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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19-01-2026

CORAM

THE HON'BLE DR.JUSTICE ANITA SUMANTH

AND

THE HON'BLE MR.JUSTICE MUMMINENI SUDHEER KUMAR

CMA No. 2873 of 2008

AND

CMA NO. 2359 OF 2007

M/s.Translanka Air Travels Pvt Ltd
'Vijaya Towers', No.4, Kodambakkam High Road,
Chennai-600034

..Appellant in
CMA.No.2873 of 2008

M/s.ETA Travel Agency Pvt. Ltd., Arihand Nitco
Park, No.90, Dr.Radhakrishnan Salai, Mylapore,
Chennai - 600004.

..Appellant in
CMA.No.2359 of 2007

Vs

The Commissioner Of Service Tax,
Service Tax Commissionerate, M.H.U.Complex,
692, Anna Salai, Nandanam, Chennai-600035

..Respondent in both
CMA's



Common Prayer: Appeals filed under Section 35-G of the Central Excise Act, 1994 read with Section 83 of the Finance Act, 1994 against Final Order Nos.698 and 452 of 2007 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Shastri Bhavan Annexe, Chennai 600 006.

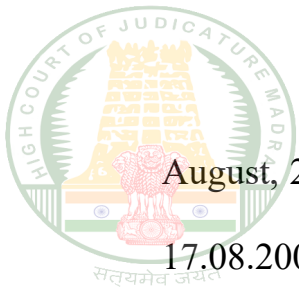
CMA.No.	For Appellant	For respondent
2873 of 2008	Mrs.Radhika Chandrasekar Mr.K.Vaitheeswaran	for Mr.M.Santhanaraman Senior Standing Counsel
2359 of 2007	Mrs.Radhika Chandrasekar Mr.K.Vaitheeswaran	for Mr.S.R.Sundar Senior Standing Counsel

COMMON JUDGMENT

(Judgment of the Court was delivered by Dr.Anita Sumanth J.)

A common order is passed in these two appeals, as the facts and legal position in both the appeals are more or less similar, though there are minor differences on facts that we will advert to presently.

2. C.M.A.No.2873 of 2008 has been filed by Translanka Air Travels Pvt. Ltd (in short, Translanka) assailing proceedings for levy of service tax under the provisions of the Finance Act, 1994 (in short, Act) for the periods 01.07.2003 to



August, 2004 and June, 2005 to March, 2006. The date of show cause notice is 17.08.2006.

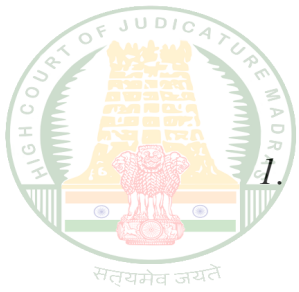
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3. C.M.A.No.2359 of 2007 has been filed by ETA Travel Agency Pvt. Ltd. (in short, ETA) assailing proceedings for levy of service tax for the period July 2003 to November, 2004. The date of show cause notice is 16.11.2005.

4. The substantial questions of law that have been admitted for consideration on 19.09.2008 in the case of Translanka are as follows:

- 1. Whether in the facts and circumstances of the cases, the Tribunal was correct in holding that the decision rendered in the context of Income Tax is not applicable to service tax?*
- 2. Whether in the facts and circumstances of the cases, the Tribunal was correct in holding that Board Circular No.5615/2003 dated 25.04.2003 is not applicable, since there is no physical export of service?*
- 3. Whether in the facts and circumstances of the case, the Tribunal was correct in holding that there is no export of service?*
- 4. Whether in the facts and circumstances of the case, the Tribunal was correct in holding that the principles for invoking extended period of limitation under the context of Section 11A dealing with demand cannot be extended to Section 73 of the Finance Act?*
- 5. Whether in the facts and circumstances of the case, the Tribunal was correct in holding that an Authority can issue show cause notice demanding service tax for period prior to such power extended to such authority?*

5. The substantial questions of law that have been admitted for consideration on 26.10.2007 in the case of ETA are as follows:



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1. *Whether in the facts and circumstances of the case, the Tribunal was correct in holding that the decision rendered in the context of Income Tax is not applicable to service tax?*

2. *Whether in the facts and circumstances of the case, the Tribunal was correct in holding that Board Circular No.5615/2003 dated 25-04-2003 is not applicable, since there is no physical export of service?*

3. *Whether in the facts and circumstances of the case, the Tribunal was correct in holding that the principles for invoking extended period of limitation under the context of Section 11A dealing with demand cannot be extended to Section 73 of the Finance Act?*

4. *Whether in the facts and circumstances of the case, the Tribunal was correct on holding that an Authority can issue show cause notice demanding service tax for period prior to such power extended to such authority?*

6. Translanka and ETA, collectively referred to as appellants, are engaged in the business of managing a travel agency. Translanka had been appointed by Srilankan Airlines as a General Sales Agent (GSA) for the States of Tamil Nadu, part of Kerala and Union Territory of Puducherry, vide agreements dated 27.03.2003 and 07.11.2003. Likewise, ETA had been appointed as a GSA by Malaysian Airlines vide agreement dated 02.11.2000 for the territory of India.

7. The appellants were in receipt of commission including Overriding Commission (ORC). In the case of Translanka, it was in receipt of ORC at the rate of 3% for passengers and 2.5% for cargo. ETA was in receipt of ORC at the rate of 6% on international and domestic sales.

8. The appellants were registered for Service tax under the category 'Air Travel Agency Service' and had filed returns and remitted taxes on the receipts



thereunder. There was an inspection in the office of the appellants in February, 2005, on the basis of which documents were recovered indicating that service tax ought to have been remitted under the category of 'Business Auxiliary Services'. The defence of the Appellants was that it was entitled to an exemption in terms of Notification No.21/2003 dated 22.11.2003 in respect of the commission earned for passenger and cargo ticket sales in foreign currency.

9. However, as the investigation revealed that payments towards ORC had been received from Srilankan Airlines and Malaysian Airlines by way of credit notes in Indian currency (INR), based on the documents found, show cause notices were issued proposing to bring the receipts to tax, along with penalty for non-registration of the appellants under the category 'Business Auxiliary Services' for the periods as referred to in the paragraphs supra.

10. The appellants responded, primarily relying upon the judgment of the Supreme Court in *J.B.Boda & Co. Pvt. Ltd. V. Central Board of Direct Taxes*¹ for the proposition that the receipts of commission, though in Indian currency, satisfied the requirement for export of service and hence there should be no liability to tax.

11. Overriding the arguments advanced, orders-in-original had been passed on 05.12.2006 (Translanka) and 13.07.2006 (ETA) confirming the

¹ (1997) 223 itr 271



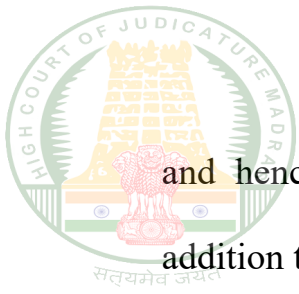
proposals in the show cause notice. In appeals before the Customs, Excise and Service Tax Appellate Tribunal (Cestat/Tribunal), the Orders-in-original stood confirmed, as against which the present appeals have been filed raising the above questions of law.

12. We have heard Ms.Radhika Chandrasekar, learned counsel for the appellant in both appeals, Mr.M.Santhanaraman, learned Senior Standing Counsel appearing for the revenue in the case of Translanka and Mr.S.R.Sundar, learned Senior Standing Counsel appearing for the revenue in the case of ETA and have perused the material papers and case law cited.

13. Ms.Radhika has taken us in detail through the agreements to illustrate the facts of the case as we have captured supra. Admittedly, the appellants have received the ORC in INR by way of credit notes from the Airline companies. However, she argues that this modus operandi is in substantial compliance with the condition under Notification No.21/2003 dated 22.11.2003 that requires the receipts to be in foreign currency, relying on the judgement of the Supreme Court in the case of *J.B.Boda*² as well as other decisions.

14. In any event, she would argue, there has been no fraud, collusion or suppression of the issue as all records were well available before the authorities,

² Foot Note Supra (1)



and hence the invocation of larger period of limitation is not justified. In addition to the judgment in *J.B.Boda*³, she relies upon the judgments in,

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- (i) *Commissioner of Service Tax-III, Mumbai V. Vodafone India Ltd.*⁴
- (ii) *PSA Sical Terminals Ltd. V. Commissioner of Customs, Tuticorin*⁵
- (iii) *Commissioner V. PSA Siscal Terminals Ltd.*⁶
- (iv) *National Engineering Industries Ltd. V. Commissioner of Central Excise*⁷
- (v) *Commissioner of Central Excise V. National Engineering Industries Ltd.*⁸
- (vi) *Arafaath Travels Pvt. Ltd. V. Commissioner of Service Tax*⁹
- (vii) *Suprashes General Insurance Service & Brokers Private Limited V. C.S.T., Chennai*¹⁰

15. Per contra, the submissions of the revenue are to the effect that Circular No.56/5/2003 dated 25.04.2003 and Notification No.21/2003 dated 22.11.2003 were precursors to Notification No.9/2005 dated 03.03.2005 under which Export of Service Rules, 2005 were notified, with effect from 15.03.2005. The Notifications made it clear that in order to avail the benefit of exemption on the ground of export, the receipts must be in foreign exchange only. In the present case, it is an admitted position that the commission was

³ Foot Note Supra (1)

⁴(2025) 33 Centax 152 (S.C.)

⁵ 2004 (165) ELT 109

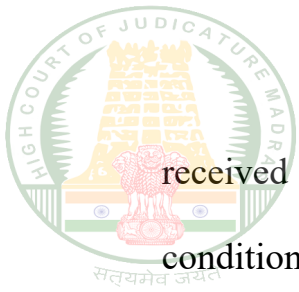
⁶2015 (316) ELT A77

⁷2008 (11) STR 156

⁸2019 (30) GSTL 211

⁹2017 (7) GSTL 437

¹⁰ 2016 (41) S.T.R.34 (Mad.)



received in Indian currency and hence the appellants had not satisfied the pre-condition for grant of exemption.

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16. As far as Translanka is concerned, it is an admitted position that the ORC received post June 2005 was in foreign currency. Those services would be covered by the Rules and Rule 3, dealing with *Export of Taxable Service* is extracted below, to the extent to which it is relevant:

3. Export of taxable service.- *The export of taxable service shall mean, -*

.....

(3) in relation to taxable services, other than, -

(i) the taxable services specified in sub-clauses (a), (f), (h), (i), (j), (l), (m), (n), (o), (p), (q), (s), (t), (u), (v), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzj), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzs), (zzt), (zzv), (zzw), (zzx) and (zzy); and

(ii) the taxable service specified in sub-clause (d) as are provided in relation to an immoveable property, of clause (105) of section 65 of the Act, - -

(i) such taxable services which are provided and used in or in relation to commerce or industry and the recipient of such services is located outside India:

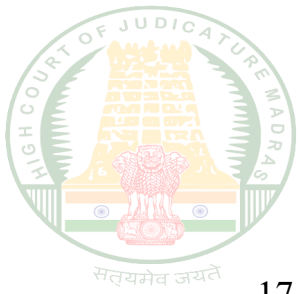
Provided that if such recipient has any commercial or industrial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of services only if -

(a) order for provision of such service is made by the recipient of such service from any of his commercial or industrial establishment or any office located outside India;

(b) service so ordered is delivered outside India and used in business outside India; and

(c) payment for such service provided is received by the service provider in convertible foreign exchange;

(ii) such taxable services which are provided and used, other than in or in relation to commerce or industry, if the recipient of the



taxable service is located outside India at the time when such services are received.

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17. The services relating to Business Auxiliary Services come under Section 65(105)(zzp) and hence would stand covered by Rule 3(3) above. There are three conditions set out in the proviso thereto under clauses (a), (b) and (c), and relate to place of delivery and utilisation of the services and receipt of consideration in forex for the services rendered. In the present case, admittedly, the services to Srilankan Airlines had been delivered outside India, are utilised in the business outside India and the payment for the services have been received by Translanka in convertible foreign exchange.

18. Hence, Translanka satisfies all the three conditions, and Mr.Santhanaraman, who appears for the revenue in the case of Translanka, accedes to the position that all three conditions as above have been satisfied. In such circumstances, we find no justification for the finding of the Tribunal to the effect that the services post 2005, have been rendered only in India.

19. In light of the same, question of law No.3 relating to export of services for the period June 2005 to March, 2006, is answered in favour of the appellant, Translanka.

20. We now advert to the questions relating to whether receipt of commission in INR would amount to satisfaction of the conditions for exemption under the Service Tax Act. Prior to the issuance of the Export of



Service Rules 2005, Circular No.56/5/2003 dated 25.04.2003 and Notification No.21/2003 dated 22.11.2003 held the field in relation to exemption for receipts from export of service. Both the Circular and Notification are extracted below:

*ST Circular No. 56/5/2003
25th April, 2003*

F.No.254/1/2003-CX-4
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs

Sub:- Non levy of service tax on export of services - Regarding

The Central Government has issued Notification no.2/2003 dated 1.3.2003 in the current year's Budget rescinding the earlier Notification no.6/99 Service Tax dated 9.4.99 which exempted taxable services from payment of service tax so long as payment for services rendered is received in convertible foreign exchange which is not repatriated outside India. Consequent to the issue of Notification no.2/2003 cited above, service tax would be leviable on all taxable services consumed or rendered in India, irrespective of whether the payment thereof is received in foreign exchange or not.

2 In this regard various representation have been received by the Board raising apprehension that because of the withdrawal of the notification no.6/99, export of service would be affected as it would be costlier in the international markets.

3. The Board has examined the issue. In this connection I am directed to clarify that the Service Tax is destination-based consumption tax and it is not applicable on export of services. Export of services would continue to remain tax-free even after withdrawal notification no. 6/99 dated 9.4.99. Further it is clarified that service consumed/provided in India in the manufacture of goods which are ultimately exported, no credit of service tax paid can be availed or reimbursed at present as inter-sectoral tax credit between services and goods are not allowed.

4. Another question raised is about the taxability of secondary services which are used by the primary service provider for the export of services,



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Since the secondary services ultimately gets consumed/merged with the services that are being exported no service tax would be leviable on such secondary services. However in case where the secondary service gets consumed in part or toto for providing service in India, the service tax would be leviable on the secondary service provider. For this purpose both primary and secondary service providers would maintain the records deemed fit by them to identify the secondary services with services that are being exported.

- 5. A further question raised is relating to payments receivable in foreign exchange for the services performed prior to March, 1, 2003 when the rate of service tax applicable was 5 % but payments are received after March 1, 2003. The enhancement of the rate of service tax from 5% to 8% would be applicable only when the Finance Bill is passed. If payments are received in the aforesaid case after the Finance Bill is passed, the rate of tax applicable would be 5% so long as the billing has been made prior to the date of passing of the Finance Bill. If the billing is made subsequent to the date of the passing of the Finance Bill, the service tax would be applicable at the enhanced rate of 8%*
- 6. The field formations may suitably be informed.*
- 7. Trade Notice may be issued for the information of the trade.*
- 8. The receipt of this Circular may kindly be acknowledged.*
- 9. Hindi version will follow.*

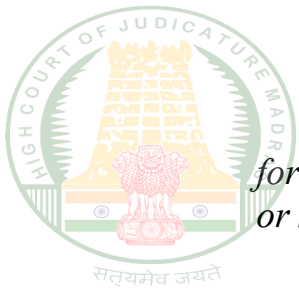
Manish Mohan
Under Secretary to the Govt. of India

Notification No. 21/2003-S. T., dated 20-11-2003

Service tax — Services for which payment received in India in convertible foreign exchange exempted

In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in sub-section (105) of section 65 of the said Act, provided to any person in respect of which payment is received in India in convertible foreign exchange, from the whole of the service tax leviable thereon under section 66 of the said Act.

Provided that nothing contained in this notification shall apply when the payment received in India in convertible



foreign exchange for taxable services rendered is repatriated from, or sent outside, India.

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21. Both the Circular and Notification, make it clear that receipts from services specified in Section 65(105) of the Act would be exempt, upon condition that the payment for those services was received in India in convertible foreign exchange. It is a settled position that a pre-condition under a Notification granting the benefit of exemption, must be strictly construed.

22. The appellants have relied upon the judgment of the Supreme Court in *J.B.Boda*¹¹. That judgment was rendered in the context of a deduction under Section 80 O of the Income Tax Act, 1961 which granted a deduction in respect of royalties received in convertible foreign exchange in India. The receipts in the case of *J.P.Boda* had been expressed, and remitted, in foreign currency and had been made through the Reserve Bank of India. The relevant portion of the judgement setting out the facts reads as follows:

8. The facts brought out in this case are clear as to how the remittance to the foreign reinsurance company is made through the Reserve Bank of India in conformity with the agreement between the appellant and the foreign reinsurers, and that the remittance statement filed along with annexure "A" which evidences that the amount due to the foreign reinsurers as also the brokerage due to the appellant and the balance due to the foreign reinsurers is remitted (and expressed so) in dollars. It is common ground that the entire transaction effected through the medium of the Reserve Bank of India is expressed in foreign exchange and in effect the retention of the fee due to the appellant is in dollars for the services rendered.

¹¹ Foot Note Supra (1)



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This, according to us, is receipt of income in convertible foreign exchange. It seems to us that a "two-way traffic" is unnecessary. To insist on a formal remittance to the foreign reinsurers first and thereafter to receive the commission from the foreign reinsurer, will be an empty formality and a meaningless ritual, on the facts of this case. On a perusal of the nature of the transaction and in particular the statement of remittance filed in the Reserve Bank of India regarding the transaction, we are unable to uphold the view of the respondent that the income under the agreement is generated in India or that the amount is one not received in convertible foreign exchange. We are of the view that the income is received in India in convertible foreign exchange, in a lawful and permissible manner through the premier institution concerned with the subject-matter- the Reserve Bank of India. In this view, we hold that the proceedings of the Central Board of Direct Taxes dated March 11, 1986, declining to approve the agreements of the appellant with Sedgwick Offshore Resources Ltd., London, for the purposes of section 80-O of the Income-tax Act, are improper and illegal.....

23. In *J.P.Boda*, the Court notes, on a perusal of the nature of the transaction and the statement of remittances issued by the Reserve Bank of India, that the income had been expressed and received in convertible foreign exchange, in accordance with the Rules of the Reserve Bank of India. Hence, on facts, the Court finds that the commission payable to that assessee had been retained in foreign exchange only.

24. The Income tax Department had, in that case, insisted that there should be a remittance to the foreign insurers first, and thereafter, the payment of the commission to the assessee in foreign currency. This, the Court felt was unnecessary, as:



(i) remittances to the foreign company had been made through the Reserve Bank of India in conformity with the agreement between the appellant and the foreign reinsurers

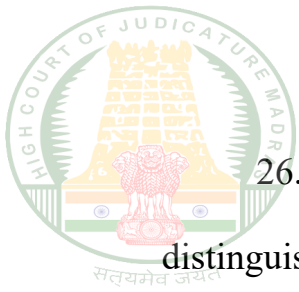
(ii) the remittance statement and annexure evidenced the amount due to the foreign reinsurers as also the brokerage due to the appellant

(iii) the balance due to the foreign reinsurers had been remitted and expressed in the statement in dollars

(iv) the entire transaction had been effected through the medium of the Reserve Bank of India and was expressed in foreign exchange and

(v) the retention of the fee due to the appellant for services rendered was in dollars.

25. On the above facts, the Court held that a '*two-way traffic*' where the amount was paid to the foreign company first and then a portion received back as commission, was unnecessary, and an empty formality. It was in the above factual circumstances, that the Court held that the procedure followed by that assessee was in compliance with the requirement under Section 80 O of the Income tax Act. The Court expressly renders that opinion (in J.P.Boda) '*on the facts of that case*'.



26. The facts in the present case are entirely different, and the distinguishing features from the case of J.P.Boda, are as below:

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(i) the payments towards passenger and cargo ticket sales were received by the Airline companies in designated bank accounts in ABN Amro, Chennai,

(ii) the aforesaid remittances were, admittedly, freely retrievable,

(iii) commission was paid to the appellant in Indian currency by way of credit notes issued by the Indian offices of the Airline companies.

27. Thus, in the case of *J.B.Boda*¹², the remittances had been in forex and the procedure followed was thus found to be in compliance of the statutory condition, whereas, in the present case, it has been received by the appellants in India, in INR, being a violation of the pre-condition under Notification 21/2003 dated 22.11.2003. The judgement in *J.P.Boda* thus, in our view, has no application to the facts of the present case.

28. In *Suprashes General Insurance Service & Brokers Private Limited*¹³ too, the facts are different, as seen from paragraph 6 of the decision. The Court records the nature of services rendered by that assessee, as consultancy and risk management services for re-insurance negotiation with the re-insurer on behalf

¹² Foot Note Supra (1)

¹³ Foot Note Supra (10)



of the Insurance Company. At the time of remitting the premiums it was entitled for commission/brokerage that it retained from the premium amount.

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29. According to the authority the services had been both rendered and consumed in India, and, as a result there had been no export of the services. Moreover, the commission ought to have been received in forex and the mere retention of the commission was insufficient to satisfy the condition under the Notification.

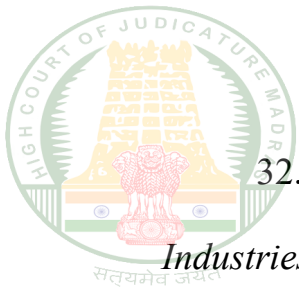
30. The Court noted that the premium had admittedly been received in convertible foreign exchange. From out of the premium, that assessee retained brokerage, and thereafter remitted the premium to the foreign re-insurance company. Hence, the retention of brokerage was out of the convertible foreign currency and the decision in *Suprashes*¹⁴ is also distinguishable on facts.

31. The assessee has also referred to a decision of the Tribunal in the case of *Arafaath Travels Pvt. Ltd.*¹⁵ where the facts are almost analogous to the facts in the present case. The Tribunal has allowed that appeal following the decision in the case of *Suprashes*¹⁶, and the distinction in the procedure followed for effecting the remittances, has not been taken note of in that case. We are also given to understand that, as against the aforesaid decision, the revenue has filed appeals that are pending before this Court.

¹⁴ Foot Note Supra (10)

¹⁵ Foot Note Supra (9)

¹⁶ Foot Note Supra (10)



32. The decisions in *PSA Sical Terminals Ltd.*¹⁷ and *National Engineering Industries Ltd.*¹⁸ do not assist the assessee, as the facts in both cases are different.

That apart, as far as *PSA Sical Terminals Ltd.*¹⁹ is concerned, an appeal was filed before this Court by the Commissioner of Customs, Tuticorin, that was closed on the ground of delay of 3053 days²⁰.

33. The decision of the Rajasthan High Court in *National Engineering Industries Ltd.*²¹ does not take into account the Circular and Notification that we have referred to in paragraph 18 supra. We are hence of the considered view that, having regard to the specific modus operandi followed in this case, and the admitted position that the receipt of ORC has been in INR, the question of exemption does not arise. We confirm the order of the Cestat on this score.

34. Lastly, Ms.Radhika assails the invocation of the extended period of limitation submitting that the ingredients of the proviso to Section 73(1) had not been satisfied in this case. The appellants had sought legal opinion on the exigibility of the claim for exemption and this establishes the doubt prevailing in the minds of the assesses. There was thus no question of fraud, collusion, wilful misstatement, suppression of facts or contravention of the Act or Rules, that would justify the invocation of the extended period of limitation.

¹⁷ Foot Note Supra (5)

¹⁸ Foot Note Supra (8)

¹⁹ Foot Note Supra (5)

²⁰ 2015 (316) ELT A77 (Mad)

²¹ Foot Note Supra (8)

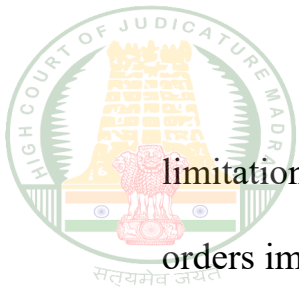


35. She places reliance on the judgement of the Supreme Court in *Stemcyte India Therapeutics Pvt. Ltd. V. Commissioner of Central Excise and Service Tax, Ahmedabad-III*²² pleading that the assessee should not be penalised for a bonafide confusion that existed in their minds in regard to the claim of exemption.

36. Per contra, learned Standing counsel would rely on the results of the investigation, stating that it was only the enquiry that revealed the incriminating documents such as the credit notes in INR. In addition, what was most incriminating was the fact that the appellant had been very much aware of the repercussions of the methodology followed by them, and had obtained legal opinion to the effect that the method would militate against the claim for exemption.

37. Based on the legal opinion, the Appellants had also written to the airline companies asking for the remittances to be made in foreign exchange and conveying to them the risk and anticipated tax liability in the methodology being followed. Despite this knowledge, they had proceeded with the transactions in the same manner, knowing fully well that they were not entitled to the exemption claimed. Thus, the elements of Section 74 were satisfied and the Department had made out a case for invocation of the extended period of

²²(2025) 32 Centax 226 (S.C.)



limitation. This sequence of facts is admitted, and has been captured in the orders impugned.

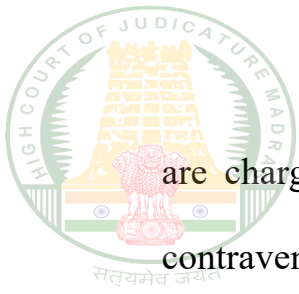
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38. We have heard the rival contentions on this score carefully and agree with the revenue. The investigations carried out by the Department revealed that correspondences had been exchanged with the airline companies from 2003 onwards on the subject of liability to service tax, and explaining the position under Indian law. A legal opinion had been obtained by the appellants in April 2004 that was adverse to the interests of the appellants. Hence, at least from then onwards, the assesses ought to have taken necessary action by amending their modus operandi.

39. The decision in the case of *Stemcyte India Therapeutics Pvt. Ltd.*²³ is distinguishable. The nature of activity carried on by that assessee involved the preservation of stem cell, and their claim had been to the effect that, preservation of stem cell would fall under the ambit of 'health care services', eligible for exemption. The Court held against *Stemcyte India* on the classification of the services, but on the facts of that case, found that there had been no suppression with intent to evade payment of service tax.

40. The language of Section 73(1) and the proviso thereunder, is very relevant. Extended limitation of five years may be invoked in a case where there

²³ Foot Note Supra (23)



are charges of fraud, collusion, wilful misstatement, suppression of facts or contravention of the Act or Rules. The charge of suppression of facts would stand attracted in situations where the surrounding circumstances indicate that the assessee was well aware of events that render it vulnerable to taxability, despite which they pursue the claim of exemption. If those evident indicators had been ignored, and had not been acted upon in accordance with the Act and Rules, with the Assessee continuing to seek exemption, the Department would be well within its right to invoke the extended period of limitation.

41. There is detailed discussion in the Orders-in-original setting out the results of the investigation and the documents and correspondences found, that evidence that the appellants had been aware of the ramifications of the methodology being followed and the adverse repercussions on service tax liability.

42. In order dated 05.12.2006 relating to Translanka, paragraphs 4.2.1 to 4.4 are relevant. Though a long extract, we insert the same here as the relevant facts have been captured in extenso, legitimising the invocation of extended period of limitation:

4.2.1 From the documents recovered from TRANSLANKA it is observed that M/s.Srilankan Airlines has been making payments to Translanka in India by issuing Credit Notes in favour of Translanka separately for passenger traffic sales and cargo by way of ORC to promote and market Srilankan Airlines traffic sales in India. On a monthly basis ORC payable is worked out and credit notes issued. In



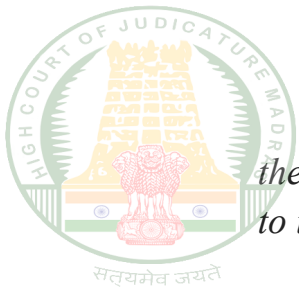
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those credit notes the amount is mentioned in terms of Indian Rupee and not in foreign. currency. To illustrate, CREDIT NOTE No.125514/03-04 DT. 11.12.03 AND No.127016/03-04 DT.11.12.03 shows credit of Rs.2,21,173.56 and Rs.7,817.23 as ORC for Passengers and Cargo respectively for the month of November 2003. Likewise, for every month Srilankan Airlines have been issuing credit note favouring Translanka as GSA and that the amount in Indian Rupee to that extent credited to the Translanka's bank account. Translanka claimed that they received ORC in Indian Rupees upto August 2004 and from September 2004 onwards they received in foreign currency.

4.3.1. From the documents recovered, it is further observed that Translanka have been making correspondence with Srilankan Airlines about liability of Service Tax on the income so earned for the services rendered by them as GSA. Opinions from tax consultant were obtained, the details of some of which are discussed below, Translanka, however, has not chosen to register themselves with the Service Tax as GSA under the Business Auxiliary Services for discharging service tax in spite of receipt of income by way of ORC every month.

4.3.2 It appeared that Translanka at Chennai has clearly foreseen the liability of Service Tax on ORC received and communicated the same to the Manager, Srilankan Airlines vide their letter dated 4/8/2004.

4.3.3. TRANSLANKA, in page 2 of their letter dated 04/08/2004 addressed to Manager, Srilankan Airlines, categorically stated that as per the legal opinion, the services rendered by them as GSA are covered under "Business Auxiliary Services" and required to pay Service Tax @8% with effect from 01/07/2003. In the said letter they seem to have clearly understood the Legal Position and invited their attention and action to be taken in connection with payment of Service Tax, which is 8% w.e.f. 01/07/2003. Further, TRANSLANKA even suggested that the ORC could be paid through a Bank Transfer from Colombo to India to the GSA directly as an inward remittance or it could be paid in India in which event GSA would have to collect



the service tax from M/s.Srilankan Airlines and pay the Service Tax to the Government Treasury separately.

4.3.4 In yet another letter dated 28/9/2004 of Mr. T.V.Dorairaj, Executive Director of Translanka to their principal, he again emphasized that the Service Tax is payable by Srilankan Airlines if the payment is made in India in Indian Rupee and any violation would attract penal action and interest payable.

4.3.5. Manager-India & Nepal of M/s.Srilankan Airlines, in his letter dated 18/10/2004 addressed to Translanka, has stated that they had obtained opinion of their Tax consultant and according to him GSA is responsible to pay Service Tax under the Category "Business Auxiliary Services" on the Overriding Commission earned by them with effect from 1.7.2003.

4.3.6 Sri T.V.Dorairaj, Executive Director, Translanka, in his letter dated 19/10/2004 addressed to M/s.Srilankan Airlines, has stated that if the Overriding commission is paid in terms of Inward Remittance, Service Tax is not payable and hence requested to get them Inward Remittance with immediate effect.

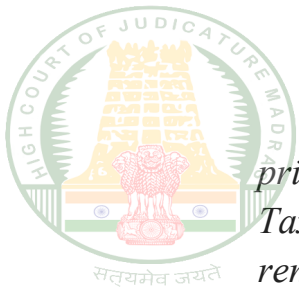
4.3.7 Manager-India & Nepal of M/s.Srilankan Airlines in his letter No.MAA/AA/2220/04 dated 18/11/2004 addressed to the Executive Director, Translanka, has reiterated that as clarified by their Tax consultant, GSA is responsible to pay Service Tax under the category of Business Auxiliary Services on the overriding commission earned by them with effect from 01/07/2003. He further stated that as requested by them action is taken to transfer funds directly to their bank account in India. From that letter, it is apparent that M/s Srilankan Airlines Ltd was having Office at Nagabramha Towers, No.76, Cathedral Road, Chennai and Sri J.D.Weimen was the Manager of M/s Sri Lankan Airlines Ltd. for India & Nepal at Chennai Office. As per the various credit notes like No.005/03-04/303 dated 22/10/2003 for Rs.9,68,403.64 of M/s Srilankan Airlines Ltd., Sri P.Parameshwaran is the Finance & Administration Manager, India of M/s SriLankan Airlines Ltd. who was functioning in the Office at 76, Cathedral Road, Chennai in



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India. Therefore it is clear that the recipient of service viz., M/s.Srilankan Airlines Ltd. is having office in India in terms of erstwhile proviso to Rule 3(3)(i) of Export of Services Rules, 2005, as it stood prior to amendment on 19/04/2006 and proviso to Rule 3(1)(iii) and 3(2)(a) of the Export of Services Rules, 2005, as amended by the Export of Services (Amendment) Rules, 2006, with effect from 19/04/2006 vide Notification No.13/2006-S.T. Dt. 19/04/2006. As per the above said provisions, in respect of Business Auxiliary Services, Section 65(105)(zzb), if the recipient of captioned service viz., M/s. SriLankan Air Lines Ltd. has any commercial or industrial establishment or any office relating thereto, in India, then such taxable services provided shall be treated as Export of Services only if the services so ordered by recipient of Services (M/s. Srilankan Airlines Ltd.) is delivered outside India and used in business outside India and payments for such services provided is received by the service provider in Convertible Foreign Exchange. As the services rendered by M/S. TRANSLANKA as GSA to M/s. SRILANKAN AIRLINES LTD. (who is having office in India) are delivered within limited States in India and used in the business of them within India, the said services rendered by M/S. TRANSLANKA are not satisfying the conditions of Export of Services Rules, 2005 and hence it appeared that they are not entitled for availing exemption under *ibid* Rules.

4.3.8 Sri T.V.Dorairaj, Executive Director, Translanka in his letter dated 19/11/2004 to M/s.Srilankan Airlines stated that he had contacted and consulted authorities at Chennai, Bangalore and Mumbai who have also suggested Inward Remittance in terms of Foreign Exchange would be the option to avail exemption from payment of Service Tax and that he had looked into the entire systems and procedures mainly to save M/s.Srilankan Airlines from paying the Service Tax. Further, it appeared from letter dt. 08/08/2006 of M/s. ABN-AMRO BANK, Chennai that they started receiving Foreign Exchange from 19/11/2004 onwards only, for the period from SEP 2004 and prior to that they have not received O.R.C. in convertible Foreign Exchange. As per Notification No. 21/2003-S.T. Dt. 20/11/2003, which was in vogue upto 14/03/2005,



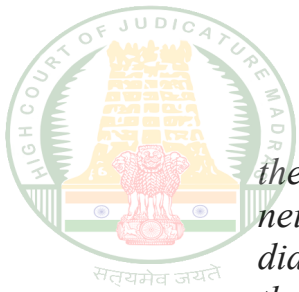
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prior to the introduction of Export of Services Rules, 2005, Service Tax exemption is available only if the payments for taxable Services rendered is received in convertible Foreign Exchange and it does not extend to the payments from proceeds prior to remittance to their principal's foreign account in Foreign Exchange. Moreover, during the period 01/07/2003 to 19/11/2003, even if the O.R.C. - value of taxable services rendered is received in convertible Foreign Exchange, no exemption is available, since the Notification No. 21/2003-S.T. dt. 20/11/2003 was issued with effect from 20/11/2003 and not applicable for the earlier period. But in the instant case, they (TRANSLANKA) received O.R.C. in Foreign Currency only from 19/11/2004.

4.4. From the foregoing internal correspondence exchanged, it appeared that TRANSLANKA, as a provider of Business Auxillary Service is consciously aware of the Service Tax liability arising out of ORC Receipts towards GSA services and that ways and means were discussed to wriggle out of liability through inward remittances, even though the suggestion did not take shape for the period from July 2003 to August 2004.

43. As far as ETA is concerned, the facts appear to be identical to the above and have been summarised in paragraphs 15.11 and 15.12 of the Order-in-Original, extracted below:

15.11. ETA has also contested that the extended period of limitation for demand of Service Tax is not attracted as they have not contravened any of the provisions of Finance Act, 1994 with intent to evade payment Service Tax. It is observed from the records that ETA are very well aware that their service as GSA for MAS are classifiable under Business Auxiliary Service and ORC earned by them would attract Service Tax. The legal opinion obtained by them from various sources also suggested that their service is liable to service tax under Business Auxiliary Service and the ORC received from MAS cannot be termed as amount received in Foreign Exchange. Lot of in house exercise have been done by ETA to know whether they are liable to pay service tax on the ORC earned by



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them. After ascertaining the taxability of the service, they have neither approached the department for registration certificate nor did they seek department's view on the taxable service provided by them. Perusal of documents clearly indicate that ETA are conscious about the service tax liability but instead of approaching the department to get themselves registered, they tried all efforts to wriggle out of the taxable net. Though seeking legal opinion about taxable nature of service may be a healthy practice, but avoiding or non-payment of tax after knowing the taxability of their service requires to be discouraged. Verification of various documents available on record suggest that the action of ETA in not paying the service tax due is not bonafide and genuine. They have wilfully suppressed the fact of rendering taxable service and also the value of taxable service realized with intent to evade payment of service tax. In the process they have contravened the provisions of Sections 68,69,70 of the Finance Act, 1994.

15.12. In view of the foregoing finding, I am of the considered view that the invoking of extended period for demand of Service Tax is justified and the contention of ETA deserves to be rejected.

44. It is very clear that the necessity for registration under the category of 'Business Auxiliary Services' has not been lost on the Appellants. There is no doubt in their minds that there is an impending liability on this count, and that the exemption claimed by them is not in line with the statutory prescription.

45. The discussion extracted above reveals that they have been in repeated communications with the officials of the foreign airlines, discussing options as to how the liability could be saved or managed, such as, either receiving the ORC by way of inward remittances in forex, or, if in INR, offering the same to service tax. In such circumstances, we are of the considered view that there is nothing untoward in the revenue having invoked the larger period



of limitation. These substantial questions of law are answered in favour of the revenue.

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46. C.M.A.No.2873 of 2008 stands disposed and C.M.A.No.2359 of 2007

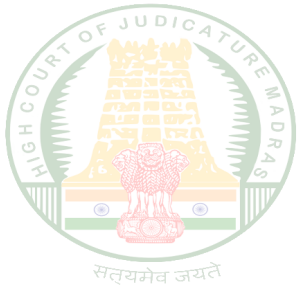
stands dismissed. No costs.

(A.S.M.,J.) (M.S.K.,J.)
19-01-2026

Index: Yes
Speaking order
Neutral Citation: Yes
Sl

To

1. The Commissioner Of Service Tax,
Service Tax Commissionerate,
M.H.U.Complex, 692, Anna Salai,
Nandanam, Chennai-600035.
2. The Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhavan Annexe, Chennai 600 006.



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CMA Nos. 2873 of 2008 and 2359 of 2



DR.ANITA SUMANTH J.

AND

MUMMINENI SUDHEER KUMAR J.

sl

**CMA No. 2873 of 2008
AND
CMA NO. 2359 OF 2007**

19-01-2026