CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,
BANGLORE-560009

COURT-2

Customs Appeal No. 1326 OF 2010

[Arising out of the Order-in-Original No.1/2010-Cus. dated 29.3.2010 passed by the Commissioner of Central Excise, Customs and Service Tax, Calicut.]

Air India Express Limited ....**Appellant**
Old Airport Road,
Sant Cruz East,
Mumbai – 400 029.

Vs.

Commissioner of Central Excise, Customs and Service Tax ....**Respondent**
C. R. Building,
Mananchira,
Calicut – 673 001.

Appearance:

Mr. Manoj Arora, Advocate
AMA Legal ....**For Appellant**

Vs.

Mr. K. A. Jathin,
Dy. Commissioner (AR) .... **For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 21.08.2023

Date of Decision: 13.10.2023

FINAL ORDER No. 21107 of 2023

Per R. BHAGYA DEVI:

M/s. Air India Express Ltd., Mumbai, the appellant, imported Aviation Turbine Fuel (ATF) and certain quantity of unutilised fuel remained on board. The entire ATF remaining on board after converting into domestic flights was being used for domestic operations and therefore, the said quantity of ATF was not eligible for customs duty exemption and therefore, duty had to be paid on the said quantity of ATF on the appropriate rates. The appellants had imported 838.134 of ATF valued at Rs.2,42,04,799/- for the period from March 2007 to November 2007 for domestic run and accordingly, customs duty and countervailing duty and other duties were to be paid on ATF. Since the appellant failed to pay customs duty, show-cause notice was issued under Section 28 read with Section 28AA and Section 112 of Customs Act, 1962. Thereafter, periodical show-cause notices were issued on the same issue for various periods as noted below:

Sl. No.	**SCN No. and date**	**Period**	**Duty demanded (in Rs.)**
1	C. No.VIII/48/15/08 dated 25.5.2008	12/2007 to 03/2008	72,41,133
2	C. No.VIII/48/31/2008 dated 17.9.2008	04/2008 to 08/2008	1,36,75,125
3	C. No.VIII/48/03/2009 dated 8.1.2009	09/2008 to 12/2008	76,25,768
4	C.No.VIII/48/3/2009 dated 5.6.2009	01/2009 to 05/2009	55,33,108

The Commissioner in the impugned order observing that there was no dispute on levy of duty as the appellant had admitted the duty levy on ATF remaining on board after the international leg and consumed in the domestic leg for the relevant periods noted in the show-cause notice, confirmed demand of customs duty.

2. The dispute was only with regard to the valuation under Section 14 of the Customs Act, 1962. The Commissioner held that the cost of transport, insurance and landing charges as per Rule 10(2) of the Customs Valuation Rules, 2007 had to be added in

order to arrive at the transaction value and determine the duty accordingly. Therefore, the Commissioner confirmed the duty amount after adding these charges to the transaction value. In addition to duty and interest, penalty was also imposed on the appellant. Aggrieved by this order, appellant is in appeal.

3. The learned counsel on behalf of the appellant submitted that the assessable value cannot include the cost of transportation, insurance, loading, unloading and handling charges because the fuel in the aircraft was never unloaded even after it reached India and there has been no handling or unloading or transportations charges incurred on the fuel remaining unutilised in the aircraft. He relies on the Larger Bench decision rendered in the case of **Jet Airways (India) Ltd. vs. Commissioner of Cus. (I) Airport, Mumbai: 2021 (377) E.L.T. 83 (Tri. - LB)** and other decisions as stated below:

i. Final Order No.51343/2018 dated 10.4.2018 in the case of M/s. Air India Ltd. vs. CC, New Delhi.

ii. Final Order dated 15.3.2019 passed by Hon'ble Supreme Court of India in the case of Commissioner of Customs, New Delhi vs. Air India Ltd. in Civil Appeal No.933-934 of 2019.

iii. Final Order No. C/A/51068/2019-CU (DB) dated 18.4.2019 in the case of Air India Ltd. vs. CC, New Delhi.

3.1 The learned counsel for the appellant also submitted that No.119/2008 dated 31.10.2008 at Columns 5 and 6 of the Table mentions the rate of duty as (-) which pertains to the additional duty/CVD on the imported goods. According to him, the (-) should be read as 'Nil' and therefore, no additional is liable to be paid. It is further submitted that the reliance placed on Notification

No.12/2012 dated 17.3.2012 is not sustainable in as much as it has to be implemented prospectively. He also relies on the judgment in the case of Standard Consultants Ltd. vs. CC, Hyderabad: 2009 (235) ELT 829 (Tri.-Bang.) where it was held that the (-) represents 'Nil'. He also relied on Final Order No.56536/2017 dated 9.10.2018 where a similar issue, the Tribunal held that the disputed period is December 2010 to November 2015, out of which no CVD is applicable up to June 2012 as above. However, the matter was remanded to decide the issue *de novo* by providing reasonable opportunity to the appellant.

4. The learned Authorised Representative in his submission fairly agrees that the issues are covered by the decision of the Larger Bench with regard to valuation. However, as far as Notification No.119/2008 is concerned, he submits that it is an exemption Notification and therefore, nothing can be read into the Notification. As held by the Commissioner, the column No.4 indicates the standard basic rate is 'Nil' and at Column No.5 there is no exemption as far as additional duty/CVD is concerned. (-) cannot be read as 'Nil' as has been clarified vide Notification No.12/2012 dated 17.3.2012.

5. Heard both sides. At para 22 of the impugned order, the Commissioner has noted that *'there was no dispute regarding the duty liability on ATF remaining on board after international leg as it was settled by the Hon'ble CESTAT in the case of Indian Airlines Ltd. vs. CCE: 2005 (180) E.L.T. 502 (Tri.-Bang.).* Therefore, the

only issue remains to be decided is as to whether the cost of transportation, the cost of loading/unloading/handling charges, insurance has to be added to the transaction value for re-determining the duty liability. The Larger Bench in the case of **Jet Airways** (supra) held that:

> **"87.** The inevitable conclusion that follows is that the Division Bench of the Tribunal in *Inter Globe Aviation* laid down the correct law. The said decision of the Tribunal in *Inter Globe Aviation* was subsequently followed by the Division Benches of the Tribunal in *National Aviation Company of India, Air India Limited* and *Jet Airways.*
>
> **88.** The reference is, accordingly, answered in the following terms.
>
> > "No amount towards alleged transportation cost is required to be included in the value of remnant ATF under Rule 10(2) of the 2007 Rules for determining the transaction value under Section 14(1) of the Customs Act."

Therefore, the notional value of transportation under proviso to Rule 10(2) of the Customs Valuation Rules, 2007 cannot be added to the transaction value. Based on the above decision, the Tribunal in the case of **Jet Airways India Ltd vs. Commissioner of Customs (Airport): 2021 (12) TMI 971, CESTAT Mumbai** observed that in the transaction value, methods of valuation, these costs are irrelevant and extraneous and accordingly, held that the transaction value excludes the scope for addition of freight, insurance and landing charges to the cost of supply for discharge of duty liability on the fuel available on board upon conclusion of an international leg.

6. Thus, going by the reasoning for not adding the transportation charges, it is obvious that none of these charges can become part of transaction value as per Rule 10(2) of the

Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Hence, the matter is remanded to the Commissioner to re-determine the duty liability after taking into consideration the Larger Bench decision in the case of **Jet Airways (India) Ltd.** (supra).

7. The second issue is whether the benefit of CVD is available to the appellant vide Notification 21/2002 as amended by Notification 119/2008 dated 31.10.2008, which is reproduced below:

> **ATF exempted while import duty increased on Ferro-molybdenum & Ferro-Vanadium — Amendment to Notification No. 21/2002-Cus.**
>
> In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002 which was published in the Gazette of India, Extraordinary, vide G.S.R. 118 (E) of the same date, namely :-
> In the said notification, in the Table, -
>
> Effective rates of basic and additional duty for specified goods falling under chapters 1 to 99
>
> In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 17/2001-Customs, dated the 1st March, 2001 [G.S.R. 116(E), dated the 1st March, 2001], the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading or sub-heading of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India,-
>
> (a) **from so much of the duty of customs** leviable thereon under the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table;

(b)**from so much of the additional duty** leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act, as is in excess of the rate specified in the corresponding entry in column (5) of the said Table, subject to any of the conditions, specified in the Annexure to this notification, the condition No. of which is mentioned in the corresponding entry in column (6) of the said Table :

Provided that nothing contained in this notification shall apply to –

(a)the goods specified against serial Nos. 239, 240, 241 and 242 of the said Table on or after the 1st day of April, 2003;

(b)the goods specified against serial Nos. 250, 251 , 252 and 415 of the said Table on or after the 1st day of March, 2005.

Explanation. - For the purposes of this notification, the rate specified in column (4) or column (5) is *ad valorem* rate, unless otherwise specified.

Table

S. No.	**Chapter Heading /sub-heading**	**Description of goods**	**Standard rate**	**Additional duty rate**	**Con-dition No.**
(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**
1.	1	Cows, heifers, bulls, goats, sheep, pigs, angora rabbits, ducklings and pureline poultry stock	5%	-	-
2.	1	Grand parent poultry stock and Donkey stallions	25%	-	-
3.	0402.10 or 0402.21	Goods upto an aggregate of ten thousand metric tonnes of total imports of such goods in a financial year	15%	-	1
4.	0405.10 or 0406.90	All goods	30%	-	-
5.	5	Pancreas	5%	-	-
6.	0511.90	Artemia cyst	15%	-	-
7.	5 or any other Chapter	The following goods, namely:- (1) Frozen semen; (2) Frozen semen equipment, namely :- (a) flasks, refrigerators, vessels, jars or dewars, and their accessories; (b) Plastic insemination sheath and insemination guns; and (c) Weaton Ampoules and straws for freezing semen	5%	Nil	-
8.	**6, 7, 8, 9**	**Planting materials,**	**5%**	**Nil**	**2**

	or 12	**namely, oil seeds, seeds of vegetables, flowers and ornamental plants, tubers and bulbs of flowers, cuttings or saplings of flower plants, seeds or plants of fruits and seeds of pulses**			
77.	**2711.11**	**Liquefied natural gas**	**5%**	**Nil**	**-**

TF exempted while import duty increased on Ferro-molybdenum & Ferro-Vanadium — Amendment to Notification No. 21/2002-Cus.

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002 which was published in the Gazette of India, Extraordinary, vide G.S.R. 118 (E) of the same date, namely :-

In the said notification, in the Table, -
1. after S. No. 77B and the entries relating thereto, the following S. No. and entries shall be inserted, namely :-

(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**
“77C.	**2710 19 20**	**All goods**	**Nil**	**-**	**-“;**

(ii) for S. No. 198 and the entries relating thereto, the following S. No. and entries shall be substituted, namely :-

“198.	7202 (except 7202 70 00, 7202 92 00)	All goods	Nil	-	-;
198A.	7202 70 00 or 7202 92 00	All goods	5%	-	-“.

[Notification No. 119/2008-Cus., dated 31-10-2008]

7.1 The Appellant claims the benefit of ‘Nil’ rate of duty on CVD in view of the fact that (-) is mentioned against Column 4 at Sl. No.77C of the above Notification No.119/2008-Cus. dated 31.10.2008. As seen from the above Notifications, it is very clear that whenever there is no duty to be levied, the Notification clearly shows ‘Nil’ as seen at Sl.No.8, 77 (CVD is Nil) and 198(basic duty is Nil) instead of (-). Therefore, one cannot assume that (-) means Nil but it only means there is no change in rate of duty as mentioned in the tariff. This has been clarified vide Notification No.12/2012 – Cus. dated 17.3.2012.

> *Explanation.- (I)* For the purposes of this notification, the rate specified in column (4) or column (5) of the said Table is *ad valorem* rate, unless otherwise specified;
>
> **(II) For the removal of doubts,-**
>
> **(a) "-" appearing in column (4) means base customs duty leviable on the goods as per the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) read with any other notifications issued under sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), for the time being in force.**
>
> **(b) "-" appearing in column (5) means additional duty equal to duty of excise leviable on the goods as per the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) read with any other notifications issued under sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), for the time being in force.**

7.2 The above Notification states for removal of doubts, thus, clarifying that (-) does not mean 'Nil'. The Hon'ble Karnataka High Court in the case of **Mandovi Motors Pvt. Ltd. vs. State of Karnataka: 2016 (41) S.T.R. 816 (Kar.)** has held that the amendment of the Notification when it is clarificatory in nature is applicable retrospectively. The Hon'ble High Court held as follows:

> **"9.** The said notification clarifies the ambiguity i.e., a dealer engaged in the purchase and sale of used cars is entitled to the benefit of the notification. The notification dated 24-10-2005 applies to sale of used cars. The tax payable is 4% of the difference between the taxable turnover in respect of such sale and the amount paid towards purchase of such car. Therefore, it applies to a case where a dealer purchases a used car and then sells such car. Therefore, it has no application to a case where a dealer purchases a car from the manufacturer. However, by notification dated 30-3-2007, whatever ambiguity was there in the notification dated 24-10-2005 has been clarified."

Based on the clarification, the benefit of the Notification was denied retrospectively.

7.3 In the present case, the Notification No.21/2012 clearly states that for removal of doubts implying that the notification always intended to state the obvious that wherever there was (-), the intention of the Notification was not to read 'Nil' into it. Therefore, this has to be held as clarificatory in nature and applicable retrospectively. Moreover, in the case of **Standard Consultants Ltd. vs. CC, CE & S.T. (Appeals-II), Hyderabad: 2009 (235) E.L.T. 828 (Tri.-Bang.)** relied upon by the learned counsel, this clarificatory Notification was not available and therefore, it cannot be relied upon and in the appellants own case, the matter was remanded for a *de novo* adjudication. In the case of **Commissioner of Cus. (Import), Mumbai vs. Dilip Kumar & Company: 2018 (361) E.L.T. 577 (SC)** wherein it is held that:

> "Literally exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, specially, in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective, etc. That is why its construction, unlike charging provision, has to be tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principles requires it to be construed strictly. *Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject, but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction..."*

Further, the Supreme court observed that :

> (1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.
>
> (2) When there is ambiguity in exemption notification which

> is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

7.4 In view of the above observations and the decision by the Apex court, an exemption Notification has to be strictly interpreted and one cannot read 'Nil' into a (-) especially when the intention of the Notification was to exempt duty 'Nil' was specifically mentioned.

8. This third issue is that the appellant submits that while computation of duty amount for the period from March 2007 to May 2009, the Basic Customs Duty for the entire period has been taken as 10%. It is submitted that Notification No.21/2002 which was amended vide Notification No.74/2008 dated 4.6.2008 at Sl. No.77A was inserted in the Table where it is stated that the duty for the goods under Heading 2710 is reduced to 5%. Thus from 4.6.2008, the rate of duty to be calculated as 5% as against the 10% as demanded in the show-cause notice and confirmed by the adjudicating authority. It is further submitted that vide Notification No.19/2008 dated 31.10.2008, the rate of duty effective from 1.11.2008 was 'Nil'. From the worksheet, it appears that as submitted by the appellant, the duty is demanded at the rate of 10% irrespective of the change in the rate of duty. Therefore, the entire duty amount needs to be redetermined based on the above change in the rate of duty for the relevant periods.

9. In view of the above observations and discussions,

(i) We hold that in view of the Larger Bench judgment in the case of Jet Airways, the transaction value will not include the cost of transportation, insurance, loading and unloading and handling charges.

(ii) The benefit of CVD is not available to the appellant as discussed at para 7 to 7.4.

(iii) Computation of duty amount has not taken into account the changes in the rate of duty as discussed at para 8.

(iv) Since the main issue was with regard to payment of duty on the transaction value including transportation, loading and unloading charges, etc., has been set aside, the question of confiscation does not arise. Accordingly, the confiscation, redemption fine and penalty are set aside.

10. Accordingly, the matter stands remanded for redetermination of duty based on our observations referred above along with interest as applicable. It is needless to say that the appellants should be given an opportunity of hearing before the matter is being decided afresh.

11. The appeal is allowed by way of remand.

*(Order pronounced in open court **13.10.2023**.)*

(P. A. AUGUSTIAN)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI
MEMBER (TECHNICAL)

rv