CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 53107 of 2016

(Arising out of Order–in-Appeal No. 102-103/ST/DLH/2016-17 dated 04.10.2016 passed by the Commissioner (Appeals-I), Service Tax, New Delhi)

Chimes Aviation P Ltd. **....Appellant**
18, Nehru Place,
New Delhi-110019

VERSUS

Commissioner, Service Tax **....Respondent**
New Delhi II

AND

Service Tax Appeal No. 53108 of 2016

(Arising out of Order–in-Appeal No. 102-103/ST/DLH/2016-17 dated 04.10.2016 passed by the Commissioner (Appeals-I), Service Tax, New Delhi)

Chimes Aviation P Ltd. **....Appellant**
18, Nehru Place,
New Delhi-110019

VERSUS

Commissioner, Service Tax **....Respondent**
Delhi II

APPEARANCE:

Shri Anil Sood & Shri Sameer Sood, Advocates for the Appellant
Dr. Radhe Tallo and Shri Rakesh Kumar, Authorized Representatives of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 18.08.2021
Date of Decision: 24.01.2022

Final Order No. 50053-50054/2022

JUSTICE DILIP GUPTA:

Service Tax Appeal No. 53107 and **Service Tax Appeal No.**

53108 of 2016 have been filed by **M/s Chimes Aviation P. Ltd.**[1] to assail the order dated 07.10.2016 passed by the Commissioner (Appeals)-I Service Tax New Delhi[2] that has modified the order dated 07.06.2016 passed by the Additional Commissioner of Service Tax Delhi-II[3], adjudicating the two show cause notices dated 21.10.2013 and 15.04.2015. The period involved in the first show cause notice dated 21.10.2013 is from 2008 to 2009, while the period involved in the second show cause notice dated 15.04.2015 is from 2013 to 2014.

2. In regard to the first show cause notice, the Additional Commissioner confirmed the demand of service tax amounting to Rs. 23,84,477/- under section 73 of the Finance Act, 1994[4] and appropriated an amount of Rs. 23,48,061 already deposited by the appellant. Interest under section 75 of the Finance Act and penalties under sections 77(1)(a) and 77(2), and section 78(1) of the Finance Act were also imposed.

3. In regard to the second show cause notice, the Additional Commissioner confirmed the demand of service tax amounting to Rs. 5,35,032/- under section 73 of the Finance Act and appropriated an amount of Rs. 5,35,032/- deposited by the appellant. The Additional Commissioner also ordered for levy of interest under section 75 of the Finance Act and penalties under sections 77 (1)(a) and 77(2), and 76 of the Finance Act.

4. The Commissioner (Appeals) dropped the levy of interest in regard to both the show cause notices, but confirmed the imposition of penalty under sections 77(1)(a) and section 77(2) of the Finance Act.

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1. the appellant
2. the Commissioner (Appeals)
3. the Additional Commissioner
4. the Finance Act

5. The appellant is in the business of imparting training and coaching to individuals in the field of flying aircrafts for obtaining commercial licenses and private licenses from the Director General of Civil Aviation. The appellant, after receiving the requisite permission, also started operating the aircraft on a need basis or charter service and obtained registration as a service provider of the taxable services "transportation of passengers by air" and "commercial training and coaching".

6. The issue involved in these appeals is as to whether the services provided by the appellant would be taxable under the head "transportation of passengers by air" [5] which became taxable w.e.f. 01.07.2010 or would be taxable under "supply of tangible goods"[6] w.e.f 16.05.2008.

7. In order to appreciate the contentions that have been advanced by the learned counsel for the appellant and the learned authorised representatives appearing for the Department, it would be necessary to examine the taxable services provided under the head 'TPA' as contended by the appellant and 'STG' as contended by the Department.

8. Prior to 01.07.2010, 'TPA' was a taxable service defined in section 65(105)(zzzo) of the Finance Act in relation to transport of a passenger embarking in India for international journey. It is reproduced below:

> **"Section 65(105)(zzzo)** "taxable service" means any service provided or to be provided 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.
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> Explanation 1: For the purposes of this sub-clause, economy class in an aircraft meant for scheduled air transport of passengers means,-
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> (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.

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5. TPA
6. STG

> 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. An amendment was made w.e.f. 01.07.2010 in the aforesaid section by including domestic journey in addition the international journey and the amended section is as follows:

> **"Section 65(105)(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;"

10. The definition of 'passenger' in section 65(77c) was also amended on 01.07.2010.

11. Prior to 01.07.2010, the definition of 'passenger', as contained in section 65(77c), is as follows:

> "(77c) "passenger" means any person boarding, at any customs airport, an aircraft for performing an international journey, but does not include-
>
> (i) a person who has arrived at such customs airport from a place outside India and is in transit through India, provided that he does not pass through immigration and does not leave customs area and continues his journey to a place outside India; and
>
> (ii) a person employed or engaged by the aircraft operator in any capacity on board the aircraft;"

12. After 01.07.2010, the definition of 'passenger' is as follows:

> "(77c) "passenger" means any person boarding an aircraft in India for performing domestic journey or international journey."

13. STG, which become a taxable service w.e.f. 16.05.2008, is defined in section 65 (105)(zzzzj) to mean:

> **"Section 65(105)(zzzzj):** "taxable service" means any service provided or to be 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."

14. It would, therefore, be seen that 'TPA' service in the case of international travel, both for scheduled and non scheduled transport operator was taxable w.e.f. 16.05.2008 but it was subjected to levy of service tax for domestic travel also w.e.f. 01.07.2010.

15. The order passed by the Commissioner (Appeals) notices the following facts:

(i) "In order to ascertain the veracity of the contents of the appellant, I have carefully gone through the impugned order and find that in para E7.4 at page 56, the original authority has observed as under:

> "I note that the notice claimed to have paid service tax of Rs. 28,83,093 for the period 2009-10 to 2013-14 under Air Transport of Passenger Services (year wise service tax amount can be tabulated as per table below):

Financial Year	**Service tax paid under Air Transport of Passenger Services as claimed in their submissions**
2008-09	Nil
2009-10	3,89,809
2010-11	4,73,089
2011-12	6,41,658
2012-13	8,43,505
2013-14	5,35,032
Total	**28,83,093**

From the above it can be seen that the appellant has been discharging their Service Tax liability since 2009-10 onwards. So far as the year 2008-09 is concerned, the impugned order clearly says that no Service Tax is payable by the appellant as the receipt of taxable services falls within the exemption limit of Rs. 10 lakh. It is also on record that the original authority has appropriated the Service Tax amount paid by the Appellant by classifying their services under 'Supply of Tangible Goods Services' instead of 'Transport of Passengers by Air Services (TPA).'

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(ii) "In the instant case, the Appellants have submitted copies of some of the Invoices, majority of which are not legible however, on concerted effort I could read the details incorporated in invoice no. 09-10/07/0004 dated 21.07.2009

and invoice no. 09-10/04/0003 dated 27.04.2009 along with their appeal memorandum. **If we take the example of Invoice dated 21.07.2009, the details given clearly indicate that an aircraft/helicopter has been hired out to one Mr. George Gatlin against a money consideration of Rs. 2,09,500/- Likewise, in the case of invoice dated 27.04.2009, the details given clearly indicate that an aircraft/helicopter has been hired out to one Mr. Ali…… for consideration of Rs. 3,84,000/-. A plain perusal of both these invoices, show that the Appellant have actually issued the said invoice for hiring out the aircraft/helicopter to particular person/organization and the amount charged in the invoice is lump-sum irrespective of number of passengers because the said invoices nowhere carry any such detail.** I have also gone through other invoices which are not easily readable, yet, from the legible part of these invoices one could find out that these invoices also do not contain any details of the passengers.

From the foregoing it appears to be a simple case of hiring of Aircraft on certain charges to be paid by the charterer who was not entitled to have the Aircraft under its control and risk during the term of the lease/hiring since exclusive possession and effective control of the said Aircraft is not transferred to the charterer during the term of the lease/hiring as is discussed in the foregoing paras."

(iii) I find that the facts of the case when analyzed in the context of the contents of the above circular and definition given under Section 65(105) (zzzzj) of Finance Act, 1994, **it can be seen that the Appellants are actually providing the services under the category of 'Supply of tangible goods services' and therefore the question of classifying the same under different category of taxable services does not hold.** One must appreciate that at the relevant point of time (upto 30.06.2012) taxable services were defined separately under clause (105) of Section 65 of the Finance Act, 1994 and the principles of classification were mentioned in Section 65A which stated

that the real nature and the substance of the transaction and not merely the form of transaction should be the guiding factor for deciding the classification and therefore the said services are taxable and are appropriately classifiable under Section 65(105) (zzzzj) of Finance Act, 1994. Even after the introduction of negative regime, by virtue of the facts of the case, the conditions of the agreement (as opined in the impugned order), details given in the invoices and also the fact that the right of possession and effective control of the aircraft is not transferred to the charterer, the question of classifying the said services under 'Air Transport Service does not arise. Hence, no intervention is warranted in the impugned order."

(iv) **"Now I come to the question of charging of interest under Section 75 of the Finance Act, 1994 and imposition of penalties under Section 76, 77 and 78 of the Finance Act, 1994.** The fact of the case with regard to payment of Service Tax on the part of the appellant as detailed in para E7.4. of the impugned order have already been discussed in para 6 above. **It can clearly be seen that the impugned order has nowhere stated/alleged/observed that there is any delay in the payment of Service Tax on the part of the appellant. Therefore as of now the only question that needs to be examined is as to whether payment of Service Tax under a different category of taxable services should attract interest/penalty.**

As there is no delay in discharging of Service Tax liability, no interest can be charged from the appellant. I have carefully gone through the provision of Section 76 and 78 of the Finance Act, 1994 and find that under both the Sections, non-payment of Service Tax attracts invoking of penal provisions. In the instant case the allegation is not about non-payment of Service Tax but it is about payment of the said Service Tax under a different category of taxable service. In the given scenario, as the records say, no Service Tax was recoverable from the appellant and that the entire amount of Service Tax has been discharged on timely basis by the appellant, **penalties**

imposed upon the appellant under Section 76 and 78 are not justified."

(v) "However, as is evident from the Grounds of Appeal, the appellant has stated that with effect from 01.07.2010, the Appellant started paying the Service Tax by classifying the same under transport of passengers by Air Services (TPA) and not under supply of Tangible Goods Services (STGU) as is observed by the department. **It, thus becomes apparent that initially, in order to seek refund of the amount already paid for the previous period (2009-10 and 2010-11 i.e. from 01.04.2009 to 30.06.2010), they classified their services under a wrong head (transport of passenger by air service/TPA) and stuck with the same later on. When the department's view was made clear to the Appellant, the insistence on their part to deliberately classify their services under a different head shows their intention of escaping their liability for the previous period which amount to non-compliance with statutory obligations.** The Appellants have relied upon various case laws but in the instant case the facts of the case are different and there is nothing on record to suggest that the circumstances/conditions as prevailed in the cited judgment are also existing vis-à-vis the present case. In the cases relied upon the Appellants, there is a certain element of technical or venial breach of a provision of law on the part of the concerned party which in turn has served as a pointer of bona-fide default on the part of that party, but in the instant case, the intentional mis-classification of the services rendered cannot be termed as a technical or venial breach of any provision on their part. As discussed above, the Appellants have also failed in proving their bona-fide in as much as the fact that they knew the exact classification of the services rendered by them and still failed to discharge their tax liability under the proper classification. It is not a case where there was any confusion with regard to the correct classification of service, rather they have deliberately defied the correct payment of Service Tax. **In view of foregoing, when the offence of deliberately mis-classifying their services on the part**

of the Appellants is proved beyond doubt, the said act deserves to be penalized and accordingly, the observation with regard to imposition of penalty under Section 77(1)(a) and Section 77(2) of the Finance Act, 1994 made in the impugned order is vindicated."

(emphasis supplied)

16. The gist of the findings recorded by the Commissioner (Appeals), are as follows:

(i) From the legible invoices it is clear that the appellant had given on hire aircraft/helicopters against consideration and the control and possession of the aircraft/helicopters always remained with the appellant. Thus, the appellant provided STG services;

(ii) As there was no delay in the discharge of service tax liability, interest under section 75 of the Finance Act cannot be charged from the appellant;

(iii) Penalties under sections 76 and 78 of the Finance Act cannot also be levied upon the appellant as it is not a case of non payment of service tax but relates to payment of service tax under a different taxable service; and

(iv) The appellant stated that it had started paying service tax under TPA services w.e.f. 01.07.2010 and, therefore, the appellant started classifying the service under a different category in order to seek refund for the tax paid for the past period and also continued to classify the service under a wrong head even after the view of the Department was made known to the appellant. The appellant would, therefore, be liable to pay interest section 77(1)(a) and section 77(2) of the Finance Act.

17. Shri Anil Sood, learned counsel for the appellant assisted by Shri Sameer Sood, made the following submissions:

(i) The intent and spirit of imposition of tax is to levy service tax on passengers opting to fly by air, the Department cannot, therefore, levy tax on the aircraft operator under STG service in view of the provisions of section 65A and Section 66F of the Finance Act. In support of this contention reliance has been placed on the decisions of the Supreme Court in **Commissioner of Central Excise, Cus. & S.T.** vs. **Federal Bank Limited**[7]**, Commissioner of C. Ex. & Cus., Kerala** vs. **Larsen & Toubro Ltd.**[8] and the decision of the Delhi High Court in **Airport Retail Pvt. Ltd.** vs. **Union of India;**

(ii) Taxability cannot be based on a Circular while deciding taxability of service. In **Global Vectra Helicorp Ltd.** vs. **Commissioner of S.T., Mumbai-II**[9] pronounced on 22.01.2015 the judgment of the Supreme Court in **Federal Bank Limited** pronounced on 18.02.2016 was not available and, therefore, the Tribunal classified the services following the law laid down by the Bombay High Court in **Indian National Shipowners' Association vs. Union of India**[10] pronounced on 23.03.2009. However, the Tribunal failed to appreciate the observations made by the Bombay High Court in paragraph 40 of the judgment in **Indian National Shipowners' Association;** and

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7. 2016 (42) S.T.R. 418 (S.C.)
8. 2015 (39) S.T.R. 913 (S.C.)
9. 2016 (42) S.T.R. 118 (Tri.-Mumbai)
10. 2009 (14) S.T.R. 289 (Bom.)

(iii) The Commissioner (Appeals) completely failed to appreciate the contentions advanced on behalf of the appellant and, therefore, passed the order in a mechanical manner.

18. Shri Rakesh Kumar and Dr. Radhe Tallo, learned authorised representatives appearing for the Department, have however, supported the impugned order and made the following submissions:

(i) The appellant was supplying aircraft/helicopter owned by it to various entities for their use. The services were rendered by the appellant to the service recipient on mutually agreed terms and conditions and while providing the helicopter/aircraft on the charter, the appellant supplied its own crew keeping an effective control and possession of the helicopter/ aircraft; and

(ii) The services so provided by the appellant are clearly covered under the taxable category of the STG w.e.f. 16.05.2008. To support this contention, reliance was placed on the decisions of the Tribunal in **Global Vectra Helicorp Ltd.** and **EIH Ltd.** vs. **Commissioner of Central Excise, Delhi-I**[11]**.**

19. The submissions advanced by the learned counsel for the appellant and the learned authorized representatives appearing for the Department have been considered.

20. The issue that arises for the consideration in the appeals is as to whether the services provided by the appellant would fall under the category of TPA or STG. To resolve this issue it would be necessary to examine whether the appellant was providing TPA service w.e.f.

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11. 2019 (24) G.S.T.L. 592 (Tri.-Del.)

01.07.2010 or was providing a service in relation to supply of aircraft/helicopter without transferring the right of possession and effective control, which service would fall under the category of STG w.e.f. 16.05.2008.

21. The finding recorded by both the adjudicating authority and the appellate authority is that the appellant had supplied aircraft/helicopter belonging to the appellant to various entities on the terms and conditions mutually agreed upon and while providing the helicopter/aircraft on charter the appellant had provided its own pilot and other flying staff and kept the effective control and possession over the said helicopter/aircraft with itself. It is for this reason that the services provided were categorized under STG w.e.f. 16.05.2008, which also continued to remain taxable w.e.f. 01.07.2012.

22. The contention for learned counsel for the appellant is that the services were actually rendered to the passengers as it is they who were transported in relation to non-scheduled air transport by the aircraft operator.

23. This submission of learned counsel for the appellant cannot be accepted. It has been found by the Commissioner (Appeals), on a perusal of the various invoices, that it was the aircraft/helicopter that was hired against money consideration which was a lump-sum amount irrespective of the number of passengers, as even the details of the passengers were not indicated in the invoices. No document has been shown by learned counsel for the appellant which may dispel this finding. If passengers were to be transported, certainly tickets would have been issued to them and the invoices would also indicate the amount received from the individual passengers, but it is not so.

24. It would be useful to refer to the Circular dated 09.02.2009 issued by the Board to clarify the situation. It is as follows:

> "It has been brought to the notice of the Board that many 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.
>
> The issue has been examined in the Board. With effect from 16-5-2008, 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 and in a wet lease of aircraft effective control is not transferred."

25. Learned counsel for the appellant also contended that classification of a service has to be in accordance with the provisions of section 65A of the Finance Act prior to 30.06.2012 and under section 66F w.e.f. 01.07.2012.

26. The provisions of section 65A would not come to the aid of the appellant for the simple reason that it is only when a taxable service is prima facie, found to be classifiable under two or more sub-clauses of section 65(105) that classification has to be effected in the manner provided. In the present case, as noticed above, there is no manner of doubt that the services provided by the appellant would fall only under section 65 (105) (zzzzj), which became taxable w.e.f. 16.05.2008. Likewise, section 66F(2), on which reliance has been placed by learned counsel for the appellant, would not come to the aid for the appellant as it is only where a service is capable of differential treatment for any

purpose based on its description that the most specific description shall be preferred over a more general description. In any view of the matter, the most specific description of the service rendered by the appellant is STG. The decisions relied upon by learned counsel for the appellant on this aspect would, therefore, be of no help to the appellant.

27. The issue was also considered by the Tribunal in **Global Vectra Helicorp Ltd**. The Member (Technical) held that the services rendered by the appellant therein for charter hire of helicopters to various corporates was classifiable under STG and imposition of penalties under section 76 and 77 was upheld. In coming to the aforesaid conclusion, the Member (Technical) noted that the contract between the appellant and ONGC was for charter hiring of helicopters for offshore operations and the appellant agreed to provide the required services. The Member (Technical) also noticed that the helicopters were operated by the crew provided by the appellant and such crew had complete control over the actual flying operations and for the services that were rendered consideration was also paid to the appellant in terms of the agreement. The Member (Technical) also examined the Circular dated 09.02.2009 issued by the Board. The Member (Judicial) agreed with the Member (Technical) that classification of services would be under STG, but did not agree on the imposition of the penalty. The difference of opinion in regard to the imposition of penalties was, therefore, referred to a third Member, who gave his opinion on the basis of which the following Final Order was passed.

"FINAL ORDER

23. In the light of the majority decision, we pass the following orders :

(i) **We hold that the services rendered by the appellant in**

> **charter hire of helicopters to various corporates for offshore operations is classifiable under "supply of tangible goods for use" service.** Consequently, we uphold the demand of service tax under the said category along with interest thereon. However, wherever the appellant has not collected service tax separately from the customers, the consideration received shall be treated as cum-tax and the service tax demand ought to be recomputed. The claim of the appellant for payment of Rs. 10,31,53,803/- towards service tax dues shall be verified and if found correct, the same shall be deducted from the amount due from the appellant. We also uphold the denial of Cenvat credit taken of Rs. 2,33,09,951/-. The appellant shall forthwith reverse the said credit, if not already done. The appellant shall also be liable to pay interest on the credit wrongly availed from the date of taking the credit to the date of reversal in accordance with law.
>
> (ii) **We also uphold the imposition of penalties on the appellant under Sections 76 & 77 of the Finance Act, 1994 for the default in payment of service tax and for non-compliance of statutory provisions relating to the service tax.** However, we set aside the penalties imposed under Section 78 of the Finance Act, 1994. The penalty of Rs. 2,000/- imposed under Rule 15(3) of the Cenvat Credit Rules, 2004 is also upheld."
>
> **(emphasis supplied)**

28. It, therefore, follows that the appellant provided STG service, which became taxable w.e.f. 16.05.2008. The findings to the contrary by the Commissioner (Appeals), therefore, cannot be sustained.

29. The issue that now remains to be decided is as to whether penalties were validly imposed upon the appellant under section 77(1)(a) and section 77(2) of the Finance Act. The two sections are reproduced below:

> **"Section 77: Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere:**
>
> **(1)** Any person,-
>
> **(a)** who is liable to pay service tax or required to take registration, fails to take registration in accordance with

the provisions of section 69 or rules made under this Chapter shall be liable to a penalty which may extend to ten thousand rupees."

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(2) Any person, who contravenes any of the provisions of this Chapter or any rules made thereunder for which no penalty is separately provided in this Chapter, shall be liable to a liable to a penalty which may extend to (ten thousand rupees)."

30. In the instant case, the appellant had not taken registration under STG taxable service and the appellant had also contravened the provisions of Chapter V of the Finance Act and the Rules made there under. Detail findings on this issue have been recorded by the Commissioner (Appeals) in the impugned order and the same have been recorded in paragraph 15(v) of the order. As there is no error in the findings recorded by the Commissioner (Appeals), the imposition of penalties under section 77(1)(a) and section 77(2) of the Finance Act cannot be faulted.

31. The impugned order, therefore, does not call for any interference in these appeals. The appeals are, accordingly, dismissed.

(Order Pronounced on **24.01.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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