS/AE/Gr.B / 09/08/1941 dated on 03.06.2009. The said SCN was confirmed vide Order-in-Original 6/ PKA/ COMMR/ Th-II/ 2012 dated 22-03-2012. The matter was heard by Hon'ble CESTAT, wherein CESTAT has remanded back the matter. In relation to the same, favorable order no. 55/MRM/COMMR/ME/2022-23 dated 28.09.2022 has been passed by the Principal Commissioner of CGST & Central Excise in favour of Air India Limited giving effect to CESTAT order in respect of revenue sharing under 'Intellectual Property Services'.

4) In the current Show Cause Notice, the demand has been raised again on the figure of revenue sharing as reiterated above under the head Business Support Services relying upon Clause '6' whereas the fact remains services provided under Clause '6' are different than the revenue sharing under Clause '9'.

5) Additionally, with respect to the period 2008-09 to 2011-12, Air India has the taxable value received under Clause '6' of Memorandum of Understanding under the head Airport services has discharged the Service tax under 'Airport services'. Air India has discharged service tax on taxable value of Rs. 156,55,17,639/- amounting to Rs. 16,75,98,811 for the period F.Y. 2008 09 to 2011-12 as intimated in Show Cause Notice No. 916/COMMR/2013-14 dated 17.10.2013 by the same audit team."

Inasmuch as the entire amount payable to the appellants, as per the records of AICL and appellants, is shown in the SCN dated 27.04.2013 as revenue sharing income in respect of clause 6 & 9 of the MOU, and the same issue arising therein has already been decided by the lower authorities, which the Department had accepted the same in review and appropriate service tax on 'airport services' have already been paid by the appellants, we don't find it necessary to examine the same again on the merits of the case in context with present SCN.

8. In view of the foregoing discussions, we do not find any merits in the impugned order insofar as it has confirmed the service tax demand invoking the extended period of limitation. Therefore, by setting aside the impugned order, the appeal is allowed in favour of the Appellant only on the ground of limitation.

(Dictated and pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha/kpw