

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

Appeal Nos. ST/707 & 708/2012

(Arising out of Order-in-Original No. 82 & 83/2012 dated 22.6.2012 passed by the Commissioner of Service Tax, Chennai)

M/s. Island Aviation India Pvt. Ltd.

Appellant

Vs.

Commissioner of GST & Central Excise
Chennai

Respondent

Appearance

Shri V.S. Manoj, Advocate for the Appellant

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: **18.01.2019**

Final Order Nos. **40156-40157 / 2019**

Per Bench

The appellants are functioning as General Sales Agent of Malaysian Airlines in the territory of South India for cargo transportation and other services provided by Malaysian Airlines. They are registered with the Service Tax Department. During the course of audit of accounts, it was noticed that the appellant had entered in a General Sales Agency Agreement

(Cargo) with Malaysian Airlines Systems, Berhad on 30.3.2007 for functioning as General Sales Agent for cargo transportation and other services provided by Malaysian Airlines. It appeared that they are liable to pay service tax under Business Auxiliary Services (BAS) on the entire income earned by them for providing the services. On verification, it was noticed that the appellant had not discharged appropriate service tax on their income. Show cause notice was issued proposing to demand service tax along with interest and also for imposing penalties. After due process of law, the original authority confirmed the demand of Rs.1,50,89,993/- for the period from October 2009 to September 2011 along with interest and also imposed penalty under section 76 of Finance Act, 1994. Aggrieved, the appellants are now before this Tribunal.

2. Ld. counsel Shri V.S. Manoj appeared and argued the matter on behalf of the appellant. He submitted that the appellant is a General Sales Agent for Malaysian Airlines for transportation of cargo as per the agreement entered between them. The appellant is receiving commission for services as a General Sales Agent. The appellant has discharged the service tax on the entire commission received by them as General Sales Agent. This agreement between the parties also provide for a specific arrangement wherein the appellant is entitled to purchase cargo slot at the rate specified / agreed and make

profit from sale of such cargo space to exporter. He submitted that the agreement specifically provides that when there is a purchase and sale, the appellant is not entitled for any commission. In the present proceedings, the demand is not raised on the commission received by the appellant as General Sales Agent. The demand is confined to the amount calculated as a difference between the purchase price and sale price of the cargo space. In such purchase of cargo space, the appellant is not acting in the capacity of a General Sales Agent for Malaysian Airlines and therefore is not receiving any commission from them. In fact, it is only a specific arrangement whereby the appellant is entitled to purchase the cargo slot at a fixed price and make profit from sale of space to the exporter. While doing so, the appellant takes the risk of incurring any loss in case the cargo slot is not sold to any customer / exporter. It is also explained by him that in case when the appellant is acting as a General Sales Agent, the master airway bill will be raised by Malaysian Airlines. When the appellant purchases and sells the cargo slots as an independent buyer, the house airway bill would be issued by the appellant and the appellant will be liable to make the payment for cargo slot to the Malaysian Airlines irrespective of the fact whether the customer pays for the slot. Thus the appellant is just making profit out of the sale of the cargo slot

and is not receiving any commission. The appellant therefore is not liable to pay service tax on this amount received as a profit from sale of cargo space. While engaged in such sale of cargo space, the appellant is acting as an independent buyer of the slot from the Malaysian Airlines and not as General Sales Agent. He adverted to the annexure to the show cause notice and argued that the annexure would show that the alleged amount of taxable value is arrived by department only from the difference of the sale price and purchase price of the cargo slot. The adjudicating authority confirmed the demand observing that the issuance of the airway bill by the appellant indicates that there is no trade of cargo space. In fact, the adjudicating authority has not considered the specific arrangement that the appellant is responsible to make payment of freight irrespective whether customer makes the payment. In such specific arrangement, the appellant may make profit or sell the slot at a price less than the purchase price which may result in loss to the appellant. In any case the price received by the appellant is only trading profit and not commission. The issuance of the House Airway Bill by the appellant will also prove that the transaction is on principal to principal basis. He relied upon the decision of the Tribunal vide Final Order No. 43487/2017 dated 19.12.2017 in the case of

Commissioner of Service Tax, Chennai Vs. M/s. Airogo Travels & Cargo P. Ltd.

3. The Id. AR Shri K. Veerabhadra Reddy supported the findings in the impugned order. He argued that the appellant is acting as a General Sales Agent as per the agreement entered between the parties. Adverting to clause 5 and 9 of the agreement, he submitted that clause 5 gives the details of the duties of general sales agent. Sub-clause (vii) of clause 5 states that the appellant is to issue airway bills in accordance with the agreement in connection with the sales made on behalf of Malaysian Airlines. Thus, the airway bills, if any, issued are on behalf of Malaysian Airlines and therefore the appellant in all transactions is doing the activity of general sales agent. Therefore, the transaction falls within the definition of BAS. In clause 9, it is stated that in case where Malaysian Airlines and the appellant have prior specific rate arrangements, the appellant who is a general sales agent is not entitled to any commission. It is clear from the above clauses that the appellant is rendering services as air cargo agent of Malaysian Airlines. It is also clear from the said clauses that income is received by the appellant from Malaysian Airlines in the form of commission at the rate of 5% of IATA published rates or in the form of difference between the rates specified by Malaysian Airlines and the rates collected

from the shipper / customer. Thus, the consideration is termed in a different manner and it is actually a commission received by the appellant.

4. Heard both sides.

5.1 The service tax demand is raised under BAS. The appellant has countered the allegations in the show cause notice stating that they are engaged not only as general sales agent but also receive income in the form of trading of cargo space. For whatever commission received as general sales agent, undisputedly the appellant has discharged the service tax. On perusal of the annexure to the show cause notice, it is seen that the alleged amount of taxable value has been arrived from the difference between the sale price and the purchase price of the cargo slot.

5.2 Malaysian Airlines and the appellant have entered into an agreement whereby appellant is appointed as a General Sales Agent of Malaysian Airlines. Clause 9(1) of the said agreement is crucial for analyzing the issue under consideration. The same is extracted as under:-

"The General Sales Agent shall claim sales commission of 5.0% (five percent) of the IATA's published rate for the services of MAS and on any through air transportation connection with the services of MAS in accordance to IATA Resolutions 801 and 801a(II). However, where MAS and the General Sales Agent have a prior specific rates arrangement relating to the transportation of any consignment on any particular route, the General Sales Agent is not entitled to any commission."

6. As per clause 9, it is seen that the Malaysian Airlines and the appellant has some arrangement with regard to the rates of the cargo slots which can be sold by the appellant. For slots, for which there is specific rate arrangement between the parties, the appellant is not entitled to any commission. Thus, the appellant purchases the cargo slots and thereafter sells the same to customer / exporters. The difference between sale price and the purchase price of the cargo slot is sought to be brought within the ambit of commission by the department. In such transaction, it is specifically stated in clause 9 that the appellant is not entitled to commission. In fact, for transactions as a General Sales Agent, the appellant is entitled to commission as per IATA regulations. In other transaction of sale of cargo space of specific agreed rates, it is not specified that appellant is eligible for any consideration. This means the appellant can sell such cargo slot at any rate. Sometimes the appellant may make profit and sometimes may incur huge loss in such sale also. This kind of transaction indicates that the appellant is not acting as a general sales agent while trading of cargo space in the capacity of an independent buyer. In other words, only when the appellant is acting or selling the cargo space on behalf of Malaysian Airlines, he acts as general sales agent and receives commission. At the cost of repetition, it is stated that the appellant has discharged service tax on such

commission received by them and the demand is confined to the difference between sale price and purchase price of cargo slot only. The Tribunal in the case of Airogo Travels and Cargo Pvt. Ltd. (supra) had occasion to analyze a similar issue. It was held that the amount received by sale of cargo is only trading of cargo space and is not subject to levy of service tax. The Tribunal therein had followed the decision in the case of Commissioner of Service Tax, New Delhi Vs. M/s. Karnam Freight Movers reported in 2017 (4) GSTL 215 (Tri. Del.).

7. Appreciating the facts of the case, we have no hesitation to conclude that the transaction sought to be brought within the net of service tax levy in the present proceedings does not fall under BAS. The demand therefore cannot sustain. The impugned order is set aside and the appeals are allowed with consequential relief, if any.

(Operative portion of the order was
pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

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

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