CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHANDIGARH.

REGIONAL BENCH.

SERVICE TAX APPEAL NO. 44 OF 2016

[Arising out of the Order-in-Original No. DLI-SVTAX-004-COM-002-15-16 dated 29/10/2015 passed by The Commissioner, Service Tax, Delhi – IV, Gurgaon (Haryana).]

M/s Interglobe Aviation Ltd., **...Appellant**
Tower D, 4th Floor, Global Business Park,
Mehrauli Road, Gurgaon,
Haryana – 122 002.

Versus

Commissioner of Service Tax, **...Respondent**
Delhi – IV, Plot No. 36 & 37,
Opposite Medanta Hospital, Sector – 32,
Gurgaon (Haryana).

APPEARANCE:

Shri B.L. Narasimhan, Advocate, Ms. Krati Singh, Advocate, Ms. Priyanka Singla, Advocate for the appellant.
Shri Bhasha Ram, Authorized Representative for the Department

CORAM:
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. 60072/2022

DATE OF HEARING : 05.07.2022
DATE OF DECISION: 21.07.2022

P.V. SUBBA RAO

M/s Interglobe Aviation Ltd[1] operates scheduled aircrafts for passengers and cargo. To acquire aircrafts on financial lease in the course of its business, the appellant borrowed money from foreign banks – through a process known as External Commercial

[1] Appellant

Borrowings (ECB). The overseas banks require foreign guarantors for the ECBs and the guarantors, in turn, charge various forms of fees for their services such as- arrangement fees, facility agent fees, trustee fees, legal and professional charges, management fees and ECA premium guarantee, fees. It is undisputed that the services rendered by these guarantors were in connection with the borrowing of money and that these services are leviable to service tax at the hands of the appellant under reverse charge, i.e., the appellant, as the service recipient, was liable to discharge the service tax as if the services were rendered by it. It is also undisputed that after paying the service tax, the appellant can take Cenvat credit of the service tax so paid and utilize it to pay the service tax on its output services. The appellant has been doing so up to July 2012 and had not paid service tax from August 2012 to March 2014.

2. On 10 March 2014, the Directorate General of Central Excise Intelligence[2] pointed out that the appellant was liable to pay service tax on these services received by it. The appellant agreed and paid service tax and intimated its jurisdictional Range officer (who is the assessing officer) by a letter dated 26 March 2014 that it has paid all the service tax due, along with interest. It further requested that the letter may be considered as an intimation under section 73(3) of Chapter V of the Finance Act, 1994[3]. Section 73 of the Act deals with the issue of show cause notice to recover service tax not paid, short paid or erroneously

[2] DGCEI
[3] Act

refunded. Sub-section (3) of this section specifies that if the assessee pays the service tax due before the show cause notice is issued, no notice should be issued. Sub-section (4) of this section, however, excludes cases where the service tax was not paid or short paid by reason of fraud or collusion or willful misstatement or suppression of facts from the scope of sub-section (3). In other words, if any of these elements are present, a show cause notice has to be issued. These very elements also make the assessee liable to penalty under section 78.

3. A show cause notice[4] was issued in this matter to the appellant on 2 June 2014 demanding the service tax with interest and proposing to impose penalties which culminated in the Order in Original[5] dated 29 October 2015 being passed by the Commissioner confirming the demand of service tax and interest, appropriating the amounts already paid by the appellant and also imposing a penalty of Rs. 35,85,57,546/- as penalty under Section 78 and a penalty of Rs. 10,000/- under Section 77 of the Act. Aggrieved by the impugned order, this appeal is filed. The short questions to be answered in this case are as follows:

a) In the given factual matrix, is the appellant's case covered by Section 73(3) or Section 73(4) of the Act?
b) Are the penalties under Section 77 and 78 correctly imposed upon the appellant?

Submissions of Learned Counsel for the appellant

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[4] SCN
[5] Impugned order

4. There is no suppression, collusion, fraud, willful-misstatement or contravention of provisions with an intent to evade on the part of the appellant as the situation is revenue neutral. The service tax paid by the appellant was immediately available to it as Cenvat credit and hence the entire exercise is revenue neutral. The appellant would have gained nothing by not paying the service tax and it cannot, therefore, be said that the appellant had an intention to evade paying service tax. The department cannot, therefore, allege suppression, willful mis-statement, fraud or collusion. Reliance was placed on the following case laws in support:

a) **British Airways versus Commissioner of Central Excise, Delhi**[6]
b) **Jet Airways (I) Ltd. versus Commissioner of Service Tax, Mumbai**[7] affirmed by Supreme Court[8]
c) **Kirby Building Systems India Ltd. versus Commissioner**[9]

5. The benefit of Section 73(3) is available to the appellant. This case is not covered under Section 73(4) because none of the elements required under Section 73(4) were present and can even be alleged to have been present in view of the above submissions.

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[6] **2014(36) STR 598 (Tri-Del)**
[7] **2016(44) STR 465(Tri-Mum)**
[8] **2017(7) GSTL J35 (SC)**
[9] **2019(10)TMI 688-CESTAT Hyderabad**

6. The entire demand is within the normal period of limitation. The appellant was also entitled to waiver of penalties under Section 80 of the Act which was available during the relevant period. Although the impugned order was issued in October 2015, the lis in the matter has begun with the issue of the show cause notice. Section 80 was available during the period of dispute including at the time of issue of show cause notice and its benefit cannot be denied to it.

Submissions on behalf of the Revenue

7. Learned Authorized Representative for the Department vehemently supported the impugned order. He submitted that the appellant had not paid service tax due on its own. It was the investigation by the DGCEI which uncovered the evasion and the appellant paying the service tax. But for the investigation, the appellant would have continued to evade paying the service tax.

8. The appellant also cannot claim ignorance because it was fully aware that the services which it was receiving were liable to service tax and it was also paying service tax up to before the period of dispute. In 2012, the service tax regime has changed and instead of the taxable services being listed in the Act, all services except those in the negative list were made taxable thus enlarging the scope of service tax. It is nobody's case that the disputed services were covered under the negative list. Therefore, if the appellant was paying service tax prior to 2012, it had no reason whatsoever to presume that it did not have to pay

service tax after 2012. Thus, the intention to evade service tax is very clear. Had the DGCEI not pointed out, the appellant would have continued to evade service tax on these services.

9. This was clearly a case of suppression of the receipt of services by the appellant and it is not covered by Section 73(3) of the Act. Revenue neutrality as a defence claimed by the appellant has no legal basis. There is nothing in the Act which makes a distinction based on Revenue neutrality. Learned Authorized Representative placed reliance on the following case laws:

a) **Star Industries versus Commissioner of Customs (Import) Raigarh**[10] in which Supreme Court ruled that if the exercise is revenue neutral, then there is no need even to file appeal;

b) **Vogue Textiles versus Commissioner of Central Excise, Delhi III**[11] in which the Tribunal held that revenue neutrality cannot be an argument to justify wrong classification and availing benefit of an exemption notification;

c) **Shree Raine Gums & Chemical Pvt. Ltd. versus Commissioner of Central Excise, Jaipur II**[12] in which it was held that there is no general rule that the assessee need not pay tax if the same is available as credit to them.

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[10] **2015(324) ELT 656(SC)**
[11] **2017(351) ELT 310(Tri-Chandigarh)**
[12] **2017(4) GSTL 340 (Tri-Del)**

d) **Kala Sagar versus Commissioner Service Tax, Mumbai II**[13] in which the Tribunal found that the appellant in that case had not taken service tax registration not filed any returns and provided documents and therefore, rejected the contention of the appellant of bonafide belief based on revenue neutrality.

10. The appellant has not brought on record any evidence to show its bonafide to claim waiver of penalties under Sections 77 and 78.

11. We have considered the arguments on both sides and perused the records. Relevant portions of Section 73 are as follows:

> **SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. —**
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> (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :
> Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —
>
> (a) fraud; or
> (b) collusion; or
> (c) wilful mis-statement; or
> (d) suppression of facts; or
> (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service

[13] **2015(38) STR 1017 (Tri-Mumbai)**

tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been substituted.
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(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer **before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid** :

Provided that the Central Excise Officer may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been 18 paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "thirty months" referred to in sub- section (1) shall be counted from the date of receipt of such information of payment.

Explanation.1— For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.

Explanation 2. — For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.

(4**) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —**

(a) fraud; or
(b) collusion; or
(c) willful mis-statement; or
(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

12. It is undisputed that the appellant had, initially, not paid service tax on the services received under reverse charge mechanism for the relevant period and had, on being pointed out by DGCEI, immediately paid the same with interest and took Cenvat credit of the service tax paid. It is also undisputed that the Cenvat credit was available to it. Needless to say that the appellant could not have and has not taken Cenvat credit of the interest paid on the service tax because it is not available as Cenvat credit. It is also undisputed that it was paying service tax prior to the disputed period and was availing Cenvat credit of the service tax paid. After the changes in the Act in 2012, from a regime where only specified taxable services were chargeable to service tax to one where all services were taxable except those in the negative list, the appellant had not paid service tax but did so after being pointed out by DGCEI.

13. The service tax was paid alongwith interest and an intimation was also given to the assessing officer by the appellant on 26 March 2014 well before the show cause notice was issued on 2 June 2014. According to the appellant, it is therefore, covered by Section 73(3) and no show cause notice should have been issued to it. On the other hand, according to the Revenue, the benefit of Section 73(3) is not available to the appellant

because it is covered by Section 73(4) which overrides Section 73(3).

14. This leads us to the next question as to whether the appellant is covered by Section 73(4). This sub-section applies to cases where service tax has not been paid by reasons of (a) fraud; or (b) collusion; or (c) willful misstatement; or (d) suppression of facts or contravention of the provisions **with an intent to evade payment of service tax.** According to the Revenue the appellant had suppressed the facts and contravened provisions with intent to evade paying service tax. It is a well settled law that fraud, collusion, willful misstatement and suppression all require the intent to be established. According to the Revenue, the intent is evident because the appellant was paying service tax before and stopped paying service tax for the relevant period and paid it only when it was pointed out by the DGCEI. According to the Revenue, this is not a bonafide lapse and therefore, the appellant is squarely covered by Section 73(4) which over-rides Section 73(3). Hence, the show cause notice was correctly issued and the impugned order has correctly confirmed the demand and imposed penalties.

15. According to the appellant, it was genuine lapse on its part of not paying service tax for the relevant period. Prior to this period, it was paying service tax and taking Cenvat credit. When this was pointed out by DGCEI, it immediately paid the service tax along with interest and took Cenvat credit. Since it was

paying service tax with one hand and immediately taking Cenvat credit, the entire exercise is Revenue neutral and therefore, it cannot be alleged to have any intention to evade because it can gain virtually nothing by evading. Therefore, Section 73(4) does not apply to this case.

16. Learned Authorized Representative for the Revenue submitted that there is no legal provision under which Revenue neutrality can be considered. Tax has to be paid regardless of Revenue neutrality as held in various case laws relied upon by him.

17. We fully agree with the learned Authorized Representative of the Revenue and in the various case laws relied upon by him that tax has to be paid regardless of revenue neutrality. Taxability depends on the charging section and nothing else. If tax is covered by the charging section, it has to be paid. It does not matter that the tax so paid may be available as Cenvat credit either the assessee or to its buyer. In fact, the schemes of Central Excise, Service Tax, state VAT and the GST are based on charging tax or duty at several stages and allowing credit of the tax paid at the previous stage. Thus, A supplies goods or provides services to B and pays Central Excise duty or Service tax and B can take credit of the duty or tax so paid and use it to pay Central Excise duty or service tax. The duty or tax so paid by B will then be available to its customer C and so on. This sequence of payments of tax or duty and credits will come to an

end when the final goods or services are sold to someone who is not liable to pay tax or duty such as a trader or customer or someone manufacturing exempted goods or providing exempted services. This does not mean that anyone can take a stand that since his customer would have got a credit there is no net impact on the Revenue and not pay duty or tax. **Thus, regardless of revenue neutrality, the charge of tax or duty remains.**

18. However, if the service tax which is due is not paid or short paid, the remedy to the Revenue to recover it is by issuing a show cause notice under Section 73 which itself is subject three limitations- WHO, WHY and WHEN. Only **the Central Excise officer** can issue the notice and not anybody else. The officer can issue a notice **only to recover the service tax not levied, short levied, not paid, short paid or erroneously refunded.** The notice can be issued **within the normal period of limitation (which varied from time to time) OR extended period of limitation of five years if the elements of fraud, collusion, willful misstatement or suppression of facts or contraventions with an intent to evade** are present. This power to issue the show cause notice is further limited by Section 73(3) which states that no show cause notice can be issued if the tax is paid before the notice is issued. However, Section 73(3) does not apply in cases covered by Section 73(4) which applies if there are elements of fraud, collusion, etc. which are identical to the elements required to invoke extended period of limitation.

19. Thus, the charge of service tax is not reduced or abated with efflux of time but only the remedy available to the Revenue goes if it is time barred. Further, the remedy available to the Revenue is also subject to the other limitations under Section 73(3) which is available in all cases where the tax is paid before the issue of show cause notice unless the elements of fraud, collusion, etc. indicated in Section 73(4) are present. As discussed above, each of these elements require an intention.

20. Revenue neutrality becomes significant to determine if the appellant had an intention to evade or otherwise although it does not make any change to the charging section. The intention of any person can only be inferred from the circumstances of the case. The case of the Revenue is that the appellant had intention to evade service tax. We find no evidence of it. If the appellant pays service tax and can get Cenvat credit immediately of what it paid, we do not find it can have any intention to evade. All that happened in this case is by not paying the service tax when it is due but by paying it late, the appellant had to pay interest on it as well. The interest is not available as Cenvat credit. The appellant had, in fact, lost by not paying service tax in time and has not gained anything at all. We, therefore, find that there is no evidence of fraud or collusion of willful misstatement or suppression of facts or contraventions with an intent to evade service tax on the part of the appellant. In the absence of these elements, the appellant is not covered by Section 73(4) and is

squarely covered by Section 73(3). The show cause notice should therefore not have been issued to the appellant.

21. The elements required to impose a penalty under Section 78 are identical to the elements required to invoke Section 73(4) and as we found that they are not present, the penalty under Section 78 should not have been imposed on the appellant. Further, Section 80 under which penalties could have not been imposed for reasonable cause for failure was also available to the appellant since the lis in the case began when the show cause notice was issued on 2 June 2014 and Section 80 was abolished only in 2015. The fact that the Commissioner adjudicated the matter after 2015 makes no difference as cases have to be decided as per the law when the lis began.

22. For all the aforesaid reasons, we find that the impugned order cannot be sustained and needs to be set aside and we do so.

23. The impugned order is set aside and the appeal is allowed with consequential relief, if any, to the appellant.

(Order pronounced in open court on 21/07/2022.)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

(AJAY SHARMA)
MEMBER (JUDICIAL)

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