CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

S.No.	Appeal No.	Appellant	Respondent
1.	C/40577/2016	Jet Airways (India) Ltd.	Principal Commissioner of Customs (Air), Chennai-I
2.	C/40940/2016	Principal Commissioner of Customs (Air), Chennai	Jet Airways Ltd.
Arising out of Order-in-Original No.360/2015-Airport dt. 30.11.2015 read with corrigendum dt. 23.3.2016 passed by the Principal Commissioner of Customs (Airport), Chennai-I			
3.	C/40337/2016	InterGlobe Aviation Ltd.	Principal Commissioner of Customs (Air), Chennai-I
4.	C/40939/2016	Principal Commissioner of Customs (Air), Chennai-I	InterGlobe Aviation Ltd.
Arising out of Order-in-Original No.362/2015-Airport dt. 30.11.2015 read with corrigendum dt. 23.3.2016 passed by the Principal Commissioner of Customs (Airport), Chennai-I			
5.	C/40941/2016	Principal Commissioner of Customs (Air), Chennai	Spicejet Ltd.
Arising out of Order-in-Original No.361/2015-Airport dt. 30.11.2015 read with corrigendum dt. 23.03.2016 passed by the Principal Commissioner of Customs (Airport), Chennai-I			

Appearance :

Shri R. Srinivasan, Consultant
For the Assessee

Shri K. Veerabhadra Reddy, ADC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi, C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 25.10.2018

FINAL ORDER No. 42726-42730 / 2018

Per Bench

All these appeals since relating to same issue they are taken up together for common disposal.

2. All these assessees are airlines operating flights to foreign destination from Chennai Airport. They uplifted Aviation Turbine Fuel (ATF) from foreign destinations for their return journey to Chennai. Department took the view that on the quantity of remnant ATF on arrival at Chennai Airport, the airlines would be required to pay Customs duty on the basis of assessable value worked out. The dispute in all these appeals concerns addition / inclusability of freight, insurance and landing charges in such assessable value. The adjudicating authorities in all these cases have upheld the inclusability of the aforesaid components, confirmed resultant duty liability and imposed penalties under Section 112(a) and Section 114A ibid. Hence Appeal No. **C/40577/2016** by Jet Airways (India) Ltd. & Appeal No.**C/40337/2016** by InterGlobe Aviation Ltd.

3. In Order No.360/2015 dt. 30.11.2015 (impugned order for Jet Airways), the adjudicating authority imposed a penalty of Rs.45,00,000/- under Section 112 (a) of the Customs Act, 1962 and also imposed penalty of Rs.5 lakhs under Section 114A ibid. However, vide corrigendum dt. 23.3.2016 the penalty imposed under Section 114A ibid was treated as deleted. Hence Appeal No.**C/40940/2016,** filed by Revenue against Jet Airways (I) Ltd., primarily on the grounds that since the amount of duty of Rs.7,09,33,181/- proposed to be demanded by SCN alleging misstatement and suppression of facts invoking Section 28 (4) of the Customs Act, 1962 has been confirmed, the adjudicating

authority should have imposed equal penalty under Section 114A ibid which is mandatory.

4. In Order-in-Original No.362/2015 dt. 30.11.2015 (impugned order in respect of InterGlobe Aviation Ltd.), the adjudicating authority confirmed the demands of duty of Rs.1,82,93,823/- and Rs.78,58,169/- under Section 28 (1) & 28 (8) of the Customs Act, 1962, imposed penalty of Rs.11 lakhs under Section 112(a) ibid and imposed penalty of Rs.8 lakhs under Section 114A ibid. However, vide corrigendum dt. 23.3.2016 the penalty imposed under Section 114A ibid was treated as deleted. Hence appeal No.**C/40939/2016** filed by Revenue against InterGlobe Aviation Ltd. on similar grounds that when the duties have been demanded on account of wilful statement and suppression of facts by invoking extended period, mandatory penalty under Section 114A along with appropriate interest should have been ordered / imposed.

5. In Order-in-Original No. 361/2015 dt. 30.11.2015 (in relation to M/s.Spicejet Ltd.) the adjudicating authority while demanded duty of Rs.83,03,664/- with interest and imposition of penalty of Rs.5 lakhs under Section 112 (a) ibid and imposed penalty of Rs.2 lakhs under Section 114A ibid. However, vide corrigendum dt. 23.3.2016 the penalty imposed under Section 114A ibid was treated as deleted. Hence appeal No.**C/40941/2016** by Revenue inter alia on similar grounds that when duty demand to the tune of Rs.83,03,664/- has been confirmed under Section 28 (1) & 28 (8) ibid on account of wilful misstatement and suppression of facts invoking extended period, only mandatory penalty should have been imposed under Section 114A ibid along with

appropriate interest and imposition of penalty under Section 112 (a) is not correct.

6.1 Today when the matter came up for hearing, on behalf of the assessees, Ld. Consultant R. Srinivasan submitted that the matter is no longer res integra. He submits that in respect of freight charges the Tribunal in the case of *Interglobe Aviation Ltd*. *Vs CC New Delhi* - 2018 (360) ELT 170 (Tri.-Del.) has categorically held that such remnant fuel, though construed to be an imported item for the purpose of customs duty, no freight element is attributable and cannot be added to form part of the assessable value. He submits that the same ratio is *pari materia* applicable to the issue of inclusability of insurance and landing charges also.

6.2. In respect of Revenue appeals, Ld. Consultant submits that when the duty demands themselves cannot sustain, there cannot be any imposition of penalty hence Revenue appeals may be dismissed.

7.1 On the other hand, Ld. A.R Shri K. Veerabhadra Reddy supports the impugned order to the extent of confirmation of proposal to add / include component of freight, insurance and landing charges to the value of ATF. He submits that the excess fuel has to be treated as stores as per Section 87 of the Customs Act. Section 2 (22) ibid includes ‘stores’ in the definition of ‘goods’. Hence, the remnant fuel will become ‘imported goods’ as per Section 2 (25) ibid and the value of such imported goods will necessarily have to be done as per the provisions of Section 4 of the Act read with the Valuation Rules by which the elements of freight, insurance and landing charges are very includible to the assessable value for working out customs duty liability.

7.2 In respect of the Revenue appeals, Ld. A.R points out that when the demands that have been confirmed have been done on the basis of the proposition in the show cause notice that the said amounts have been evaded by way of suppression of facts etc. invoking extended period of limitation, the ingredients of Section 114A are very much present, hence equal penalty under Section 114A will also have be necessarily invoked mandatorily by the adjudicating authority, which has not been done. In respect of aforesaid appeals, even the reduced penalty imposed at the first instance was subsequently deleted vide corrigenda dt. 23.3.2016.

7.3 For these reasons Ld. A.R prays that the assessees' appeals may be dismissed the department appeals allowed.

8.1 Heard both sides. We find that the Ld. Advocate is correct in his assertions with regard to the Tribunal decision in *Interglobe Aviation Ltd. Vs CC New Delhi* (supra). We find that the Tribunal inter alia held as under :

> " **7.** The main point of dispute is the valuation of leftover ATF available in the fuel tank of aircraft landing in India from an international trip. The duty liability on such ATF is not under dispute. However, its valuation, more specifically, addition of freight element on notional basis to arrive at the value of such ATF is in dispute. The Original Authority held that the remnant ATF is transported by the aircraft and as such, as the actual freight is not ascertainable, a notional freight in terms of Rule 10(2) is to be added to arrive at the assessable value of ATF. We note that the aircraft requires ATF for its propulsion. As per the Civil Aviation Regulating requirements and also for safety, aircraft carries adequate amount of fuel in its flight. The consumption of fuel depends on various factors. Factually, when the aircraft completes the inward journey to reach the Indian Airport, certain quantity of fuel is left in the tanks. We are not in agreement that there should be a freight element attributable to such fuel in the tank. In other words, the aircraft did not transport the fuel as a cargo or goods for the purpose of freight. Such interpretation will be a result of hyper-technical approach to the facts of the case. Admittedly, the remnant fuel is construed to be an imported item for the purpose of customs duty. In the importation of such remnant fuel, we could not discern any separate freight element, which can be added in the assessable value. The fuel in the tank is part of aircraft in operation. Fuel cost is calculated, and apparently, forms part of commercial consideration while fixing ticket charges for transporting aircraft. No freight element is attributable to fuel in the

tank, the usage of which varies on different parameters. In other words, the aircraft did not transport ATF on which a freight element can be attributed. The plain meaning of 'Freight' is goods that are transported by ships, planes, trains or lorries/trucks; the system of transporting goods in this way (OXFORD Advanced Learners Dictionary 7th ed.). We note that on this basis it cannot be said that fuel in the tank of aircraft used for propulsion can be considered as cargo/goods with attributable cost of freight. Further, we note that Rule 10(2) was applied by the lower authority on the ground that the freight of ATF is not ascertainable. We note that there is no freight element involved and hence, there is no application for Rule 10(2).

8. The Hon'ble Supreme Court in *Wipro Ltd.* - (2015) 14 SCC 161 = 2015 (319) E.L.T. 177 (S.C.), held that normally, the value of imported goods has to be the transactional value which means the price "actually paid" or "payable" for the goods imported. When the value of transaction could not be determined then the Rules are applied to arrive at the value. The endeavour is to have closest proximity with the actual price. Dealing with addition of loading and handling charges at 1% on notional basis as per Rule 9 of Valuation Rules, the Apex Court held that when the actual cost towards handling charges are available, notional addition is not legally tenable. It was held to be violative of Article 14 of the Constitution. In the present case, there is no freight involved with reference to left- over fuel in the tank of an operating aircraft. Hence, there is no question such freight being 'not ascertainable' and hence addition of 20% notional freight."

8.2 We find that the ratio laid down by the aforesaid Tribunal decision is also applicable on all fours to the disputes concerning inclusibility of landing charges and insurance.

8.3 In the event, following the *Interglobe* decision, we have no hesitation in holding that in all these appeals, there cannot be any addition of freight / insurance or landing charges to the cost of ATF for arriving at the assessable value of the remnant ATF.

8.4 Accordingly, impugned Order-in-Original Nos. 360/2015 dt. 30.11.2015 and 362/2015-Airport dt. 30.11.2015 will have to be set aside in toto, which we hereby do.

8.4 As the impugned orders in toto have been set aside, the related Revenue appeals C/40940/2016 (In Re: Jet Airways Ltd.) & C/40939/2016 (In Re: InterGlobe Aviation) are dismissed.

8.5. Coming to Appeal No. C/40941/2016 filed by Revenue in respect of M/s.Spicejet Ltd., on perusal of respective impugned order, we find that there is no discussion, finding and justification by the Commissioner as to why penalty has to be imposed. In the connected appeals, on the very same issue as discussed above, we have already found that the demands per se are unsustainable. Viewed in this light, merely because the assessee (SpiceJet Ltd.) has not filed any appeal, we are not inclined to interfere with the order passed by the Commissioner as to the non-imposition of penalty under Section 114A especially when there are no grounds established as to how the ingredients are present attracting imposition of equal penalty. On this score, the Revenue appeal C/40941/2016 also is dismissed.

9. In the result,

The assessee's appeals are allowed with consequential benefits, if any, as per law.

The Revenue appeals are dismissed.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi, C.S)
Member (Judicial)

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