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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 3292/2010

BUSINESS AVIATION ASSOCIATION FOR INDIA Petitioner

Through Mr. Atul Sharma, Mr. Milanka
Chaudhury and Mr. Abhishek
Sharma, Advocates.

versus

UNION OF INDIA & ANR. Respondent

Through Mr. Sushil Kumar Dubey,
Advocate for Ms. Sonia Mathur,
Advocate for R-1. Mr. Satish
Kumar, Advocate for R-2.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

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12.07.2011

Heard Mr. Atul Sharma, learned counsel along with Mr. Milanka Chaudhury and Mr. Abhishek Sharma, learned counsel for the petitioner, Mr. Sushil Kumar Dubey, learned counsel for the respondent No.1 and Mr. Satish Kumar, learned counsel for the respondent No.2.

2. Invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner has prayed for issue of a writ of certiorari for quashment of the circular bearing Dy. No.20/Comm (ST)/2009 dated 9th February, 2009 issued by the first respondent seeking to impose Service Tax on chartering of aircrafts under Clause (zzzzj) of sub-section 105 of Section 65 of the Finance Act, 1994 and further to issue a direction to the second respondent restraining it from initiating any

proceedings to impose and collect Service Tax on chartering of aircrafts under the said provision.

3. The factual matrix need not be stated in detail except stating that the petitioner, namely, Business Aviation Association for India, a society registered under the Societies Registration Act, 1860, consisting of members engaged in the business of charter aircrafts i.e. members who own and operate an aircraft in India as a means of transportation commercially as a business activity.

4. On 9th February, 2009, a circular was issued by the Central Board of Excise and Customs, Department of Revenue. The petitioner association sought clarification in respect of the said circular. The respondent No.2, without clarifying the queries made by the petitioner, asked for information. The nature of information relates to chartering contracts. Be it noted, in the said clarificatory letters, it is submitted by Mr. Sharma, demands are being made.

5. It is submitted by Mr. Sharma that the circular transgresses the language employed in clause (zzzzj) of sub Section 105 of Section 65 as there is no transaction. Learned counsel would submit that activity is covered under the said clause and, therefore, during the relevant period exemption is to be granted except in case of international travel.

6. Mr. Satish Kumar, learned counsel for the respondent No.2 would

submit that the circular has been issued under clause (zzzzj) to ensure that the service tax under the Act is not avoided and the language employed in the circular clearly gives room for interpretation and the petitioner can always raise the plea that it is not covered within the circular.

7. To appreciate the submissions, it is apposite to refer to the circular, which is under challenge. It reads as follows:-

“Sub: Service Tax on chartering of Aircrafts.

It has been brought to the notice of the Board that non-scheduled operator engaged in the business of giving the right to use the aircraft to its customers (Chartering of aircrafts) are not paying service tax.

2. The issue has been examined in the Board. With effect from 16.05.2008, service provided 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 appliances is taxable service under Section 65(105) (zzzj). Chartering of aircrafts by a client only confers him with the right to use the aircraft and the owner of the aircraft in such case does not transfer right of possession. As to whether effective control over the aircraft is transferred or not would be a question of fact to be determined in each case. Where the crew is also provided by the owners of the aircrafts as in a wet lease of aircraft effective control is not transferred.

3. You may examine the facts of each case of aircraft leasing in your jurisdiction and take action to recover tax wherever due. A list of the non-scheduled operators (permit holders) is enclosed herewith. A report in the present position of collection of service tax paid in chartering of aircrafts and the further action based on this reference may be sent to Director General (Service Tax).”

8. Clause (zzzo) of Section 65 of the Act before it was amended w.e.f.

1st July, 2010 was as follows:-

“(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.

Explanation 1 : For the purposes of this sub-clause, economy class in an aircraft meant for scheduled air transport of passengers means,-

- (i) Where there is more than one class of travel, the class attracting the lowest standard fare; or
- (ii) Where there is only one class of travel, that class.

Explanation 2 : For the purposes of this sub-clause, in an aircraft meant for non-scheduled air transport of passengers, no class of travel shall be treated as economy class”

9. Clause (zzzzj) of Section 65 reads as follows:-

“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 appliances.”

10. It is submitted by Mr. Sharma that aircraft operators are only taking passengers and when passengers board a chartered flight, service tax has to be levied under clause (zzzo) and clause (zzzzj) has no application.

11. Regard being had to the language employed and the language engrafted in the circular, we are of the considered view that the issue raised falls in the realm of interpretation of the terms, namely “charter

agreement”. Factual matrix in each case has to be examined. We cannot examine and decide the issue in a vacuum. In praesenti, we are inclined to think so because the circular uses the terms “where the crew is also provided by the owners of the aircraft as in a wet lease of aircraft effective control is not transferred”. Mr. Sharma would submit that his activities come within the scope of transport as he only transports passengers from one place to other. Last part of the paragraphs 2 and 3 of the circular would indicate that each case has to be adjudicated on its own facts.

12. We have been apprised at the Bar that there has been no adjudication and decision so far. In view of the aforesaid, we are inclined to think that adjudication should take place first and till the adjudication is made, no coercive steps shall be taken against the members of the petitioner-association. In case members of the petitioner-association are aggrieved by any kind of adjudication, they can challenge the same before the appropriate forum in accordance with law. The issue pertaining to the validity of the circular is kept open. The writ petition is accordingly disposed of without any order as to costs.

CHIEF JUSTICE

SANJIV KHANNA, J.

JULY 12, 2011/NA