CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86974 OF 2016

[Arising out of Order-in-Original No:02/ST-VI/RK/2016-17 dated 25^{th} April 2016 passed by the Commissioner of Service Tax – VI, Mumbai.]

EON Aviation Private Limited
DH House, Yashodham, General AK Vaidya Marg
Goregaon (E), Mumbai - 400063 … ***Appellant***

versus

Commissioner of Service Tax – VI
New Central Excise Building,
115 Maharshi Karve Marg, Churchgate,
Mumbai - 400020 ***…Respondent***

WITH

SERVICE TAX APPEAL NO: 86975 OF 2016

[Arising out of Order-in-Original No:02/ST-VI/RK/2016-17 dated 25^{th} April 2016 passed by the Commissioner of Service Tax – VI, Mumbai.]

Rakesh Kacker
VP Operations
EON Aviation Private Limited
DH House, Yashodham, General AK Vaidya Marg
Goregaon (E), Mumbai - 400063 … ***Appellant***

versus

Commissioner of Service Tax – VI
New Central Excise Building,
115 Maharshi Karve Marg, Churchgate,
Mumbai - 400020 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate for the appellant

Shri Priyesh Bheda, Joint Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 87116-87117/2024

DATE OF HEARING: 06/08/2024
DATE OF DECISION: 28/11/2024

PER: C J MATHEW

M/s Eon Aviation Pvt Ltd is in appeal against the finding that payment received between April 2010 and March 2014 from their clients of their flight operations have been erroneously held, in order[1] of Commissioner of Service Tax, Mumbai-VI, to be liable to tax as 'supply of tangible goods service' under section 66 of Finance Act, 1994 upto June 2012 and under section 66B of Finance Act, 1994 for the period beyond. Recovery of ₹ 15,61,60,912 was ordered under section 73 of Finance Act, 1994 as differential tax liability and irregularly availed credit under rule 14 of CENVAT Credit Rules, 2004, along with appropriate interest under section 75 of Finance Act, 1994, besides penalties being imposed on the company as well as official of the company even as demand of ₹ 15,88,250, as proposed in the show cause notice, was dropped though that had more to do with

[1] [order-in-original no. 02/ST-VI/RK/2016-17 dated 25th April 2016]

being consistent about the nature of the service within which the impugned activity actually fell.

2. The appellant-assessee, a holder of 'non-scheduled operator permit' issued by the Directorate General of Civil Aviation (DGCA), offers its fleet of 'fixed wing' and 'rotary' aircraft on charter under agreement between themselves and customers with tax liability on consideration from 2009-10 to November 2013 discharged as provider of 'transport of passenger by air' service which, between beginning and June 2010, did not extend to domestic travel and tax liability on that component paid thereafter no tax was paid on consideration received for domestic flights with abatement of sixty per cent (60%) availed in terms of notification specific to that service; thereafter, from 1st December 2013, the same activity was classified, though irrelevant to the leviability by then, as 'supply of tangible goods service', and, presumably, that, along with several clauses in the agreements as well as payment by time rather than use and exclusivity of access during charter, sufficed for the adjudicating authority to alter the category of service for the disputed period. While that distinction did not exist in law after June 2012, it was on the entitlement to abate a substantial portion of the consideration for tax that the dispute primarily turns.

3. The displacing category of service, incorporated as

'(zzzzj) to any person, by any other person in relation to supply

> *of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliance'*

in section 65(105) of Finance Act, 1994 by Finance Act, 2008, had come effect from 16th May 2008 and, *vide* circular[2], Central Board of Excise & Customs clarified that chartering of aircraft would be within the scope of this incorporation subject to right of use being established and right of possession demonstrated in the terms of the charter. The claim of appellant-assessee is that the charge effected by

> *'(zzzo) to any passenger, by an aircraft operator, in relation to scheduled or non-scheduled air transport of such passenger embarking in India for international journey, in any class other than economy class;'*

in section 65(105) of Finance Act, 1994 with effect from 1st May 2006 that, by Finance Act, 2010, was expanded to tax

> *'(zzzo) to any passenger, by an aircraft operator, in relation to scheduled or non-scheduled air transport of such passenger embarking in India for domestic journey or international journey;'*

thus erasing class distinction and destination discrimination effective from 1st July 2010.

4. The appellant-assessee was brought down to the ground with the

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[2] [dof no. 334/1/2008 TRU dated 29th February 2008]

interim decision[3] of the Tribunal in *Global Vectra Helicorp Ltd v. Commissioner of Service Tax, Mumbai-II,* rejecting challenge in appeal[4] to levy of tax as 'supply of tangible goods service' but referred for resolution of divergent opinions on penalty, that became the foundation of the investigation launched against them as well as of others. The records state that, in that dispute, the Tribunal held the impugned activity to be 'supply of tangible goods service' owing to which the appellant-assessee was persuaded to fall in line by service tax authorities and thus, opted for the Voluntary Compliance Encouragement Scheme (VCES), 2013 for the tax dues of upto 31st December 2012 while commencing payment of tax on the entire consideration for the period thereafter. It is also on record that the appellant-assessee had raised supplementary invoices on their customers and many disregarded that for absence of contractual relevance.

5. The demands were, thus, of ₹ 15,35,49,520 towards rendering of taxable service *supra*, ₹ 18,74,121 towards procurement of 'support service of business and commerce' and 'banking and financial service' from outside India, ₹ 7,37,271owing to inappropriate availment of credit and ₹ 15,88,250 towards credit availed under CENVAT Credit Rules, 2004 of tax paid but not extinguished to the extent attributable

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[3] [misc order no. M/1323/2013-WZB/CSTB/C-I dated 1st October 2013]
[4] [appeal no. ST/341/2012-MUM]

to non-taxed component respectively of which the last was dropped for having been sought in connection with exclusion of domestic journeys for a while from consideration earned by providing ‘transportation of passenger by air’ service. The ineligible credit was sought to be denied for not being ‘input service’ as set out in rule 2(l) of CENVAT Credit Rules, 2004.

6. The bulk of the demand is a consequence of alteration of category of service from ‘transportation of passenger by air’ service, taxable under the authority of section 65(105)(zzzo) of Finance Act, 1994 to ‘supply of tangible goods service’, taxable in terms of section 65(105)(zzzzj) of Finance Act, 1994, which, according to Learned Counsel for appellant, is not consistent with the regulatory regime prescribed for such activity under Aircraft Rules, 1937 commencing with issuance of ‘non-scheduled operator permit (NSOP)’,(no. 10/2009), to them by the Directorate General of Civil Aviation (DGCA) in pursuance of statutory amendment permitting this new category of airline operations for which Civil Aviation Rules (CAR) were notified by the statutory authority. It was his contention that this permit specifies carriage of passengers, mail and goods and is inclusive of charter operations. He took us through the scheme of charter operations to contend that erroneous construction has been made on several aspects of the business to return an erroneous finding.

7. In re-classifying the impugned activity, the clarification[5] offered by Central Board of Excise & Customs (CBEC) upon incorporation of this taxable service, *viz*., such as was not leviable to tax by states – transfer of right to use involving transfer of possession and control – by Article 366 (29A)(d) of the Constitution was sought to be taxed henceforth under Finance Act, 1994, to cover all such transfers which were not subjected to tax by the state governments. In accordance with subsequent instructions of Central Board of Excise & Customs (CBEC) referred *supra*, the adjudicating authority examined a sample of the agreement entered into by the appellant with customers to arrive at the conclusion of change of classification being warranted.

8. According to Learned Counsel for appellants, their relationship with their corporate customers is to ensure availability of pre-determined model of aircraft to be made available upon prescribed notice and for which the payment is on actual usage with guaranteed minimum flying hours and other costs incurred on being away from base and tax liability discharged from July 2010 to March 2012. He intimated that abatement, permitted in notification no. 6/2012-ST dated 17th March 2012 and notification no. 26/2012-ST dated 20th June 2012, had been availed thereafter until November 2013 and that, upon prompting by service tax authorities, the differential tax was paid which, for the period upto December 2012, was discharged as dues

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[5] [dof no. 334/1/2008-TRU dated 29th February 2008]

under the scheme referred *supra* for escapement from interest and penalty and for the full differential from January 2013 to November 2013. Learned Counsel submitted that, for the period prior to July 2012, the definition of revised taxable service was not applicable to them as they had not supplied aircraft to their customers but merely facilitated use of aircraft and, instead, provided only use of the aircraft with effective control yet retained with them. He drew distinction between 'time charter' and supply of aircraft to demonstrate that, while possession or title remained with the appellant at all times, the use was also circumscribed to deciding on destination and composition of the travel group.

9. Taking us to the specifics of the proposed 'taxable service', it was contended by him that the structuring of the definition with two limbs of which the 'including' preceding 'machinery, equipment and appliances' was, in circumstances of the manner in which the second limb was composed, was to be interpreted as restricted to 'machinery, equipment and appliances' for any other would lead to absurdity of 'use' being intended for 'tangible goods' of all sorts but of 'right of possession and effective control' being limited only to 'machinery, equipment and appliances. He submitted that such could never be conceived as intended to describe aircraft. It was submitted that this argument rendered by him had found approval of the Hon'ble Supreme Court in *South Gujarat Roofing Tiles Manufacturing Association v.*

State of Gujarat [(1976) 4 SCC 601], in *NDP Namboodiri v. Union of India [2007 4 SCC 502]* and in *Commissioner of Customs v. Carryaire Equipment India P Ltd [2012 (278)ELT 30]*.

10. Learned Authorized Representative submitted that the impugned order had, logically and legally, countered every one of the conceivable claims brought up the appellant to contest the culminating proposition in the show cause notice that the contracts called for discard of claim of having rendered 'transportation of passenger by air' service. He pointed out that the contracts were with corporate entities and these envisaged merely that the aircraft would be placed at the disposal of the said entity with no linkage with passengers except when the contractual obligation was sought to be consummated. Besides making submissions on 'right of possession and effective control' of, and over, aircraft not having been transferred to the client, Learned Authorized Representative pointed out that from the contractual terms, it was apparent that the normal activities of an 'aircraft operator' were not be found in the transactional engagement of the appellant with their clients. He drew our attention to the lack of ticketing, the computation of consideration not being 'passenger-wise' and claim of appellant for availability of aircraft subject to prescribed notice of intended use as being far different from dealings that an 'aircraft operator' would have with a passenger. He carefully took us through the judicial decisions that paved the way for the adjudicating authority to conclude that the

impugned activity was rendering of ‘supply of tangible goods service’ and, hence, the differential tax liability.

11. From the manner in which aspects find repetition in the impugned order, it appears that the adjudicating authority was primarily concerned with arrangements that left the ‘right to physical possession and effective control’ in the hands of the appellant while bringing to bear the cost of the aircraft, as well as the technical expertise acquired by the appellant, to validate the inevitability of such retention. We do find that the pattern of the order has much to do with manner in which the Tribunal, in *Global Vectra Helicorp Ltd v. Commissioner of Service Tax, Mumbai-II [2016 (42) STR 118 (Tri-Mumbai),* came to the conclusion that the activity was, in effect, ‘supply of tangible goods service’ which was rendered taxable earlier and, subsequently, devoid of benefit of abatement that the rival category was. That was reason enough for service tax authorities to press the provisions of law and judicial determination in proposing recovery of differential tax. Furthermore, the subsequent resort to ‘supply of tangible goods service’ by appellant-assessee for discharge of tax liability was harped upon as acquiescence with the revised categorization and, consequential, lack of merit in the claimed categorization.

12. To us, such a deduction does not appear to be bereft of chinks in the logic; though the investigation had been underway for a time, it is

also clear that it took the decision *supra* of the Tribunal in *re Global Vectra Helicorp Ltd*, as interim order preceding resolution of difference of opinion on imposition of penalty which had been referred to Third Member, to confer some validation and, in the meanwhile, attempts at persuading their clients of their obligation to make good on taxes that were allegedly leviable for the earlier period, reportedly, not having proved successful, there would be good reasons for transferring future burden of the tax onto clients rather than risk it on appellate affirmation of correctness of displacing category. Too much, therefore, cannot be read into the events as they unfolded. The appellant-assessee herein was in the business of contracted chartering and had been discharging tax liability from 1st July 2010 as provider of service set out in section 65(105)(zzzo) of Finance Act, 1994 and eligible for abatement from 1st April 2012 in terms of notification[6] issued under section 93 of Finance Act, 1994. In like manner, they continued to discharge tax liability after 1st July 2012 when delineation of taxable services was substituted by 'service' as defined in section 65B(44) of Finance Act, 1944. At that stage, classification was irrelevant and the dispute, thereafter, turned solely on eligibility to avail abatement afforded by the successor notification[7] to provision of 'transport of passengers by air, with or without accompanied belongings' with effect from 1st July 2012. The dispute, thus, straddles three distinct periods – charged as 'supply of

[6] [notification no. 6/2012-ST dated 17th March 2012]
[7] [notification no. 26/2012-ST dated 20th June 2012]

tangible goods service' for service rendered without payment of tax, as 'supply of tangible goods service' for liability having been discharged as 'transport of passengers by air service' with abatement, and as 'taxable service' on which liability was discharged with abatement – from October 2009 to March 2014.

13. We find that the decision, in *re Global Vectra Helicorp Ltd*, of the Tribunal, that appears to have been 'near replicated' in the order impugned here, did go into the terms of the contractual engagement as set out in the circulars and instructions of Central Board of Excise & Customs (CBEC) to evaluate conformity with 'effective control' and drew support, besides, from the judgement of the Hon'ble High Court of Bombay in *Indian National Shipowners' Association v. Union of India [2009 (14) STR 289 (Bom)]* but, in order to reject the claim of appellant for being devoid of any conformity with 'transport of passenger by air' service, reliance was had to the decision of the Tribunal in *King Rotors & Air Charter P Ltd v. Commissioner of Customs (ACC & Import), Mumbai [2011 (269) ELT 343 (Tri-Mumbai)]*. In the course of discussions, three orders, *viz*., *United Helicharters Ltd v. Commissioner [2010 (262) ELT 293 (Tribunal)]*, *Karnavati Aviation Pvt Ltd v. Commissioner [2013 (30) STR 89 (Tribunal)]* and *Adani Gas Ltd v. Commissioner [2012 (28) STR 170 (Tribunal)]*, came to be considered as overwhelming the one order, in *Mesco Airlines Ltd v. Commissioner of Service Tax*, *New Delhi [2013*

(31) STR 364 (Tri-Del)], cited by appellant therein with all of these as irrelevant for resolution of the dispute which was decided on the foundation of the decision in *re King Rotors & Air Charter P Ltd* of the Tribunal to reject classification claimed by the appellant therein and in *re Indian National Shipowners' Association* of the Hon'ble High Court of Bombay for factual similitude coupled with definitions as applicable and circulars of Central Board of Excise & Customs (CBEC).

14. The decision in *re Global Vectra Helicorp Ltd*, as well as the impugned order, have eliminated the claim of having provided 'transport of passenger by air' service by excluding the client, as corporate, from scope of coverage as passenger for which the interpretation of 'passenger' in *re King Rotors and Air Charters Pvt Ltd* was drawn upon. Such reliance places the decisions themselves in jeopardy by being dependent on continued availability of those as precedents. More so, as the issue involved in *re King Rotors and Air Charters Pvt Ltd* was eligibility for exemptions from duties of customs availed at the threshold on import wherein it had be resolved if customs authorities could deny benefits intended for holders of 'non-scheduled operator permit (NSOP)' and 'passenger', in the absence of definition, was held to be restricted to natural persons. Furthermore, in the light of 'passenger' as set out in section 65 (77c) of Finance Act, 1994, a dispute over rendering of 'taxable service' did not have to draw upon resolution of dispute pertaining to another levy. Learned Counsel also pointed out

that the decision in *re King Rotors and Air Charters Pvt Ltd* came up once again, and in the context of divergent decisions impeding acceptance of either as precedent, before the Tribunal in a Larger Bench in *VRL Logistics Ltd v. Commissioner of Customs, Ahmedabad [2022 (8) TMI 720 – CESTAT AHMEDABAD (LB)]* and it had been held therein that

> *'119. The division bench of the Tribunal in King Rotors held that since the flight operations are not open to the public, the aircraft would not be considered to have been used for non-scheduled (passenger) services. This view, as discussed above, proceeds on an incorrect appreciation of the definition of non-scheduled (passenger) services.'*

owing to which its adoption in the impugned order is misplaced.

15. Learned Counsel further submitted that the decision of the Larger Bench *supra* was, in the context of a dispute identical to that here, was applied thus

> *'23. In view of above we find that charter operation is a sub-category of non-scheduled aircraft operations. The definition of charter operations is contained in that part of the CAR which pertains to Minimum Requirement for grant of permit to operate non-scheduled Air Transport Services. Hence, charter operations do not cease to be aircraft operations by reason of the fact that the entire aircraft is chartered by the client from the aircraft operator. Charter operations are essentially aircraft operations, and cannot be categorized as supply of aircraft by the aircraft operator to the charterer. In light of the abovementioned stipulations of the CAR it is evident that in*

> *case of charter operation, no ticket is required to be sold to the individual passenger. Further, the charter may be for single journey or for multiple journeys over a period of time. Regardless of this the services remains one of charter operation.*
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> *24. In view of above, it is seen that the services rendered by the appellants fall within the category of non-scheduled air transport services. Further, the appellant is in the business of providing service to its customers embarking in India for domestic journey. Hence, the conditions for coverage under the "transport of passengers by air service" are satisfied. Therefore, in our view the service provided by the appellant is covered under the taxable service category of "transport of passengers by air service" defined under clause (zzzo) of sub-section 65(105) of the Finance Act, 1994.'*

by the Tribunal in *Karnavati Aviation Pvt Ltd and another v. Commissioner of Service Tax, Ahmedabad [2024 (3) TMI 458 – CESTAT AHMEDABAD]*.

16. In *re Indian National Shipowners' Association*, by which the Hon'ble High Court of Bombay displaced the proposal of service tax authorities to subject constituents of the petitioner therein to tax as provider of 'taxable service' from date preceding 16th May 2008, when tax on 'supply of tangible goods service' was brought into effect by insertion in section 65 (105) of Finance Act, 1994, it was held that insertion of a separate 'taxable service', with definition conforming to the impugned activity, implied legislative intent to not subject the activity to tax as some other pre-existing 'taxable service', and that, in

comparison with ‘mining service’ in section 65 (105) (zzzy) of Finance Act, 1994, ‘supply of tangible goods service’ was the more apt category by which consideration received for charter of vessels could be subjected to tax. Such decision, in the context of the two rival assertions on category of tax coupled with voluntary acceptance of taxability under Finance Act, 1994 and restricted to commencement of tax liability, does not purport, as assumed by the adjudicating authority, to hold all charters to be taxable for having rendered ‘supply of tangible goods service’ and, in fact, had taken notice of lack of any category for tax on ‘transport by sea’, thus,

> *‘40. It is pertinent to note that Section 65(105)(zzn) of the Finance Act, 1994 covered services rendered to “any person, by an aircraft operator, in relation to transport of goods by aircraft”. Section 65(105)(zzp) covered services rendered to “any person by a goods transport agency in relation to transport of goods by road in a goods carriage”. Section 65(105)(zzz) refers to service rendered to any person in relation to transport of goods other than water, through pipeline or other conduit. There was no entry covering transport by sea. Legislature could have easily provided for such an entry. Absence of such entry leads us to conclude that the chartering of vessels undertaken by the members of the 1st petitioner was not covered by any entry prior to insertion of entry (zzzzj). In the light of judgment of the Assam High Court in Magus Corporation’s case (supra) it must be held that the said services were not specified under any entry and hence were not liable to service tax till entry (zzzzj) was introduced covering them.’*

without subjecting the category claimed in the present dispute to comparison even while holding that

> *'42. Thus activities which had direct relation to mining were covered by entry (zzzy) transport of goods by air and road was covered by separate entries. There was no separate entry for transport by sea. The fact that charter hire of vessels is brought to tax under entry (zzzzj) indicates that the said entry is to cover transport by sea..'*

which precludes air charter from the said entry. Be that as it may, we, too, would be derelict in adopting that peripheral observation as settling the law. Indeed, it is the absolute absence of judicial determination of liability of 'air charters' as 'supply of tangible goods service' that now compels examination of the scope of definition of proposed 'taxable service' for the period prior to 1st July 2012 which, in the absence of exclusion of, exception to, and exemption from taxability in the 'negative list' era, may safely be presumed to have passed into the amorphous bundle of 'taxable services' thereafter. Needless to say, the extent and coverage of circulars of Central Board of Excise & Customs (CBEC) will also be examined.

17. Across all national jurisdictions, air operations are rigidly controlled and for obvious reasons. While all means of transport using fuel and public spaces are regulated, carriage of persons that involves temporary movement into the atmosphere in a 'motorized capsule' is even more so; after all, in *terra firma* and *tumidum mare*, humans are

equipped to survive unlike in the air that the ‘first flight’ of Daedalus and Icarus showed to their cost. With the opening up of the skies over India for carriage, other than by the ‘national carriers’, new classes of operators were statutorily acknowledged for enforcing mutual obligation between them and passengers to be enforced under the authority of the State vested in the Directorate General of Civil Aviation (DGCA). Civil Aviation Rules (CAR) have, therefore, been notified under the empowerment the Aircraft Act, 1934 and Aircraft Rules, 1937 by this statutory authority to erect a regulatory framework insofar as air travel is concerned. Indeed, such travel governs the relationship of passenger who chooses to be in the custody of the personnel of the aircraft during the period of travel with the licenced operator. The details prescribed therein may have only contextual relevance but the regulatory scheme posits legislative acknowledgement that passenger is catered to when travelling by air on aircraft flown by licenced operator; the distinction is only between private and other than private aircraft so far as rigidity of regulatory framework is concerned. That such an equation is also the legislative intent in Finance Act, 1994 – in the enumeration of ‘taxable service’ and in the enumeration of eligibility for abatement during the pre-‘negative list’ and ‘negative list’ regimes – should be, and unmistakably, apparent from section 65 (105)(zzzo) of Finance Act, 1994 which, unlike most of the rest, designates the provider and recipient of the service. Consideration is a third aspect of ‘taxable service’ but it is the provider and recipient that underscores the essence of the ‘taxable event’ in a ‘destination based consumption tax’ as the levy has been described by the Hon’ble Supreme Court in *All India Federation of Tax Practitioners and others v. Union of India [AIR 2007 SC 2990]*. In the present dispute, the contractual engagement between corporate entity, having interest in the passenger to be transported, and the licenced operator - essentially for guaranteeing availability of means of travel and for discharge of terms of consideration – has been erroneously accorded interpretational significance over a relationship legislated upon well before, and acknowledged definitionally in, the tax came into being. The manner of description and method of payment of consideration does not make for any ‘taxable service’ but only serves as measure for levy and tangible evidence of intangible service having been rendered. The decision to travel and the destination of the travel are not determined by the artificial person. The impugned order is, thus, incorrect in having negated the rendering of ‘transport of persons by air’ service solely for the reason that the contract was entered into and consideration paid by an artificial person.

18. Turning to the assigned ‘taxable service’ enumerated as section 65(105)(zzzzj) of Finance Act, 1994, the communication *supra* from Central Board of Excise & Customs (CBEC) upon incorporation of ‘supply of tangible goods service’ in 2008 sets out the distinguishment

with the event taxed on transfer of 'possession and effective control' alienated from the taxing jurisdiction of the Union under the constitutional empowerment of Article 366 (29A). The impugned order has narrowed down the relevant 'taxable service' by reference to this expression in the enumeration. Effectively, it is posited, and despite the tax excluding the taxing jurisdiction of the constituent states of the Union from its ambit, that it is for service tax authorities to determine the boundary of levy devolving on the states; that claim of superiority is not consistent with the residuary authority by which the said activity was brought within the tax net. Neither should the expression deployed to exclude the jurisdiction to legislate be considered as the entirety of description of the service intended to be taxed. It was, therefore, of essence for the show cause notice to evidence 'use' by the appellant-assessee and for subjecting the consideration to tax to the extent that there is no encroachment upon taxability arising from 'right of possession and effective control' that is legislatively, and constitutionally, excluded. It was to this aspect of conformity of activity with the first limb within the bounds of the second that the second communication[8] of Central Board of Excise & Customs (CBEC) commended scrutiny of contracts. The scope for taxing, as service, is, thus, contained within the second limb even as the first limb offers jurisdiction.

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[8] [circular no. 20/COMMR(ST)/2009 dated 9th February 2009]

19. Here, we are immediately struck by the apparently anomalous reach of the ‘taxable service’: while ‘supply of intangible goods’ have been qualified by ‘including machinery, equipment and appliances for use', the further circumscribing condition qualifies ‘transferring right of possession and effective control’ with ‘such machinery, equipment and appliances’ and the consequent implication that any goods other than ‘machinery, equipment and appliances’ are not restricted by ‘transferring right of possession and effective control’ in levy of service tax. This is constitutionally untenable and the only feasible interpretation is the submission of Learned Counsel, *albeit* with a different approach, that ‘aircraft’, *inter alia*, are not intended to covered by the ‘taxable service’ impugned in the appeal. Consequently, with the availability of another ‘taxable service’, the deficit, as far as ‘ships and vessels’ are concerned, taken note of by the Hon’ble High Court of Bombay in *re Indian National Shipowners’ Association* does not occur here to warrant fitment within a broader entry. Even more suggestive is the enumeration, though by no means exhaustive, in the second of the communications of the Central Board of Excise & Customs (CBEC) that includes special types of vessels but clearly omitted vessels intended for carriage of goods and persons; such vessels could well counted among ‘machinery, equipment and appliances’ that are intended to be taxed by section 65(105)(zzzzj) of Finance Act, 1994.

20. We also take note that, while ‘goods’ are defined in section 65

and section 65B of Finance Act, 1994, there is no definition of 'tangible goods' and, further that 'supply' – an expression rarely used in enumeration of 'taxable service' – is also similarly devoid of explanatory guidance. It appears to us, from a plain reading, that it is only such goods as are supplied that are intended to be taxed. An aircraft or a vessel, intended for carriage of persons, is not amenable to description as 'supply of tangible goods' as only passage, an intangible good, is under offer when transfer is without right of possession and effective control. Furthermore, and it is moot if 'conveyance' – separately provided for in Customs Act, 1962 – does also merit description as 'goods' and, more particularly, as 'tangible goods' which reinforces the conclusion that the scheme for taxing of services does not envisage coverage of 'means of transport' except where specifically articulated so.

21. This, in effect, has been set out in *re Karnavati Aviation Pvt Ltd* thus

> *'25. We also find that the nature of the appellant's activity is also clear from the fact that they hold a permit for operating non-scheduled airtransport service granted by the Director General of Civil Aviation, that services of transportation of passengers by air within India became taxable u/s 65(105)(zzzo) of the Finance Act w.e.f. 1-7-2010, that prior to 1-7-2010 only the airtransport of passengers embarking in India for international journey in any class other than economy class was taxable and only w.e.f. 1-7-2010 the domestic*

> *transportation of passengers by air by any air craft operator, whether operating scheduled or nonscheduled flights, became taxable, that the appellant are paying service tax w.e.f. 1-7-2010 u/s 65(105)(zzzo), therefore, during the period prior to 1-7-2010, their activity can not be subjected to tax u/s 65(105)(zzzzj) by treating the same as supply of tangible goods. It is well settled law when an activity becomes taxable from a particular date, it is to be treated as non-taxable for the previous period, therefore, for the period prior to 1-7-2010, the appellant's activity can not be treated as supply of tangible goods service covered by Section 65(105)(zzzzj), that since the cost of operation of the Aircrafts such as maintenance, cost of the crew, fuel expenses, parking fee etc. are borne by the appellants, and since the main remuneration received by the appellant is on the basis of flying hours, trips, per seats the appellant's activity can not be treated as supply of tangible goods, but has to be treated service of transportation of passengers in India by air. When there is an entry specifically for taxing "transport of passenger by aircraft", the activity cannot be brought under a more general entry like "supply of tangible goods"'.*

The resort to 'supply of tangible goods service' clears fails to sustain the demand of differential tax.

22. The demand, for October 2009 to June 2012, of ₹ 18,74,121 under section 66A of Finance Act, 1994 read with Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 for the period upto June 2012, and under Place of Provision of Service Rules, 2012 for the period thereafter, is premised on the displacement of the 'taxable service' crystallised by the adjudicating authority. That

membership fees paid for navigation charts and electronic flight bag updates as well as administration charges to be paid for corporate trusts were covered within ‘support service of business or commerce’ and ‘banking and financial services’ has neither been examined in depth nor justification offered in the impugned order. This demand, too, fails. Neither is there any justification offered for excluding cellular phone service, staff medical insurance and penal charge levied by Airports Authority of India (AAI) from the ambit of ‘input service, as set out in rule 2(l) of CENVAT Credit Rules, 2004 to finalise recovery of ₹ 7,37,271 for 2010-11 to 2013-14 under rule 14 of CENVAT Credit Rules, 2004.

23. In the light of the above findings, the demands on the appellant-assessee lack support of law. Likewise, the penalty imposed on the individual also fails. Impugned order is set aside to allow the appeals.

(Order pronounced in the open court on 28/11/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*