CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. 4

Service Tax Appeal No. 51544 Of 2018

[Arising out of Order-in-Original No. 21-26/PP/COMMR./CGST/AUDIT-II/2017-18 dated 28.02.2018 passed by the Commissioner of Central Goods and Service Tax, New Delhi]

Taj Sats Air Catering Limited : **Appellant**
I.G.I. Airport Complex
Near Centaur Hotel, New Delhi

Vs

Principal Commissioner of Central Goods, Service Tax and Central Excise, Delhi South : **Respondent**
2nd & 3rd Floor, EIL Annexe Building,
Plot 2-B, Bhikaji Cama Place. R. K. Puram
New Delhi-110066

APPEARANCE:
Shri B. L. Narsimhan, Shri Kunal Agarwal, Advocates for the Appellant
Ms. Jaya Kumari, Authorized Representative for the Respondent

CORAM :
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 50928/2025

Date of Hearing:21.04.2025

Date of Decision:24.06.2025

HEMAMBIKA R. PRIYA

The present appeal has been filed by M/s Taj Sats Air Catering Limited[1] to assail the Order-in-Original No. 21-26/PP/COMMR./CGST/AUDIT-II/2017-18 dated 28.02.2018 wherein the Commissioner confirmed the demand of service tax amounting to Rs. 8,73,36,967/- along with interest and imposed penalties.

2. The brief facts of the case are as follows:-

(i) The appellant, is registered with the Service Tax Department vide Registration No. AABCT4686PST002, and engaged in the business

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1 The appellant

of airline catering which entails sale of food & beverages and provision of flight handling and hi-loader services to airlines companies. The Appellant charged separate considerations for the sale of food & beverages and provision of services to the airlines. The appellant pays Value Added Tax[2] on the sale of goods (food & beverages) and Service Tax on the amount charged for provision of services. The Appellant entered into an agreement with Airport Authority of India[3] and Delhi International Airport Private Limited[4] whereby the lease granted to the Appellant for its works at airport premises was extended and the rights of AAl thereunder have been assigned to DIAL. The Appellant was required to pay annual lease rental to DIAL along with the royalty calculated in the manner set out in the agreement. Both these amounts were part of the consideration payable by the Appellant to DIAL for lease of premises at the airport. The said amount was recovered by DIAL by raising invoices on the Appellant, on which DIAL charged and paid appropriate Service Tax. Being cost incurred by the appellant in carrying out various transactions, the appellant recovered these charges from its customers.

(ii) An audit of the service tax records of the appellant was conducted by the office of Director General of Audit (Central Receipt), New Delhi, wherein the audit party alleged that there was a short payment of service tax of Rs. 1,68,60,879/- for the period 2004-05 to 2010-11 by the Appellant.

(iii) A show cause notice dated 24.10.2011 was issued to the Appellant for the period 2004-05 to 2010-11, wherein a demand of Rs.

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2 VAT
3 AAI
4 DIAL

1,68,60,879/- under Section 73A of the Act along with interest under Section 75 of the Act and penalties under Section 76, 77 and 78 of the Act were raised against the appellant. The said show cause notice also proposed to invoke extended period of limitation by alleging suppression on the part of the appellant.

(iv) Subsequent to the show cause notice dated 24.10.2011, another show cause notice dated 21.12.2012 was issued to the appellant for the period 2011-12, wherein a demand of Rs. 1,32,62,106/- under Section 73A of the Act along with interest under Section 75 of the Act and penalties under Section 76, 77 and 78 of the Act was raised.

(v) Thereafter, show cause notice dated 22.05.2014 was issued for the period 2012-13, wherein a demand of Rs. 1,80,57,624/-under Section 72 and 73 of the Act along with interest under Section 75 of the Act and penalties under Section 76, 77 and 78 of the Act was raised against the appellant.

(vi) Subsequently, show cause notice dated 20.04.2015 was issued for the period 2013-14, wherein a demand of Rs. 1,26,62,093/-under Section 73A of the Act along with interest under Section 75 of the Act and penalties under Section 76 and 77 of the Act were raised.

(vii) This was followed by show cause notice dated 23.03.2016 issued to the appellant for the period 2014-15, wherein a demand of Rs. 1,30,27,585/-under Section 73A of the Act along with interest under Section 75 of the Act and penalties under Section 76 and 77 of the Act was raised.

(viii) Finally, show cause notice dated 09.04.2017 was issued for the period 2015-16, wherein a demand of Rs. 2,11,42,739/-under Section 73A of the Act along with interest under Section 75 of the Act and penalties under Section 76 and 77 of the Act were raised against the Appellant.

(ix) Vide the impugned order-in-original, the Commissioner adjudicated all the said six SCNs and confirmed the demand of an amount of Rs. 8,73, 36,967/- along with interest under Section 75 of the Act by invoking extended period of limitation. The Commissioner also imposed penalty amounting to Rs. 70,47,609/-under Section 76, Rs. 10,000/-on each ST-3 return for the period 2004-05 to 2015-16 under Section 77 and Rs. 1,68,60.8/9/- under Section 78 of the Act. The Commissioner dropped demand of service tax amounting to Rs. 76,76,059/- for the period 2012-13 on the difference between taxable value as submitted vide the letter dated 23.05.3014 by the Appellant. Aggrieved by the said order-in-original, the appellant filed the present appeal.

3. Learned counsel for the appellant submitted that the impugned Order-in-Original is a non-speaking order and has been passed by the Commissioner without considering the submissions of appellant. He submitted that the impugned order-in-original was nothing but a mere replication of the allegations made in the SCNs without any independent analysis. The show cause notice has given any explanation as to how the Appellant had collected service tax from the airlines, in absence of any such charges or tax mentioned in the invoice raised by the Appellant on the Airlines with respect to food items and beverages. Learned counsel further submitted that demand of service tax under Section 73 and demand of an 'amount' under Section 73A are completely different and distinct proceedings. Demand under Section 73 can be raised on short payment of Service tax,

whereas Section 73A is a forfeiture provision and can be invoked only in those cases wherein an amount has been recovered from any person which is either in excess of service tax liability or which was not required to be deposited. He further submitted that for a demand of an amount raised under Section 73A, demand of interest on such amount can be raised under Section 73B which has been specifically enacted for this purpose. However, the SCNs had invoked Section 75 and the impugned order-in-original confirmed demand of interest under Section 75, which is not relevant for raising demand of interest on an amount confirmed under Section 73A. Learned counsel relied on the decision of the Tribunal in the case of **G.V. Alurkar vs. Commissioner of Central Excise & Service Tax, Kolhapur**[5]**.**

3.1 Learned counsel further submitted that the impugned order or the SCNs do not refer to sub-section of Section 73A under which demand had been raised and confirmed. He drew attention to the sub-sections of Section 73A which were as follows:-

a) a person liable to pay service tax has collected an amount as service tax from the service recipient which is in excess of the service tax leviable on the transaction.
b) a person has collected an amount from any person, in a manner as representing service tax, despite the fact that no service tax is leviable on the transaction.

However, learned counsel contended that neither the show cause notice nor the impugned order specified the provision under which the demands had been raised and confirmed against the Appellant. Hence, he contended that the impugned order was violative of natural justice

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5 2017 (5) GSTL 202 (Tri.-Mumbai)

and liable to be set aside. The learned counsel placed reliance on the following cases:

(i) Amrit Foods v. Commissioner of Central Excise[6]

(ii) Naresh Kumar Gupta & Co. V. Union of India[7]

(iii) Balbir Singh vs. Collector of Customs,[8]

3.2 Learned counsel further submitted that Section 73A was inserted in the statute book vide Finance Act, 2006 with effect from 18.4.2006. Further, Letter No. 334/4/2006-TRU, dated 28-2-2006 provided clarification on the amendments made in the Act, including introduction of Section 73A and Section 73B. The first show cause notice dated 24.10.2011 was issued to the appellant for the period 2004-05 to 2010-11 proposing to recover the amount under Section 73A. However, for the first two years of the said notice period, Section 73A was not even in existence in the Finance Act, 1994. Therefore, confirmation of demand for the period when the section under which demand was made did not exist is illegal and liable to be set aside. In this regard, learned counsel relied on the decision in **Hindalco Industries Ltd. v. Assistant Collector, Mirzapur[9]** wherein, while dealing with Section 11D (pari materia to Section 73A for excise duty), the Hon'ble Delhi High Court had held that the said provision cannot be invoked for recovering of an amount alleged to have been collected prior to the introduction of the said section. For the period 2004 to 2006 when Section 73A was not in existence, the Act provides for the borrowing of the provisions of Section 11D of the Excise Act (pari

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6 2005 (190) ELT 433 (SC)
7 2014 (36) S.T.R. 271 (Cal.)
8 1991 (56) E.L.T 64 (Tri.)

9 2017 (52) S.T.R. 223 (Del.)

matería to Section 73A) through Section 83 of the Act. Learned counsel contended that the SCN as well as the impugned Order-in-Original had failed to invoke Section 11D of the Central Excises Act for the period 2004 to 2006 and therefore, the demand for the period 2004 to 2006 was not sustainable.

3.3 Learned counsel further submitted that the appellant had already discharged the applicable VAT with respect to AAI levy collected on food items sold by the appellant. Learned counsel further stated that the said SCNs has proceeded on the assumption that service tax had been collected by the Noticee on the royalty amount, ie. AAl levy, on all its transactions (i.e. sale of food & beverages and provision of services. The SCNs had alleged that the Appellant had recovered service tax on AAI levy from its customers under all transactions, without referring to the invoices raised by the Appellant on its customers. Learned counsel stated that this allegation had been followed in the impugned order-in-original, wherein the Commissioner had confirmed the demand, without understanding the invoices for sale of food & beverages as well as for provision of services raised by the Appellant on its customers. Learned counsel referred to the sample invoices that were raised by the Appellant to the customer airlines in respect of sale of food & beverages. He drew attention to the fact that only VAT and AAI Levy had been charged by the Appellant over and above the charges whereas in the invoices with respect to the provision of services, the appellant had charged service tax over and above the consideration and AAI levy, which had duly been deposited with the Service Tax Department. The same had not been disputed by the Department in the impugned order as well as in the show cause notice, whereby deduction of such tax paid wasallowed from the total demand confirmed/proposed. In support of his submission, learned counsel relied on the following decisions:-

(i) Union of India v. Garware Nylons Ltd.[10]

(ii) State of Madhya Pradesh vs Marico Industries Ltd.[11]

(iii) Commissioner of Customs, Mumbai v. Foto Centre Trading Co.,[12]

(iv) Commr. of C. Ex., Chandigarh v. Khalsa Charan Singh And Sons,[13]

(v) V. Sandoz India Limited vs Union of India and Others,[14]

3.4 Learned counsel further submitted that the allegations contained in the show cause notice were solely based on the objection raised during the Audit. No further investigations were carried out by the Department to substantiate the audit objections raised during the audit. Further, the impugned order-in-original was nothing but the replication of the allegations made in the show cause notice without any independent analysis.

3.5 Learned counsel for the appellant submitted that the SCNs had not invoked any provisions which were in force during the relevant period. The show cause notices had proposed to recover Service Tax for the relevant period from 2004-05 to 2009-10 and 2011-12 to 2015-16 which includes both prior and past the advent of negative list. However, the SCNs did not specify the category of 'taxable services' under which the said demand had been raised in respect of the period,

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10 [(1996) 10 SCC 413)]
11 2016 (338) ELT 335 (SC)
12 2008 (225) ELT 193 (Bom.)
13 2010 (255) ELT 379 (P&H)
14 1980 (6) ELT 696 (Bom.)

prior to the 1.7.2012. Further, with respect to the period past 1.7.2012, the notice did not specify or elaborate so as to how the said transaction was covered under 'service' as per Section 65B (44) of the Act. Learned counsel stated that the SCNs had failed to invoke the provisions of Section 66 and Section 65 (105) of the Act with respect to pre-negative list period and that of Section 65B (44) of the Act, which were in force during the post negative list period.

3.5 Learned counsel further submitted that section 73A contemplates 'forfeiture' of the part A service tax amount fraudulently collected and retained by the assessee. It ensured that the said amount of service tax was not retained by the person who collected, but is remitted to the Central Government who may then take steps to restore the excess tax collected to the person from whom the said tax was collected. He submitted that the order-in-original had held that the appellant had collected the Service Tax on AAl levy with respect to transaction of sale of food & beverages and did not deposit the same with the Government. In this regard, he submitted that the appellant had not collected any service tax on the said transaction as was amply clear from the invoices raised by the appellant. Learned counsel submitted that the invoices raised by the appellant with respect to sale of food and beverages did not show any collection of service tax, hence, does not attract the rigours of provisions of Section 73A of the Act.

4. Learned Authorized Representative for the Department submitted that a perusal of the invoices raised for sale of goods as well as provision of services, the Department had noted the AAI levy has been charged by the Appellant over and above the Service Tax or VAT,

as the case may be. Learned Authorized Representative contended that the AAI levy was an independent component in the invoices. Apparently, no service Tax has been collected by the appellant separately on the AAI levy from their clients either in the invoice pertaining to supply of food or in the invoice pertaining to provision of services. However, she contended that the Appellant has themselves admitted that they had collected Service Tax on the AAI levy on the invoices pertaining to provision of services. As both these two types of invoices were identical so far as AAI levy is concerned, learned Authorized Representative submitted that the Appellant had failed to show as to how in one invoice pertaining to provision of services the AAI levy is inclusive of Service Tax, and the other invoice pertaining to the supply of food items, the Service Tax was not inclusive. Learned Authorized Representative submitted that the AAl levy charged by DIAL was towards allowing of use of Airport infrastructure by DIAL to the appellant. Such services provided by DIAL during the relevant period, were leviable to service tax. The Appellant, in their reply to the Department had admitted that they had paid AAI levy and the service tax on such AAI levy to DIAL. However, no invoice raised by DIAL to the Appellant had been put on record by the Appellant. Thus, whatever Service Tax was leviable on the services provided by DIAL to the appellant, the Appellant had collected the same along with Service Tax thereon, from their clients and paid the same to DIAL. Learned Authorized Representative further submitted that DIAL had provided taxable services to the appellant for which the consideration had to be paid by the appellant. However, they had collected the said consideration from their clients along with service tax and paid the same to DIAL. The appellant had collected service tax on the AAl levy, both on provision of services and supply of food but, had not paid the Service Tax collected by them on the invoices pertaining to supply of food items. Hence, the same was recoverable under Section 73A of the Act, and the extended period had been invoked correctly.

4.1 Learned Authorized Representative further submitted that in either of the cases (whether services were rendered or goods were sold), service tax on AAI levy was not for any service rendered by Appellant. It represented the services rendered by AAl, which had been applied to all the transactions of appellant irrespective of the fact whether they supplied goods or services. Thus, the differentiation made at the stage of payment to exchequer by appellant was artificial since the appellant had collected these charges from their customers. They had not clearly shown how this element was collected from service recipients and not goods buyers and no invoices of relevant period had been submitted. Therefore, she stated that the department's conclusion that the appellant had collected and retained the tax element was correct. Both the invoices for goods and for services are identical so far as 'AAI levy' is concerned. The appellant hds failed to show as to how in the invoice pertaining to provision of services, the 'AAl levy was inclusive of service tax and in the other invoice pertaining to the supply of food items, the service tax was not included. The AAl levy was payable by M/s Taj Sats Air Catering Ltd, as percentage of its turnover comprising of goods sold and services provided at the airport. The 'AAl levy' was payable by M/s Taj Sats Air Catering Ltd. to DIAL for allowing the use of airport infrastructure, and was a cost incurred by M/s Taj Sats Air Catering Ltd. for using the airport infrastructure to effect sale of goods i.e. food and beverages and provision of services.

4.2 Learned Authorized Representative further contended that M/s Taj Sats Air Catering Ltd. recovered the "AAl levy' amount paid to DIAL from its customers i.e. airline companies. Since 'AAl levy' was payable by M/s Taj Sats Air Catering Ltd. to DIAL as a percentage of its turnover of sale of goods and provision of services, M/s Taj Sats Air Catering Ltd. charged the 'AAl levy' to the airline companies as a percentage of the amounts charged for sale of goods and provision of services. The appellant in their reply to the department has admitted that they had paid 'AAl levy' and service tax on such AAl levy to DIAL. However, no invoice raised by DIAL to the appellant has been put on record by the appellant. Thus, whatever service tax was leviable on the services provided by DIAL to the appellant, the appellant had collected the same along with service tax thereon from their clients and paid the same to DIAL. Learned Authorized Representative prayed for dismissing the appeal.

5. We have heard the Ld Counsel for the appellant, the learned Authorized Representative for the Department and perused the records. The issue for our consideration is whether the collection of 13% airport authority levy by the appellant from their clients is inclusive of component of service tax, as alleged by the Department.

6. We note that the instant impugned order has adjudicated six show cause notices as detailed in the table below:-

Sl No.	**SCN date**	**Period**	**Amount Confirmed (Rs)**	**Amount dropped(Rs)**	**Sections invoked**
1	24.10.2011	2004-05 to 2009-	1,68,60,879	-	73A, 75,76,77, & 78

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2	21.12.2012	2011-12	1,32,62,106	-	73A, 75,76,77
3	22.05.2014	2012-13	1,03,81,565	76,76,059	Best Judgment: 72,73,75,76,77(2) & 78
4	20.04.2015	2013-14	1,26,62,093	-	73A, 75,76 &77
5	23.03.2016	2014-15	1,30,27,585		73A, 75,76 &77
6	19.04.2017	2015-16	2,11,42,739		73A, 75,76 &77
Total			**8,73,36,967**	**76,76,059**	

7. At the outset, it has been contended before us that the demand has been incorrectly raised under Section 73A of the Finance Act, 1994. In order to appreciate the submissions of the Ld Counsel, we need to refer to Section 73A, which is reproduced hereinafter:

> ***73A. Service Tax Collected from any person to be deposited with Central Government***
>
> *(1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.*
>
> ***(2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.***
>
> *(3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.*
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> *(4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.*

> *(5) The amount paid to the credit of the Central Government under sub-section (1) or sub- section (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).*
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> *(6) Where any surplus amount is left after the adjustment under sub-section (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount.*

7.1 From the above, we note that Section 73A (w.e.f. 18.04.2006) provides that any person who has collected any amount in excess of Service Tax assessed or determined and paid on any taxable service from recipient of Service Tax in any manner as representing Service Tax, shall forthwith pay the amount so collected to the credit of the Central Government.The provisions of this section come to play only when any excess amount has been collected as service tax from the service recipient. If such amount of service tax is collected, which is in excess of service tax assessed or determined or paid on any taxable service, such amount is required to be deposited forthwith to the credit of the Central Government. In this context, we note that the word 'Collection' precedes 'payment'. Thus, if no amount of service tax is collected, then section 73A is not applicable. Further, such amount should be in excess of service tax determined or assessed. In this context, we note that the Tribunal in **Alstom Projects India Ltd. v. CC, CE & ST Coimbatore** [15] held that so far as section 73A is concerned, it applies only when a person collects any sum in name of

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15 2013 (6) TMI 202 - CESTAT CHENNAI

service tax, which could not have been done by a person claiming all through that he is not liable to pay Service Tax. Similarly, in **Neel Sidhi Enterprises v. CST, Mumbai**[16] the Tribunal held that Section 73A envisages two things - amount is required to be collected and amount is collected as representing service tax. In the instant case, it has been submitted by the Ld Counsel that the invoices issued by the appellant related to the transactions of sale of food and beverages. A perusal of the sample invoice raised by the appellant on Singapore Airlines (invoice no. 001753 dated 30.09.2013) on sale of food and beverages reveals that the appellant has charged VAT at various applicable rates and AAI levy at 13% from the client. We see no collection of any amount representing as service tax in the said invoice. As discussed above, Section 73A is categorical that the amount should have been collected as Service tax and not deposited. In the instant case, no such evidence has been brought forward by the Revenue to establish that the said amount representing service tax was collected by the appellant from the sale of Food and beverages. Ld AR has submitted that as the appellant had issued similar invoices for sale of goods and provision of services, hence as service tax was collected on the AAI levy, hence it is presumed that the invoices for sale of goods has also collected an amount representing service tax. This is merely a presumption by the Revenue authorities. The charging section 73A categorically applies only when a person collects any sum in name of service tax, which is not the case in this appeal.

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16 2013 (8) TMI 674 - CESTAT MUMBAI

8. In this context, we draw support from the decision of the Principal Bench of this Tribunal in the case of Make My Trip and others vs ADG, DGGI, wherein the Tribunal held as follows:-

> *47. It is evident that for the invocation of section 73A of the Finance Act, it is necessary that the amount collected has been collected as representing service tax. In the present case, the amount which has been collected by the appellant is termed as „taxes and fees", which include all taxes collected on behalf of the hotel. This amount has also been remitted to the hotels. The contention of the appellant is that it is not collecting any amount representing as service tax and so the provisions of section 73A of the Finance Act could not have been invoked. It is also the contention of the learned counsel for the appellant that the amount of hotel taxes collected from the customer has duly been remitted to the hotels and no amount of tax has been retained by the appellant.*
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> *48. To substantiate that the appellant collected taxes under the head "hotel taxes and fees" and paid it to the hotel and no part of it has been retained by the appellant, the appellant has referred to a sample hotel confirmation voucher of Booking ID NH2115510482641 issued by the appellant to Mr. Jatinder Singh (customer). This sample voucher shows that the total amount charged by the appellant from the customer is Rs. 4751/- out of which the room charges/ base amount is Rs. 3821/- and the hotel taxes and fees is Rs. 930/-. The*

total amount paid by the customer to the appellant is Rs. 4751/-.

49. It also transpires from the Hotelier Voucher issued by the appellant to the hotel in reference to the aforesaid hotel booking, that the amount charged by the hotel for the room is Rs. 2960/- and the tax amount paid is Rs. 485.44/-. Thus, the appellant paid an amount of Rs. 3445.44/-to the hotel.

50. It also transpires from the service tax invoice that the appellant accounted Rs. 4685/- as the sale value and Rs. 66/- as the service tax. According to the appellant the service tax of Rs. 66/- has been deposited. Thus, according to the appellant, service tax liability was discharged on the entire amount.

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52. It is, therefore, clear that the taxes collected by the appellant from customer has been paid to the hotel and the appellant has also discharged has service tax liability by paying service tax on the amount collected by from the customer after availing the benefit of the Abatement Notifications as a tour operator. The appellant had not collected any amount, which was not required to be collected, from any person, in any manner as representing service tax. Section 73A of the Finance Act would, therefore, not be attracted.

53. Reliance can be placed on the judgment of the Supreme Court in R.S. Joshi, Sales Tax Officer, Gujarat vs. Ajit Mills

Limited and Another6, wherein the Supreme Court held that the word „collected" can only refer to cases where a person collects an amount from another with an intention to retain the said amount. The relevant portion of the judgment is as follows:

> "Section 37 (1) uses the expressions, in relation to forfeiture, "any sum collected by the person shall be forfeited". What does "collected" mean here? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that "collected" means "collected and kept as his" by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return if eventually it was not taxable, it is not collected. "Collected", in an Australian Customs Tariff Act, was held by Griffth C.J., not „to include money deposited under an agreement that if it was not legally payable it will be returned" (Words & Phrases p. 274). We therefore, semanticise "Collected" not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer." (emphasis supplied)
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> In the present case, the DGCEI fails to make out even a prima facie case that some portion of the service tax collected by the Petitioners from the customers 'as representing service tax' or otherwise has been "retained" by them. Without such prima facie conclusion, it cannot

be inferred that the Petitioners have violated Section 73A (1) of the FA."

(emphasis supplied)

9. The provisions of Section 73A was examined by the High Court of Delhi in the case of MakeMyTrip (India) Pvt Ltd vs Union of India **[2016(44) STR 481(Del)]**and the relevant paras are reproduced hereinbelow:-

"Analysis of Section 73A of the FA

53. Next, it is necessary to examine in some depth Section 73A of the FA particularly since the case of the DGCEI is that both Petitioners have collected service tax from their customers and have not deposited it with the Central Government. Section 73A of the FA reads thus:

—73A. Service Tax collected from any person to be deposited with Central Government:

(1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made there under from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government…………………………………………………………………….'

54. Section 73A (1) requires any person liable to pay service tax who has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing "service tax" to forthwith pay the amount so collected to the credit of the Central Government. The crucial words are "collected any amount in excess of the service tax assessed or determined." The other expression

which has significance is: "in any manner as representing service tax." The case of the DGCEI is that service tax is being collected by the Petitioners from the recipient of taxable service "in any manner as representing service tax".

55. The Petitioners state that as far as they are concerned, they have collected service tax only to the extent that they are required to pay service tax on the service charges collected by them and further that they have paid the service tax so collected to the credit of the Central Government. They say that as far as the service tax payable by the hotels are concerned, it is collected from the recipient of the taxable services i.e., the customers who book the hotel room using the portal of the Petitioners, and pass it on to the hotels who in turn pay it to the credit of the Central Government. Therefore, the Petitioners contend that they have not "collected any amount" from the recipient of taxable service "in any manner as representing service tax" and have not retained such amount without passing it on to the Central Government.

56. The case of the DGCEI on the other hand is that irrespective of whether the hotels have paid the service tax passed on to them by the Petitioners, since it is the Petitioners who have collected' the said component service tax, it is the Petitioners who are liable to, under Section 73A (1) of the FA, to credit the tax so collected to the account of the Central Government and their failure to do so results in violation of Section 73A of the FA.

57. The case of the Petitioners that they have included the service tax to the extent payable by the hotels in the bills raised on the customers but have not retained such service tax and have passed it on to the hotels appears to have not been considered by the DGCEI in the correct perspective. The understanding of the DGCEI of the transaction of online booking of hotel rooms using the web portals of the Petitioners appears to be prima facie incorrect.

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60. In the present case, the DGCEI fails to make out even a prima facie case that some portion of the service tax collected by the Petitioners from the customers 'as representing service tax' or otherwise has been 'retained' by them. Without such prima facie

conclusion, it cannot be inferred that the Petitioners have violated Section 73A (1) of the FA."

10. In the instant case, it has been demonstrated by the learned Counsel that no amount was collected by the appellant representing service tax in their sale invoices raised in respect of food and beverages. What has been collected is VAT and AAI levy. It is also on record that the appellant had duly deposited service tax collected on invoices raised in respect of provision of services. The department has not disputed this fact.We note that the impugned order has held that "Apparently, no Service Tax has been collected by the Appellant separately on the AAI levy from their clients either in the invoice pertaining to supply of food or provision of services". In this context, it has been submitted by the Ld. AR that the invoices issued for sale of goods as well as provision of services did not indicate any separate collection of service tax, which is what the impugned order has held. If that is the basis of the argument of the Revenue, then it has to be held that the appellant did not pass on the burden of service tax to his client, and has paid service tax out of his pocket. That is an absurd conclusion to reach as service tax, amongst others, is an indirect Tax, wherein the burden of the tax is borne by the customer/client. Further, we note from para 1.4 of the impugned order that the adjudicating authority has reproduced two invoices- Invoice 001753 raised by the appellant to their client Singapore Airlines for sale of food and beverages and 001754 for provision of services. A perusal of invoices categorically reflects collection of taxes and AAI levy. Similarly, Invoice number 001754 indicates the amount of service tax collected on Bond Handling, Service income, Handling income and Hi-lift income. There is

no dispute that the amount so collected as service tax was duly deposited with the Government. In addition, we are unable to accept the contention of the adjudicating authority that the appellant has failed to establish how service tax was collected on AAI levy on services related in invoices and not in sale of food and beverages invoice. A perusal of the invoices reveal that VAT & AAI levy and service tax and AAI levy was collected on the invoices issued to their customers. However, we are not able to accept that service tax was not indicated separately in the invoices issued for provision of services.

11. We also find support from para 4.1.1 of the Board's Circular no. 201/11/2016-ST dated 30.09.2016 issued in respect of arrest guidelines in service tax, the relevant portion is reproduced hereinbelow:

"F.N0. 137/47/2013-Service Tax
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
Service Tax Wing
New Delhi, the 30th September, 2016

To
All Principal Chief Commissioners/ Chief Commissioners of Central Excise/Service Tax
Principal Directors General/ Directors General of Goods & Service Tax/Systems/Central Excise Intelligence/ Audit/Tax Payer Services
Chief Commissioner AR CESTAT
All Principal Commissioners/Commissioners of Central Excise/Service Tax
All Principal Additional Directors General/ Additional Directors General Audit
Madam/Sir,

Subject: Guidelines for arrest in relation to offences punishable under the Finance Act, 1994 and Central Excise Act, 1944

I am directed to draw your attention to the fact that the arrest provisions in Service Tax were introduced with effect from 10.05.2013 vide sub-sections (J) and (K) of section 103 of the Finance Act, 2013 which introduced sections 90 and 91 in the Finance Act, 1994 and also amended section 89 of the Finance Act 1994. Vide sections 155, 156 and 157 of the Finance Act 2016, with effect from 14.05.2016, sections 89, 90 and 91 of the Finance

Act, 1994 have been amended. As a consequence of these amendments, the power of arrest in Service Tax is available only if a person collects any amount as service tax but fails to pay the amount so collected to the credit of the Central Government beyond the period of six months from the date on which such payment becomes due and the amount exceeds rupees two crore.

2.0 Vide paragraph 2 of Board Circular F.No. 137/47/2013-Service Tax dated 17.09.2013 certain conditions precedent to carrying out arrests were indicated. These were:

2.1 Careful exercise of this power since arrest impinges on the personal
liberty of an individual.

2.2 The reason to believe that a person has committed the specified offence which is rendering the person liable for arrest must be based on credible material which will stand judicial scrutiny.

2.3 The relevant factors before deciding to arrest a person must be, apart from fulfillment of the legal requirements, the need to ensure proper investigation and prevention of the possibility of tampering with evidence or intimidating or influencing witnesses.

3.0 In the context of the legislative amendments vide the Finance Act 2016 and the single offence for which the power of arrest exists, it is necessary to again emphasize and indicate the factors which must invariably be kept in mind before arresting a person:

4.0 ***Conditions precedent- Legal***

4.1. At the outset there must be clear and unambiguous notings in the file, bringing out how all the ingredients of the offence have been established. The notings must specifically refer to evidence relating to-

4.1.1 Amount collected as service tax: Collection of an amount as service tax should be clear and self-evident from the invoices, bills, contracts, etc. An amount should be clearly indicated as service tax. The copies of sample invoices /bills, contracts, etc. which cover the period being investigated should be in the file*.*

4.1.2 ***Amount should exceed ₹ 2 crore.***

4.1.3 ***Failure to pay the amount so collected to the credit of the Central Government:*** *The ST3 return filed by the assessee for the relevant period, showing the self-assessed value of taxable services and service tax paid should be available in file. Where no such return has been filed, an observation to this effect should be made since this will make the departmental case stronger.*

Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxx”

12. We find that the aforesaid arrest guidelines issued by the Central Board of Excise & Customs (now CBIC) has directed that any amount

collected as Service tax should be indicated as such in the bills/challans/invoices etc., for the period under investigation. This is not the case in the instant appeal. The invoice mentioned supra does not indicate any service tax collection by the appellant. A perusal of the invoice makes it abundantly clear that the appellant had merely collected VAT and AAI levy from their clients, and no amount representing Service tax has been collected. Consequently, we hold that the demand under Section 73A cannot be sustained in respect of 5 of the Show Cause Notices issued to the appellant.

13. We now consider the demand raised under Best Judgment method under section 73 of the Finance Act, 1994 in respect of the show cause notice dated 22.05.2014. We note that it has been held in the impugned order that the instant show cause notice has incorrectly been issued under section 73. The relevant para 1.9 is reproduced hereinafter "As regards the SCN dated 22.05.2014, I find that the SCN though issued under section 73 of the Finance Act, 1994, the same has been issued on grounds as mentioned in the earlier SCNs and thus the same is being considered as issued under section 73A of the Finance Act, 1994. The mention of section 73 instead of section 73A in the said SCN seems to be due to oversight which does not affect the nature of the demand and does not render it as *non-est* just because right provision was not sighted." If the instant SCN is to be considered to have been issued under Section 73A, then we hold that the said demand cannot be upheld as per the discussions supra.

14. The Ld Counsel has also submitted that the appellant has been discharging VAT on the AAI levy collected with respect to the transaction related to sale of food & beverages. He contended that

once VAT had been paid on a transaction, no service tax can be demanded as VAT and Service Tax are mutually exclusive tax. In this context, the Ld Counsel has relied on the judgment of the Supreme Court in the case of Imagic Creative Pvt Ltd. vs Commissioner of Commercial Taxes **[2008(9) STR 337(SC)].**In the said case, the Supreme Court of India ruled that Service Tax and Value Added Tax (VAT) are mutually exclusive, meaning they cannot be levied on the same transaction. This decision clarified the relationship between the two taxes and has significant implications for businesses providing services. The relevant paras are reproduced hereinafter:

> "24. We have, however, a different problem at hand. Appellant admittedly is a service provider. When it provides for service, it is assessable to a tax known as service tax. Such tax is leviable by reason of a Parliamentary statute. In the matter of interpretation of a taxing statute, as also other statutes where the applicability of Article 246 of the Constitution of India, read with Seventh Schedule thereof is in question, the Court may have to take recourse to various theories including aspect theory, as was noticed by this Court in Federation of Hotel & Restaurant Association of India, etc. v. Union of India& Ors. [(1989) 3 SCC 634].
>
> 25. If the submission of Mr. Hegde is accepted in its entirety, whereas on the one hand, the Central Government would be deprived of obtaining any tax whatsoever under the Finance Act, 1994, it is possible to arrive at a conclusion that no tax at all would be payable as the tax has been held to be an indivisible one. A distinction must be borne in mind between an indivisible contract and a composite contract. If in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and clause 29A had to be inserted in Article 366, must be kept in mind.
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> 26. We have noticed hereinbefore that a legal fiction is created by reason of the said provision. Such a legal fiction, as is well known, should be applied only to the extent for which it was enacted. It, although must be given its full effect but the same would not mean

that it should be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity.

27. The Court, while interpreting a statute, must bear in mind that the legislature was supposed to know law and the legislation enacted is a reasonable one. The Court must also bear in mind that where the application of a Parliamentary and a Legislative Act comes up for consideration; endeavours shall be made to see that provisions of both the acts are made applicable.

28. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct."

15. In the light of the facts of the instant case, we find that the said demand has been raised on the transactions where VAT was paid by the appellant on sale of food and beverage. Consequently, we find that on this ground as well the demand cannot be sustained. Once demand cannot be sustained, the penalties are also not sustainable.

13. In view of above discussions, we set aside the impugned order, and allow the appeal.

(Order pronounced in the open Court on 24.06.2025)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.